

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

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

DANIEL TREGLIA,
Plaintiff,
v.
MATTHEW CATE, et al.,
Defendants.

No. C 10-0757 LHK (PR)
ORDER OF PARTIAL
DISMISSAL; DISMISSAL WITH
LEAVE TO AMEND OR
NOTIFY COURT OF INTENT
TO PROCEED WITH FOURTH
AMENDED COMPLAINT

Plaintiff, a state prisoner proceeding *pro se*, filed a fourth amended civil rights complaint pursuant to 42 U.S.C. § 1983 challenging the conditions of his confinement at Pelican Bay State Prison (“PBSP”). Plaintiff is granted leave to proceed in forma pauperis in a separate order. For the reasons stated below, the Court orders the fourth amended complaint partially dismissed and grants Plaintiff leave to amend. Alternatively, Plaintiff shall file a notice that he intends to proceed only with the cognizable claims discussed below.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss

1 any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or
2 seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §
3 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*
4 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

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

9 B. Plaintiff's Claims

10 Plaintiff alleges that on August 13, 2009, he protested the inhumane conditions at PBSP
11 by lighting a fire in his cell. (Complaint at 5.) The fire got out of control and Plaintiff was
12 rescued and rushed to the hospital for smoke inhalation. (*Id.*) After Plaintiff returned, he was
13 interviewed by Defendant Dr. Schrock, a psychiatrist, to determine whether Plaintiff was
14 attempting to commit suicide. (*Id.*) Plaintiff explained that he was not. (*Id.* at 5-6.) Plaintiff
15 states that he told Schrock that he started the fire with tobacco matches but he no longer had any
16 matches. (*Id.* at 6.) Schrock wrote a report that indicated Plaintiff admitted that he still had a
17 few matches left. (*Id.*) Plaintiff asserts that because of Schrock's false report, Defendants
18 Vanderhoofvan and M.D. Yax signed an order directing Plaintiff to Contraband Surveillance
19 Watch ("CSW"). (*Id.*)

20 On August 15, 2009, Plaintiff was taken to CSW by Defendants O'Donnell and Daharsh.
21 (*Id.*) From August 15, 2009 at 5:45 p.m. through August 18, 2009 at 11:45 a.m., Plaintiff alleges
22 that he was subject to cruel and unusual punishment, prevented from humane conditions, and
23 Defendants were deliberately indifferent.

24 Plaintiff also alleges that Defendants failed to adequately train and supervise prison
25 employees based on the inhumane "torture tubes" that Plaintiff was forced to wear and the
26 improper manner in which Plaintiff was treated while in CSW. Specifically, Plaintiff states that
27 he was prevented from having blankets, sheets, or bed covering, and no one responded to his
28

1 complaints that he had difficulty breathing and experienced nausea, sleep deprivation, and other
2 ailments. (Id. at 8-9.)

3 Plaintiff further alleges that Defendants violated a state-created liberty interest when
4 Defendants failed to give him an opportunity to surrender the contraband or conduct a medical
5 examination prior to placement in CSW. Very liberally construed, Plaintiff states cognizable
6 Eighth Amendment claims and a due process claim against Defendants Chisman, Kelley,
7 O'Donnell, Clancy, Kernan, Cabrera, Dahard, Cate, Jacques, and McLean.

8 C. Dismissed Claims

9 Plaintiff also raises several state law claims relating to his federal claims. Specifically,
10 Plaintiff cites alleged violations of several California regulations. Section 1983 does not impose
11 liability for violations of duties of care arising out of state tort law. *See DeShaney v. Winnebago*
12 *County Social Servs. Dep't.*, 489 U.S. 189, 201-03 (1989); *Baker v. McCollan*, 443 U.S. 137,
13 146 (1979) (without more no action for false imprisonment). The Due Process Clause is not
14 implicated by a state official's negligent act causing unintended loss or injury to life, liberty, or
15 property. *See Daniels v. Williams*, 474 U.S. 327 (1986). However, "district courts shall have
16 supplemental jurisdiction over all other claims that are so related to claims in the action within
17 such original jurisdiction that they form part of the same case or controversy under Article III of
18 the United States Constitution." 28 U.S.C. § 1367(a).

