

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

3 OMARR L. BURNETT,
4 Plaintiff,

No. C 09-04693 SBA (PR)

ORDER OF SERVICE

5 v.

6 DEPUTY FRAYNE, et al.,
7 Defendants.

8 **INTRODUCTION**

9 Plaintiff, a state prisoner, has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983.
10 His motion for leave to proceed in forma pauperis has been granted. Venue is proper because the
11 events giving rise to the claim are alleged to have occurred at the San Mateo County Jail (SMCJ)
12 and at San Quentin State Prison (SQSP), which are both located in this judicial district. See 28
13 U.S.C. § 1391(b).

14 In his complaint, Plaintiff names the following Defendants: SMCJ Deputies Frayne and
15 Buck; SMCJ Correctional Officers Adler and Bow; as well as SQSP Physician Ericsson. Plaintiff
16 seeks declaratory relief and monetary damages.

17 **DISCUSSION**

18 **I. Standard of Review**

19 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
20 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
21 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that
22 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary
23 relief from a defendant who is immune from such relief. Id. § 1915A(b)(1), (2). Pro se pleadings
24 must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

25 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:

- 26 (1) that a right secured by the Constitution or laws of the United States was violated, and
27 (2) that the alleged violation was committed by a person acting under the color of state law. West v.
28 Atkins, 487 U.S. 42, 48 (1988).

1 **II. Legal Claims**

2 **A. Excessive Force**

3 A prisoner has the right to be free from cruel and unusual punishment, including physical
4 abuse by guards. Whenever prison officials stand accused of using excessive physical force in
5 violation of the Eighth Amendment, the core judicial inquiry is whether force was applied in a good-
6 faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Hudson
7 v. McMillian, 503 U.S. 1, 6 (1992) (citing Whitley v. Albers, 475 U.S. 312, 317 (1986)).

8 Plaintiff alleges that on September 29, 2005, he was subjected to excessive force by
9 Defendants Frayne, Adler, Buck and Bow at the SMCJ. Plaintiff claims that he sustained injuries as
10 a result of this incident.

11 Liberally construed, Plaintiff's complaint states a cognizable Eighth Amendment claim
12 against Defendants Frayne, Adler, Buck and Bow.

13 **B. Deliberate Indifference**

14 Plaintiff's allegations also state a claim for deliberate indifference to his serious medical
15 needs.

16 Deliberate indifference to serious medical needs violates the Eighth Amendment's
17 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
18 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX
19 Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); Jones v. Johnson, 781
20 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate indifference" involves an examination
21 of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's
22 response to that need. See McGuckin, 974 F.2d at 1059. A "serious" medical need exists if the
23 failure to treat a prisoner's condition could result in further significant injury or the "unnecessary
24 and wanton infliction of pain." Id. (citing Estelle v. Gamble, 429 U.S. at 104). A prison official is
25 deliberately indifferent if he or she knows that a prisoner faces a substantial risk of serious harm and
26 disregards that risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825,
27 837 (1994).

28 Plaintiff was eventually transferred to SQSP. Plaintiff states that he suffered from long-

1 lasting injuries stemming from the September 29, 2005 incident. He claims that on June 2, 2006, he
2 was still in need of treatment for pain in his "wrist and ankle." Plaintiff was seen by Defendant
3 Ericsson, who "could not help [him] regarding [his] injuries to [his] wrist and ankle." Plaintiff
4 claims that Defendant Ericsson refused to provide him with medical treatment for his injuries.

5 Plaintiff has adequately pled cognizable claims against Defendant Ericsson.

6 **CONCLUSION**

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

8 1. Plaintiff states a cognizable Eighth Amendment claim for the use of excessive force
9 against Defendants Frayne, Adler, Buck and Bow; and for deliberate indifference to serious medical
10 needs against Defendant Ericsson.

11 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
12 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and
13 all attachments thereto (docket no. 1) and a copy of this Order to: **SMCJ Deputies Frayne (D-665),**
14 **Adler (D-859)¹ and Buck (D-824); SMCJ Correctional Officer Bow (C-117); as well as SQSP**
15 **Physician Ericsson.** The Clerk of the Court shall also mail a copy of the complaint and a copy of
16 this Order to the San Mateo County Counsel's Office as well as the State Attorney General's Office
17 in San Francisco. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

18 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires
19 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant
20 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of
21 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of
22 such service unless good cause be shown for their failure to sign and return the waiver form. If
23 service is waived, this action will proceed as if Defendants had been served on the date that the
24 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve
25 and file an answer before **sixty (60) days** from the date on which the request for waiver was sent.

