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\*E-Filed 9/27/11\*

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UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

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TARENCE T. LINDSAY,

No. C 11-2839 RS (PR)

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Plaintiff,

**ORDER DISMISSING COMPLAINT  
 WITH LEAVE TO AMEND**

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v.

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GRAY LEWIS, et al.,

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Defendants.

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**INTRODUCTION**

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This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

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**DISCUSSION**

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**A. Standard of Review**

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A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

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1 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim  
2 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)  
3 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial  
4 plausibility when the plaintiff pleads factual content that allows the court to draw the  
5 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting  
6 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions  
7 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from  
8 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).  
9 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
10 (1) that a right secured by the Constitution or laws of the United States was violated, and  
11 (2) that the alleged violation was committed by a person acting under the color of state law.  
12 *See West v. Atkins*, 487 U.S. 42, 48 (1988).

13 **B. Legal Claims**

14 The complaint will be dismissed with leave to amend. Plaintiff alleges that defendants  
15 used excessive force and retaliated against him, yet he has not shown that he has properly  
16 exhausted his administrative remedies as to any claim. Plaintiff states at one point in the  
17 complaint that he did not pursue the first steps of the grievance process because they were  
18 “not require[d].” Later he states that he filed at least two first-level grievances. Not only are  
19 these statements contradictory, plaintiff does not state or show that he pursued his grievances  
20 through all levels of administrative review. He must show that he properly exhausted his  
21 claims before his suit can proceed. If plaintiff has not properly exhausted, he must exhaust  
22 his claims before pursuing them in this Court.

23 Prisoners must properly exhaust their administrative remedies before filing suit in  
24 federal court. “No action shall be brought with respect to prison conditions under [42 U.S.C.  
25 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other  
26 correctional facility until such administrative remedies as are available are exhausted.” 42  
27 U.S.C. § 1997e(a). Exhaustion is mandatory and is no longer left to the discretion of the


1 district court. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citing *Booth v. Churner*, 532 U.S.  
2 731, 739 (2001)). To exhaust properly administrative remedies in California state prisons,  
3 inmates must proceed through a four-step process, which consists of (1) an informal attempt  
4 at resolution; (2) a first-level formal appeal; (3) a second-level appeal to the institution head;  
5 and (4) an appeal to the Director of the California Department of Corrections and  
6 Rehabilitation. *See* 15 Cal. Code Regs. § 3084.5. In his amended complaint, plaintiff must  
7 show that he properly exhausted his administrative remedies as to *every* claim he wishes to  
8 assert.

9 Accordingly, the complaint is DISMISSED WITH LEAVE TO AMEND. Plaintiff  
10 shall file an amended complaint addressing the concerns detailed above within 30 days from  
11 the date this order is filed. The first amended complaint must include the caption and civil  
12 case number used in this order (11-2839 RS (PR)) and the words FIRST AMENDED  
13 COMPLAINT on the first page. Because an amended complaint completely replaces the  
14 previous complaints, plaintiff must include in his first amended complaint *all* the claims he  
15 wishes to present and *all* of the defendants he wishes to sue. *See Ferdik v. Bonzelet*, 963  
16 F.2d 1258, 1262 (9th Cir. 1992). Plaintiff may *not* incorporate material from the prior  
17 complaint by reference. Failure to file an amended complaint in accordance with this order  
18 will result in dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

19 It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
20 informed of any change of address by filing a separate paper with the clerk headed "Notice  
21 of Change of Address." He must comply with the Court's orders in a timely fashion or ask  
22 for an extension of time to do so. Failure to comply may result in the dismissal of this action  
23 for failure to prosecute.

24 **IT IS SO ORDERED.**

25 DATED: September 27, 2011

  
RICHARD SEEBORG  
United States District Judge

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