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8 **IN THE UNITED STATES DISTRICT COURT**

9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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11 JASON DURAN, No. 2:14-cv-1080-CMK-P

12 Plaintiff,

13 vs. ORDER

14 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
15 et al.,

16 Defendants.
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18 Plaintiff, a proceeding pro se, brings this civil rights action pursuant to 42 U.S.C.
19 § 1983. Plaintiff has consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c)
20 and no other party has been served or appeared in the action. Pending before the court is
21 plaintiff's second amended complaint (Doc. 13). Both of plaintiff's prior complaints were
22 dismissed, with leave to amend, for failure to state a claim.

23 As plaintiff has been informed, the court is required to screen complaints brought
24 by prisoners seeking relief against a governmental entity or officer or employee of a
25 governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion
26 thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be

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granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that complaints contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This means that claims must be stated simply, concisely, and directly. See McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the complaint gives the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must allege with at least some degree of particularity overt acts by specific defendants which support the claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is impossible for the court to conduct the screening required by law when the allegations are vague and conclusory.

I. PLAINTIFF'S ALLEGATIONS

Plaintiff's second amended complaint continues to allege a violation of plaintiff's Eighth Amendment rights for failure to provide sex offender treatment while he was incarcerated in the state prison system. In his second amended complaint, he alleges he sought treatment from staff at Avenal State Prison, including Dr. Smith and the warden, but was denied as no such programs existed. As a result of the lack of treatment, plaintiff engaged in the lesser offense of possession of child pornography, for which he is now incarcerated within the federal prison system. He alleges he was denied treatment due to the overcrowding of the state prisons.

II. DISCUSSION

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. See Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639,

640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

In order to avoid dismissal for failure to state a claim a complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. at 678 (2009). Furthermore, a claim upon which the court can grant relief has facial plausibility. See Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. When considering whether a complaint states a claim upon which relief can be granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Plaintiff has been informed that the treatment a prisoner receives in prison and the conditions under which the prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel and unusual punishment. See Helling v. McKinney, 509 U.S. 25, 31 (1993); Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." Estelle v. Gamble, 429 U.S. 97, 102 (1976). Conditions of confinement may, however, be harsh and restrictive. See Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Nonetheless, prison officials must provide prisoners with "food, clothing, shelter, sanitation, medical care, and personal safety." Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986). A prison official violates the Eighth Amendment only when two requirements are met: (1) objectively, the official's act or omission must be so serious such that it results in the denial of the minimal civilized measure of life's necessities; and (2) subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of inflicting harm. See Farmer, 511 U.S. at 834.

Thus, to violate the Eighth Amendment, a prison official must have a "sufficiently culpable mind." See id.

Deliberate indifference to a prisoner's serious illness or injury, or risks of serious injury or illness, gives rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 105; see also Farmer, 511 U.S. at 837. This applies to physical as well as dental and mental health needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982). An injury or illness is sufficiently serious if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992); see also Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994). Factors indicating seriousness are: (1) whether a reasonable doctor would think that the condition is worthy of comment; (2) whether the condition significantly impacts the prisoner's daily activities; and (3) whether the condition is chronic and accompanied by substantial pain. See Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

The requirement of deliberate indifference is less stringent in medical needs cases than in other Eighth Amendment contexts because the responsibility to provide inmates with medical care does not generally conflict with competing penological concerns. See McGuckin, 974 F.2d at 1060. Thus, deference need not be given to the judgment of prison officials as to decisions concerning medical needs. See Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989). The complete denial of medical attention may constitute deliberate indifference. See Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir. 1986). Delay in providing medical treatment, or interference with medical treatment, may also constitute deliberate indifference. See Lopez, 203 F.3d at 1131. Where delay is alleged, however, the prisoner must also demonstrate that the delay led to further injury. See McGuckin, 974 F.2d at 1060.

Negligence in diagnosing or treating a medical condition does not, however, give rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 106. Moreover, a difference of opinion between the prisoner and medical providers concerning the appropriate

course of treatment does not give rise to an Eighth Amendment claim. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

Plaintiff continues to allege that he requested sex offender treatment several times and was denied. He argues that the prison, and the defendants, had a duty to provide such treatment as rehabilitation for his condition which had been found to be treatable. He explains he was categorized as a "situational sex offender" not a pedophile in his psychological evaluation. He claims that had he been provided treatment, he could have been rehabilitated with a low recidivism rate, and would not have re-offended.

As set forth above, deliberate indifference to a prisoner's serious illness can give rise to a claim under the Eighth Amendment. However, as the court explained to plaintiff in the prior screening orders, plaintiff fails to allege he suffered from a psychological disorder necessitating treatment. He does state that he was categorized as a situational sex offender, but that, similar to a conviction for a sex offense, does not equate to a psychological disorder. Without a diagnosis of a psychological disorder, there can be no showing that the defendants were deliberately indifferent to plaintiff's medical needs.

To the extent plaintiff alleges the defendants' failure to rehabilitate him violated his Eighth Amendment rights, such an allegation is meritless. Prisoners have no constitutional right to rehabilitation. See Hoptowit, 682 F.2d at 1254-55. Thus any alleged failure to rehabilitate cannot be the basis for a violation of constitutional rights.

III. CONCLUSION

Plaintiff has been provided several opportunities to file a complaint that states a claim. As discussed above, and in the court's prior screening orders, he has failed to do so. His allegations that the defendants violated his Eighth Amendment rights by failing to rehabilitate him or provide sex offender treatment are insufficient to state a claim. It appears that plaintiff is either unable or unwilling to amend the complaint in which to state a claim.

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Because it does not appear possible that the deficiencies identified herein can be cured by amending the complaint, plaintiff is not entitled to leave to amend prior to dismissal of the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc). Plaintiff shall show cause in writing, within 30 days of the date of this order, why this action should not be dismissed for failure to state a claim. Plaintiff is warned that failure to respond to this order may result in dismissal of the action for the reasons outlined above, as well as for failure to prosecute and comply with court rules and orders. See Local Rule 110.

IT IS SO ORDERED.

DATED: August 17, 2017

CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE