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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA  
6

7 ESTABAN PELACOS,  
8 Plaintiff,  
9 v.  
10 MUNIZ, et. al.,  
11 Defendants.

Case No. [16-cv-6666-TEH](#)

ORDER OF DISMISSAL WITH LEAVE  
TO AMEND

Dkt Nos. 10, 11, 12

12  
13 Plaintiff, a state prisoner, filed this pro se civil rights  
14 action under 42 U.S.C. § 1983. Plaintiff is granted leave to  
15 proceed in forma pauperis in a separate order. His complaint is  
16 now before the Court for initial screening pursuant to 28 U.S.C.  
17 § 1915A.

18 I

19 Federal courts must engage in a preliminary screening of  
20 cases in which prisoners seek redress from a governmental entity  
21 or officer or employee of a governmental entity. 28 U.S.C. §  
22 1915A(a). The Court must identify cognizable claims or dismiss  
23 the complaint, or any portion of the complaint, if the complaint  
24 "is frivolous, malicious, or fails to state a claim upon which  
25 relief may be granted," or "seeks monetary relief from a  
26 defendant who is immune from such relief." Id. § 1915A(b).  
27 Pleadings filed by pro se litigants, however, must be liberally  
28 construed. Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010);

1 Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699 (9th Cir.  
2 1990).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
4 allege two essential elements: (1) that a right secured by the  
5 Constitution or laws of the United States was violated, and (2)  
6 that the alleged violation was committed by a person acting under  
7 the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

8 II

9 Plaintiff alleges that Defendants were deliberately  
10 indifferent to his health and safety.

11 The Constitution does not mandate comfortable prisons, but  
12 neither does it permit inhumane ones. See Farmer v. Brennan, 511  
13 U.S. 825, 832 (1994). The treatment a prisoner receives in  
14 prison and the conditions under which he is confined are subject  
15 to scrutiny under the Eighth Amendment. See Helling v. McKinney,  
16 509 U.S. 25, 31 (1993). In its prohibition of "cruel and unusual  
17 punishment," the Eighth Amendment places restraints on prison  
18 officials, who may not, for example, use excessive force against  
19 prisoners. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). The  
20 Amendment also imposes duties on these officials, who must  
21 provide all prisoners with the basic necessities of life such as  
22 food, clothing, shelter, sanitation, medical care and personal  
23 safety. See Farmer, 511 U.S. at 832; DeShaney v. Winnebago  
24 County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989);  
25 Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

26 A prison official violates the Eighth Amendment when two  
27 requirements are met: (1) the deprivation alleged must be,  
28 objectively, sufficiently serious, Farmer v. Brennan, 511 U.S.

1 825, 834 (1994) (citing Wilson v. Seiter, 501 U.S. 294, 298  
2 (1991)), and (2) the prison official possesses a sufficiently  
3 culpable state of mind, id. (citing Wilson, 501 U.S. at 297).

4 Deliberate indifference to serious medical needs violates  
5 the Eighth Amendment's proscription against cruel and unusual  
6 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976); McGuckin  
7 v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other  
8 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136  
9 (9th Cir. 1997) (en banc). A determination of "deliberate  
10 indifference" involves an examination of two elements: the  
11 seriousness of the prisoner's medical need and the nature of the  
12 defendant's response to that need. Id. at 1059.

13 A "serious" medical need exists if the failure to treat a  
14 prisoner's condition could result in further significant injury  
15 or the "unnecessary and wanton infliction of pain." Id. The  
16 existence of an injury that a reasonable doctor or patient would  
17 find important and worthy of comment or treatment; the presence  
18 of a medical condition that significantly affects an individual's  
19 daily activities; or the existence of chronic and substantial  
20 pain are examples of indications that a prisoner has a "serious"  
21 need for medical treatment. Id. at 1059-60.

22 A prison official is deliberately indifferent if he or she  
23 knows that a prisoner faces a substantial risk of serious harm  
24 and disregards that risk by failing to take reasonable steps to  
25 abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The  
26 prison official must not only "be aware of facts from which the  
27 inference could be drawn that a substantial risk of serious harm  
28 exists," but he "must also draw the inference." Id. If a prison

1 official should have been aware of the risk, but was not, then  
2 the official has not violated the Eighth Amendment, no matter how  
3 severe the risk. Gibson v. County of Washoe, 290 F.3d 1175, 1188  
4 (9th Cir. 2002). "A difference of opinion between a prisoner-  
5 patient and prison medical authorities regarding treatment does  
6 not give rise to a § 1983 claim." Franklin v. Oregon, 662 F.2d  
7 1337, 1344 (9th Cir. 1981).

