

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

RODNEY GOLDSON,

Plaintiff,

vs.

DR. CLARENCE DAVID,

Defendant.

No. C 13-0403 PJH (PR)

**ORDER DISMISSING WITH  
LEAVE TO AMEND**

Plaintiff, a state prisoner currently incarcerated at San Quentin State Prison, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

**DISCUSSION**

**A. 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). In its review the court must identify any cognizable claims, and dismiss any claims which 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. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations

1 omitted). Although in order to state a claim a complaint “does not need detailed factual  
2 allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
3 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
4 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
5 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
6 (citations omitted). A complaint must proffer “enough facts to state a claim to relief that is  
7 plausible on its face.” *Id.* at 570. The United States Supreme Court has recently explained  
8 the “plausible on its face” standard of *Twombly*: “While legal conclusions can provide the  
9 framework of a complaint, they must be supported by factual allegations. When there are  
10 well-pleaded factual allegations, a court should assume their veracity and then determine  
11 whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 129 S.Ct.  
12 1937, 1950 (2009).

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

17 **B. Legal Claims**

18 Plaintiff states he has severe joint separation in his left shoulder. The sole  
19 defendant in this case, Dr. David, refused requests for an X-ray, MRI or a referral to an  
20 orthopedic specialist, from February 2012 to June 2012. At some point plaintiff was  
21 referred to an orthopedic specialist who recommended surgery, but Dr. David has denied  
22 and delayed this recommendation. Plaintiff seeks money damages.

23 Deliberate indifference to serious medical needs violates the Eighth Amendment’s  
24 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104  
25 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*  
26 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).  
27 A determination of “deliberate indifference” involves an examination of two elements: the  
28 seriousness of the prisoner’s medical need and the nature of the defendant’s response to

1 that need. *Id.* at 1059.

2 A "serious" medical need exists if the failure to treat a prisoner's condition could  
3 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.* The  
4 existence of an injury that a reasonable doctor or patient would find important and worthy of  
5 comment or treatment; the presence of a medical condition that significantly affects an  
6 individual's daily activities; or the existence of chronic and substantial pain are examples of  
7 indications that a prisoner has a "serious" need for medical treatment. *Id.* at 1059-60.

8 A prison official is deliberately indifferent if he or she knows that a prisoner faces a  
9 substantial risk of serious harm and disregards that risk by failing to take reasonable steps  
10 to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only  
11 "be aware of facts from which the inference could be drawn that a substantial risk of serious  
12 harm exists," but he "must also draw the inference." *Id.* If a prison official should have  
13 been aware of the risk, but was not, then the official has not violated the Eighth  
14 Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175,  
15 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and prison  
16 medical authorities regarding treatment does not give rise to a § 1983 claim." *Franklin v.*  
17 *Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). In addition "mere delay of surgery, without  
18 more, is insufficient to state a claim of deliberate medical indifference.... [Prisoner] would  
19 have no claim for deliberate medical indifference unless the denial was harmful." *Shapely*  
20 *v. Nevada Bd. Of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985).

21 While plaintiff may have a cognizable claim, he only presents brief facts in this  
22 complaint which indicate a difference of opinion or perhaps mere delay of medical  
23 treatment. The complaint is dismissed with leave to amend for plaintiff to provide more  
24 information regarding his joint separation and how delay or denial of surgery has been  
25 deliberately indifferent to his serious medical needs and why the surgery is required.  
26 Simply stating defendant has caused unnecessary and wanton infliction of pain is  
27 insufficient, plaintiff must be more specific.

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

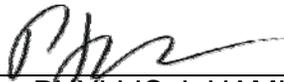
**CONCLUSION**

1. The complaint is **DISMISSED** with leave to amend in accordance with the standards set forth above. The amended complaint must be filed no later than **April 1, 2013**, and must include the caption and civil case number used in this order and the words **AMENDED COMPLAINT** on the first page. Because an amended complaint completely replaces the original complaint, plaintiff must include in it all the claims he wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not incorporate material from the original complaint by reference. Failure to amend within the designated time will result in the dismissal of these claims.

2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address by filing a separate paper with the clerk headed "Notice of Change of Address," and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

**IT IS SO ORDERED.**

Dated: March 1, 2013.

  
\_\_\_\_\_  
PHYLLIS J. HAMILTON  
United States District Judge

G:\PRO-SE\PJH\CR.13\Goldson0403.dwlta.wpd