No. 22-1045

In The
Supreme Court of the United States

ROBERT R. SNYDER,

Petitioner,

vs.

California Department of Corrections and Rehabilitation et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT R. SNYDER, In Pro Se
D.O.C. No. AC9136,
CSATF, COR.--P.O. Box 5244
Corcoran, CA 93212

QUESTIONS PRESENTED

- Does Federal Rules of Civil Procedure Rule 12 permit a defendant to file successive, pre-answer Rule 12(b)(6) motion(s) to dismiss—each towards a separate claim—six months apart?

- Where as here, if a prisoner is subject to constant intra-facility transfers over a period of 24 months, does this constitute 'an expected parameter of the sentenced imposed by the trial court'?

- Is it fundamentally unfair for the District Court to allow Petitioner's well documented claims of custodial abuse to remain in the pleadings stage, for 35 months before eventually dismissing the case?

- Considering the nature and volume of the evidence lodged into the record, should the public-official defendants named below, be able to avoid liability for their overt acts/omissions?

- After the United States Magistrate Judge declared that Petitioner stated a claim, did the 'burden shift' within the meaning of *Mt. Healthy v. Doyle*, for the purposes of § 1983 retaliation claims? Where is the constitutional line drawn between pleading standards and burden of proof?

PARTIES TO THE PROCEEDING

Petitioner: Robert R. Snyder was the petitioner in the lower court, the U.S. District Court for the Central District of California, and the Ninth Circuit Court of Appeals proceedings.

Respondents:

California Department of Corrections and Rehabilitation,

The U.S. Court of Appeals for the Ninth District

U. S. District Court for the Central District of California,

California Attorney General: Robert Bonta

RELATED CASES

Robert R. Snyder vs. C.D.C.R. et al.,
In The United States Supreme Court,
Docket # 18-171. Oct. 08, 2018
(See App. 39)

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

FEDERAL REGULATIONS

PETITION FOR WRIT OF CERTIORARI

Robert Snyder respectfully petitions for a writ of certiorari to review an appeal of the dismissal of a civil rights complaint by the U.S. District Court for the Central District Court of California.

OPINIONS AND ORDERS BELOW

Opinions And Orders From The Ninth Circuit Court of Appeal.

This Court's Mandate was filed on Feb. 16, 2023. The finalizing of its judgment of the matter is attached at **App. 1**

The Jan 25, 2023 Court Order affirming the District Court's dismissal of plaintiff – appellants' civil rights claims on direct appeal for case No.: 21-55087, is attached at **App.'s 2 – 4**

Opinions And Orders From The United States District Court, Central District Of California.

The January 05, 2021 Order dismissing the plaintiffs Third Amended Complaint for monitory relief is attached at **App. 5 – 6.**

The November 25, 2020 Order recommending the dismissal of the Third Amended Complaint by the Magistrate Judge is attached at

App.'s 7 through 38. Case No. : CV-18-01223

Opinion and Order of the United States Supreme Court.

The October 09, 2018 Order and Opinion following the denial of TRO and affirmancy of the original appeal. Case No.: 18-171. The order is found at **App. 39**.

JURISDICTION

This petition is authorized by United States Supreme Court rules, Rule 10(a). subd. (a) and is timely filed in accordance with Rule 13 and 30. Jurisdiction is conferred upon this court by 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS

This case involves issues directly related to the Seventh, Eighth and Fourteenth Amendments to the United States Constitution. The *Seventh* deals with the right to a civil trial before a jury. The *Eighth* guarantees freedom from cruel and unusual punishment, and the *Fourteenth* requires that no state shall make or enforce any law, which shall abridge the privileges of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The following is a procedural history necessary for the resolution of the questions presented. Petitioner sought both prospective relief and monetary damages against multiple defendants in conjunction with a request for a Temporary Restraining Order: pursuant to a complaint brought under 42 USC § 1983, filed on February 14th, 2018. Six days later, the District Court for the Central District of California, dismissed the TRO which petitioner appealed in Case No.: C A 9, 18-55335; Certiorari Denied case no.: 18-171. Many times throughout the proceedings, petitioner's objections made reference to his constitutional rights being violated.

The course of the proceedings was extensive but most notably, after a March 8th, 2019 Second Amended Complaint, "SAC" the USMJ declared shortly afterward: that petitioner stated First and Eighth amendment claims against various prison officials; while dismissing other claims.[1] On July 15th, 2019 the District Judge approved those findings. The Defendants filed their Motion to Dismiss under Rule 12(b)(6) although it engaged in a factual dispute, on December 12th, 2019. This motion, was based solely on the defendant's plea towards the First Amendment claim. Petitioner contends that the defendants, through their attorneys, waived their defense against Plaintiff's Eighth Amendment claims because it was not included in document 72.

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[1] Both civil charges derive from a single set of facts.

On February 15th, 2020 the USMJ screened out the SAC. Next, petitioner filed his Third Amended Complaint, "TAC" on April 13th, 2020. The defendants then filed a second 'motion to dismiss' under Rule 12(b)(6) on April 30th, 2020. That motion was answered on June 23rd, 2020 by a 30 page, detailed opposition. (Doc. 86) The USMJ waited 5 months to issue her Report [2] and Recommendations (Doc. 89), which the district court accepted on January 5th, 2021 and the judgment/ approval of findings issued the same day, (Doc. 93, 94). Petitioner filed a timely notice of appeal and opening brief. His appeal was affirmed on February 16th, 2023.

Reasons for Granting Certiorari

The facts giving rise to the matter before the court present important questions not only to the administration of a state prison, but also regarding civil procedure. As well, the petitioner's lack of success in the lower courts deprived him of a remedy for various injuries. The case started after petitioner gathered evidence of custodial misconduct beginning with a continuous series of arbitrary intra-facility transfers; also known as 'bed moves' by prison employees. This pattern of otherwise *discriminatory* housing practices also included incompatible cellmates along with frequent institutional transfers; from one prison, to another. What else besides retaliatory intent could motivate these officials of the California Department of Corrections, "CDCR" to act

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[2] This unsupported report went far beyond 'piercing the pleadings'.

in the manner described? To this day, petitioner has been housed in nearly a hundred different cells throughout the California prison system. The complaint alleged that prison officials under color of state law, deliberately placed petitioner at risk[3] for harm.

Although the task of gathering evidence and researching the law while required to submit to CDCR's many forced evictions, is very difficult. . , petitioner managed to do so. The factual evidence of injures sustained during this critical period was not allowed past the pleading stage for 35 months before it was dismissed with prejudice except for one John Doe defendant. Then after an extensive opening brief, the Appellate Court for Ninth Circuit waited approximately 19 months before issuing a 173 word order, affirming the unreasoned decision by the district court. Whether the court gave this important matter more than a brief moment of consideration is not discernable from their written decision. This case involves an interesting combination of elements; one not easy to plead. However, petitioner complied with his procedural responsibilities to notify the defendants of his claims despite his status of *pro se.* It is questionable whether the district judge in this case, should have recused himself. Judge Gutierrez also dismissed petitioner's direct appeal claims in a 2015, 28 U.S.C. § 2254 proceeding.

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[3] To an extent that offends "contemporary concepts of decency,.." Hope *infra,* (2002) at p. 742.

Argument

A: Introduction

Petitioner diligently pursued justice in this matter over the course of 5 years because of the strength of evidence; [4] (2) the nature of the deprivations, and (3) the intentions of the state actors operating the control board. Throughout his detailed objections, he complimented the pleadings. Petitioner also raised his concerns in question form at every possible juncture; regarding many specific areas where his rights were violated. Despite all of his good faith effort, the motion(s) to dismiss echoed the Magistrate's 1915A(b) and petitioner was effectively prohibited from the discovery of additional evidence.

Although not required,[5] petitioner sensed the need to proffer much of evidence along with the complaint in 2018 as though it were a writ petition. Each time the district court requested an amendment, the filing party attached yet more evidence... The lower courts' duty to construe an unrepresented litigant's concerns liberally, was spoken highly of in: *Hughes v. Rowe*, (1980) 449 U.S. 5, 12-13; quoting *Estelle v. Gamble*, (1976) 429 U.S. 97. Additionally, the law library was often difficult to access; because of that, petitioner had to request several extensions of time. "[A]ccess to court is a fundamental right and all other rights of prisoners are illusory without it."

