

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

3 LEO ALEJANDREZ,

No. C 11-02381 CW (PR)

4 Plaintiff,

ORDER OF SERVICE

5 v.

6 M. KIRCHER, et al.,

7 Defendants.
8 _____/

9 INTRODUCTION

10 Plaintiff, a state prisoner currently incarcerated at
11 Corcoran State Prison, has filed a pro se civil rights action
12 pursuant to 42 U.S.C. § 1983 alleging the violation of his Eighth
13 and Fourteenth Amendment rights. His motion for leave to proceed
14 in forma pauperis has been granted.

15 Venue is proper because the events giving rise to the claim
16 are alleged to have occurred at Salinas Valley State Prison
17 (SVSP), which is located in this judicial district. See 28 U.S.C.
18 § 1391(b).

19 DISCUSSION

20 I. Standard of Review

21 A federal court must conduct a preliminary screening in any
22 case in which a prisoner seeks redress from a governmental entity
23 or officer or employee of a governmental entity. 28 U.S.C.
24 § 1915A(a). In its review, the court must identify any cognizable
25 claims and dismiss any claims that are frivolous, malicious, fail
26 to state a claim upon which relief may be granted or seek monetary
27 relief from a defendant who is immune from such relief. Id.
28 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.

1 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
2 1988).

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
6 (2) that the alleged violation was committed by a person acting
7 under the color of state law. West v. Atkins, 487 U.S. 42, 48
8 (1988).

9 II. Factual Background

10 According to the allegations in the complaint, in June 2008
11 Plaintiff was incarcerated at SVSP. On June 24, 2008, Plaintiff
12 and another inmate, both of whom are affiliated with the "Fresno
13 Bulldogs," were involved in an altercation with two white inmates.
14 As a result, Plaintiff was charged with a rules violation and
15 subsequently found guilty of battery on an inmate.

16 Plaintiff maintains that during the course of the interaction
17 between the "Fresno Bulldogs" and the white inmates SVSP
18 correctional officers used excessive force when they shot
19 Plaintiff in the head with "gas launcher direct impact rounds,"
20 resulting in a head injury that required surgery and caused
21 neurological damage and damage to Plaintiff's hearing, vision,
22 balance and memory.

23 Plaintiff names as Defendants SVSP Correctional Sergeant M.
24 Kircher and SVSP Correctional Officers R. Loza, O. Ponce, Frank
25 Colburn and M. Herrera.

26 III. Legal Claims

27 The treatment a prisoner receives in prison and the conditions
28 under which he is confined are subject to scrutiny under the

1 Eighth Amendment. See Helling v. McKinney, 509 U.S. 25, 31
2 (1993). "'After incarceration, only the unnecessary and wanton
3 infliction of pain . . . constitutes cruel and unusual punishment
4 forbidden by the Eighth Amendment." Whitley v. Albers, 475 U.S.
5 312, 319 (1986).

6 Whenever prison officials stand accused of using excessive
7 force in violation of the Eighth Amendment, the core judicial
8 inquiry is whether force was applied in a good-faith effort to
9 maintain or restore discipline, or maliciously and sadistically to
10 cause harm. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992);
11 Whitley, 475 U.S. at 320-21.

12 Here, Plaintiff has alleged facts which, when liberally
13 construed, show that on the date of the events at issue SVSP
14 correctional officers M. Herrera, R. Loza, O. Ponce and
15 correctional sergeant M. Kircher used and/or authorized the use of
16 excessive force against Plaintiff.

17 Additionally, Plaintiff has alleged facts which, when
18 liberally construed, show that SVSP correctional officer Frank
19 Colburn failed to provide a videotape of the events to his
20 supervisors, resulting in the violation of Plaintiff's Fourteenth
21 Amendment right to have reliable information form the basis for
22 prison disciplinary actions. See Cato v. Rushen, 824 F.2d 703,
23 704-05 (9th Cir. 1987).

24 CONCLUSION

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

26 1. The Clerk of the Court shall mail a Notice of Lawsuit
27 and Request for Waiver of Service of Summons, two copies of the
28 Waiver of Service of Summons, a copy of the complaint and all

1 attachments thereto (docket no. 1) and a copy of this Order to
2 SVSP Defendants M. Kircher, R. Loza, O. Ponce, Frank Colburn and
3 M. Herrera.

4 The Clerk of the Court shall also mail a copy of the
5 complaint and a copy of this Order to the State Attorney General's
6 Office in San Francisco. Additionally, the Clerk shall mail a
7 copy of this Order to Plaintiff.

8 2. Defendants are cautioned that Rule 4 of the Federal
9 Rules of Civil Procedure requires them to cooperate in saving
10 unnecessary costs of service of the summons and complaint.
11 Pursuant to Rule 4, if Defendants, after being notified of this
12 action and asked by the Court, on behalf of Plaintiff, to waive
13 service of the summons, fail to do so, they will be required to
14 bear the cost of such service unless good cause be shown for their
15 failure to sign and return the waiver form. If service is waived,
16 this action will proceed as if Defendants had been served on the
17 date that the waiver is filed, except that pursuant to Rule
18 12(a)(1)(B), Defendants will not be required to serve and file an
19 answer before sixty (60) days from the date on which the request
20 for waiver was sent. (This allows a longer time to respond than
21 would be required if formal service of summons is necessary.)
22 Defendants are asked to read the statement set forth at the foot
23 of the waiver form that more completely describes the duties of
24 the parties with regard to waiver of service of the summons. If
25 service is waived after the date provided in the Notice but before
26 Defendants have been personally served, the Answer shall be due
27 sixty (60) days from the date on which the request for waiver was
28 sent or twenty (20) days from the date the waiver form is filed,

1 whichever is later.

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

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

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

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

23 Rule 56 tells you what you must do in order to
24 oppose a motion for summary judgment. Generally,
25 summary judgment must be granted when there is no
26 genuine issue of material fact -- that is, if there is
27 no real dispute about any fact that would affect the
28 result of your case, the party who asked for summary
judgment is entitled to judgment as a matter of law,
which will end your case. When a party you are suing
makes a motion for summary judgment that is properly
supported by declarations (or other sworn testimony),
you cannot simply rely on what your complaint says.
Instead, you must set out specific facts in

1 declarations, depositions, answers to interrogatories,
2 or authenticated documents, as provided in Rule 56(e),
3 that contradict the facts shown in the defendant's
4 declarations and documents and show that there is a
5 genuine issue of material fact for trial. If you do not
6 submit your own evidence in opposition, summary
7 judgment, if appropriate, may be entered against you.
8 If summary judgment is granted [in favor of the
9 defendants], your case will be dismissed and there will
10 be no trial.

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

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

25 c. Defendants shall file a reply brief no later than
26 thirty (30) days after the date Plaintiff's opposition is filed.

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

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

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

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

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

IT IS SO ORDERED.

DATED: 10/7/2011



CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

LEO ALEJANDREZ,
Plaintiff,

Case Number: CV11-02381 CW

CERTIFICATE OF SERVICE

v.

M KIRCHER et al,
Defendant.

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

That on October 7, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Leo Alejandro P-20280
4A-2L-32
CSP - Corcoran
P.O. Box 3476
Corcoran, CA 93212

Dated: October 7, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk