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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JABBARI McELROY,  
Plaintiff,  
v.  
CDC, et al.,  
Defendants.

No. 2:15-cv-2271-EFB P

SCREENING ORDER AND ORDER  
GRANTING IFP; FINDINGS AND  
RECOMMENDATIONS RECOMMENDING  
MOTION FOR INJUNCTIVE RELIEF BE  
DENIED

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint, plaintiff has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, motions for injunctive relief, and a request for appointment of counsel.

**I. Request to Proceed In Forma Pauperis**

Plaintiff’s application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

**II. Screening Requirement and Standards**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.

1 § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion  
2 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which  
3 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such  
4 relief.” *Id.* § 1915A(b).

5 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)  
6 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and  
7 plain statement of the claim showing that the pleader is entitled to relief, in order to give the  
8 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*  
9 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).  
10 While the complaint must comply with the “short and plain statement” requirements of Rule 8,  
11 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556  
12 U.S. 662, 679 (2009).

13 To avoid dismissal for failure to state a claim a complaint must contain more than “naked  
14 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of  
15 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of  
16 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at  
17 678.

18 Furthermore, a claim upon which the court can grant relief must have facial plausibility.  
19 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual  
20 content that allows the court to draw the reasonable inference that the defendant is liable for the  
21 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a  
22 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*  
23 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the  
24 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

### 25 **III. Screening Order**

26 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and finds  
27 that the allegations are too vague and conclusory to state a cognizable claim for relief. The  
28 complaint names defendants CDC, Isad, Lopez, Holmes, Walker, Virgas, and Beard. The

1 allegations, which are difficult to decipher, include the following: (1) between September 2009  
2 and November 2011, defendants subjected plaintiff to “behavioral experiments and chemical  
3 dependency as a retaliatory measure to defraud and oppress” plaintiff, ECF No. 1 at 4-5; (2)  
4 defendants assigned plaintiff to “injurious” prison cells and punitive segregation, *id.* at 5; (3)  
5 plaintiff was deprived of “sufficient medical living space,” *id.* at 7; (4) plaintiff was attacked and  
6 rendered unconscious, *id.* at 8; (5) defendants confiscated plaintiff’s legal items and cancelled his  
7 grievances, *id.* at 9; (6) defendants have “reinjured” plaintiff and still deny any proper medical  
8 care, *id.* at 11; (7) plaintiff is in “incessant pain from traumas grief, side effects of involuntary  
9 psychotropic and mood stabilizers . . . and . . . experiences the same musculoskeletal spasms  
10 which contribute to frequent loss of use; inability to regularly stand/walk without collapse or  
11 pause,” *id.* at 14; and (8) as of September 15, 2015, plaintiff experienced internal bleeding,  
12 threatened airway constriction, broken rib, and a twisted and swollen “scribing hand,” *id.* at 14-  
13 15.

14 Plaintiff’s intention appears to be to assert various Eighth Amendment claims of  
15 deliberate indifference. However, he has not pleaded sufficient facts to state a proper claim for  
16 relief. Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair  
17 notice and state the elements of the claim plainly and succinctly. *Jones v. Community Redev.*  
18 *Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of  
19 particularity overt acts which defendants engaged in that support plaintiff’s claim. *Id.* Because  
20 plaintiff fails to state a claim for relief, the complaint must be dismissed.

21 Plaintiff will be granted leave to file an amended complaint, if he can allege a cognizable  
22 legal theory against a proper defendant and sufficient facts in support of that cognizable legal  
23 theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (*en banc*) (district courts must  
24 afford pro se litigants an opportunity to amend to correct any deficiency in their complaints).  
25 Should plaintiff choose to file an amended complaint, the amended complaint shall clearly set  
26 forth the claims and allegations against each defendant. Any amended complaint must cure the  
27 deficiencies identified above and also adhere to the following requirements:

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1 Any amended complaint must identify as a defendant only persons who personally  
2 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*  
3 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
4 constitutional right if he does an act, participates in another's act or omits to perform an act he is  
5 legally required to do that causes the alleged deprivation).

6 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

7 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*  
8 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

9 Any amended complaint must be written or typed so that it so that it is complete in itself  
10 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended  
11 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
12 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114  
13 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter  
14 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
15 1967)).

16 The court cautions plaintiff that failure to comply with the Federal Rules of Civil  
17 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.  
18 *See* E.D. Cal. Local Rule 110.

19 In addition, the court notes that the following legal standards may apply to plaintiff's  
20 intended claim for relief.

21 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal  
22 constitutional or statutory right; and (2) that the violation was committed by a person acting under  
23 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d  
24 930, 934 (9th Cir. 2002).

25 An individual defendant is not liable on a civil rights claim unless the facts establish the  
26 defendant's personal involvement in the constitutional deprivation or a causal connection between  
27 the defendant's wrongful conduct and the alleged constitutional deprivation. *See Hansen v.*  
28 *Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

1 Plaintiff may not sue any official on the theory that the official is liable for the unconstitutional  
2 conduct of his or her subordinates. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Plaintiff must  
3 identify the particular person or persons who violated his rights. He must also plead facts  
4 showing how that particular person was involved in the alleged violation.