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[4] Such that was not subject to reasonable dispute; e.g., see photograph at ECF Doc. 1 at p. 16.

[5] See, *Swierkiewicz v. Sorema* N.A., (2002) 122 S. Ct. 992, 997.

McCray v. Sullivan, 509 F. 2d 1332,1337 (C A 5, 1975). In every respect, the district court placed an unfair pleading burden upon the plaintiff in this case.

Although the district court eventually allowed, then plaintiff, to proceed—on at least one claim—against all defendants, their implausibility theory was later upheld. That happened after two separate, distinct events where the defendant's contentions were: plaintiff's claims did not state a cause of action under FRCP, Rule 12(b)(6). Nonetheless, we must remember—Supreme Court Justice Hugo Black, in a 1937 case stated that, "pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between two litigants. They should not raise barriers which prevent the achievement of that end." *Maty v. Grasseli*, 303 US 197, 200 supports the claim. The trial court's construction of the pleadings did not accomplish justice; FRCP, Rule 8(e).

B: District Court Violated Rule 12

Despite the issue being currently a legal gray-area, petitioner's argument is that the district court violated the language of FRCP, Rule 12(g) and (h) by entertaining a second opportunity to make a *pre-answer* defense to plaintiff's civil rights' claims. The violation of this fundamental rule of procedure erodes fundamental fairness elicited by at least one of the Fourteenth Amendment's numerous clauses. Was the 6-month gap between motions, a tactical delay? By waiting, did the respondents waive their

right to challenge the Eighth Amendment claim under Rule 12(b)(6)?

Rule 12(g)(2)(limitations on further motions) lists subd.(h)(2)[6] as an exception—however, it still does not supply clear textual authority to make two or more 'pre-answer, Rule 12(b)(6) motions to dismiss'. In fact, it does not nearly imply permission to do what the deputy attorney general did in this case. A second such motion *after* an answer is furnished seems fairly permissible by the civil rules.

So let us look to the decisions of various authorities on the matter. Citing from Federal Civil Practice, Before Trial; Rutter Group 2015, regarding this issue: petitioner finds (1) Courts may infer from delay that any motion lacks merit; § 9.49 and (2) Rules are intended to eliminate unnecessary delay at the pleading stage by minimizing the number of pre-trial motions. See, *AETNA Life Insurance Co., v. All Med-Servs, Inc.*, (9th Cir., 1988) 855 F. 2d 1470, 1475 fn. 2(successive rule 12 motions usually not permit-ed), (*id.* § 9). In the opening brief,[7] petitioner addressed this issue and favorably quoted the 9th Circuit's (1986) *Chilicky v. Schweiker* case, 796 F.2d 1131, 1136; 487 U.S. 412, (1988) reversed on other grounds.

Concerning other circuits, "...the court concluded that under Rule 12(g) and (h), the failure

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[6] Pertinent to this case—Rule 12(h)(2)(B) refers back to Rule 12(c).

[7] The issue was first preserved by objection in the District Court; Doc. 86 at p. 5.

to raise the defense below was 'a fundamental and incurable matter'. " (*Pila v. G. R. Leasing and Rental Corp.*, 551 F.2d 941, 943; 1st Circuit, 1977); accord—*Myers v. American Dental Assoc.*, 695 F. 2d 716, 721, (3rd Cir., 1982). Those strong words imply *reversible* error.

Because the respondents took an extra 6 months to research a defense to petitioner's Eighth Amendment claims, the question is whether or not, this " 'deliberate failure to not raise the claim earlier' was an attempt to sandbag the court..," as a procedural strategy; Cf. *Peterson v. Highland Music, Inc.*, (9th Cir., 1998) 140 F. 3d 1313, 1318.

Pars interponere certainly did not receive any special procedural advantages during the pendency of the lawsuit. As well, *both* of the Rule 12(b)(6) motions in question.., contained highly-subjective, debatable conclusions.[8] In response, Petitioner counters with, "... the day and night defendants have succeeded in obtaining the very delay which Rule 12 was designed to prevent, although in fairness it did not seek the relief it received. Their only response here is a technical one: that the motion filed, though denominated a 'motion to dismiss' was nevertheless more properly a motion for summary judgment, under Rule 56..." Rule 56. In the same spirit, a factual attack against pleadings using a motion to dismiss under Rule 12(b)(6) was a *speaking motion* when its argument for dismissal referred to materials beyond the pleadings; Fed. R. Civ. P., Rule 12(d), see also *Olson v. United States*,

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[8] These conclusory wish-lists furnished elaborate commentary as to easily disputable points of contention.

(2008) 306 F. App'x. 360, 362, quoting *Black v. Payne*, 591 F. 2d 83, 89, (2008): both Ninth Circuit cases.

A comparison to Habeas jurisprudence: respondent should be "obligated to present facts that his earlier failure to raise his claims, is excusable..." (*Johnson v. Copinger*, 420 F. 2d 395, 399)(4th Cir., 1969). With the foregoing in view, did the lower court violate petitioner's due process when it permitted a second Rule 12(b)(6) motion that posited a separate, previously-available defense? The split in authority here across the board as to this question, might require treatment by this court for resolution.

C: The Pleadings In General and the TRO

"...This court's experience indicates that pro se petitioners are capable of using law books to file cases raising claims that are serious and legitimate..." In spite of this venerated viewpoint,[9] the district court improperly held him to a higher pleading standard. The quality of the pleadings was subjected to a lengthy verbal exchange in the lower court's lodgment. The phrase, "failed to state a claim" is itself subject to broad interpretation by district judges. Petitioner believes, the noted phrase should only be used to leverage legally and structurally flawed, case-initiating documents. Instead, the district court allowed the people to make a detailed critique of the allegations. . , and whether or not petitioner could prove them.

Whether fined tuned or not, the pleadings are only designed to place the defendant(s) on notice

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[9] *Bounds v. Smith*, (1977) 430 U.S. 817, 826-27.

of a pending claim. The series of amended pleadings more than sufficed. This court undoubtedly has heard limitless controversy as to whether or not a litigant's pleadings can withstand scrutiny by the often cited *Bell Atl. Corp,. v. Twombly*, (2007) 550 U.S. 544 and *Ashcroft v. Iqbal*, (2009) 556 U.S. 682—so germane writer will spare it of any unnecessary arguments. Petitioner cannot attach hundreds of pages of lower court transcripts in support of his argument here; he went above and beyond submitting a plausible complaint by proffering multiple declarations and other key pieces of evidence to prove improper motivation. Never once did the court in its screening, nor the respondent in their papers, mention the *amplified* factual showing requirements explained in *Igbal id.* at p. 670 that it implied the complaints lacked.

The appellate court quoted *Hebbe v. Pliler,* 627 F. 3d 338; C A 9, (2010) in its decision to affirm, further stating that it reviewed the matter *denovo, (pp.)*. However, until discovery has been completed, technically it cannot be determined what facts have been established, for review. "...requires the reviewing court to draw upon its judicial experience and common sense. It must allege more than a mere possibility of misconduct." (*Iqbal* at p. 679). This quote was used to dismiss the instant case. It seems to be common sense that over 20 moves in 24 months, is more than a possibility of misconduct...

In addition, *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014)(per curiam) relates, "Federal pleadings rules call for a 'short and plain statement of the claim showing that the pleader is entitled to relief' " FRCP, 8(a)(2) ... and citing a legal treatise,

the court further provides, "Federal Rules of Civil Procedure 'are designed to discourage battles over form of statement," not to mention how much more this should apply to *pro se*, prisoner litigants whom are 'usually handicapped in developing the evidence'; *Harris v. Nelson*, (1969) 394 U.S. 286, 291. As for a factual mixture, under the stressful circumstances described in the challenged proceedings, it is difficult to plead with laser precision, clear descriptions to match the prevailing legal standards. The defendants were notified and provided with detailed allegations—those hardened by corresponding proof attached to the complaint. The merit of the suit was prejudiced by both delay and dismissal.

In February of 2018, the initial request was for injunctive relief only. A request for monetary damages did not take place until the first amended complaint, many months later because of the addition of new defendants and new developments of the evidence. The denial of the TRO, was a discouraging sign as to the court's view of the merits. The Ninth Circuit's decision to proceed to hear an opening brief regarding denial of the TRO,[10] suggested the claims had some qualifications. However, the question remained, whether or not "...the denial of the (TRO) effectively decided the merits of the case." [*Graham v. Teledyne-Continental*, 805 F. 2d 1386 (9th Cir., 1986)]. In any event, for a case where this question arises out of well-documented facts.., it would appear very prejudicial to leave a case stagnant for 35 months

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[10] See, Lands Council v. McNair, 537, F. 3d 981, 986 (9th Cir., 2008)(denial of preliminary injunctive relief is subject to the abuse of discretion review).

instead of allowing the appeal court to review the whole matter.

D: The Facts Presented Satisfied The Elements For Both Retaliation And Cruel and Unusual Punishment.

"The unnecessary and wanton infliction of pain.., constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, (1986). "We have said that among unnecessary and wanton inflictions of pain are those that are 'totally without penalogical justification.' " *Rhodes v. Chapman*, 452 U.S. 337 (1981). The "... Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opn.) Because the facts of this case involve incessant transfers, the inevitable liberty interest inquiry is applicable. See, *videlicet—Sandin v. Connor*, 515 U.S. 472 (1995); *Meachum v. Fano*, 427 U.S. 215 (1976); *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Montanye v. Haymes*, 427 U.S. 236 (1976). This principle applies whether the transfer is disciplinary in nature *and* when a transfer to a lower security environment is arbitrarily denied. . . It is axiomatic that no legitimate correctional goal[11] can be served by what happened between 2016 and 2019, in the instant case.

It is worth noting, petitioner was not allowed

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[11] The regulatory prohibition against the refusing housing assignments does not permit officials to constantly order prisoners to move around.

the benefit of the discovery phase to cement the facts, yet what was provided was indisputable evidence to prove not only an obvious risk, but also serious injuries. In fact, this serious situation could have warranted a criminal investigation under 18 U.S.C. § 242. *Hope v. Pelzer*, (2002) 536 U.S. 730, quoting *United States v. Lanier*, (1997) 520 U.S. 259 (a § 18 U.S.C. case) makes clear that officials can be on notice that their conduct violates clearly established law, even in *novel* factual situations." (emphasis added) Petitioner *sub-judice* is quite sure that the case *ad manum* presents at least one issue of first impression.

Petitioner *nonce*, had to infringe upon the housing policy,[12] 15 Cal. Code Regs., § 3005(c) (Resisting housing) in order get more proof and a *hearing* in connection with these events. Petitioner never resisted any lawful order. He was sent to administrative segregation for refusing to move from the third floor [13] to the first floor at 9 p.m.; on the heels of another move 9 days earlier. On that note, "The constitution contemplates that in the end (a court's) own judgment will be brought to bear on the question of the acceptability 'of a given punishment'." *Rhodes* (1981) *supra* at p. 346 quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977). But such "judgments should be informed by objective factors to the maximum possible extent." (*Rhodes ibid.)* To be

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[12] CDCR's housing policy is implemented using 'force and violence'; Cf. *Rizzo v. Goode*, (1976) 423 U.S. 362, 374.

[13] The whole basis behind the demand for this move was *pre-textual*; Cf. *Allen v. Iranon*, 283 F.3d at 1077. Shortly after returning from Ad-Seg, petitioner was sent back to the exact, same third-floor cell.

perfectly objective, petitioner honestly needed to find an urgent remedy for the continuous cycle of housing hardships .., in order to preserve his *life* interest.

Furthermore, all "these principles apply when the conditions of confinement compose the punishment at issue," (*id.* at 347). Thus, as a direct result of the defendant's actions described in the § 1983 complaint, petitioner suffered physical, emotional, and mental injuries as well as damage to his property. By emotional, he means shock to his nervous system because of fear, anxiety, sleeplessness, and embarrassment. By mental, . . he was subjected to the extraordinary burden of searching frantically for legal solutions without an attorney; in addition to the normal daily activities of prison life. In order to obtain evidence, he was wrongly disciplined and confined to quarters as well, for 90 days. "The right to be heard before being condemned to suffer a grievous loss of any kind, is a principle basic to our society..," applies in this context. (*Kristsky v. McGinnis*, 313 F. Supp. 1247, 1250 (N.D., New York, 1970)). What these officials did, shows how *id.* § 3005 'conferred standardless discretion on corrections personnel,' *Sandin supra*, at p. 482.

All of this against another factual background: at all relevant times, petitioner is a member of the *Coleman* and *Armstrong* protected class; vulnerable due to physical and mental impairments. (Cf., 29 C.F.R. § 1630.2 (j)(3)(iii)). Petitioner for over a decade has had diagnoses on file for major depression, bi-polar, along with physical limitations. Petitioner has found a few relevant decisions. First, *Braggs v. Dunn*, 562 F. Supp. 3d 1178, 1311 (Alabama Dist., Ct., 2021); "testimony..,

describing frequent transfers for no apparent reason," and "—ADOC 's current approach demonstrates insufficient consideration of the effect transfers may have on mentally ill inmates." Also, see another very interesting case: *Snider v. Pa.*, 505 F. Supp. 3d 360, (M.D., Pa., (2020)(Numerous transfers, allegedly as a retaliatory device; excessive force and discrimination); partial accord— *Allen v. Scribner*, 828 F. 2d 1445 [C A 9, 1987]. Sadly, Joel Snider lost his battle with mental illness on March 31st, 2021 while in an isolation module at Houtzdale penitentiary in Pennsylvania; see Prison Legal News; Vol. 33 (April 2022, p.60).

E: Miscellaneous Factors

Rule 12(h)(2)'s limitation[14] function basically explains when 'other', 'failure to state a claim', dismissal motions can be 'raised' ... thus, the pivotal language here is from subd.(h)(2)(B), which refers back to Rule 12(c): and Rule 12(c) begins with the words, "After the pleadings are closed...". *Id.* (h)(2)'s other exceptions under (h)(2)(A) and (h)(2)(C) are irrelevant to this issue. This seems to imply that second or successive motions under Rule 12(b)(6) are prohibited until *after* an answer is furnished by the defendant.

If an argument were advanced as to the extremity or lack thereof involved with one cell move or prison transfer; that would be inconsiderate of the accumulation of its long-term effect. *Johnson v. Lewis*, 217 F. 3d 726 (9th Cir., 2000)(Noting that

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[14] Violation of Rule 12(h) constitutes *waiver* of a delayed defense.

"more modest deprivations can form the basis of a violation, but only if such deprivations are lengthy and ongoing.") Up until the current day, the CDCR continues their enforcement of illegal housing policies, against petitioner Snyder.

Also, the district court applied the overly complicated standard in *Rhodes v. Robinson*, 408 F. 3d 559 (9th Cir., 2005) eventually denying the claim about retaliatory intentions of those involved; which includes two well informed prison wardens, an assistant warden, a few sergeants and other experienced officers. More appropriately, this court's very succinct standard in *Mt. Healthy*[15] *City School District v. Doyle*, (1977) 50 L. Ed.2d 471, should apply with distinction because it greatly simplifies the inquiry: Would the challenged conduct have occurred absent the first amendment activities? Instead, the district court unduly held this case to the 5-element standard in *Rhodes,* which results in the weakened enforcement of First Amendment retaliation cases. After the US Magistrate allowed the parties to be served a summons, the burden arguably shifted to the parties responsible for all the unexplained evictions; to furnish evidence refuting the presumably unconstitutional sequence of events. Petitioner had submitted multiple grievances and notices all throughout this sequence.

