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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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MATTHEW SCOTT WHITE,)
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Plaintiff,)
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vs.)
)
RENE BAKER et al.,)
)
Defendants.)

3:15-cv-00262-RCJ-VPC

ORDER

This is a prisoner civil rights complaint under 42 U.S.C. § 1983. Plaintiff Matthew White is a prisoner in the custody of the Nevada Department of Corrections at Ely State Prison in Ely, Nevada. He has sued several Defendants in this Court for various constitutional and statutory violations. The Court dismissed the Complaint under 28 U.S.C. § 1915A in part, with leave to amend. The Court now screens the First Amended Complaint (“FAC”).

I. LEGAL STANDARDS

Federal courts 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). Dismissal of a complaint for failure to state a claim upon which relief can be granted is

1 provided for in Federal Rule 12(b)(6), and the court applies the same standard under § 1915A.
2 *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012). When a court dismisses a complaint
3 upon screening, the plaintiff should be given leave to amend the complaint with directions as to
4 curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could
5 not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

6 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
7 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
8 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
9 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
10 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
11 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578,
12 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to
13 state a claim, dismissal is appropriate only when the complaint does not give the defendant fair
14 notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a
16 claim, the court will take all material allegations as true and construe them in the light most
17 favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The
18 court, however, is not required to accept as true allegations that are merely conclusory,
19 unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State*
20 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

21 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
22 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just
23 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)
24 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to

1 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
2 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
3 cognizable legal theory (*Conley* review), but also must allege the facts of his case so that the
4 court can determine whether the plaintiff has any basis for relief under the legal theory he has
5 specified or implied, assuming the facts are as he alleges (*Twombly-Iqbal* review). Put
6 differently, *Conley* only required a plaintiff to identify a major premise (a legal theory) and
7 conclude liability therefrom, but *Twombly-Iqbal* requires a plaintiff additionally to allege minor
8 premises (facts of the plaintiff’s case) such that the syllogism showing liability is logically
9 complete and that liability necessarily, not only possibly, follows (assuming the allegations are
10 true).

11 “Generally, a district court may not consider any material beyond the pleadings in ruling
12 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
13 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
14 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
15 whose contents are alleged in a complaint and whose authenticity no party questions, but which
16 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
17 motion to dismiss” without converting the motion to dismiss into a motion for summary
18 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule of
19 Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay Beer*
20 *Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
21 materials outside of the pleadings, the motion to dismiss is converted into a motion for summary
22 judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

23 Finally, all or part of a complaint filed by a prisoner may be dismissed *sua sponte* if the
24 prisoner’s claims lack an arguable basis in law or in fact. This includes claims based on legal

1 conclusions that are untenable, e.g., claims against defendants who are immune from suit or
2 claims of infringement of a legal interest which clearly does not exist, as well as claims based on
3 fanciful factual allegations, e.g., fantastic or delusional scenarios. *See Neitzke v. Williams*, 490
4 U.S. 319, 327–28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

5 **II. ANALYSIS**

6 **A. Counts I and II**

7 Plaintiff previously alleged Defendants violated his rights under the Free Exercise Clause
8 of the Constitution and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) by denying his requests for a diet consistent with his religious beliefs. The Court dismissed the
9 claims, with leave to amend, noting that Plaintiff must allege the specific accommodations he
10 requested, how Defendants denied his request, and how the denial constituted a substantial
11 burden on his religious exercise. Without such allegations, the Court could not find that Plaintiff
12 had sufficiently alleged that the denial was not within the scope of prison officials’ discretion for
13 purposes of the First Amendment, *see Thornburgh v. Abbott*, 490 U.S. 401, 414–18 (1989);
14 *Turner v. Safley*, 482 U.S. 78 (1987), or that it was a substantial burden on his religious exercise
15 and not the least restrictive means of furthering a compelling state interest under RLUIPA, *see*
16 42 U.S.C. § 2000cc-1(a)(1)–(2).

17
18 Plaintiff now alleges that as a Heraklean, he requires a “‘sacred Heraklean diet’
19 (consisting of high protein natural and organic cuisine only) (natural and organic are defined as
20 the same).” He alleges that when he submitted requests for such a diet, Byrne and Sandoval
21 verbally denied his requests because his religion was not recognized, but that they would look
22 into the request. Byrne, Sandoval, and Mallinger failed to respond to subsequent written
23 requests. Drain and Baker responded to separate requests in writing that Plaintiff’s faith was not
24 recognized. The Court will not dismiss either the Free Exercise claim or the RLUIPA claim at

1 this time. The Court cannot say that the applicable least restrictive means test or even the more
2 lenient *Turner* test is satisfied in the context of a religious diet claim without any evidence from
3 Defendants. *See, e.g., Shakur v. Shapiro*, 514 F.3d 878, 885–891 (9th Cir. 2008).

4 **B. Counts III and IV**

5 Plaintiff previously alleged Defendants violated his rights under the Free Exercise Clause
6 and RLUIPA by denying him possession of religious artifacts. The Court dismissed the claims,
7 with leave to amend noting that Plaintiff must allege what religious artifacts he requested, how
8 Defendants denied his request, and how the denial constituted a substantial burden on his
9 religious exercise.

10 Plaintiff now alleges that the artifacts consist of two metallic rings and one necklace, and
11 that the requests for these items were denied because his religion was not recognized. The Court
12 will not dismiss either the Free Exercise claim or the RLUIPA claim at this time. These items do
13 not on their face appear to implicate significant safety concerns, and the allegation is that they
14 were denied because Plaintiff's religion was not recognized.

