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FILED

JUN 20 2013

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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

LUIS HUMBERTO GARCIA,  
  
Plaintiff,  
  
v.  
  
LELAND, et al.,  
  
Defendants.

No. C 13-02251 EJD (PR)

ORDER OF SERVICE; DIRECTING  
DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR NOTICE  
REGARDING SUCH MOTION;  
INSTRUCTIONS TO CLERK

Plaintiff, a state prisoner, has filed a civil rights action under 42 U.S.C. § 1983, against the officers of the Hollister Police Department for unconstitutional acts. Plaintiff's motion for leave to proceed in forma pauperis will be granted in a separate written order.

**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,

1 fail to state a claim upon which relief may be granted or seek monetary relief from a  
2 defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se  
3 pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police  
4 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  
6 elements: (1) that a right secured by the Constitution or laws of the United States  
7 was violated, and (2) that the alleged violation was committed by a person acting  
8 under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

9 **B. Plaintiff's Claims**

10 Plaintiff claims that on April 2, 2012, Defendants Leland, Wells, Bowen and  
11 Winn used excessive force, causing serious bodily injury which required Plaintiff to  
12 be hospitalized for five days. The force used included punches, the use of a tazer,  
13 and an attack by a K-9 dog. Plaintiff also claims that Defendants Police Chief and  
14 Hill are liable as supervisors for their subordinates' actions. Liberally construed,  
15 Plaintiff's claims are cognizable under § 1983 as violations of his rights under the  
16 Fourth, Eighth, Fifth and Fourteenth Amendments.

17  
18 **CONCLUSION**

19 For the reasons stated above, the Court orders as follows:

20 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for  
21 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a  
22 copy of the complaint, (Docket Nos. 1 & 2), all attachments thereto, and a copy of  
23 this order upon **Defendants Police Chief Jeff Miller, Curtis J. Hill, Officers**  
24 **Leland, Wells, Winn and Bowen** at the **Hollister Police Department** 395 Apollo  
25 Ct., Hollister, California 95023). The Clerk shall also mail a copy of this Order to  
26 Plaintiff.

27 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
28 Procedure requires them to cooperate in saving unnecessary costs of service of the

1 summons and the second amended complaint. Pursuant to Rule 4, if Defendants,  
2 after being notified of this action and asked by the Court, on behalf of Plaintiff, to  
3 waive service of the summons, fail to do so, they will be required to bear the cost of  
4 such service unless good cause shown for their failure to sign and return the waiver  
5 form. If service is waived, this action will proceed as if Defendants had been served  
6 on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B),  
7 Defendants will not be required to serve and file an answer before **fifty-six (56)**  
8 **days** from the day on which the request for waiver was sent. (This allows a longer  
9 time to respond than would be required if formal service of summons is necessary.)  
10 Defendants are asked to read the statement set forth at the foot of the waiver form  
11 that more completely describes the duties of the parties with regard to waiver of  
12 service of the summons. If service is waived after the date provided in the Notice  
13 but before Defendants have been personally served, the Answer shall be due **fifty-**  
14 **six (56) days** from the date on which the request for waiver was sent or **twenty-one**  
15 **(21) days** from the date the waiver form is filed, whichever is later.

16 3. No later than **fifty-six (56) days** from the date of this order,  
17 Defendants shall file a motion for summary judgment or other dispositive motion  
18 with respect to the claims in the second amended complaint found to be cognizable  
19 above.

20 a. If Defendants elect to file a motion to dismiss on the grounds  
21 Plaintiff failed to exhaust his available administrative remedies as required by 42  
22 U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion  
23 pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied  
24 Alameida v. Terhune, 540 U.S. 810 (2003). **The Ninth Circuit has held that**  
25 **Plaintiff must be provided with the appropriate warning and notice under**  
26 **Wyatt concurrently with Defendants' motion to dismiss. See Woods v. Carey,**  
27 **Nos. 09-15548 & 09-16113, slip op. 7871, 7874 (9th Cir. July 6, 2012).**

28 b. Any motion for summary judgment shall be supported by

1 adequate factual documentation and shall conform in all respects to Rule 56 of the  
2 Federal Rules of Civil Procedure. Defendants are advised that summary judgment  
3 cannot be granted, nor qualified immunity found, if material facts are in dispute. If  
4 any Defendant is of the opinion that this case cannot be resolved by summary  
5 judgment, he shall so inform the Court prior to the date the summary judgment  
6 motion is due.

7 4. Plaintiff's opposition to the dispositive motion shall be filed with the  
8 Court and served on Defendants no later than **twenty-eight (28) days** from the date  
9 Defendants' motion is filed.

10 a. **In the event Defendants file a motion for summary**  
11 **judgment, the Ninth Circuit has held that Plaintiff must be concurrently**  
12 **provided the appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963**  
13 **(9th Cir. 1998) (en banc). See Woods, Nos. 09-15548 & 09-16113, slip op. at**  
14 **7874.**

15 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil  
16 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party  
17 opposing summary judgment must come forward with evidence showing triable  
18 issues of material fact on every essential element of his claim). Plaintiff is cautioned  
19 that failure to file an opposition to Defendants' motion for summary judgment may  
20 be deemed to be a consent by Plaintiff to the granting of the motion, and granting of  
21 judgment against Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54  
22 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

23 5. Defendants shall file a reply brief no later than **fourteen (14) days**  
24 after Plaintiff's opposition is filed.

25 6. The motion shall be deemed submitted as of the date the reply brief is  
26 due. No hearing will be held on the motion unless the Court so orders at a later date.

27 7. All communications by the Plaintiff with the Court must be served on  
28 Defendants, or Defendants' counsel once counsel has been designated, by mailing a

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true copy of the document to Defendants or Defendants' counsel.

8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

9. 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. 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).

10. Extensions of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

DATED: 6/20/13

  
EDWARD J. DAVILA  
United States District Judge