19 The Court is unaware of any general cause of action for violations of general prison
20 regulations. If such a cause of action exists, Plaintiff may amend his claims and identify the
21 statute or law that gives rise to his cause of action. For example, Plaintiff cites to a violation of
22 California Code of Regulations title 15 section 2368.2(a). Section 2368.2(a) describes
23 appropriate instances in which mechanical means of physical restraint may be used in a prison
24 facility. It does not provide for any private cause of action against violators of the regulations.
25 In other words, Plaintiff has not identified any statute, regulation, or law that states that he may
26 sue a prison official who violates those regulations for damages in a civil action. Thus, Plaintiff
27 fails to state any cognizable claims under state law for violations of these prison regulations and
28

1 these claims are DISMISSED with leave to amend if Plaintiff can identify the law that gives rise
2 to an appropriate cause of action.

3 Plaintiff also cites to several criminal statutes as the basis of alleged civil rights
4 violations.¹ Criminal statutes do not generally provide a private cause of action nor basis for
5 civil liability. *See, e.g., Ellis v. City of San Diego*, 176 F.3d 1183, 1189 (9th Cir. 1999)
6 (concluding that district court properly dismissed claims premised on violations of California
7 Penal Code sections because they did not create enforceable individual rights); *Aldabe v. Aldabe*,
8 616 F.2d 1089, 1092 (9th Cir. 1980) (noting that 18 U.S.C. §§ 241, 242 provide no private right
9 of action and cannot form basis for civil suit); *Parra v. Hernandez*, 2009 WL 3818376, at *7
10 (S.D. Cal. 2009) (dismissing a prisoner’s state law claim brought under a provision of the
11 California Penal Code imposing criminal penalties on persons for lack of a private right of
12 action). Therefore, Plaintiff fails to state a claim upon which relief may be granted based on the
13 alleged violations of California criminal statutes. Accordingly, these claims are DISMISSED.

14 D. Dismissed Defendants

15 Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the
16 plaintiff can show that the defendant proximately caused the deprivation of a federally protected
17 right. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988). A person deprives another of a
18 constitutional right within the meaning of section 1983 if he does an affirmative act, participates
19 in another’s affirmative act or omits to perform an act which he is legally required to do, that
20 causes the deprivation of which the plaintiff complains. *See id.* at 633. Even at the pleading
21 stage, “[a] plaintiff must allege facts, not simply conclusions, that show that an individual was
22 personally involved in the deprivation of his civil rights.” *Barren v. Harrington*, 152 F.3d 1193,
23 1194 (9th Cir. 1998). Either personal involvement or integral participation of the officers in the
24 alleged constitutional violation is required before liability may be imposed; liability may not be
25 imposed based solely on an officer’s presence during the incident. *See Hopkins v. Bonvicino*,

26
27 ¹ For example, Plaintiff cites to California Penal Code sections 206 (torture), 147 (officer
28 inhumanely or oppressively treating prisoners, 673 (cruel, corporal or unusual punishments), and
2084 (relating to the administration of male prisoners sentenced to death).

1 573 F.3d 752, 769-70 (9th Cir. 2009) (holding that although “integral participant” rule may not
2 be limited to officers who provide armed backup, officer who waits in front yard and does not
3 participate in search of residence not an integral participant).

4 Here, Plaintiff names F. Vanderhoofvan, M.D. Yax, Dr. Daryll Schrock, and T. Moore as
5 defendants in his complaint. However, he fails to allege that their actions or inactions
6 proximately caused the alleged violations. Vanderhoofvan and Yax merely signed the order
7 directing Plaintiff to CSW. Schrock allegedly wrote a report which triggered the order to CSW.
8 However, none of these defendants were alleged to participate in the claimed violations of
9 inhumane conditions or due process. In addition, T. Moore is alleged to have created the
10 “torture tube,” but again, Plaintiff does not allege how he was involved in the claimed
11 deprivations. Accordingly, Vanderhoofvan, Yax, Schrock, and Moore are DISMISSED with
12 leave to amend. If Plaintiff can cure the above deficiencies in good faith, he may file a FIFTH
13 AMENDED COMPLAINT **within thirty (30) days** or notify this Court that he wishes to
14 proceed with the cognizable claims found above.

15 Plaintiff also names “John and Jane Does” as defendants in this action. Although the use
16 of “John Doe” to identify a defendant is not favored in the Ninth Circuit, *see Gillespie v.*
17 *Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980), situations may arise where the identity of alleged
18 defendants cannot be known prior to the filing of a complaint. In such circumstances, the
19 plaintiff should be given an opportunity through discovery to identify the unknown defendants,
20 unless it is clear that discovery would not uncover their identities or that the complaint should be
21 dismissed on other grounds. *See id.* Accordingly, the Doe Defendants are DISMISSED without
22 prejudice. Should Plaintiff discover their identities in a timely manner, he may move to add
23 them to the complaint at a later date.

24 E. Plaintiff’s request to proceed to pro se settlement conference

25 Plaintiff has filed several requests to have this case referred to Judge Vadas for a
26 settlement conference. At this early stage in the litigation, those requests are DENIED without
27 prejudice.

1 **CONCLUSION**

2 For the foregoing reasons, the court hereby orders as follows:

3 1. Plaintiff’s state law claims based on violations of criminal statutes are
4 DISMISSED. John and Jane Doe Defendants are DISMISSED.

5 2. Plaintiff’s state law claims based on violations of prison regulations are
6 DISMISSED with leave to amend if Plaintiff can cure the deficiencies described above in good
7 faith. Defendants F. Vanderhoofvan, M.D. Yax, Dr. Daryll Schrock, and T. Moore are
8 DISMISSED with leave to amend if Plaintiff can cure the deficiencies described above in good
9 faith. The Court grants Plaintiff leave to file a FIFTH AMENDED COMPLAINT **within thirty**
10 **(30) days** of the date this order is filed, to address the deficiencies set forth above. In the
11 alternative, **within thirty (30) days** of the date this order is filed, Plaintiff may file a notice with
12 the Court stating that he intends to proceed with the cognizable claims found in this Order.
13 Because an amended complaint completely replaces previous complaints, Plaintiff must include
14 in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
15 1992). Plaintiff is advised that an amended complaint supersedes the original complaint. “[A]
16 plaintiff waives all causes of action alleged in the original complaint which are not alleged in the
17 amended complaint.” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).

18 An amended complaint must include the caption and civil case number used in this order
19 (C 10-0757 LHK (PR)) and the words “FIFTH AMENDED COMPLAINT” on the first page.
20 Plaintiff may not incorporate material from the original complaints, such as supporting
21 documentation or exhibits, by reference. Plaintiff must include all of his claims, including the
22 cognizable claims set forth above, in the fifth amended complaint. **Failure to file an amended**
23 **complaint or file a notice with the court in compliance with this order within the**
24 **designated time will result in the court proceeding with the cognizable claims in the fourth**
25 **amended complaint as stated in this order.**

26 3. It is the Plaintiff’s responsibility to prosecute this case. Plaintiffs must keep the
27 court informed of any change of address by filing a separate paper with the clerk headed “Notice
28

1 of Change of Address,” and must comply with the court’s orders in a timely fashion. Failure to
2 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule
3 of Civil Procedure 41(b).

4 IT IS SO ORDERED.

5 DATED: 8/26/2010


6 LUCY H. KOH
United States District Judge

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28