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

KEENAN G. WILKINS,	)	No. C 10-2818 LHK (PR)
	)	
Plaintiff,	)	ORDER OF DISMISSAL
	)	WITH LEAVE TO AMEND
v.	)	
	)	
GARY PICETTI, Judge, Superior Court	)	
Alameda County, et al.,	)	
	)	
Defendants.	)	

Plaintiff, currently housed at San Quentin State Prison and proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. On January 11, 2011, the court dismissed this action with leave to amend, advising plaintiff that there were several deficiencies with his complaint that required plaintiff to file an amended complaint. On March 17, 2011, plaintiff filed an amended complaint. On April 25, 2011, the court stayed the action pursuant to *Wallace v. Kato*, 549 U.S. 384, 393 (2007). On August 7, 2013, the court granted plaintiff's motion to lift the stay and re-opened the action.<sup>1</sup> For the reasons stated below, plaintiff's amended complaint is DISMISSED WITH LEAVE TO AMEND.

<sup>1</sup> Plaintiff has also filed a motion for disqualification of the undersigned and a motion for reconsideration of the court's order denying plaintiff's motion for appointment of counsel. Plaintiff has already filed similar motions in July 2013, and the court has previously addressed them. Thus, both motions are DENIED for the reasons already stated in the court's August 7, 2013, order.

1 **DISCUSSION**

2 A. Standard of Review

3 A federal court must conduct a preliminary screening in any case in which a prisoner  
4 seeks redress from a governmental entity or officer or employee of a governmental entity. *See*  
5 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss  
6 any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or  
7 seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C.  
8 § 1915A(b)(1), (2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v.*  
9 *Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir. 1988).

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

14 B. Legal Claims

15 Plaintiff is seeking injunctive and declaratory relief, as well as damages. He alleges that  
16 he was falsely imprisoned when he was arrested on March 6, 2007, and was restrained until  
17 March 12, 2007. Plaintiff asserts that he was not taken before a judge for six days and not  
18 allowed to leave custody. He claims that he was held for an unreasonable amount of time, from  
19 March 23, 2007, through June 4, 2008, while awaiting a competency determination. Plaintiff  
20 also claims that he was wrongfully committed to a hospital without due process. Specifically,  
21 plaintiff states that he was found to be incompetent on June 27, 2007, and ordered committed on  
22 July 27, 2007. Plaintiff further alleges that he was denied equal protection, denied the right to  
23 effective assistance of counsel, and that defendants engaged in conspiracy.

24 The amended complaint has several deficiencies that must be addressed before this action  
25 can proceed. As an initial matter, the court has already dismissed with prejudice defendants  
26 Judge Gary Picetti and Judge Michael Gaffey because they have absolute judicial immunity for  
27 the acts alleged in the amended complaint, as the allegations concern decisions they made in  
28 presiding over the case, and those are acts performed in their judicial capacity. *See Pierson v.*

1 *Ray*, 386 U.S. 547, 553-55 (1967). Judges Picetti and Gaffey are not properly named in this  
2 action.

3 Second, plaintiff’s amended complaint fails to provide a short and plain statement  
4 regarding each claim, including the conduct of each individual defendant that he asserts is  
5 responsible for a constitutional violation. Plaintiff must specifically identify what each named  
6 defendant did or did not do in order to state a claim with regard to each separate claim. Plaintiff  
7 must also state a sufficient connection between each defendant and the alleged violation. For  
8 example, several defendants, including Dr. Steven W. Mayberg, are merely named in the list of  
9 defendants, but not mentioned anywhere in the body of the complaint. A complaint that fails to  
10 state the specific acts of each defendant who violated the plaintiff’s rights fails to meet the  
11 requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure. *Hutchinson v. United*  
12 *States*, 677 F.2d 1322, 1328 n.5 (9th Cir. 1982).

13 Plaintiff should bear in mind that liability may be imposed on an individual defendant  
14 under 42 U.S.C. § 1983 if plaintiff can show that the defendant proximately caused the  
15 deprivation of a federally protected right. *See Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir.  
16 1988). A person deprives another of a constitutional right within the meaning of section 1983 if  
17 he does an affirmative act, participates in another’s affirmative act or omits to perform an act  
18 which he is legally required to do, that causes the deprivation of which the plaintiff complains.  
19 *See id.* at 633. Even at the pleading stage, “[a] plaintiff must allege facts, not simply  
20 conclusions, that show that an individual was personally involved in the deprivation of his civil  
21 rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). A defendant cannot be held  
22 liable simply based on his membership in a group; rather, each individual defendant’s  
23 participation in unlawful conduct must be shown. *Chuman v. Wright*, 76 F.3d 292, 294-95 (9th  
24 Cir. 1996).