15 **C. Counts V and VI**

16 Plaintiff previously alleged Defendants violated his rights under the Free Exercise Clause
17 and RLUIPA by denying him the right to participate in group worship. The Court dismissed the
18 claims, with leave to amend, noting that Plaintiff must allege what kind of group worship he
19 requested, how Defendants denied his request, and how the denial constituted a substantial
20 burden on his religious exercise. Plaintiff has failed to make the required allegations in the FAC.
21 The Court therefore dismisses these claims, without leave to amend.

22 **D. Counts VII and VIII**

23 Plaintiff previously alleged Defendants violated his rights under the Free Exercise Clause
24 and RLUIPA by failing to recognize his religion. The Court dismissed the claims, with leave to

1 amend, noting that Plaintiff must allege the nature of his request to have his religion
2 “recognized,” how Defendants denied his request, and how the denial constituted a substantial
3 burden on his religious exercise.

4 Plaintiff now alleges that he submitted required forms under NDOC Administrative
5 Regulation 810 to have his religion recognized, but that his request was denied. The Court
6 dismisses these claims, without leave to amend. There is no constitutional or statutory right to
7 have one’s religion recognized. Indeed, a state may not recognize particular religions or
8 condition religious rights on state recognition. Plaintiff’s particular grievances as to diet,
9 artifacts, etc., have been appropriately made elsewhere. The Free Exercise Clause and RLUIPA
10 govern Plaintiff’s substantive rights.

11 **E. Count IX**

12 Plaintiff alleges that Matusek, Jones, and Kirchen retaliated against him by transferring
13 him from the general population to “death row” because Plaintiff intended to file a grievance.
14 He previously alleged Defendants moved him from the general population to “death row” on
15 September 14, 2014 because Plaintiff intended to file a grievance. Specifically, Matousek told
16 Plaintiff to control his cellmate when the cellmate told Matousek that he could not control his
17 own anxiety and could not be housed with another inmate. Plaintiff told Matousek that it was
18 not his job to police other inmates and requested an emergency grievance form. Matousek told
19 Plaintiff that he could not have a grievance form and that if he wanted to file a grievance he
20 could do it from “the hole, because that’s where you[‘]r[e] going.” Jones and Kirchen then had
21 Plaintiff moved to “death row,” which is part of administrative segregation.

22 Prisoners have a First Amendment right to file prison grievances and to pursue civil
23 rights litigation in the courts. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004). “[P]urely
24 retaliatory actions taken against a prisoner for having exercised those rights . . . violate the

1 Constitution quite apart from any underlying misconduct they are designed to shield.” *Id.* To
2 state a viable First Amendment retaliation claim in the prison context, a plaintiff must allege:
3 “(1) . . . that a state actor took some adverse action against an inmate (2) because of (3) that
4 prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First
5 Amendment rights [or resulted in separate harm], and (5) the action did not reasonably advance a
6 legitimate correctional goal.” *Id.* at 567–68 & n.11 (footnote omitted).

7 The Court previously dismissed the claim, with leave to amend. Plaintiff did not allege
8 either that the action chilled his filing of a grievance or that it resulted in separate harm. Housing
9 in segregation does not constitute constitutionally cognizable harm unless the conditions are
10 sufficient to constitute an “atypical and significant hardship on the inmate in relation to the
11 ordinary incidents of prison life.” *See Hernandez v. Cox*, 989 F. Supp. 2d 1062, 1068–69 (D.
12 Nev. 2013) (Jones, J.) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). Plaintiff had made
13 such allegations. The Court noted that Plaintiff must allege either that his speech was chilled or
14 the conditions and length of time spent on “death row.” Plaintiff has not cured these defects, and
15 the Court dismisses this claim, without leave to amend.

16 **F. Counts X and XIII**

17 Plaintiff alleges Defendants violated his right to petition the government for redress of
18 grievances under the First Amendment by retaliating against him for filing grievances. He
19 alleges that when he was moved to “death row,” Matousek threw out Plaintiff’s personal
20 property (eight photo albums, drawings, office supplies, CDs, mail such as letters and greeting
21 cards, and legal papers) because of Plaintiff’s stated intention to file a grievance against
22 Matousek. Kerner also held Plaintiff’s remaining property in the property room from Plaintiff
23 improperly. Even assuming Plaintiff’s rights were not actually chilled, prisoners have a
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1 protected interest in their personal property. *Hansen v. May*, 502 F.2d 728, 730 (9th Cir. 1974).
2 The Court previously permitted these claims to proceed.

3 **G. Counts XI and XII**

4 Plaintiff previously alleged Defendants were deliberately indifferent to his health and
5 safety in violation of the Eighth Amendment when they deprived him of a mattress for seven
6 days while housed on “death row” (during which time he slept on a cold, metal bed) and
7 permitted him only a tank top shirt, one pair of boxer shorts, one pair of socks, and one pair of
8 shoes. They also denied him clean clothing, a towel, and a laundry bag. The Court dismissed
9 the claim, with leave to amend. Plaintiff now brings the claims as First Amendment retaliation
10 claims. The claims fail, however, for the same reason Count IX fails. The conditions described
11 are not austere enough to implicate a liberty interest in a convicted inmate, and there is no
12 allegation that Plaintiff’s petitions for redress were chilled.

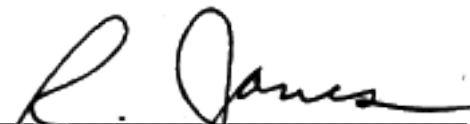
13 **CONCLUSION**

14 IT IS HEREBY ORDERED that a decision on the Application to Proceed in Forma
15 Pauperis (ECF No. 5) is DEFERRED.

16 IT IS FURTHER ORDERED that Counts I–IV, X, and XIII may PROCEED.

17 IT IS FURTHER ORDERED that Counts V–IX, XI, and XII are DISMISSED.

18 Dated this 19th day of August, 2016.

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21 ROBERT C. JONES
22 United States District Judge
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