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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 CHESTER ANDERSON,

9 Plaintiff,

10 v.

11 THE UNITED STATES OF  
12 AMERICA,

Defendant.

C16-586 TSZ

ORDER

13 THIS MATTER comes before the Court on the government's motion to dismiss,  
14 docket no. 17. Having reviewed the papers filed by the parties, the Court GRANTS  
15 defendant's motion to dismiss without prejudice, and grants plaintiff's request for leave  
16 to file another amended complaint, docket no. 19.

17 **Background**

18 Plaintiff alleges in his second amended complaint that he was denied treatment for  
19 diabetic foot ulcers while he was incarcerated at the Seattle-Tacoma Federal Detention  
20 Center. Second Am. Compl., docket no. 16. As a result, plaintiff alleges that he  
21 contracted a bacterial infection that required surgery. *Id.* at 24-27. Plaintiff brings the  
22 present action under the Federal Tort Claims Act (FTCA), and alleges that the prison  
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1 officials’ “conscious indifference” of his medical condition, *id.* at ¶¶ 30-37, caused  
2 “unnecessary and wanton infliction of pain.” *Id.* at ¶ 32.

### 3 **Discussion**

4 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not  
5 provide detailed factual allegations, it must offer “more than labels and conclusions” and  
6 contain more than a “formulaic recitation of the elements of a cause of action.” *Bell Atl.*  
7 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must indicate more than  
8 mere speculation of a right to relief. *Id.* A complaint may be lacking for one of two  
9 reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a  
10 cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th  
11 Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of a  
12 plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s favor. *Usher v.*  
13 *City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is  
14 whether the facts in the complaint sufficiently state a “plausible” ground for relief.  
15 *Twombly*, 550 U.S. at 570. If the Court dismisses the complaint or portions thereof, it  
16 must consider whether to grant leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th  
17 Cir. 2000). If the facts in the underlying claim could entitle a plaintiff to relief, the Court  
18 should generally allow the plaintiff an opportunity to amend the complaint unless there is  
19 an “apparent or declared reason” not to. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

20 Generally, “the United States is immune from suit unless it consents to be sued.”  
21 *Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016). However, if a plaintiff seeks  
22 money damages based on a personal injury, the FTCA provides a limited waiver of this  
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1 immunity where such injury is “caused by the negligent or wrongful act or omission of  
2 any employee of the Government while acting within the scope of his office or  
3 employment, under circumstances where the United States, if a private person, would be  
4 liable to the claimant in accordance with the law of the place where the act or omission  
5 occurred.” Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1).

6       When an alleged tort involves prison officials, plaintiff may bring an FTCA action  
7 based on a violation of 18 U.S.C. § 4042. *Williams v. United States*, 405 F.2d 951, 954  
8 (9th Cir. 1969). Under 18 U.S.C. § 4042, the Bureau of Prisons has a duty to “. . .  
9 provide for the safekeeping, care, and subsistence of all persons charged with or  
10 convicted of offenses against the United States . . .” 18 U.S.C. § 4042. However, a party  
11 may not bring an FTCA suit based on a violation of the federal constitution. 28 U.S.C.  
12 2679(b)(2)(B); *F.D.I.C. v. Meyer*, 510 U.S. 471, 477–78, 114 S. Ct. 996, 1001, 127  
13 L. Ed. 2d 308 (1994) (“. . . the United States simply has not rendered itself liable under  
14 [the FTCA] for constitutional tort claims.”).

15       The second amended complaint fails to assert a cognizable legal theory because  
16 plaintiff references the Eighth Amendment in support of an FTCA claim. *See* Second  
17 Am. Compl., docket no. 16 at ¶¶ 29, 30-37. In his response, plaintiff attempts to remedy  
18 this by arguing that the FTCA claim is actually based on a violation of 18 U.S.C. § 4042,  
19 and he raises the Eighth Amendment merely to highlight the standard of care that should  
20 be applied. *See* Opp’n to Mot. to Dismiss, docket no. 19, at pgs. 2-5. This argument is  
21 unpersuasive. A claim under 18 U.S.C. § 4042 was not clearly articulated in the second  
22 amended complaint, and as such, the government was not effectively given “fair notice”  
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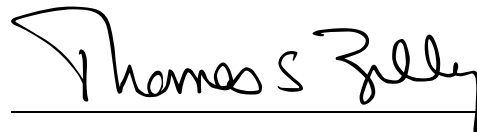
1 of it. *See Twombly*, 550 U.S. at 555. Rather, plaintiff repeatedly used language  
2 suggesting that the FTCA claim was based upon a violation of his Eighth Amendment  
3 rights. *See Second Am. Compl.*, docket no. 16 at ¶¶ 29, 30-37. Such a claim cannot be  
4 made as a matter of law. 28 U.S.C. 2679 (b)(2)(B); *Meyer*, 944 F.2d at 565–66. Thus, the  
5 Court is left with nothing more than a “suspicion of a legally cognizable right of action,”  
6 which is insufficient to withstand a motion to dismiss. *See Twombly*, 550 U.S. at 555.  
7 However, because plaintiff may be able to allege a claim under 18 U.S.C. § 4042,  
8 plaintiff’s request to amend is GRANTED. Any amended complaint must be filed within  
9 30 days of this order.

10 **Conclusion**

11 Defendant’s motion to dismiss, docket no. 17, is GRANTED, without prejudice,  
12 and with leave to amend.

13 IT IS SO ORDERED.

14 Dated this 12th day of December, 2016.

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17 Thomas S. Zilly  
18 United States District Judge  
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