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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THURMAN LEROY SPENCER,
Plaintiff,
v.
TIMOTHY VIRGA, et al.,
Defendants.

No. 2:16-cv-0886-JAM-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. He has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and a motion for injunctive relief.

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. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

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

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
6 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
7 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
11 U.S. 662, 679 (2009).

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

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

24 **III. Screening Order**

25 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and finds
26 that the allegations are too vague and conclusory to state a cognizable claim for relief. The
27 named defendants include Warden Timothy Virga, Euraka Daye, and B. Brizendine
28 (psychologist). The “Statement of Claim” alleged in the complaint consists of the following:

1 On June 18, 2012 plaintiff attended committee at California State Prison –
2 Sacramento and informed Timothy Virga – Warden and mental health B.
3 Brizendine, Z. Haghbin, M. Cook, R. Costa, D. McCarthy and C. Cantrell, plaintiff
4 was not a mental health candidate under (Department of Mental Health – DMH,
5 Enhanced Outpatient Program . . . psychiatric services unit). Plaintiff was treated
6 with (deliberate cruelty). Human waste and urine on the floor in PSU. Unhealthy!

7 ECF No. 1, § IV.

8 The allegations suggest that plaintiff intends to assert an Eighth Amendment claim based
9 on his conditions of confinement. However, plaintiff has not pleaded sufficient facts to state a
10 claim for relief. Although the Federal Rules adopt a flexible pleading policy, a complaint must
11 give fair notice and state the elements of the claim plainly and succinctly. *Jones v. Community*
12 *Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree
13 of particularity overt acts which defendants engaged in that support plaintiff’s claim. *Id.* Because
14 plaintiff fails to state a claim for relief, the complaint must be dismissed.

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

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

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

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

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1 Any amended complaint must be written or typed so that it so that it is complete in itself
2 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
3 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
4 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
5 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter
6 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
7 1967)).

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

11 In addition, the court notes that the following legal standards may apply to plaintiff’s
12 intended claims for relief.

13 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
14 constitutional or statutory right; and (2) that the violation was committed by a person acting under
15 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d
16 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the
17 facts establish the defendant’s personal involvement in the constitutional deprivation or a causal
18 connection between the defendant’s wrongful conduct and the alleged constitutional deprivation.
19 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44
20 (9th Cir. 1978). Plaintiff may not sue any official on the theory that the official is liable for the
21 unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
22 Plaintiff must identify the particular person or persons who violated his rights. He must also
23 plead facts showing how that particular person was involved in the alleged violation.

24 The Eighth Amendment protects prisoners from inhumane methods of punishment and
25 from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir.
26 2006). To show a violation of the Eighth Amendment, plaintiff must allege facts sufficient to
27 support a claim that prison officials knew of and disregarded a substantial risk of serious harm to
28 the plaintiff. *E.g., Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Frost v. Agnos*, 152 F.3d 1124,

1 1128 (9th Cir. 1998). Extreme deprivations are required to make out a conditions of confinement
2 claim, and only those deprivations denying the minimal civilized measure of life's necessities are
3 sufficiently grave to form the basis of an Eighth Amendment violation. *Hudson v. McMillian*,
4 503 U.S. 1, 9 (1992). Prison officials "must provide humane conditions of confinement,"
5 including "adequate food, clothing, shelter, and medical care." *Farmer*, 511 U.S. at 832-33.

6 To succeed on an Eighth Amendment claim predicated on the denial of medical care, a
7 plaintiff must establish that he had a serious medical need and that the defendant's response to
8 that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see*
9 *also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the failure to
10 treat the condition could result in further significant injury or the unnecessary and wanton
11 infliction of pain. *Jett*, 439 F.3d at 1096. Deliberate indifference may be shown by the denial,
12 delay or intentional interference with medical treatment or by the way in which medical care is
13 provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

14 To act with deliberate indifference, a prison official must both be aware of facts from
15 which the inference could be drawn that a substantial risk of serious harm exists, and he must also
16 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if
17 he knows that plaintiff faces "a substantial risk of serious harm and disregards that risk by failing
18 to take reasonable measures to abate it." *Id.* at 847. A physician need not fail to treat an inmate
19 altogether in order to violate that inmate's Eighth Amendment rights. *Ortiz v. City of Imperial*,
20 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition,
21 even if some treatment is prescribed, may constitute deliberate indifference in a particular case.
22 *Id.*

23 It is important to differentiate common law negligence claims of malpractice from claims
24 predicated on violations of the Eighth Amendment's prohibition of cruel and unusual punishment.
25 In asserting the latter, "[m]ere 'indifference,' 'negligence,' or 'medical malpractice' will not
26 support this cause of action." *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.
27 1980) (citing *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); *see also Toguchi v. Chung*, 391
28 F.3d 1051, 1057 (9th Cir. 2004).

1 **IV. Motion for Injunctive Relief**

2 Plaintiff seeks a court order requiring the warden to release plaintiff's personal property
3 and prohibiting staff from removing plaintiff's legal property from his cell. ECF No. 13 at 3.
4 The court construes plaintiff's request as one for injunctive relief.

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

25 Given the complaint's vague and conclusory allegations, the court cannot determine
26 whether plaintiff is likely to succeed on his claims, and plaintiff's request for a preliminary
27 injunction must be denied. Nor is there any evidence that plaintiff is likely to suffer irreparable
28 harm in the absence of preliminary relief. During the course of this action, plaintiff will have the

1 opportunity to conduct discovery and present evidence. Presently, however, plaintiff fails to
2 make a clear showing that he is entitled to the extraordinary remedy of a preliminary injunction.
3 Plaintiff also has not shown that the balance of equities tips in his favor or that the injunction he
4 seeks is in the public interest. Therefore, the court recommends that plaintiff's request, construed
5 as a motion for a preliminary injunction, be denied.

6 **V. Summary of Order**

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. Plaintiff's request to proceed in forma pauperis (ECF No. 6 & 8) is granted.
- 9 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected
10 in accordance with the notice to the California Department of Corrections and
11 Rehabilitation filed concurrently herewith.
- 12 3. The complaint is dismissed with leave to amend within 30 days. The complaint
13 must bear the docket number assigned to this case and be titled "Amended
14 Complaint." Failure to comply with this order will result in dismissal of this
15 action for failure to prosecute. If plaintiff files an amended complaint stating a
16 cognizable claim the court will proceed with service of process by the United
17 States Marshal.

18 Further, it is hereby RECOMMENDED that plaintiff's request (ECF No. 13), construed as
19 a motion for injunctive relief, be denied.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
22 after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Such a document should be captioned
24 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: August 3, 2017.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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