In a criminal case, defense attorneys normally cannot tell the prosecution it did not 'adequately allege' a *prima facie* case against a defendant caught red-handed. It thus seems

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[15] Nothing in this case expressly limits the relevant holding, to *only* Title VII controversies.

incongruous to "require a plaintiff—in order to survive a motion to dismiss—to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered." (*Id. Swierkiewicz* at p. 997.) Therefore, in this sense, civil pleadings are not much different. In a case with serious allegations, the court should not determine by a reading of the pleading alone. . , 'whether a claimant is entitled to offer evidence to support the claims.' (*Ibid.*)

Of special import is (Doc. No.: 89). This extensive opposition to the defendant's second 'motion to dismiss' should have adequately replied to any remaining doubts the district court may have had as to the objective/subjective factors underlying both the allegations and the tangible evidence. The appellate court's affirmance does not adequately reflect the merit of petitioner's opening and reply briefs.

Conclusion

Petitioner's due process rights were violated when the appellate court overlooked the district court's prejudicial errors including its refusal to protect his rights and hear his case through trial. In light of the foregoing argument, the petitioner's request is that the court would grant Certiorari to favorably resolve the questions presented.

Ubi cessat remedium ordinarium, ibi decurritur ad extraordinarium

Thank you for the opportunity to be heard.

Respectfully Submitted,

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APPENDIX TABLE OF CONTENTS

App. 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT R. SNYDER, Plaintiff – Appellant, v. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; et al., Defendants – Appellees.	No. 21-550878 D.C. No. 2:18-cv-01223-PSG-RAO U.S. District Court for Central California, Los Angeles **MANDATE**

The judgment of this Court, entered January 25, 2023, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.
Costs are taxed against the appellant in the amount of $209.20.

FILED

FEB. 16 2023

Molly C. Dwyer, Clerk U.S. Court of Appeals

FOR THE COURT:
MOLLY C. DWYER
CLERK OF COURT

By: Rebecca Lopez
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 25 2023

Molly C. Dwyer, Clerk U.S. Court of Appeals - Not For Publication

ROBERT R. SNYDER
Plaintiff – Appellant,

v.

CALIFORNIA DEPT. OF CORRECTIONS AND REHABILITATION; D. ASUNCION, Warden at CA State Prison, L.A. County, Individual; JOSIE GASTELO Warden, Individual; D. SCHEIFFELE Sergeant, Indiv. P. WARD, Sergeant, Indiv.; B. FLOERCKY, Acting Sgt., Indiv.; B. PHILLIPS, Assoc. Warden, Individual; ACUNA Duty Sgt., Individual;

Defendants – Appellees.

Case No.: 21-55087

D.C. No. 2:18-cv-01223-PSG-RAO

MEMORANDUM*

Appeal from the United States District Court for the Central District of California

Phillip S. Gutierrez, District Judge, Presiding

Submitted January 18, 2023**

Before: GRABER, PAEZ and NGUYEN, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent excepts provided by Ninth circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for a decision without oral argument. See Fed. R. App. P. 34(a)(2)

California state prisoner Robert R. Snyder appeals pro se from the district court's judgment dismissing his 42 U.S.C. sec. 1983 action alleging retaliation and deliberate indifference to his health. We have jurisdiction under 28 U.S.C. sec. 1291. We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Hebbe v. Pliler*, 627 F. 3d 338, 341 (9th Cir. 2010). We Affirm.

The district court properly dismissed Snyder's action because Snyder failed to allege facts sufficient to state a plausible violation of his constitutional rights. See *Watison v. Carter*, 668 F. 3d 1108, 1114 (9th Cir. 2012)(to establish retaliation, plaintiffs must allege "a causal connection exists between the protected conduct and the adverse action."; *Toguchi v. Chung*, 391 F. 3d 1051, 1056-60 (9th Cir. 2004)(a prison is deliberately indifferent only if he or she knows of and disregards an excessive risk to inmate health).

The district court did not abuse its discretion by dismissing Snyder's complaint without leave to amend because amendment would have been

futile. See *Cervantes v. Countrywide Home Loans, Inc.*, 656 F. 3d 1034, 1041 (9th Cir. 2011)(setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile).

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT R. SNYDER, Plaintiff, v. CA DEPT. OF CORRECTIONS, AND REHABILITATION, et al., Defendants.	Case No. CV 18-01223 PSG (RAO) ORDER ACCEPTING REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Pursuant to 28 U.S.C. sec. 636, the court had reviewed the Third Amended Complaint, Dkt. No. 81; the Motion to Dismiss filed by Gastelo, Asuncion, Scheiffele, Phillips, Ward, Floercky, and Esquerra (collectively, "Defendants"), Dkt. No. 82; Plaintiff's Opposition to the Motion to Dismiss, Dkt. No. 86; Defendant's Reply, Dkt. No. 87; the Report and Recommendations of United States Magistrate Judge ("Report"), Dkt. No. 89; Plaintiffs Objections to the Report, Dkt. No. 90; Defendant's Reply to Plaintiff's Objections, Dkt. 92; and all of the other records and files herein. Further the Court has made a de novo determination of those portions of the Report to which Plaintiff has objected. The Court is not persuaded by Plaintiff's Objections and hereby accepts and adopts the Magistrate Judge's findings, conclusions and recommendations.

Accordingly, IT IS ORDERED that:

(1) Defendants' **Motion to Dismiss is GRANTED**;

(2) Plaintiff's Third Amended Complaint is dismissed with prejudice as to Defendants Gastelo, Scheiffele, Phillips, Ward, Floercky, and Esquerra; and

(3) Plaintiff's Third Amended Complaint is dismissed without prejudice as to Acuna/John Doe.

DATED: 1/5/21.

/s/_____
PHILIP S. GUTIERREZ
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT R. SNYDER, Plaintiff, v. CA DEPT OF CORRECTIONS AND REHABILITATION et al., Defendants.	Case No. CV 18-01223-PSG(RAO) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE [82]

This Report and Recommendation is submitted to the Honorable Philip Gutierrez, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

On February 14, 2018, Plaintiff Robert R. Snyder ("Plaintiff"), a California state prisoner proceeding *pro se*, filed a complaint pursuant to 42 U.S.C. § 1983. Dkt. No. 1. Plaintiff's complaint was dismissed twice with leave to amend. Dkt. Nos. 22, 33. On July 15, 2019, certain claims of the Second Amended Complaint ("SAC") were dismissed without leave to amend. Dkt. No. 50. Plaintiff was permitted to serve the SAC on the named defendants. Dkt. No. 52. A motion to dismiss the SAC was filed. Dkt.

No.72. The Court dismissed the retaliation claims and provided Plaintiff the option to proceed on the remaining Eighth Amendment claims or to file a further amended complaint. Dkt. 78.

On April 13, 2020, Plaintiff filed a Third Amended Complaint ("TAC"), the operative complaint in this action. Dkt. 81. The TAC is brought against: Wardens J. Gastelo ("Gastelo") and D. Asuncion ("Asuncion"); Sergeants D. Scheiffele ("Scheiffele"), B. Phillips ("Phillips"), P. Ward ("Ward"), B. Floercky)"Floercky"), and Acuna/John Doe ("Acuna"); and C.O. A. Esquerra ("Esquerra"). *Id.* All defendants are sued in their individual capacities. *Id.*

Defendants Gastelo, Asuncion, Scheiffele, Phillips, Ward, Floercky, and Esquerra (collectively, "Defendants") filed a Motion to Dismiss the TAC ("Motion") on April 30, 2020. Dkt. No. 82. Plaintiff filed his Opposition ("Opposition") on June 23, 2020. Dkt. No. 87. For reasons set forth below, the court recommends that Defendants' Motion be granted.

II. LEGAL STANDARD FOR MOTION TO DISMISS

Federal Rule of Civil Procedure 12(b)(6) permits dismissal, as a matter of law, "where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104 (9th Cir. 2008) (citation omitted). To survive a Rule 12(b)(6) motion, a plaintiff must allege enough facts to state a claim that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is facially plausible when a plaintiff "pleads

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility does not mean probability, but does require "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A pleading that offers mere "labels and conclusions" or "a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. at 555.

In considering a motion to dismiss, a court must accept all factual allegations in the complaint as true "and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). *Pro se* pleadings, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (*per curiam*) (citation omitted). But the liberal pleading standard "applies only to a plaintiff's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 330 n.9, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989). The Court will not accept as true unreasonable inferences or legal conclusions cast in the form of factual allegations. *Ileto v. Glaock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003). In giving liberal interpretations, a court may not supply essential elements of a claim not initially pled. *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992).

