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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN HARDNEY,

 Plaintiff,

 v.

R. WARREN, et al.,

 Defendants.

No. 2:16-cv-0172-GEB-EFB P

ORDER SCREENING AMENDED
COMPLAINT PURSUANT TO 28 U.S.C. §
1915A AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis in an action brought under 42 U.S.C. § 1983. After a dismissal pursuant to 28 U.S.C. § 1915A (ECF No. 7), he has filed an amended complaint (ECF No. 10), and two motions seeking the return of his legal property (ECF Nos. 12 & 14), which the court construes as motions for a preliminary injunction.

I. Screening of the Amended Complaint

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

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1 Plaintiff alleges that on October 10, 2014, at Mule Creek State Prison, Officer Pogue
2 informed him that Psychiatric Technician Warren had accused plaintiff of indecent exposure with
3 masturbation. ECF No. 10 at 7-8.¹ In the presence of Officer Hickman and Supervising Sergeant
4 Almodovar, Pogue then allegedly slammed plaintiff's head into a window, yanked plaintiff's
5 handcuffed arms above plaintiff's head, and slammed plaintiff hard to the ground. *Id.* at 8-9.
6 Hickman and Almodovar allegedly "looked on" and failed to intervene. *Id.* at 9. Licensed
7 Vocational Nurse Kumeh, also an alleged witness to Pogue's "brutal" acts, observed plaintiff's
8 bleeding face, but ignored his cries for help, failed to report Pogue's misconduct, and falsely
9 documented a finding of "no injuries." *Id.* at 8-9. Later that evening, defendant Brazil allegedly
10 subjected plaintiff to further physical abuse for the purpose of causing plaintiff pain. *Id.* at 9-10.
11 Liberally construed and for the purposes of § 1915A screening, these allegations state the
12 following claims: (1) Eighth Amendment excessive force against defendants Pogue, Hickman,
13 Almodovar,² and Brazil; and (2) Eighth Amendment deliberate indifference to medical needs
14 against defendant Kumeh.

15 Plaintiff also claims that he was falsely accused of a sex crime and that the indecent
16 exposure charge violated his "right to privacy from the glare of the opposite sex while conducting
17 [a] personal function." *Id.* at 14-15. A false accusation of a crime, however, does not in and of
18 itself, support a claim under section 1983. *See Washington v. Cicone*, No. 1:17-cv-00515-DAD-
19 SAB, 2017 U.S. Dist. LEXIS 86039, at *9-10 (E.D. Cal. June 5, 2017) (citing cases). And
20 because plaintiff lacks a legitimate expectation of privacy in his prison cell, his claim that an
21 officer's "glare[] into [his] cell from a substantial distance without warning" violated his Fourth
22 Amendment rights also fails. ECF No. 10. at 15; *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984)

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25 ¹ This and subsequent page number citations to plaintiff's complaint are to the page
26 numbers reflected on the court's CM/ECF system and not to page numbers assigned by plaintiff.

27 ² It is well settled that failure to intervene can support an excessive force claim where a
28 bystander-officer has a realistic opportunity to intervene, but fails to do so. *Lolli v. County of
Orange*, 351 F.3d 410, 418 (9th Cir. 2003); *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir.
2000); *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995).

1 (“[T]he Fourth Amendment proscription against unreasonable searches does not apply within the
2 confines of the prison cell.”).

3 In addition, plaintiff claims that “supervising” defendants Lizarraga and Beard enforced
4 policies regarding the indecent exposure allegations that “alter[ed] regulations . . . for punitive
5 measures.” *Id.* at 15, 16-17. However, it is not clear from such vague and conclusory allegations
6 how either defendant personally caused plaintiff’s constitutional rights to be violated. *See*
7 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (“A person subjects another to the
8 deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative
9 act, participates in another's affirmative acts, or omits to perform an act which he is legally
10 required to do *that causes the deprivation of which complaint is made.*”) (internal quotations
11 omitted) (emphasis added).

12 Next, plaintiff claims he was again charged with sex crimes and threatening staff in April
13 of 2015. ECF No. 10 at 11-12, 17. Defendant Hernandez allegedly denied plaintiff due process
14 at the May 27, 2015 hearing regarding these accusations. *Id.* at 12. Around this time, defendant
15 Winfield allegedly identified plaintiff as a “rapist” and a “molester” in the presence of other
16 inmates. *Id.* at 12. To the extent plaintiff wishes to pursue any claims based on the events of
17 April or May of 2015, including the hearing and and/or any resulting discipline, he must do so in
18 a separate action. Such claims may not be properly joined in this action with the claims
19 concerning the events of October 10, 2014, as they involve discrete events that do not arise out of
20 the same occurrence and involve a common question of law or fact.³ *See* Fed. R. Civ. P. 20(a)(2).

21 For these reasons, plaintiff may either proceed only on the Eighth Amendment claims
22 against defendants Pogue, Hickman, Almodovar, Brazil, and Kumeh, or he may amend his

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24 ³ “The controlling principle appears in Fed. R. Civ. P. 18(a): ‘A party asserting a claim . . .
25 may join, [] as independent or as alternate claims, as many claims . . . as the party has against an
26 opposing party.’ Thus multiple claims against a single party are fine, but Claim A against
27 Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims
28 against different defendants belong in different suits, not only to prevent the sort of morass [a
multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners pay the
required filing fees-for the Prison Litigation Reform Act limits to 3 the number of frivolous suits
or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C.
§ 1915(g).” *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

1 complaint if he believes he can cure the defects identified above. Plaintiff is not obligated to
2 amend his complaint.