25 Third, plaintiff’s claims of equal protection and conspiracy are conclusory. To allege  
26 equal protection, plaintiff must state that he was treated differently than others who were  
27 similarly situated. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). In  
28 order to allege a conspiracy under § 1983, a plaintiff must show “an agreement or ‘meeting of

1 the minds' to violate constitutional rights.” *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002)  
2 (citing *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir.  
3 1989) (en banc)). This agreement or meeting of the minds may be inferred on the basis of  
4 circumstantial evidence, such as the actions of the defendants. *Mendocino Env'tl. Ctr. v.*  
5 *Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999). Plaintiff's amended complaint does  
6 not provide any facts to support these allegations. Accordingly, plaintiff's equal protection and  
7 conspiracy claims are DISMISSED with leave to amend.

8 Finally, plaintiff's claim of ineffective assistance of counsel is not proper in a federal  
9 civil rights action because it impliedly calls into question his conviction. The case of *Heck v.*  
10 *Humphrey*, 512 U.S. 477 (1994), held that a plaintiff cannot bring a civil rights action for  
11 damages for a wrongful conviction or imprisonment, or for other harm caused by actions whose  
12 unlawfulness would render a conviction or sentence invalid, unless that conviction or sentence  
13 already has been determined to be wrongful. *See id.* at 486-87. The *Heck* rule also prevents a  
14 person from bringing an action that – even if it does not directly challenge the conviction or  
15 other decision – would imply that the conviction or other decision was invalid. The practical  
16 importance of this rule is that a plaintiff cannot attack his conviction in a civil rights action for  
17 damages; the conviction must have been successfully attacked before the civil rights action for  
18 damages is filed. The *Heck* rule was first announced with respect to an action for damages, but  
19 the Supreme Court has since applied the rule to an action that sought declaratory relief as well as  
20 damages. *See Edwards v. Balisok*, 520 U.S. 641, 648 (1997). If success in the § 1983 action  
21 would “necessarily demonstrate the invalidity of confinement or its duration,” the § 1983 action  
22 is barred no matter the relief sought (i.e., damages or equitable relief) as long as the conviction  
23 has not been set aside. *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005). Thus, this claim is  
24 DISMISSED with leave to amend if plaintiff has successfully overturned the conviction in which  
25 he alleges he received ineffective assistance of counsel.

26 Plaintiff must file a second amended complaint addressing the above-mentioned  
27 deficiencies. Without this information, this action cannot proceed. The second complaint need  
28 not be long. In fact, a brief and clear statement with regard to each claim listing each

1 defendant's actions regarding that claim is preferable. Accordingly, the amended complaint is  
2 DISMISSED WITH LEAVE TO AMEND. Plaintiff will be provided with thirty days in which  
3 to amend.

4 **CONCLUSION**

5 1. Plaintiff shall file a SECOND AMENDED COMPLAINT within **thirty days**  
6 from the date this order is filed to cure the deficiencies described above. The second amended  
7 complaint must include the caption and civil case number used in this order (C 10-2818 LHK  
8 (PR)) and the words SECOND AMENDED COMPLAINT on the first page. Plaintiff may not  
9 incorporate material from the prior complaint by reference. **Failure to file a second amended**  
10 **complaint within thirty days and in accordance with this order will result in dismissal of**  
11 **this action and a finding that further leave to amend would be futile. The Clerk shall send**  
12 **plaintiff a blank civil rights form along with his copy of this order.**

13 2. Plaintiff is advised that an amended complaint supersedes the original complaint.  
14 “[A] plaintiff waives all causes of action alleged in the original complaint which are not alleged  
15 in the amended complaint.” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981).  
16 Defendants not named in an amended complaint are no longer defendants. *See Ferdik v.*  
17 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

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

23 IT IS SO ORDERED.

24 DATED: 11/6/13

  
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LUCY H. KOH  
United States District Judge