In considering a motion to dismiss, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and

unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984).

The court may consider exhibits attached to the complaint and incorporated by reference, see Petrie v. Electronic Game Card, Inc., 761 F.3d 959, 964 n.6 (9th Cir. 20-14), Fed. R. Civ. P. 10(c), but is not required to blindly accept conclusory allegations, unwarranted deductions of fact, or unreasonable inferences, nor accept as true allegations that are contradicted by the exhibits attached to the complaint. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

III. SUMMARY OF RELEVANT ALLEGATIONS

Plaintiff alleges that there is a common nucleus of facts for his First and Eighth amendment claims that repeat from one prison to the next and that Plaintiff has notified the Wardens through multiple written forms of communication. TAC at 5.

A. Defendant Scheiffele, California Men's Colony ("CMC")

Plaintiff alleges that Scheiffele was the originator of the improper activity, namely improper multiple cell moves. TAC at 9. Scheiffele worked with C.O. Poindexter on the first improper move.[1] *Id.* Plaintiff filed a 602 grievance on December 23, 2015 against Poindexter which also referenced Scheiffele as "Sgt." *Id.* The grievance was exhausted

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[1] Poindexter is not a named defendant in this action.

to the Third Level. *Id.* Plaintiff also filed a petition for a writ of mandate in the San Luis Obispo Superior Court in July 2016 that alleged "Poindexter and his supervisors" engaged in retaliation. *Id.* at 5, 9 Almost immediately, a long series of additional improper moves took place. *Id.* at 9. Between Jan. 17, 2016 and Nov. 16, 2016, there were nine cell transfers. *Id.*

Scheiffele was responsible for initiating two night moves on January 17, 2016 and November 16, 2016, both on evenings after Plaintiff spent the day visiting with family. *Id.*at 9, 11.

In August 2016, Scheiffele harassed Plaintiff in a way that was similar to Poindexter's actions on July 30, 2016. *Id.* at 10. Poindexter had threatened Plaintiff with arbitrary punishments if he did not remove a draft sealant from a plumbing chase and later wrote three Rules Violation Reports ("RVR's") for 'bad cause." *Id.*

After the California Department of Corrections and Rehabilitation ("CDCR") dismissed the complaint against Scheiffele and Poindexter, the two worked together on Sept. 18, 2016 and alleged that Plaintiff resisted a move. *Id.* at 9. This would not have happened had Scheiffele not ordered Plaintiff back to Poindexter's floor. *Id.*

Plaintiff contends that many of the 16 moves he had while at CMC for 27 months were in violation of a Movement Warning regarding stairs, his seizure risk, and his slip and fall risk because he had to carry his boxes of property up or down stairs, making six to eight trips. *Id.* at 8, 9.

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B. Defendant Ward, CMC

Plaintiff alleges that Ward completed the two night moves on Jan. 17, 2016 and Nov. 6, 2016 that Scheiffele initiated. TAC at 9, 11. These moves took place at 3:00 p.m. after Plaintiff finished visiting with his family. Id. at 9. Ward threatened to throw away Plaintiff's property and place him in administrative segregation if he refused to move. Id. at 11. Plaintiff then became scared to write additional 602 appeals. *Id.* Plaintiff contends that Ward's actions were not necessary as no one was usually moved into Plaintiff' clean cells as soon as he vacated. *Id.* Plaintiff argues that many of these moves also violated the Movement Warning. *Id.*

C. Defendant Phillips, CMC

Plaintiff alleges that Phillips ordered Floercky to move Plaintiff at 7 p.m. on Nov. 10, 2016. TAC at 8. The Watch commander assured Plaintiff's mother on Nov. 10, 2016 that no inmates would be moving at night. *Id.* at 7. Plaintiff refused to move and proposed to move in the morning, but Plaintiff was issued an RVR. *Id.* at 8. Phillips also approved the guilty finding that sent Plaintiff to administrative segregation. *Id.* Plaintiff complains that many of the moves violated the Movement Warning. *Id.*

D. Defendant Floercky, CMC

With respect to the night move on Nov. 10, 2016, Floercky told Plaintiff that he was the last one to move in, so he was also the first out. TAC at 8. Plaintiff contends this was not true because another inmate moved in to the tier after Plaintiff. *Id.* In the

resulting RVR, Floercky admitted being told by Phillips to move Plaintiff and that Plaintiff told him he was too tired. *Id.* at 10. Floercky also admitted to being notified by Plaintiff that the move was a health risk and that Plaintiff was willing to move in the morning. *Id.* Floercky then changed his story at the disciplinary hearing, showing evidence of retaliatory intent. *Id.*

E. Defendant Gastelo, CMC

Plaintiff alleges that as warden, Gastelo is liable for her failure to terminate a series of illegal acts by her subordinates despite being on notice via exhausted appeals, including the 602 on Poindexter which resulted in the lawsuit 16HC-0062. TAC at 5. Plaintiff also submitted a CDCR-22 form to Gastelo on July 10, 2016. *Id.* This was ignored for 45 days. *Id.* Gastelo was served with a copy of the petition for writ of mandate filed in July 2016 which alleged retaliation and claimed that Gastelo failed to intervene. *Id.* Plaintiff alleges that Gastelo could have ordered Plaintiff moved to a different building but knowingly left him in Poindexter's way. *Id.* Plaintiff also alleges that Gastelo ignored a letter written to her by Plaintiff's parents on Nov. 22, 2016 regarding the frequent intra-facility moves. *Id.* Six weeks later, a member of Gastelo's staff answered the letter. *Id.*

Plaintiff alleges that his ordinary firmness was chilled because he realized that any additional 602s would increase the retaliation. *Id.* at 7. After the Nov. 22, 2016 letter, misconduct by Gastelo's subordinates continued. *Id.* Phillips upheld the fraudulent disciplinary proceeding from the RVR and the subsequent adverse transfer to a maximum-

security level prison. *Id.* Plaintiff was subjected to 16 intra-facility moves in 27 months. *Id.*

There were also numerous appeals that the appeals coordinator refused to process on Gastelo's watch. *Id.* Plaintiff believes that the Warden actively encouraged her employee' misconduct by ignoring written communications. *Id.*

F. Defendant Asuncion, California State Prison – Los Angeles County ("CSP-LAC')

Plaintiff alleges that by 2018, CDCR was well aware of the controversy at CMC. TAC at 12. Plaintiff contends that as warden, Asuncion refused to terminate a series of illegal acts on the part of her subordinates, such as her employees not completing a compatibility assessment before Plaintiff was housed with five different cellmates over the 15 months he was at CSP-LAC. *Id.* One of those cellmates came from administration segregation, and only a representative from the warden's office can determine release from administration segregation into the general or EOP population. *Id.* Her failure to discipline was akin to giving permission to her employees to harass Plaintiff. *Id.* Plaintiff was also assigned to a job incompatible with his medical condition. *Id.*

Plaintiff provides a chronology of various events that happened while he was at CSP-LAC. On June 12, 2017, Plaintiff's property was not "trans-packed" when he was transferred from CMC to CSP-LAC. *Id.* at 13. On September 5, 2017, Plaintiff filed a petition for writ of habeas corpus with the U.S. Supreme Court, and retaliation escalated after this. *Id.* On October 2, 2017, Plaintiff filed a staff complaint against C.O. L. Godina for constantly

harassing Plaintiff. *Id.* at 14.

Starting on November 5, 2017, an arbitrary set of lockdowns began, and Plaintiff had disagreements with his cellmate on a daily basis during this lockdown. *Id.* The lockdowns continued for about three weeks. *Id.*

On December 21, 2017, a nurse practitioner discontinued medications. *Id.*

On February 2018, Plaintiff filed a staff complaint regarding flashlights being used in retaliation for his filing of grievances. *Id.*

On March 19, 2018, Plaintiff filed a staff complaint that he was being harassed by employees, including C.O. Altamirano and others in the D program office while Plaintiff tried to do his job as a Chapel clerk. *Id.*

On May 7, 2018, Plaintiff filed a staff complaint against C.O. F.D. Nichols for interfering with his job, delaying his packages, and retaliating against his friends. *Id.*

On June 4, 2018, shortly after Plaintiff filed the instant case, Plaintiff was deprived of access to the library. *Id.* at 12, 14. On June 11, 2018, he and others were deprived of access to the library, resulting in a group writ of mandate. *Id.* at 15.

On June 19, 2018, Plaintiff filed a staff complaint that he was denied court access. *Id.*

On June 21, 2018, Plaintiff filed a medical complaint about a psych tech's unprofessional and provocative response. *Id.*

Plaintiff also contends that his transfer to California State Prison – Corcoran ("CSP-Corcoran") on July 5, 2018, followed by a transfer to R.J. Donovan two months later, is suspicious and was done under Asuncion's watch. *Id.* at 12-13, 21.

Plaintiff filed ten 602 grievances in a six-

month period regarding harassment and retaliation by Asuncion's staff. *Id.* at 13. Asuncion failed to train or reprimand her employees. *Id.* Other appeals were discarded, destroyed, or improperly screened out. *Id.* Plaintiff contends that there were clear adverse consequences by submitting these numerous grievances. *Id.* at 15.

G. Acuna/John Doe, CSP-Corcoran[2]

Plaintiff alleges that Acuna placed an incompatible inmate in Plaintiff's cell. TAC at 16. The cellmate had a higher security level and needed to be housed on an SNY yard. *Id.* Plaintiff is White and the cellmate is Hispanic. *Id.* The cellmate had recently been charged with two batteries against other inmates, and was belligerent while housed with Plaintiff over the course of three weeks. *Id.* Acuna housed the cellmate with Plaintiff without a compatibility assessment when there were other cells that could have housed the other inmate. *Id.* Plaintiff filed a grievance that mentioned Acuna's misconduct and retaliation. *Id.*

H. Defendant Esquerra, CSP-Corcoran

Plaintiff alleges that Esquerra refused Plaintiff's request to remove a dangerous and incompatible cellmate from Plaintiff' cell. TAC at 17. After three weeks and no fights with the cellmate, Esquerra forced Plaintiff to move out. *Id.* Plaintiff

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[2] Although Plaintiff provides a last name for this defendant, Plaintiff acknowledges that the identity and location of this defendant is currently unknown and so Plaintiff sues Acuna by a fictitious name. TAC at 16.

was housed with an African American inmate even though there were numerous empty cells. *Id.* No compatibility assessment was done or on file. *Id.* Esquerra also improperly screened out grievances only days after Plaintiff arrived at the institution. *Id.* Esquerra, Asuncion and Acuna all took adverse action after the matter at hand was filed. *Id.* Within a few weeks, on September 12, 2018, Plaintiff was "dubiously" transferred to R.J. Donovan. *Id.* at 17, 21.

IV. LEGAL STANDARDS

A. Section 1983

Plaintiff brings his claims under 42 U.S.C. section 1983 ("Section 1983"). *See* 11 TAC at 1. To state a claim under Section 1983, Plaintiff must plead that Defendants, while acting under color of state law, deprived him of a right created by federal law. 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988). Vicarious liability is unavailable in a Section 1983 claim. *Iqbal*, 556 U.S. at 676. To state a viable Section 1983 claim against an individual, a plaintiff's complaint must allege that the individual's own actions caused the particular constitutional deprivation alleged. *Id.* Allegations regarding causation must be individualized and must focus on the duties and responsibilities of the defendant "whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

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B. Supervisory Liability

"A defendant may be held liable as a supervisor under § 1983 if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011)(quotations and citation omitted). "The requisite causal connection can be established . . . by setting in motion a series of acts by others, . . . or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." *Id.* at 1207-08 (quotations and citations omitted). Supervisory officials may be liable under § 1983 for their own culpable action or inaction in the training, supervision, or control of subordinates; for acquiescence in the constitutional injuries complained of; or for conduct showing a callous or reckless indifference to the rights of others. *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (citing *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991)).

C. Retaliation

A First Amendment claim based on retaliation has the following elements: (1) the plaintiff engaged in protected conduct; (2) a defen-dant state actor took adverse action against the plaintiff; (3) a causal connection exists between the protected conduct and the adverse action; (4) the adverse action is one that "would chill or silence a person of ordinary firmness from future First Amendment activities"; and (5) the retaliatory action did not advance a legitimate

penological goal. *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012).

Prisoners have a First Amendment right to file grievances against prison officials and to be free from retaliation for doing so. *Id.* Transfers or double-celling in retaliation for exercise of First Amendment rights can constitute adverse action. *See Pratt v. Rowland*, 65 F.3d 802, 806-07 (9th Cir. 1995); *Rizzo v. Dawson,* 778 F.2d 527, 531-32 (9th Cir. 1985). Because direct evidence of retaliatory intent rarely can be pleaded, allegations of a chronology of events from which retaliation can be inferred are sufficient to survive dismissal. *Watison*, 668 F.3d at 1114; *see also Pratt*, 65 F.3d at 808 ("[T]iming can properly be considered as circumstantial evidence of retaliatory intent."). A plaintiff may allege a chilling effect or some other harm that is more than minimal. *Watison*, 668 F.3d at 1114. A plaintiff must plead facts to support, "in addition to a retaliatory motive, that the defendant's actions were arbitrary and capricious, or that they were unnecessary to the maintenance of order in the institution." *Id.* at 1114-15 (citation and internal quotation marks omitted).

D. Eighth Amendment Deliberate Indifference

The Eighth Amendment is violated when prison officials are "deliberately indifferent" to "inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (citation omitted). A prisoner alleging a violation must show (1) that he is "incarcerated under conditions posing a substantial risk of serious harm"; and (2) that the defendants were "deliberately indifferent." *Id.* at 834-37. "Deliberate indifference" is a subjective test that requires

plaintiffs to establish that an official knew of a substantial risk of serious harm and disregarded the risk "by failing to take reasonable measures to abate it." *Id.* at 847. This consideration can extend to inmate transfers, if made with deliberate indifference to a serious risk of harm. *See Fitzharris v. Wolff*, 702 F.2d 836, 839 (9th Cir. 1983) (affirming district court's holding that plaintiff alleged a cognizable Eighth Amendment claim based on a prison transfer where plaintiff alleged that he would be killed if he were transferred and that prison authorities knew it).

Knowledge of the risk by prison officials can be inferred from circumstantial evidence or proved directly. *See Farmer*, 511 U.S. at 842 (holding that Plaintiff "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm."); *see also Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995) (prisoner notified officials about hazard).

V. DISCUSSION

A. The Parties' Arguments

1. Defendants' Motion

With respect to the retaliation claims, Defendants argue that Plaintiff has not alleged any facts suggesting that the filing of this instant lawsuit was the substantial or motivating factor that caused Asuncion or Esquerra to take any particular action. Mot. at 8. Additionally, Plaintiff does not allege that either were aware of the filing of the lawsuit prior to service being completed on November 9, 2019. *Id.* As

to Gastelo and Scheiffele, Defendants argue that Plaintiff has not alleged that Gastelo was aware of the grievance filed on December 23, 2015 against Poindexter, or that the filing of the grievance was the substantial or motivating factor that caused Gastelo or Scheiffele to take any specific adverse action. *Id.* at 9-10. Defendants contend that there is no explanation how allegedly adverse actions occurring three weeks, nine months, and ten months after the filing of this grievance demonstrate evidence of proximity of time between the protected conduct and the retaliatory consequence. *Id.* at 10.

Turning to Plaintiff's Eighth Amendment claims, Defendants assert that Plaintiff fails to allege that Gastelo, Phillips, Scheiffele, Floercky or Ward knew of and disregarded a substantial risk of serious harm to Plaintiff in relation to the three cell moves that are specifically alleged in the TAC. *Id.* at Defendants contend that Plaintiff does not allege that any of those three cell moves were intra-facility moves that necessitated that he carry property up or down stairs, or that any Defendant knew of this movement warning. *Id.* at 12-13. Defendants maintain that Plaintiff has not shown that any Defendant's personal conduct demonstrated deliberate indifference to a substantial risk of serious harm. *Id.* at 13. As to Gastelo, Plaintiff does not identify any of the exhausted appeals that Gastelo allegedly ignored or that the delay in responding to Plaintiff's parents' letter constituted deliberate indifference. *Id.* As to Phillips, Scheiffele, Floercky and Ward, Defendants argue that Plaintiff alleges no facts suggesting these Defendants were aware of and disregarded a substantial risk of harm related to the cell moves at issue. *Id.* at 14-16.

Defendants also assert that Gastelo, Phillips,

Scheiffele, Floercky and Ward are entitled to qualified immunity for the Eighth Amendment claims relating to Plaintiff's housing moves. *Id.* at 16. Defendants contend that there is no binding precedent that would place Gastelo on notice that a failure to respond promptly to a letter from Plaintiff's parents violates the Eighth Amendment, or that would place Scheiffele and Ward on notice that it was a constitutional violation to order Plaintiff to move cells two or three times in a year, or that would place Phillips and Floercky on notice that it was a constitutional violation to impose discipline in response to Plaintiff's refusal to move cells when instructed to do so. *Id.* at 18. Defendants argue that further leave to amend should be denied as Plaintiff has amended three times and has not alleged facts that plausibly suggest that Defendants are liable for violation of the First or Eighth Amendments. *Id.* at 19.

2. Plaintiff's Opposition

Plaintiff argues that the TAC adequately alleges each Defendant's personal involvement in the First and Eighth Amendment violations. Opp'n at 2. Plaintiff contends that many of the cases cited by Defendants do not apply because they were at the summary judgment stage. *Id.* at 3.

With respect to his Eighth Amendment claims, Plaintiff contends that any reasonable official should or would know that constant location changes at the threat of disciplinary penalties could cause adverse health effects and that Defendants colluded to act with subjective malice. *Id.* at 4. Plaintiff argues that Defendants collectively deprived Plaintiff of adequate shelter due to the frequency of the forced

moves. *Id.* at 5.

In response to Defendants' arguments that they were unaware of any risk to Plaintiff or of Plaintiff's protected conduct, Plaintiff contends that Defendants could plainly see he was overweight and they watched Plaintiff walk on a regular basis to the library with materials. *Id.* Plaintiff argues that this case has never been about Plaintiff's medical needs though Defendants' acts exacerbated his documented, pre- existing ailments such as arthritis, obesity, and bipolar disorder. *Id.* Plaintiff contends that it is not required for latent health problems to become full fledged diseases before being considered serious. *Id.* at 6.

Plaintiff contends that the fact that Defendants may not have been aware of the Movement Warning admits to the dereliction of their paid duty. *Id.* at 6-7. Plaintiff argues that the questions whether the Wardens were aware of the risks created by their subordinate employees' actions or what the Sergeant's intentions were when approving cell transfers are questions for a jury. *Id.* at 7. Plaintiff asserts that Defendants violated the Eighth Amendment over course of days, weeks or even years by harboring retaliatory plans. *Id.* Plaintiff maintains that the misconduct by CDCR has evolved and a common thread exists with Plaintiff's housing being constantly switched to where he was near dangerous men and subject to risk of harm. *Id.* at 8.

With respect to Asuncion, Acuna, and Esquerra, Plaintiff contends these Defendants acted quickly in retaliation in relation to when Plaintiff was transferred. *Id.* at 9.

Turning to his retaliation claims, Plaintiff argues that he need only plead facts to show that

conduct was done with an improper retaliatory motive. *Id.* at 10. Plaintiff contends that it is difficult for Defendants to explain what the cause of the changes were. *Id.* Gastelo continued to permit cell transfers to occur after being fully advised of the problem, and Asuncion and Acuna were involved in dangerous cell pairings. *Id.* Plaintiff asserts that none of the misconduct can be explained in context with any legitimate institutional goals. *Id.* at 11.

In response to Defendants' observation that Plaintiff has not identified the officers involved in the moves, Plaintiff states that this cannot be ascertained without discovery and is unnecessary because they were approved by Asuncion's classification committee. *Id.* at 12.

Plaintiff argues that the retaliation by Gastelo was not in ignoring communications, but in failing to terminate a series of unlawful acts. *Id.*

Plaintiff contends that the clearest act of retaliation is Warden Asuncion's sabotage of the library program two months after Plaintiff filed his case in February 2018. *Id.* at 14. Plaintiff's transfer to CSP-Corcoran also followed closely after a group complaint about the library deprivation. *Id.* Plaintiff contends that Defendants in different locations can communicate by phone and that there are also officer transfers between institutions. *Id.* at 15.

With respect to Defendants' arguments about qualified immunity, Plaintiff argues that there is no requirement for Plaintiff to cite precedent in a complaint. *Id.* at 17. Plaintiff contends that the prohibition against retaliatory punishment is clearly established *Id.* at 18.

Plaintiff also attaches a declaration in support of his Opposition, *id.* at 24-26, an exhibit with his and other inmates' priority passes, *id.* at 28, and an

addendum of new developments in the past five months, *id.* at 29-30.

3. Defendants' Reply

Defendants reply that the Opposition contains mostly conclusory and speculative allegations. Reply at 1-2. Plaintiff concludes that there was retaliation because nothing happens without a motive but does not allege or point to facts showing that any Defendant was aware of Plaintiff's protected activity. *Id.* at 3. Defendants argue that Plaintiff's allegations do not constitute well-pleaded facts to support any First Amendment retaliation claims. *Id.* at 4. For the Eighth Amendment claims, Defendants assert that Plaintiff has not clarified how each Defendant injured him or knowingly exposed Plaintiff to risk. *Id.* at 5. Defendants contend that Plaintiff did not identify in his Opposition any prior case law or binding precedent demonstrating that correctional guards and supervisors act unlawfully when instructing an inmate to move to another cell. *Id.* at 8.

B. Retaliation Claims under the First Amendment

Plaintiff was granted leave to amend his retaliation claims against Gastelo, Scheiffele, Asuncion and Esquerra. Dkt. No. 78. The retaliation claims against Defendants Floercky, Phillips, Ward and Acuna were dismissed from the action with prejudice and without leave to amend. *See* Dkt. Nos. 44, 50. The Court addresses only those claims that have not been dismissed from the action with prejudice.

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1. Defendant Scheiffele

The Court previously dismissed Plaintiff's retaliation claim against Scheiffele because Plaintiff failed to sufficiently allege a causal connection between Plaintiff's filing of grievances and Scheiffele's allegedly adverse actions of night moves and a cell assignment. Dkt. No. 78 at 9. Plaintiff alleges in the TAC that Scheiffele ordered at least three improper moves after Plaintiff filed a grievance on December 23, 2015 against Scheiffele and his coworker. TAC at 9. Plaintiff alleges that the grievance "made reference to the 'Sgt.'" *Id.* Defendants argue that Plaintiff has not alleged facts showing that Scheiffele was aware of the December 23, 2015 grievance or how the moves occurring three weeks, nine months, and ten months after his protected conduct demonstrate evidence of proximity. Mot. at 10.

The Court finds that the TAC fails to allege a causal connection between the filing of the December 23, 2015 grievance and the alleged adverse action. Although a prison official may be aware of a grievance that names and is brought against that official, Plaintiff does not allege that the December 23, 2015 named Scheiffele. TAC at 9. Rather, Plaintiff alleges that it was filed against Poindexter and referred to a "Sgt." [3] *See id.* Plaintiff does not allege facts to

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[3] The Court has reviewed the December 23, 2015 grievance, which was attached to Plaintiff's original complaint. *See* Dkt. No. 1 at 25-26. In the grievance, Plaintiff complains about Poindexter's conduct towards Plaintiff. *See id.* Plaintiff claims that Poindexter made Plaintiff move due to a broken lock, and Plaintiff "proceed[ed] to speak with Sgt to no avail." *Id.* at 26. This is the only reference to a "Sgt" and Scheiffele is not

support that Scheiffele would have been aware of a grievance that was filed against Poindexter and referred to a "Sgt." but not specifically to Scheiffele. *Id.* Similarly, Plaintiff does not allege facts to support how Scheiffele would have known about Plaintiff's petition for mandate that only mentioned "Poindexter and his supervisors." *Id.* at 9. Without facts to support that Scheiffele knew about the grievance or other protected conduct by Plaintiff and ordered the cell moves because of Plaintiff's protected conduct, Plaintiff fails to state a cognizable retaliation claim against Scheiffele. The Court recommends that Defendants' Motion be granted as to this claim.