3 **II. Leave to Amend**

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

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

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

12 Any amended complaint must be written or typed so that it so that it is complete in itself
13 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
14 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
15 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
16 F.3d 1467, 1474 (9th Cir. 1997) (the “amended complaint supersedes the original, the latter
17 being treated thereafter as non-existent.”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
18 1967)).

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

22 **III. Plaintiff's Motions for the Return of His Legal Property**

23 In his first motion, plaintiff claims that prison officials at California State Prison,
24 Corcoran, intentionally deprived him of his legal books and property and have obstructed his right
25 to prosecute this case. ECF No. 12 at 2-3. He seeks an order compelling the return of his
26 property. *Id.* at 3. He seeks the same relief in his second motion. ECF No. 14. The court
27 construes plaintiff's motions as seeking a preliminary injunction.

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1 A preliminary injunction will not issue unless necessary to prevent threatened injury that
2 would impair the court's ability to grant effective relief in a pending action. *Sierra On-Line, Inc.*
3 *v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984); *Gon v. First State Ins. Co.*, 871
4 F.2d 863 (9th Cir. 1989). A preliminary injunction represents the exercise of a far reaching
5 power not to be indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*,
6 326 F.2d 141, 143 (9th Cir. 1964). To be entitled to preliminary injunctive relief, a party must
7 demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm
8 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an
9 injunction is in the public interest." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.
10 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d
11 249 (2008)). The Ninth Circuit has also held that the "sliding scale" approach it applies to
12 preliminary injunctions—that is, balancing the elements of the preliminary injunction test, so that
13 a stronger showing of one element may offset a weaker showing of another—survives *Winter* and
14 continues to be valid. *Alliance for the Wild Rockies v. Cottrell*, 622 F.3d 1045, 1050 (9th Cir.
15 2010). "In other words, 'serious questions going to the merits,' and a hardship balance that tips
16 sharply toward the plaintiff can support issuance of an injunction, assuming the other two
17 elements of the *Winter* test are also met." *Id.* In cases brought by prisoners involving conditions
18 of confinement, any preliminary injunction "must be narrowly drawn, extend no further than
19 necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive
20 means necessary to correct the harm." 18 U.S.C. § 3626(a)(2).

21 Plaintiff fails to meet that standard. This action concerns alleged violations of plaintiff's
22 Eighth Amendment rights at Mule Creek State Prison. The motions for injunctive relief do not
23 involve the defendants in this action or the Eighth Amendment claims. Because plaintiff's
24 motion addresses conduct that is not a subject of this civil action, it does not demonstrate either a
25 likelihood of success or a serious question going to the merits of his complaint. Generally, such
26 unrelated allegations must be pursued through the prison administrative process and then litigated
27 in a separate action. See *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per
28 curiam) and *Rhodes v. Robinson*, 621 F.3d 1002, 1004-07 (9th Cir. 2010) (together holding that

1 claims must be exhausted prior to the filing of the original or supplemental complaint); *Jones v.*
2 *Felker*, No. CIV S-08-0096 KJM EFB P, 2011 U.S. Dist. LEXIS 13730, at *11-15 (E.D. Cal.
3 Feb. 11, 2011). Moreover, plaintiff fails to show that he would suffer irreparable harm in the
4 absence of the requested relief. At the time plaintiff filed his motions seeking the return of his
5 property in order to prosecute this case, he had already filed a timely amended complaint and had
6 no other filing deadlines or obligations in this case. Thus, the immediate return of plaintiff's legal
7 property was not required for his prosecution of this case. For these reasons, plaintiff's motions
8 for a preliminary injunction must be denied.

9 **IV. Order & Recommendation**

10 Accordingly, IT IS HEREBY ORDERED that:

- 11 1. The allegations in the pleading are sufficient to state Eighth Amendment claims
12 against defendants Pogue, Hickman, Almodovar, Brazil, and Kumeh. All other
13 claims and defendants are dismissed with leave to amend within 30 days of service
14 of this order. Plaintiff is not obligated to amend his complaint.
- 15 2. With this order the Clerk of the Court shall provide to plaintiff a blank summons, a
16 copy of the April 21, 2017 amended complaint, five forms USM-285, and
17 instructions for service of process on defendants. Within 30 days of service of this
18 order plaintiff may return the attached Notice of Submission of Documents with
19 the completed summons, the completed USM-285 forms, and six copies of the
20 endorsed complaint. The court will transmit them to the United States Marshal for
21 service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure.
22 Defendants will be required to respond to plaintiff's allegations within the
23 deadlines stated in Rule 12(a)(1) of the Federal Rules of Civil Procedure.
- 24 3. Failure to comply with this order may result in a recommendation that this action
25 be dismissed.

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1 Further, it is HEREBY RECOMMENDED that plaintiff's motions for the return of his
2 legal property (ECF Nos. 12 & 14), construed as motions for preliminary injunctions, be denied.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
8 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 DATED: October 12, 2017.

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12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
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UNITED STATES DISTRICT COURT
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Defendants.

No. 2:16-cv-0172-GEB-EFB P

NOTICE OF SUBMISSION OF DOCUMENTS

In accordance with the court’s Screening Order, plaintiff hereby elects to:

(1) _____ proceed only with the Eighth Amendment claims against defendants

Pogue, Hickman, Almodovar, Brazil, and Kumeh, and submits the following documents:

- 1 completed summons form
- 5 completed forms USM-285
- 6 copies of the April 21, 2017 endorsed amended complaint

OR

(2) _____ delay serving any defendant and files an amended complaint in accordance with the court’s Screening Order.

Plaintiff

Dated: