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**\*E-FILED - 11/30/10\***

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

FRANCISCO J. MEDINA,	)	No. C 10-3610 RMW (PR)
	)	
Plaintiff,	)	ORDER OF PARTIAL
	)	DISMISSAL; ORDER OF
v.	)	SERVICE; DIRECTING
	)	DEFENDANTS TO FILE
DR. CLAIRE WILLIAMS, et al.,	)	DISPOSITIVE MOTION OR
	)	NOTICE REGARDING SUCH
Defendants.	)	MOTION

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff is granted leave to proceed in forma pauperis in a separate order. For the reasons stated below, the court orders service on defendants.

**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 any claims that 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. See id. § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police

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

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

6 B. Plaintiff's Claims

7 Plaintiff alleges that he has a permanent medical condition and has been diagnosed with  
8 back disorder and chronic back pain. When Plaintiff was transferred to PBSP, despite receiving  
9 Plaintiff's medical records from his prior institutions and knowing that Plaintiff was  
10 recommended for potential surgery, Plaintiff claims that Dr. Claire Williams discontinued  
11 Plaintiff's treatment and refused to follow the instructions submitted by Plaintiff's prior doctors.  
12 For example, Dr. Williams discontinued Plaintiff's previously prescribed back brace, egg-crate  
13 mattress, double mattress, lower tier cell housing, and pain medication. Plaintiff also alleges that  
14 the remaining defendants knew that Plaintiff risked substantial harm but failed to protect him.  
15 Liberally construed, Plaintiff states a cognizable claim of deliberate indifference to a serious  
16 medical need.

17 Plaintiff also names several "Doe" defendants. Although the use of "John Doe" to  
18 identify a defendant is not favored in the Ninth Circuit, see Gillespie v. Civiletti, 629 F.2d 637,  
19 642 (9th Cir. 1980); Wiltsie v. Cal. Dep't of Corrections, 406 F.2d 515, 518 (9th Cir. 1968),  
20 situations may arise where the identity of alleged defendants cannot be known prior to the filing  
21 of a complaint. In such circumstances, the plaintiff should be given an opportunity through  
22 discovery to identify the unknown defendants, unless it is clear that discovery would not uncover  
23 their identities or that the complaint should be dismissed on other grounds. See Gillespie, 629  
24 F.2d at 642. Here, Doe defendants are DISMISSED without prejudice. Should plaintiff discover  
25 their identities in a timely manner, he may move to add them to the complaint at a later date.

26 Plaintiff also names C. Hammond, N. Grannis, and J. Clark Kelson as defendants.  
27 However, it appears that plaintiff is challenging the administrative appeals process and their  
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1 handling of his appeals. There is no constitutional right to a prison administrative appeal or  
2 grievance system. See Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003). Moreover,  
3 although there certainly is a right to petition the government for redress of grievances, there is no  
4 right to a response or any particular action. See Flick v. Alba, 932 F.2d 728, 729 (8th Cir. 1991).  
5 Accordingly, these defendants will be dismissed.

## 6 CONCLUSION

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

8 1. Defendants C. Hammond, N. Grannis, and J. Clark Kelson are DISMISSED from  
9 this action.

10 2. The clerk shall issue a summons and the United States Marshal shall serve,  
11 without prepayment of fees, copies of the complaint in this matter (docket no. 1), all attachments  
12 thereto, and copies of this order on **Dr. Claire Williams; Dr. Michael C. Sayre, CMO; L.**  
13 **Phillips, SRN II; Maureen McLean, FNP; Richard R. Robinson; Green Lewis, Acting**  
14 **Warden; Derral G. Adams, Warden; Robert A. Horel, Former Warden; Francisco**  
15 **Jacquez, Chief Deputy Warden at Pelican Bay State Prison and Dr. John Culton and J.**  
16 **Walker at Ironwood State Prison** in Blythe, California. The clerk shall also serve a copy of  
17 this order on plaintiff and mail a courtesy copy of the amended complaint to the California  
18 Attorney General's Office.

19 3. No later than **ninety (90) days** from the date of this order, defendants shall file a  
20 motion for summary judgment or other dispositive motion with respect to the cognizable claim  
21 in the complaint.

22 a. If defendants elect to file a motion to dismiss on the grounds that plaintiff  
23 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),  
24 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315  
25 F.3d 1108, 1119-20 (9th Cir. 2003).

26 b. Any motion for summary judgment shall be supported by adequate factual  
27 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil  
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1 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**  
2 **qualified immunity found, if material facts are in dispute. If defendants are of the opinion**  
3 **that this case cannot be resolved by summary judgment, they shall so inform the court**  
4 **prior to the date the summary judgment motion is due.**

5 4. Plaintiff's opposition to the dispositive motion shall be filed with the court and  
6 served on defendants no later than **thirty (30) days** from the date defendant's motion is filed.

7 a. In the event defendants file an unenumerated motion to dismiss under  
8 Rule 12(b), plaintiff is hereby cautioned as follows:<sup>1</sup>

9 The defendants have made a motion to dismiss pursuant to Rule 12(b) of  
10 the Federal Rules of Civil Procedure, on the ground you have not exhausted your  
11 administrative remedies. The motion will, if granted, result in the dismissal of  
12 your case. When a party you are suing makes a motion to dismiss for failure to  
13 exhaust, and that motion is properly supported by declarations (or other sworn  
14 testimony) and/or documents, you may not simply rely on what your complaint  
15 says. Instead, you must set out specific facts in declarations, depositions, answers  
16 to interrogatories, or documents, that contradict the facts shown in the defendant's  
17 declarations and documents and show that you have in fact exhausted your  
18 claims. If you do not submit your own evidence in opposition, the motion to  
19 dismiss, if appropriate, may be granted and the case dismissed.

20 b. In the event defendants file a motion for summary judgment, the  
21 Ninth Circuit has held that the following notice should be given to plaintiffs:

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

25 Rule 56 tells you what you must do in order to oppose a motion for  
26 summary judgment. Generally, summary judgment must be granted when there is  
27 no genuine issue of material fact--that is, if there is no real dispute about any fact  
28 that would affect the 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  
declarations, depositions, answers to interrogatories, or authenticated documents,  
as provided in Rule 56(e), that contradict the facts shown in the defendants'  
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

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<sup>1</sup> The following notice is adapted from the summary judgment notice to be given to pro se  
prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 granted in favor of defendants, your case will be dismissed and there will be no  
2 trial.

3 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read  
4 Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317  
5 (1986) (holding party opposing summary judgment must come forward with evidence showing  
6 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that  
7 failure to file an opposition to defendant's motion for summary judgment may be deemed to be a  
8 consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff  
9 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges  
10 v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

11 5. Defendants shall file a reply brief no later than **fifteen (15) days** after plaintiff's  
12 opposition is filed.

13 6. 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 7. All communications by the plaintiff with the court must be served on defendant,  
16 or defendant's counsel once counsel has been designated, by mailing a true copy of the  
17 document to defendant or defendant's counsel.

18 8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
19 No further court order is required before the parties may conduct discovery.

20 For plaintiff's information, the proper manner of promulgating discovery is to send  
21 demands for documents or interrogatories (questions asking for specific, factual responses)  
22 directly to defendants' counsel. See Fed. R. Civ. P. 33-34. The scope of discovery is limited to  
23 matters "relevant to the claim or defense of any party . . ." See Fed. R. Civ. P. 26(b)(1).  
24 Discovery may be further limited by court order if "(i) the discovery sought is unreasonably  
25 cumulative or duplicative, or is obtainable from some other source that is more convenient, less  
26 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by  
27 discovery in the action to obtain the information sought; or (iii) the burden or expense of the  
28 proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). In order to comply

1 with the requirements of Rule 26, before deciding to promulgate discovery plaintiff may find it  
2 to his benefit to wait until defendants have filed a dispositive motion which could include some  
3 or all of the discovery plaintiff might seek. In addition, no motion to compel will be considered  
4 by the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and N.D. Cal. Local  
5 Rule 37-1 has been satisfied. Because plaintiff is detained, he is not required to meet and confer  
6 with defendants in person. Rather, if his discovery requests are denied and he intends to seek a  
7 motion to compel he must send a letter to defendants to that effect, offering them one last  
8 opportunity to provide him with the sought-after information.

9 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court  
10 and all parties informed of any change of address and must comply with the court's orders in a  
11 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
12 pursuant to Federal Rule of Civil Procedure 41(b).

13 IT IS SO ORDERED.

14 DATED: 11/30/10

  
RONALD M. WHYTE  
United States District Judge