5 Claims for damages against the state, its agencies or its officers for actions performed in  
6 their official capacities are barred under the Eleventh Amendment, unless the state waives its  
7 immunity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *see also Will v. Michigan Dep't of*  
8 *State Police*, 491 U.S. 58, 71 (1989) (neither a state nor its officials acting in their official  
9 capacities are persons under § 1983). Section 1983 does not abrogate the states' Eleventh  
10 Amendment immunity from suit. *See Quern v. Jordan*, 440 U.S. 332, 344-45 (1979). *See also*  
11 *Hafer v. Melo*, 502 U.S. 21, 30 (1991) (clarifying that Eleventh Amendment does not bar suits  
12 against state officials sued in their individual capacities, nor does it bar suits for prospective  
13 injunctive relief against state officials sued in their official capacities).

14 The Eighth Amendment protects prisoners from inhumane methods of punishment and  
15 from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir.  
16 2006). To show a violation of the Eighth Amendment, plaintiff must allege facts sufficient to  
17 support a claim that prison officials knew of and disregarded a substantial risk of serious harm to  
18 the plaintiff. *E.g., Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Frost v. Agnos*, 152 F.3d 1124,  
19 1128 (9th Cir. 1998). Extreme deprivations are required to make out a conditions of confinement  
20 claim, and only those deprivations denying the minimal civilized measure of life's necessities are  
21 sufficiently grave to form the basis of an Eighth Amendment violation. *Hudson v. McMillian*,  
22 503 U.S. 1, 9 (1992). Prison officials "must provide humane conditions of confinement,"  
23 including "adequate food, clothing, shelter, and medical care." *Farmer*, 511 U.S. at 832-33.

24 To succeed on an Eighth Amendment claim predicated on the denial of medical care, a  
25 plaintiff must establish that he had a serious medical need and that the defendant's response to  
26 that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see*  
27 *also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the failure to  
28 treat the condition could result in further significant injury or the unnecessary and wanton

1 infliction of pain. *Jett*, 439 F.3d at 1096. Deliberate indifference may be shown by the denial,  
2 delay or intentional interference with medical treatment or by the way in which medical care is  
3 provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

4 To act with deliberate indifference, a prison official must both be aware of facts from  
5 which the inference could be drawn that a substantial risk of serious harm exists, and he must also  
6 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if  
7 he knows that plaintiff faces “a substantial risk of serious harm and disregards that risk by failing  
8 to take reasonable measures to abate it.” *Id.* at 847. A physician need not fail to treat an inmate  
9 altogether in order to violate that inmate’s Eighth Amendment rights. *Ortiz v. City of Imperial*,  
10 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition,  
11 even if some treatment is prescribed, may constitute deliberate indifference in a particular case.  
12 *Id.*

13 It is important to differentiate common law negligence claims of malpractice from claims  
14 predicated on violations of the Eighth Amendment’s prohibition of cruel and unusual punishment.  
15 In asserting the latter, “[m]ere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not  
16 support this cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.  
17 1980) (citing *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); see also *Toguchi v. Chung*, 391  
18 F.3d 1051, 1057 (9th Cir. 2004).

19 “When prison officials use excessive force against prisoners, they violate the inmates’  
20 Eighth Amendment right to be free from cruel and unusual punishment.” *Clement v. Gomez*, 298  
21 F.3d 898, 903 (9th Cir. 2002). In order to establish a claim for the use of excessive force in  
22 violation of the Eighth Amendment, a plaintiff must establish that prison officials applied force  
23 maliciously and sadistically to cause harm, rather than in a good-faith effort to maintain or restore  
24 discipline. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). In making this determination, the court  
25 may evaluate (1) the need for application of force, (2) the relationship between that need and the  
26 amount of force used, (3) the threat reasonably perceived by the responsible officials, and (4) any  
27 efforts made to temper the severity of a forceful response. *Id.* at 7; see also *id.* at 9-10 (“The  
28 Eighth Amendment’s prohibition of cruel and unusual punishment necessarily excludes from

1 constitutional recognition *de minimis* uses of physical force, provided that the use of force is not  
2 of a sort repugnant to the conscience of mankind.” (internal quotation marks and citations  
3 omitted)).

4 Under the Eighth Amendment, “prison officials have a duty to protect prisoners from  
5 violence at the hands of other prisoners.” *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (internal  
6 quotation marks, ellipsis, and citation omitted). However, “not . . . every injury suffered by one  
7 prisoner at the hands of another . . . translates into constitutional liability for prison officials  
8 responsible for the victim’s safety.” *Id.* at 834. A prison official may be held liable for an assault  
9 suffered by one inmate at the hands of another only where the assaulted inmate can show that the  
10 injury is sufficiently serious, *id.* at 834 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)), and  
11 that the prison official was deliberately indifferent to the risk of harm, *id.* at 837. Thus, the  
12 relevant inquiry is whether prison officials, “acting with deliberate indifference, exposed a  
13 prisoner to a sufficiently substantial risk of serious damage to his future health.” *Id.* at 834  
14 (internal quotation omitted).