8 Plaintiff alleges that two correctional officers were  
9 deliberately indifferent to his health and safety by not  
10 providing him with a cane and then having him walk down a steep  
11 ramp where he fell and was injured. He also alleges a sergeant  
12 is liable for continuing to have inmates walk down this steep  
13 ramp despite the risk of injury. These allegations are  
14 sufficient to proceed.

15 Plaintiff also states that upon his return to the prison  
16 after being treated at the hospital for an injured back, a doctor  
17 told him that his back was fine and a lost toe nail was due to  
18 fungus. The doctor prescribed fungus cream. Plaintiff has  
19 failed to describe the treatment that should have been provided  
20 and how it violated the Eighth Amendment. Plaintiff has also  
21 failed to identify this doctor. This claim will be dismissed  
22 with leave to amend. Plaintiff should provide more information  
23 about how his rights were violated and he must identify the  
24 doctor. He may wish to review his medical paperwork from that  
25 appointment to ascertain the doctor's name.

26 Plaintiff has also requested that counsel be appointed to  
27 assist him in this action. A district court has the discretion  
28 under 28 U.S.C. § 1915(e)(1) to designate counsel to represent an

1 indigent civil litigant in exceptional circumstances. See  
2 Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). This  
3 requires an evaluation of both the likelihood of success on the  
4 merits and the ability of the plaintiff to articulate his claims  
5 pro se in light of the complexity of the legal issues involved.  
6 See id. Neither of these factors is dispositive and both must be  
7 viewed together before deciding on a request for counsel under §  
8 1915 (e)(1). Here, exceptional circumstances requiring the  
9 appointment of counsel are not evident and the request is denied.

10 III

11 For the foregoing reasons, the Court hereby orders as  
12 follows:

13 1. The motions to file an amended complaint (Docket Nos.  
14 10, 12) are GRANTED and the Court has considered those filings.  
15 The motion appoint counsel (Docket No. 11) is DENIED.

16 2. Plaintiff's Complaint is DISMISSED WITH LEAVE TO FILE A  
17 FIRST AMENDED COMPLAINT, within twenty-eight days containing all  
18 related claims against all Defendants that Plaintiff wishes to  
19 proceed against in this action. The pleading must state clearly  
20 how each and every Defendant is alleged to have violated  
21 Plaintiff's federally-protected rights. See Leer, 844 F.2d at  
22 634. The pleading must include the caption and civil case number  
23 used in this order and the words COURT ORDERED FIRST AMENDED  
24 COMPLAINT on the first page. Plaintiff is advised that he must  
25 file all of his claims in one complaint and not present them  
26 piecemeal to the Court in various letters and other documents.  
27 Failure to file a proper First Amended Complaint within twenty-  
28 eight days of this order will result in this case only proceeding

1 against the two correctional officers and sergeant as described  
2 above.

3 2. Plaintiff is advised that the First Amended Complaint  
4 will supersede the original Complaint and all other pleadings.  
5 Claims and defendants not included in the First Amended Complaint  
6 will not be considered by the Court. See Lacey v. Maricopa  
7 County, 693 F.3d 896 (9th Cir. 2012) (en banc) ("For claims  
8 dismissed with prejudice and without leave to amend, we will not  
9 require that they be repled in a subsequent amended complaint to  
10 preserve them for appeal. But for any claims voluntarily  
11 dismissed, we will consider those claims to be waived if not  
12 repled.").

13 3. It is Plaintiff's responsibility to prosecute this  
14 action. Plaintiff must keep the Court informed of any change of  
15 address by filing a separate paper with the Clerk headed "Notice  
16 of Change of Address," and must comply with the Court's orders in  
17 a timely fashion. Failure to do so may result in the dismissal  
18 of this action for failure to prosecute pursuant to Federal Rule  
19 of Civil Procedure 41(b).

20 IT IS SO ORDERED.

21 Dated: 1/10/2017



THELTON E. HENDERSON  
United States District Judge

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