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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WAYNE JEROME ROBERTSON,)	No. C 12-4698 JSW (PR)
)	
Plaintiff,)	ORDER OF SERVICE
)	
v.)	
)	
SGT. W. STRUFFERT, et al.,)	
)	
Defendants.)	
_____)	

INTRODUCTION

Plaintiff, a California prisoner proceeding pro se, filed this civil rights complaint under 42 U.S.C. § 1983 against officials at Pelican Bay State Prison, where Plaintiff was formerly housed. Plaintiff’s application to proceed *in forma pauperis* is granted in a separate order. This Court now reviews the complaint pursuant to 28 U.S.C. § 1915A and orders it served upon certain Defendants.

DISCUSSION

I. Standard of Review

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

1 defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be
2 liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
3 1990).

4 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement
5 of the claim showing that the pleader is entitled to relief." "Specific facts are not
6 necessary; the statement need only "give the defendant fair notice of what the . . . claim
7 is and the grounds upon which it rests." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200
8 (2007) (citations omitted). Although in order to state a claim a complaint “does not need
9 detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds of his
10 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic
11 recitation of the elements of a cause of action will not do. . . . Factual allegations must
12 be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v.*
13 *Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer
14 "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974. Pro se
15 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696,
16 699 (9th Cir. 1990).

17 "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
18 detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds of his
19 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic
20 recitation of the elements of a cause of action will not do. . . . Factual allegations must
21 be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at
22 553-56. A motion to dismiss should be granted if the complaint does not proffer "enough
23 facts to state a claim for relief that is plausible on its face." *Id.* at 570. This standard
24 applies to all cases. *See, e.g., Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) (finding
25 under *Twombly* and Rule 8 of the Federal Rules of Civil Procedure, that complainant-
26 detainee in a *Bivens* action failed to plead sufficient facts “plausibly showing” that top
27 federal officials “purposely adopted a policy of classifying post-September-11 detainees
28 as ‘of high interest’ because of their race, religion, or national origin” over more likely

1 and non-discriminatory explanations). From these decisions, the following “two
2 principles” arise: “First to be entitled to the presumption of truth, allegations in a
3 complaint or counterclaim may not simply recite the elements of a cause of action but
4 must contain sufficient allegations of underlying facts to give fair notice and to enable
5 the opposing party to defend itself effectively. Second, the factual allegations that are
6 taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to
7 require the opposing party to be subjected to the expense of discovery and continued
8 litigation.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

9 II. Legal Claims

10 When liberally construed, Plaintiff’s allegations that excessive force was used
11 against him during a cell extraction, states a cognizable claim for the violation of his
12 Eighth Amendment rights against Defendants Sergeant W. Struffert and Captain K.
13 Cruse. The complaint will be ordered served upon these Defendants.

14 Plaintiff alleges that Defendants A. Perpiot, N. Cervantes, and J. Whitlow did not
15 follow prison procedures for videotaping and reporting the use of force. These
16 allegations do not state a cognizable claim for relief, even when liberally construed,
17 because there is no constitutional right to a videotape or report on the use of force, nor is
18 there any other federal law implicated by the failure these Defendants’ actions. Plaintiff
19 alleges that Defendant E. Scott asked him to hand over his medication for high blood
20 pressure, and that when he refused, Defendants Nelson and Martinez ordered him to
21 “cuff up.” These allegations, even when liberally construed, also do not state a
22 cognizable claim for relief because such actions do not by themselves violate any federal
23 constitutional right or other federal law. Consequently, the claims against these
24 defendants will be dismissed.

25 **CONCLUSION**

26 For the foregoing reasons, the Court orders as follows:

27 1. The claims against Defendants E. Scott, A. Perpiot, D. Nelson, R.E. Martinez,
28 J. Whitlow, and N. Cervantes are DISMISSED. The claims against Defendants W.

1 Struffert and K. Cruse are, when liberally construed, cognizable.

2 2. The Clerk of the Court shall issue summons and the United States Marshal
3 shall serve, without prepayment of fees, a copy of the complaint and all attachments
4 thereto, and a copy of this order upon Defendants: **Sergeant W. Struffert and Captain**
5 **K. Cruse at Pelican Bay State Prison.**

6 The Clerk shall also mail a courtesy copy of the complaint with all attachments
7 thereto, and this order to the California Attorney General's Office.

8 The Clerk shall also serve a copy of this order on Plaintiff.

9 3. Defendants shall file an answer to the complaint in accordance with the
10 Federal Rules of Civil Procedure.

11 4. In order to expedite the resolution of this case:

12 a. No later than **84 days** from the date this order is filed, defendants shall
13 file a motion for summary judgment or other dispositive motion. If defendants are of the
14 opinion that this case cannot be resolved by summary judgment, they shall so inform the
15 court prior to the date the summary judgment motion is due. All papers filed with the
16 court shall be promptly served on the plaintiff.

17 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with
18 the court and served upon defendants no later than **28 days** from the date of service of
19 the motion. Plaintiff must read the attached page headed "NOTICE -- WARNING,"
20 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.
21 1998) (en banc), and *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

22 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed
23 to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
24 plaintiff should take note of the attached page headed "NOTICE -- WARNING
25 (EXHAUSTION)," which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d
26 1108, 1120 n. 4 (9th Cir.), *cert. denied*, *Alameida v. Wyatt*, 124 S.Ct 50 (2003).

27 c. Defendants **shall** file a reply brief no later than **14 days** after the date of
28 service of the opposition.

1 d. The motion shall be deemed submitted as of the date the reply brief is
2 due. No hearing will be held on the motion unless the court so orders at a later date.

3 e. Along with their motion, defendants shall proof that they served
4 plaintiff the applicable warning(s) required by *Woods v. Carey*, No. 09-15548, slip op.
5 7871 (9th Cir. July 6, 2012) and/or *Stratton v. Buck*, No. 10-35656, slip op. 11477 (9th
6 Cir. Sept. 19, 2012), at the same time they served him with their motion. Failure to do so
7 will result in the summary dismissal of their motion without prejudice.

8 5. All communications by the plaintiff with the court must be served on
9 defendant, or defendant's counsel once counsel has been designated, by mailing a true
10 copy of the document to defendant or defendant's counsel.

11 6. Discovery may be taken in accordance with the Federal Rules of Civil
12 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
13 Local Rule 16-1 is required before the parties may conduct discovery.

14 7. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
15 court informed of any change of address and must comply with the court's orders in a
16 timely fashion. Failure to do so may result in the dismissal of this action for failure to
17 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

18 IT IS SO ORDERED.

19 DATED: October 25, 2012

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21 _____
22 JEFFREY S. WHITE
23 United States District Judge
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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 WAYNE J ROBERTSON,
6 Plaintiff,

Case Number: CV12-04698 JSW

7 **CERTIFICATE OF SERVICE**

8 v.

9 W STRUFFERT et al,
10 Defendant.
_____ /

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
12 Court, Northern District of California.

13 That on October 25, 2012, I SERVED a true and correct copy(ies) of the attached, by placing
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
16 delivery receptacle located in the Clerk's office.

17 Wayne J. Robertson #C-24851
18 High Desert State Prison
19 P.O. Box 3030
20 Susanville, CA 96127

21 Dated: October 25, 2012

Jennifer Ottolini
22 Richard W. Wieking, Clerk
23 By: Jennifer Ottolini, Deputy Clerk
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