15 There are no constitutional requirements regarding how a grievance system is operated.  
16 *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (holding that prisoner’s claimed loss of  
17 a liberty interest in the processing of his appeals does not violate due process because prisoners  
18 lack a separate constitutional entitlement to a specific prison grievance system). Thus, plaintiff  
19 may not impose liability on defendants Tseng or Smiley simply because they played a role in  
20 processing plaintiff’s inmate appeals. *See Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993)  
21 (an administrative “grievance procedure is a procedural right only, it does not confer any  
22 substantive right upon the inmates. Hence, it does not give rise to a protected liberty interest  
23 requiring the procedural protections envisioned by the fourteenth amendment. . . . Thus,  
24 defendants’ failure to process any of Buckley’s grievances, without more, is not actionable under  
25 section 1983.” (internal quotations omitted)).

#### 26 **IV. Motion for Injunctive Relief**

27 Plaintiff seeks a temporary restraining order requiring, among other requests, that officials  
28 “fully restore [his] legal property,” write him a letter of apology, transfer him to another prison,

1 provide him with a wheelchair, and deliver meals and legal property to his cell door. ECF No. 5  
2 at 3; *see also* ECF Nos. 6, 10.

3 A temporary restraining order may be issued upon a showing “that immediate and  
4 irreparable injury, loss, or damage will result to the movant before the adverse party can be heard  
5 in opposition.” Fed. R. Civ. P. 65(b)(1)(A). The purpose of such an order is to preserve the status  
6 quo and to prevent irreparable harm “just so long as is necessary to hold a hearing, and no  
7 longer.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974). “The  
8 standards for granting a temporary restraining order and a preliminary injunction are identical.”  
9 *Haw. County Green Party v. Clinton*, 980 F. Supp. 1160, 1164 (D. Haw. 1997); *cf. Stuhlberg Int’l*  
10 *Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (observing that an  
11 analysis of a preliminary injunction is “substantially identical” to an analysis of a temporary  
12 restraining order).

13 A preliminary injunction will not issue unless necessary to prevent threatened injury that  
14 would impair the courts ability to grant effective relief in a pending action. *Sierra On-Line, Inc.*  
15 *v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984); *Gon v. First State Ins. Co.*, 871  
16 F.2d 863 (9th Cir. 1989). A preliminary injunction represents the exercise of a far reaching  
17 power not to be indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*,  
18 326 F.2d 141, 143 (9th Cir. 1964). In order to be entitled to preliminary injunctive relief, a party  
19 must demonstrate “that he is likely to succeed on the merits, that he is likely to suffer irreparable  
20 harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an  
21 injunction is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.  
22 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). The Ninth Circuit has  
23 also held that the “sliding scale” approach it applies to preliminary injunctions—that is, balancing  
24 the elements of the preliminary injunction test, so that a stronger showing of one element may  
25 offset a weaker showing of another—survives *Winter* and continues to be valid. *Alliance for Wild*  
26 *Rockies v. Cottrell*, 622 F.3d 1045, 1050 (9th Cir. 2010). “In other words, ‘serious questions  
27 going to the merits,’ and a hardship balance that tips sharply toward the plaintiff can support  
28 issuance of an injunction, assuming the other two elements of the *Winter* test are also met.” *Id.*



1 In cases brought by prisoners involving conditions of confinement, any preliminary injunction  
2 “must be narrowly drawn, extend no further than necessary to correct the harm the court finds  
3 requires preliminary relief, and be the least intrusive means necessary to correct the harm.” 18  
4 U.S.C. § 3626(a)(2).

5 Given the complaint’s vague and conclusory allegations, the court cannot determine  
6 whether plaintiff is likely to succeed on his claims, and plaintiff’s request for a preliminary  
7 injunction must be denied. Nor is there any evidence that plaintiff is likely to suffer irreparable  
8 harm in the absence of preliminary relief. During the course of this action, plaintiff will have the  
9 opportunity to conduct discovery and present evidence. Presently, however, plaintiff fails to  
10 make a clear showing that he is entitled to the extraordinary remedy of a preliminary injunction.  
11 Plaintiff also has not shown that the balance of equities tips in his favor or that the injunction he  
12 seeks is in the public interest. Therefore, the court recommends that plaintiff’s motion for a  
13 preliminary injunction be denied.

14 **V. Request for Appointment of Counsel**

15 Plaintiff requests that the court appoint counsel. District courts lack authority to require  
16 counsel to represent indigent prisoners in section 1983 cases. *Mallard v. United States Dist.*  
17 *Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney  
18 to voluntarily to represent such a plaintiff. *See* 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935  
19 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990).  
20 When determining whether “exceptional circumstances” exist, the court must consider the  
21 likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro  
22 se in light of the complexity of the legal issues involved. *Palmer v. Valdez*, 560 F.3d 965, 970  
23 (9th Cir. 2009). Having considered those factors, the court finds there are no exceptional  
24 circumstances in this case.

25 **VI. Summary of Order**

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 4) is granted.

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