

1 The court dismissed plaintiff's original complaint, with leave to file an amended
2 complaint, for the following reasons (ECF No. 7 at 2-3):

3 Plaintiff's "complaint" – which alleges that [sole defendant]
4 correctional officer Hansen threatened to shoot plaintiff if he did
5 not bring to an end his prison janitorial tasks -- reveals three
6 problems. First, while plaintiff is clearly asserting a civil rights
7 claim, his "complaint" is set forth on a form used to pursue a
8 petition for writ of habeas corpus. Plaintiff will be accorded an
9 opportunity to present his claims on the appropriate form for
10 pursuing a civil rights action, in an "Amended Complaint."

11 Second, plaintiff's attached exhibits indicate that he exhausted his
12 administrative remedies through only the Second Level. A prisoner
13 must exhaust all available administrative remedies, through the
14 Director's (Third) Level, before bringing a federal civil rights
15 action. Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009);
16 Brown v. Valoff, 422 F.3d 926, 934 (9th Cir. 2005). A court may
17 dismiss an action for failure to exhaust administrative remedies,
18 pursuant to initial screening of the complaint under 28 U.S.C. §
19 1915A. Bennett v. King, 293 F.3d 1096, 1098 (9th Cir.2002)
20 (affirming district court's sua sponte dismissal of prisoner's
21 complaint because he failed to exhaust his administrative remedies).
22 Because plaintiff has alerted the court to this possibility, he must
23 demonstrate exhaustion of his administrative remedies when he
24 files his Amended Complaint.

25 Third, plaintiff is informed that his allegations against defendant
26 Hansen, as currently framed, do not appear to state a cognizable
27 Eighth Amendment claim. See Gaut v Sunn, 810 F2d 923, 925 (9th
28 Cir. 1987) (mere threat of physical harm is not a constitutional
wrong); Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (verbal
harassment alone does not violate the Eighth Amendment); see also
Ferguson v. Pagati, 2013 WL 3989426 (C.D. Cal. 2013) (collecting
and reviewing cases). Therefore, plaintiff must demonstrate, in his
Amended Complaint, that his allegations are sufficient to state an
Eighth Amendment claim.

21 The court informed plaintiff that "[f]ailure to timely file an Amended Complaint in
22 accordance with this order will result in a recommendation that this action be dismissed." (Id. at
23 3.)

24 Plaintiff timely filed an Amended Complaint on the proper form, and checked the box
25 indicating that he exhausted his administrative remedies. (ECF No. 10.) However, this complaint

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1 is even more limited than plaintiff's original complaint, and states in full (id. at 3):

2 On [blank] Officer D. Hansen threatened to shoot me and I wasn't
3 doing anything that consists of getting shot. I was only doing my
4 job. [Requested Relief:] Prosecute D. Hansen for terrorist (sic)
threats and monetary comp.

5 The undersigned finds that plaintiff's Amended Complaint (ECF No. 10) fails to state a
6 claim upon which relief may be granted, 28 U.S.C. § 1915A(b)(1), and, on this basis, should be
7 dismissed.

8 Accordingly, IT IS HEREBY ORDERED that:

9 1. The Clerk of Court is directed to randomly assign a district judge to this case.

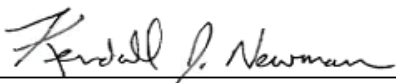
10 For the reasons stated above, IT IS HEREBY RECOMMENDED that:

11 1. This action be dismissed for failure to state a claim. 28 U.S.C. § 1915A(b)(1).

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
17 objections shall be filed and served within fourteen days after service of the objections. The
18 parties are advised that failure to file objections within the specified time may waive the right to
19 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: April 8, 2014

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24 KENDALL J. NEWMAN
25 UNITED STATES MAGISTRATE JUDGE
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