26 _____
27 ¹ Plaintiff originally listed Defendant Adler with badge number "#24." (Compl. at 1.) Clerk's
28 Office staff has been informed that Defendant Adler originally had badge number 24; however, he now
has badge number 859.

1 (This allows a longer time to respond than would be required if formal service of summons is
2 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that
3 more completely describes the duties of the parties with regard to waiver of service of the summons.
4 If service is waived after the date provided in the Notice but before Defendants have been
5 personally served, the Answer shall be due **sixty (60) days** from the date on which the request for
6 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

7 4. Defendants shall answer the complaint in accordance with the Federal Rules of Civil
8 Procedure. The following briefing schedule shall govern dispositive motions in this action:

9 a. No later than **ninety (90) days** from the date their answer is due, Defendants
10 shall file a motion for summary judgment or other dispositive motion. The motion shall be
11 supported by adequate factual documentation and shall conform in all respects to Federal Rule of
12 Civil Procedure 56. If Defendants are of the opinion that this case cannot be resolved by summary
13 judgment, they shall so inform the Court prior to the date the summary judgment motion is due. All
14 papers filed with the Court shall be promptly served on Plaintiff.

15 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court
16 and served on Defendants no later than **sixty (60) days** after the date on which Defendants' motion
17 is filed. The Ninth Circuit has held that the following notice should be given to pro se plaintiffs
18 facing a summary judgment motion:

19 The defendant has made a motion for summary judgment by which they seek
20 to have your case dismissed. A motion for summary judgment under Rule 56 of the
Federal Rules of Civil Procedure will, if granted, end your case.

21 Rule 56 tells you what you must do in order to oppose a motion for summary
22 judgment. Generally, summary judgment must be granted when there is no genuine
23 issue of material fact -- that is, if there is no real dispute about any fact that would
24 affect the result of your case, the party who asked for summary judgment is entitled
25 to judgment as a matter of law, which will end your case. When a party you are
26 suing makes a motion for summary judgment that is properly supported by
27 declarations (or other sworn testimony), you cannot simply rely on what your
28 complaint says. Instead, you must set out specific facts in declarations, depositions,
answers to interrogatories, or authenticated documents, as provided in Rule 56(e),
that contradict the facts shown in the defendant's declarations and documents and
show that there is a genuine issue of material fact for trial. If you do not submit your
own evidence in opposition, summary judgment, if appropriate, may be entered
against you. If summary judgment is granted [in favor of the defendants], your case
will be dismissed and there will be no trial.

1 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc).

2 Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex
3 Corp. v. Catrett, 477 U.S. 317 (1986) (party opposing summary judgment must come forward with
4 evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is
5 cautioned that because he bears the burden of proving his allegations in this case, he must be
6 prepared to produce evidence in support of those allegations when he files his opposition to
7 Defendants' dispositive motion. Such evidence may include sworn declarations from himself and
8 other witnesses to the incident, and copies of documents authenticated by sworn declaration.
9 Plaintiff will not be able to avoid summary judgment simply by repeating the allegations of his
10 complaint.

11 c. If Defendants wish to file a reply brief, they shall do so no later than **thirty (30)**
12 **days** after the date Plaintiff's opposition is filed.

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

15 5. Discovery may be taken in this action in accordance with the Federal Rules of Civil
16 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose
17 Plaintiff and any other necessary witnesses confined in prison.

18 6. All communications by Plaintiff with the Court must be served on Defendants, or
19 Defendants' counsel once counsel has been designated, by mailing a true copy of the document to
20 Defendants or Defendants' counsel.

21 7. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
22 informed of any change of address and must comply with the Court's orders in a timely fashion.

23 8. Extensions of time are not favored, though reasonable extensions will be granted.
24 Any motion for an extension of time must be filed no later than **fifteen (15) days** prior to the
25 deadline sought to be extended.

26 IT IS SO ORDERED.

27 DATED: 4/23/10

28 
SAUNDRA BROWN ARMSTRONG
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4
5

6 OMARR L. BURNETT,
7 Plaintiff,

Case Number: CV09-04693 SBA
CERTIFICATE OF SERVICE

8 v.
9 FRAYNE et al,
10 Defendant.

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

13 That on April 26, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
15 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
located in the Clerk's office.
16

17 O'Marr L. Burnett F-26842
18 Salinas Valley State Prison
19 P.O. Box 1050
Soledad, CA 93960-1050

20 Dated: April 26, 2010

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk

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