

1 agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the
2 Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly payments of 20% of
3 the preceding month's income credited to plaintiff's prison trust account. These payments will be
4 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's
5 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

6 **II. Screening Requirement**

7 The court is required to screen complaints brought by prisoners seeking relief against a
8 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
9 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
10 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
11 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).
12 A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v.
13 Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir.
14 1984). The court may dismiss a claim as frivolous if it is based on an indisputably meritless legal
15 theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327. The critical
16 inquiry is whether a constitutional claim has an arguable legal and factual basis. See Jackson v.
17 Arizona, 885 F.2d 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

18 Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a short and plain statement
19 of the claim that shows the pleader is entitled to relief. Bell Atlantic Corp. v. Twombly, 550 U.S.
20 544, 555 (2007). In order to state a cognizable claim, a complaint must contain more than "a
21 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
22 sufficient "to raise a right to relief above the speculative level." Id., 550 U.S. at 555. The facts
23 alleged must "'give the defendant fair notice of what the... claim is and the grounds upon which it
24 rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic, 550 U.S. at 555). In
25 reviewing a complaint under this standard, the court accepts as true the allegations of the
26 complaint and construes the pleading in the light most favorable to the plaintiff. See id.; Scheuer
27 v. Rhodes, 416 U.S. 232, 236 (1974).

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1 **III. Allegations in the Complaint**

2 COVID-19 was spreading in plaintiff’s housing unit at High Desert State Prison. (ECF
3 No. 1 at 3.) On an unspecified date, plaintiff’s cell mate received a “positive notice” in the mail.
4 (Id.) Plaintiff filed a request form to find out if he was infected. (Id.) Plaintiff also asked C/O
5 Barker for a cell transfer. (Id.) C/O Barker housed plaintiff with a cell mate who was “super
6 infected,” coughing, and on a respirator. (Id.) Plaintiff was asymptomatic but scared. (Id.)

7 The next morning, plaintiff’s new cell mate went to the emergency room. (Id.) C/O
8 Mathison removed the cell mate’s door tag but did not gather the cell mate’s property, which
9 remained in the cell with plaintiff for seven days. (Id.) Plaintiff tried to hide the property for his
10 cell mate but got accused of stealing and was written up. (Id.)

11 Plaintiff names as defendants the California Department of Corrections (“CDCR”), C/O
12 Barker, and C/O Mathison. He seeks monetary damages. (ECF No. 1 at 3.)

13 **IV. Discussion**

14 **A. CDCR – Improper Defendant**

15 The Eleventh Amendment bars a suit against a state or state agency absent a valid waiver
16 or abrogation of its sovereign immunity. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54
17 (1996); Hans v. Louisiana, 134 U.S. 1, 10 (1890). This immunity applies regardless of whether
18 the relief sought is for damages or injunctive relief, Alabama v. Pugh, 438 U.S. 731, 732 (1978),
19 and regardless of whether the claim arises under federal or state law, Pennhurst State Sch. &
20 Hosp. v. Halderman, 465 U.S. 89, 121 (1984).

21 While Congress may validly abrogate a state’s sovereign immunity by statute, the
22 Supreme Court has repeatedly emphasized that “§ 1983 was not intended to abrogate a State’s
23 Eleventh Amendment immunity.” Kentucky v. Graham, 473 U.S. 159, 169 n.17 (1985); accord
24 Quern v. Jordan, 440 U.S. 332, 342 (1979). The “State of California has not waived its Eleventh
25 Amendment immunity with respect to claims brought under § 1983 in federal court.” Dittman v.
26 California, 191 F.3d 1020, 1025-26 (9th Cir. 1999). Thus, CDCR is immune from this suit under
27 the Eleventh Amendment. See, e.g., Brown v. Cal. Dep’t of Corrs., 554 F.3d 747, 752 (9th Cir.
28 2009); cf. Holley v. Cal. Dep’t of Corrs., 599 F.3d 1108, 1111-12 (9th Cir. 2010) (affirming

1 dismissal of complaint against CDCR because California had not constructively waived its
2 sovereign immunity by accepting federal funds).

3 **B. Eighth Amendment**

4 Plaintiff appears to attempt to state a claim under the Eighth Amendment based on a
5 housing placement with a very ill cell mate who was COVID-positive. To state a claim under the
6 Eighth Amendment, a prisoner must allege that, objectively, he suffered a serious deprivation
7 and, subjectively, prison officials acted with deliberate indifference in allowing or causing the
8 deprivation to occur. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991).

9 Prison officials have a duty “to take reasonable measures to guarantee the safety of
10 inmates[.]” Labatad v. Corrections Corp. of America, 714 F.3d 1155, 1160 (9th Cir. 2013) (citing
11 Farmer v. Brennan, 511 U.S. 825, 832-33 (1994) and Hearns v. Terhune, 413 F.3d 1036, 1040
12 (9th Cir. 2005)). To establish a violation of this duty, a prisoner must “show that the officials
13 acted with deliberate indifference to threat of serious harm or injury to an inmate.” Id. at 1160
14 (citing Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002)).

15 To prove the objective component, an inmate must establish there was some degree of
16 actual or potential injury, and that society considers the risk to be so grave that it violates
17 contemporary standards of decency to expose anyone unwillingly to such a risk. Helling v.
18 McKinney, 509 U.S. 25, 36 (1993). As to the subjective component, “only the unnecessary and
19 wanton infliction of pain implicates the Eighth Amendment” and thus the defendant must have
20 acted with a “sufficiently culpable state of mind.” Wilson, 501 U.S. at 297 (internal quotations
21 marks, emphasis, and citations omitted). “Whether a prison official had the requisite knowledge
22 of a substantial risk is a question of fact subject to demonstration in the usual ways, including
23 inference from circumstantial evidence, ... and a factfinder may conclude that a prison official
24 knew of a substantial risk from the very fact that the risk was obvious.” Farmer, 511 U.S. at 842.

25 Here, the risks associated with COVID-19 are objectively, sufficiently serious under the
26 Eighth Amendment. Nevertheless, plaintiff’s current allegations fail to state a cognizable claim.
27 Plaintiff alleges that while he was asymptomatic, C/O Barker placed him with a COVID-positive
28 cell mate who was very sick. These sparse allegations fall short of plausibly suggesting that C/O

1 Barker acted with a sufficiently culpable state of mind to an obvious risk to plaintiff. To any
2 extent plaintiff became infected with COVID-19, the complaint's allegations fail to plausibly
3 suggest the infection resulted from any action or omission by C/O Barker. To the contrary, the
4 complaint implies plaintiff was exposed to COVID-19 and tested positive for COVID-19 prior to
5 the challenged housing placement by C/O Barker. Moreover, to the extent plaintiff describes
6 himself as asymptomatic, there is no indication he suffered actionable harm in the form of a
7 physical injury as a result of the housing placement by C/O Barker. See 42 U.S.C. § 1997e(e) (no
8 federal civil action for mental or emotional injury may be brought by a prisoner without a
9 showing of physical injury or the commission of a sexual act). Plaintiff will have an opportunity
10 to amend.

11 **B. Failure to State a Claim based on Cell Mate's Property**

12 Plaintiff appears to attempt to state a claim against C/O Mathison pertaining to the
13 property that belonged to plaintiff's cell mate and which was left behind when that inmate went to
14 the hospital. Plaintiff alleges he tried to hide the property but got accused of stealing and was
15 written up. These allegations do not state a cognizable claim. The court is unable to identify a
16 constitutional guarantee implicated by these allegations. In any amended complaint that plaintiff
17 files, plaintiff may attempt to state a claim by pleading additional facts related to this alleged
18 deprivation.

19 **V. Appointment of Counsel**

20 Plaintiff has requested appointment of counsel. (ECF No. 5, 6.) The United States
21 Supreme Court has ruled that district courts lack authority to require counsel to represent indigent
22 prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In
23 certain exceptional circumstances, the district court may request the voluntary assistance of
24 counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir.
25 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

26 The test for exceptional circumstances requires the court to evaluate the plaintiff's
27 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in
28 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,

1 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances
2 common to most prisoners, such as lack of legal education and limited law library access, do not
3 establish exceptional circumstances that would warrant a request for voluntary assistance of
4 counsel. In the present case, the court does not find the required exceptional circumstances.

5 **VI. Conclusion and Order**

6 Plaintiff's complaint does not state any cognizable claims, but plaintiff is granted leave to
7 file an amended complaint. See Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). If
8 plaintiff chooses to file an amended complaint, it should be titled "first amended complaint" and
9 must state what each named defendant did that led to the deprivation of constitutional rights. See
10 Iqbal, 556 U.S. at 676-677.

11 Plaintiff is not obligated to file an amended complaint. In the alternative, plaintiff may
12 notify the court he wishes to stand on the complaint as it is currently pleaded. See Edwards v. Marin
13 Park, Inc., 356 F.3d 1058, 1064-65 (9th Cir. 2004). If plaintiff chooses this option, the undersigned
14 will issue findings and recommendations to dismiss the complaint without further leave to amend,
15 after which plaintiff will be granted an opportunity to file objections, and a district judge will
16 determine whether the complaint states a cognizable claim. In the further alternative, if plaintiff
17 does not wish to pursue his claims further, plaintiff may file a notice of voluntary dismissal, which
18 will terminate this action by operation of law.

19 This opportunity to amend is not for the purpose of adding new claims. See George v.
20 Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints). Instead, plaintiff should
21 focus efforts on curing deficiencies of the claims already set forth.

22 An amended complaint supersedes the prior complaint, see Loux v. Rhay, 375 F.2d 55, 57
23 (9th Cir. 1967), and must be "complete in itself without reference to the prior or superseded
24 pleading," E.D. Cal. Local Rule 220. Once plaintiff files an amended complaint, the original
25 pleading no longer serves any function in the case. Therefore, in any amended complaint, plaintiff
26 must sufficiently allege each claim and the involvement of each defendant.

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VII. Order

In accordance with the above, IT IS HEREBY ORDERED:

1. Plaintiff's motion to proceed in forma pauperis (ECF No. 2) is granted.
2. Plaintiff's motions for appointment of counsel (ECF Nos. 5, 6) are denied.
3. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action as set forth by separate order.
4. The Clerk's Office shall send plaintiff a blank civil rights complaint form.
5. Within thirty days from the date of service of this order, plaintiff must file one of the following:
 - a. An amended complaint curing the deficiencies identified in this order;
 - b. A notice of election to stand on the complaint as filed; or
 - c. A notice of voluntary dismissal.
7. Failure to respond to this order will result in a recommendation that this action be dismissed for failure to obey a court order and failure to prosecute.

Dated: September 15, 2022

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DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE