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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MARK E. DORSEY,

12 Plaintiff,

13 v.

14 DANIEL PARAMO, et al.,

15 Defendant.

Case No.: 17cv1123-CAB-KSC

**ORDER ADOPTING REPORT AND
RECOMMENDATION [Doc. No. 38]
AND GRANTING DEFENDANTS'
MOTION TO DISMISS [Doc. No. 32]**

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18 Plaintiff Mark E. Dorsey, a state prisoner proceeding *pro se*, filed this civil rights
19 action pursuant to Title 42, United States Code, Section 1983, alleging prison officials at
20 R.J. Donovan Correctional Facility (RJDCF) violated his rights under the United States
21 Constitution. [Doc. No. 3.] On February 27, 2018, Defendants filed a motion to dismiss
22 Counts 2 and 3 of the Complaint for failure to state a claim. [Doc. No. 32.]¹ On March
23 16, 2018, Plaintiff filed an opposition to the motion. [Doc. No. 33.] On July 9, 2018,
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26 ¹ On March 28, 2018, Plaintiff filed a motion for judgment on the pleadings as to Count 1, claiming that
27 Defendants failed to answer Count 1, as the motion to dismiss is only directed to Counts 2 and 3. [Doc.
28 No. 35.] However, the filing of a motion to dismiss under Fed.R.Civ.P. Rule 12(b) extends a
defendant's time to file a responsive pleading, even if the Rule 12(b) motion challenges only some of the
claims of the complaint. *See Compton v. City of Harrodsburg, Ky.*, 287 F.R.D. 401, 402 (E.D. Ky.
2012). Therefore, the motion for judgment on the pleadings [Doc. No. 35] is **DENIED**.

1 Magistrate Judge Karen S. Crawford issued a Report and Recommendation (“Report”)
2 recommending that the motion to dismiss be granted with leave to amend. [Doc. No. 38.]
3 On July 20, 2018, Plaintiff filed objections to the Report. [Doc. No. 39.] For the reasons
4 set forth below, the Report is **ADOPTED** and the motion to dismiss is **GRANTED** with
5 leave to amend.

6 REVIEW OF REPORT AND RECOMMENDATION

7 The duties of the district court in connection with a report and recommendation of
8 a magistrate judge are set forth in Federal Rules of Civil Procedure 72(b) and 28 U.S.C. §
9 636(b). The district judge must “make a de novo determination of those portions of the
10 report . . . to which objection is made,” and “may accept, reject, or modify, in whole or in
11 part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. §
12 636(b). The district court need not review de novo those portions of a report and
13 recommendation to which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992,
14 1000 n. 13 (9th Cir. 2005); *U.S. v. Reyna-Tapia*, 328 F.3d 1114, 1121-22 (9th Cir. 2003)
15 (en banc).

16 DISCUSSION

17 A. Count 2 (Double Celling/Right to Privacy).

18 As noted by Magistrate Judge Crawford, a prisoner does not have a constitutional
19 right to be housed in a single cell. *See Rhodes v. Chapman*, 452 U.S. 337, 347-48 (1981)
20 (holding that double-celling does not violate Eighth Amendment when it does not involve
21 conditions amounting to unnecessary and wanton pain); *Ford v. Ramirez-Palmer*, 301
22 F.3d 1043, 1051 (9th Cir. 2002) (“Double-celling as such is not constitutionally
23 impermissible.”). Rather, the Eighth Amendment's proscription of excessive punishment
24 bars conditions of confinement that are incompatible with evolving standards of decency.
25 *See Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976). The Constitution does not mandate
26 that prison conditions be comfortable, “but neither does it permit inhumane ones.”
27 *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). “Prison officials have a duty to ensure that
28 prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and

1 personal safety.” *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). “The
2 circumstances, nature, and duration of a deprivation of necessities must be considered in
3 determining whether a constitutional violation has occurred.” *Hearns v. Terhune*, 413
4 F.3d 1036, 1042 (9th Cir. 2005) (*citing Johnson*, 217 F.3d at 731 (alteration omitted)).²

5 As also noted by Magistrate Judge Crawford, two requirements must be met to
6 establish an Eighth Amendment violation based on jail conditions: (1) the deprivation
7 alleged must objectively have been “sufficiently serious” in that an official's act or
8 omission resulted in the denial of “the minimal civilized measure of life's necessities,”
9 and (2) the prison official must have had a “sufficiently culpable state of mind,” namely,
10 “deliberate indifference” to the inmate's health or safety. *Farmer*, 511 U.S. at 834
11 (citation omitted); *see also Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991). “Deliberate
12 indifference” is established only when an official “knows that inmates face a substantial
13 risk of serious harm and disregards that risk by failing to take reasonable measures to
14 abate it.” *Farmer*, 511 U.S. at 847.

15 Here, Plaintiff fails to allege deprivation of his basic needs or that prison officials
16 ignored an obvious risk to plaintiff’s health or safety. In addition, Plaintiff’s allegation
17 that he was forced to share a cell with other inmates who had mental health disorders
18 without compatibility screening does not state an Eighth Amendment claim. *Allen v.*
19 *Figueroa*, 56 F.3d 70, at *7 (9th Cir. 1995)(*unpublished disposition*)(no Eighth
20 Amendment or Due Process right to be housed with inmate of one’s choice); *Allen v.*

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23 ² In his objections, Plaintiff cites to *Dohner v. McCarthy*, 635 F.Supp. 508 (C.D. Cal. 1985) for the
24 proposition that “the Federal Court recognized there are prisoners who have psychological needs
25 requiring single cells.” [Doc. No. 39 at 4.] However, *Dohner* does not hold that *all* prisoners who have
26 psychological needs require single cells. In fact, *Dohner* held that, in that case, double-celling did not
27 violate the Eighth Amendment. 635 F. Supp. at 426-27. Plaintiff also cites to *Delgado v. Cady*, 576
28 F.Supp. 1446 (E.D. Wis. 1983) as somehow requiring that prisons evaluate prisoners with psychological
or psychiatric problems prior to double-celling them. [Doc. No. 39 at 4.] However, due to unique
circumstances in that case involving suicidal prisoners, the *Delgado* court ordered those defendants to
devise a new evaluation system. Here, Plaintiff’s allegations are generally that it is unconstitutional to
double-cell prisoners due to “thousands of incident reports.” But this is insufficient to state an Eighth
Amendment claim, as Plaintiff fails to allege how he has been deprived of his basic needs.

1 *Purkett*, 5 F.3d 1151, 1153 (8th Cir. 1993)(no Due Process right to be housed with
2 compatible inmate); *Bjorlin v. Hubbard*, No. CIV S-09-1793, 2010 WL 457685, *1
3 (E.D. Cal. Feb. 4, 2010)(*same*).

4 Finally, it appears that Plaintiff may be attempting to state a claim for violation of
5 his right to privacy under the Fourth Amendment when he alleges “the daily violation of
6 his bodily privacy rights.” [Doc. No. 3 at 10.] However, as noted by Magistrate Judge
7 Crawford, “[a] right to privacy in traditional Fourth Amendment terms is fundamentally
8 incompatible with the close and continual surveillance of inmates and their cells required
9 to insure institutional security and internal order.” [Doc. No. 38 at 8, citing *Hudson v.*
10 *Palmer*, 468 U.S. 517, 526 (1984).] While “incarcerated prisoners retain a limited right
11 to bodily privacy,” *Michenfelder v. Sumner*, 860 F.2d 328, 338 (9th Cir. 1988), a prisoner
12 plaintiff “bears the burden of pleading and proving the absence of legitimate correctional
13 goals for the conduct of which he complains.” *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th
14 Cir. 2003). Here, plaintiff has not alleged any facts to indicate that any loss of bodily
15 privacy that results from double celling is unreasonable or unjustified under the
16 circumstances.

17 Accordingly, the Report is **ADOPTED** as to Count 2 and the motion to dismiss Count
18 2 is **GRANTED** with leave to amend.

19 B. Count 3 (Equal Protection).

20 As noted by Magistrate Judge Crawford, to state an equal protection claim, plaintiff
21 must either allege that defendants acted with an intent or purpose to discriminate against
22 the plaintiff based upon membership in a protected class,” *Barren v. Harrington*, 152
23 F.3d 1193, 1194 (9th Cir. 1998), or that he has been “intentionally treated differently
24 from others similarly situated and that there is no rational basis for the difference in
25 treatment,” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Plaintiff has
26 done neither. Rather he alleges that the policies and procedures in Exhibit G (housing
27 policy memorandum) allow prison officials to “pick and choose” which prisoners are
28 entitled to be housed in “single cells.” [Doc. No. 3 at 12.] However, on its face, the

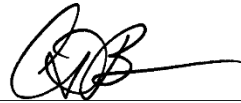
1 policy memorandum is not discriminatory, as it sets forth a long list of legitimate factors
2 to be considered to determine whether single cell status is appropriate for a particular
3 inmate. [Doc. No. 3 at 56-58.] Therefore, Plaintiff fails to state an equal protection
4 claim. Accordingly, the Report is **ADOPTED** and the motion to dismiss Count 3 is
5 **GRANTED** with leave to amend.

6 CONCLUSION

7 For the reasons set forth above, the Court **HEREBY ORDERS:**

- 8 (1) The Report [Doc. No. 38] is **ADOPTED**;
- 9 (2) Defendants' motion to dismiss Counts 2 and 3 of the Complaint [Doc. No. 32]
10 is **GRANTED WITH LEAVE TO AMEND**;
- 11 (3) If Plaintiff wishes to amend Counts 2 and 3, then he **SHALL FILE** a First
12 Amended Complaint ("FAC") by **October 12, 2018**. Plaintiff is reminded that
13 the FAC must be identified as his First Amended Complaint, include Civil Case
14 No. 17cv1123-CAB-KSC in its caption, name the **all** parties he wishes to sue,
15 and allege **all** the claims he wishes to pursue (including Count 1) in one single,
16 clear, and concise pleading;
- 17 (4) The Clerk of the Court is **DIRECTED** to provide Plaintiff with a copy of its
18 form Civil Rights Complaint pursuant to 42 U.S.C. § 1983 for Plaintiff's use
19 should he choose to file a FAC.
- 20 (5) If Plaintiff does not file a FAC by October 12, 2018, then Defendants **SHALL**
21 **ANSWER** the Complaint, as modified by this order, by **October 26, 2018**.

22 Dated: August 29, 2018



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24 Hon. Cathy Ann Bencivengo
25 United States District Judge
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