2. Defendant Gastelo

The Court previously dismissed Plaintiff's

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identified by name. *See id.* This confirms that the grievance was filed against Poindexter and not Scheiffele, and that, assuming the "Sgt" in the grievance refers to Scheiffele, the grievance referred to Scheiffele only briefly and by position only. Although the TAC is the operative pleading, the Ninth Circuit has suggested that documents attached to a prior pleading may be considered in certain contexts. *See Akhtar v. Mesa*, 698 F.3d 1202, 1209 (9th Cir. 2012) ("Under recent case law, [the original] complaint was not entirely superseded when the amended complaint was filed, and so could have been considered by the magistrate judge in considering exhaustion."). Here, the Court finds that even without considering the contents of the December 23, 2015 grievance, the TAC fails to state a claim. However, the contents of the grievance support the Court's recommendation to dismiss the claim without leave to amend.

retaliation claim against Gastelo because Plaintiff failed to allege facts to show that Gastelo was aware of her subordinates' retaliation such that she could have yet failed to terminate the retaliatory conduct. *See* Dkt. No. 78 at 6-7. The TAC does not cure the deficiencies addressed in the Court's prior order.

Plaintiff alleges in the TAC that Gastelo was made aware of her subordinates' retaliation through an exhausted appeal on Poindexter and resulting lawsuit, a petition for writ of mandate that alleged retaliation by Poindexter and his supervisors, and a November 22, 2016 letter from his parents. TAC at 5, 7. However, Plaintiff has not sufficiently alleged any retaliatory acts after Gastelo was allegedly made aware of her subordinates' retaliation to show that Gastelo failed to terminate or prevent such retaliation.

First, Plaintiff has not alleged any facts to show that Gastelo would have been aware of the grievance filed against Scheiffele and Poindexter. Moreover, to the extent Plaintiff is attempting to allege that Gastelo would have been aware due to her involvement in the review of the grievance, district courts in the Ninth Circuit have found that there is no Section 1983 liability where a defendant's only involvement in an alleged constitutional violation is the review or denial of an administrative grievance. *See, e.g.*, *Balzarini v. Diaz*, Case No. 5:18-cv-01962-RGK (MAAx), 2018 WL 6591423, at *6 (C.D. Cal. Dec. 14, 2018) (finding plaintiff's allegations insufficient to state a claim against a warden in part because the warden's only involvement was in the review and determination of the plaintiff's second-level appeal); *see also Wright v. Shapirshteyn*, No. CV 1-06-0927-MHM, 2009 WL 361951, at *3 (E.D. Cal. Feb. 12, 2009);

Velasquez v. Barrios, No. 07cv1130-LAB (CAB), 2008 WL 4078766, at *11 (S.D. Cal. Aug. 29, 2008). Accordingly, Plaintiff cannot maintain a supervisory liability claim against Gastelo based on the filing of the 602 grievance.

Second, Plaintiff's allegations regarding the CDCR-22 form and the petition for writ of mandate are not sufficient to plead a claim for supervisory liability against Gastelo. Plaintiff states that the CDCR-22 form referenced retaliation but does not allege that it complained of any specific retaliatory conduct by any specific employee. *See* TAC at 5. Similarly, although Plaintiff alleges that Gastelo was served with a copy of the petition for writ of mandate, Plaintiff only vaguely alleges that the petition for writ of mandate complained of retaliation by Poindexter and his supervisors and Gastelo's failure to intervene. *See id.* at 5, 9. Plaintiff does not provide any allegations regarding the details of the retaliation complained of in the CDCR-22 form or the petition for writ of mandate such that Gastelo would have been placed on notice of unconstitutional retaliation by her employees. Therefore, even if Gastelo was aware of the CDCR-22 form or the petition for writ of mandate, Plaintiff has not alleged facts to show her personal liability in preventing subsequent action that was allegedly retaliatory.

Third, Plaintiff has not alleged facts to show that he was subject to retaliation after Gastelo became aware of the November 22, 2016 letter. Plaintiff has alleged facts to support a reasonable inference that Gastelo was aware of the November 22, 2016 letter from his parents regarding the frequent intra-facility moves because he alleges that a member of her staff responded to the letter. *See*

TAC at 5. To plead facts to show that Gastelo failed to terminate retaliation addressed in the letter, Plaintiff must show that a retaliatory intra-facility move occurred after Gastelo became aware of the November 22, 2016 letter. Although Plaintiff has alleged that he was subjected to a number of improper moves, the last allegedly improper move specified in the TAC took place on November 16, 2016. *See* TAC at 9. Plaintiff does not allege that he was subjected to any improper moves at CMC after November 16, 2016, even though he was housed there until June 12, 2017. *See id.* at 21.

Plaintiff does allege that misconduct continued after the November 22, 2016 letter, including Phillips upholding a fraudulent disciplinary proceeding and a transfer to a different prison. *See id.* at 7. Plaintiff has not alleged, however, that his parents' November 22, 2016 letter complained of anything other than improper moves within the facility such that it would have placed Gastelo on notice of other forms of retaliation. Moreover, Plaintiff has not alleged any protected conduct that preceded Phillips' alleged misconduct to show that the adverse action was retaliatory. Accordingly, Plaintiff's allegations do not show that Gastelo failed to terminate retaliation after being made aware of allegedly improper moves by the November 22, 2016 letter. The Court recommends that Plaintiff's retaliation claim against Gastelo be dismissed.

3. Defendant Asuncion

The Court previously dismissed Plaintiff's retaliation claim against Asuncion for failure to allege a chronology of events that would show that Asuncion knew her subordinates were retaliating against Plaintiff, that she refused to terminate those actions, and that there was further retaliation as a

result. Dkt. No. 78 at 8. Plaintiff alleges that he filed various grievances while housed at CSP-LAC. *See* TAC at 12-15. As explained above, Plaintiff may not maintain a Section 1983 claim against Asuncion based only on her or her office's review of Plaintiff's grievances.

Additionally, most of the grievances described by Plaintiff do not allege retaliation. For example, Plaintiff alleges that he filed a complaint against C.O. L. Godina for harassment. *Id.* at 14. However, he does not allege that he complained that she engaged in retaliation against him, nor does he allege that any retaliation by this individual took place after Plaintiff filed his complaint. Plaintiff also complains of a series of lockdowns that started on November 5, 2017 and continued for three weeks. *Id.* at 14. However, Plaintiff does not allege that these lockdowns were retaliatory. Similarly, Plaintiff's complaints about unreasonable medical care do not involve retaliation. *See id.* at 14-15. Even for the grievances that do mention or complain of retaliation, Plaintiff has not alleged any protected conduct that was causally connected to the alleged retaliation. Accordingly, even if these grievances could have placed Asuncion on notice, they did not adequately allege retaliation such that she would have a duty to terminate or prevent further retaliation.

Plaintiff also does not causally connect any adverse action by Asuncion to his protected conduct. Plaintiff alleges that Asuncion took adverse action in response to this lawsuit. *See* TAC at 17. However, all the allegedly adverse action took place prior to when Asuncion was served in November 2019 and Plaintiff does not allege facts to show that Asuncion would have been aware of this lawsuit prior to service.

Accordingly, Plaintiff fails to allege a claim against Asuncion for retaliation.

4. Defendant Esquerra

The Court previously dismissed Plaintiff's retaliation claim against Esquerra because Plaintiff had not sufficiently alleged facts to show that Esquerra knew about a grievance that had been filed against her and took adverse action because of it. Dkt. No. 78 at 10. Plaintiff now alleges that Esquerra took adverse action against Plaintiff in "following suit" with the misconduct from CMC and CSP-LAC and because of the filing of the instant action. *See* TAC at 17.

Plaintiff was housed at CSP-Corcoran from July to mid-September 2018. *See id.* at 21. Plaintiff has not alleged how Esquerra was aware of this lawsuit prior to service in November 2019. Moreover, Esquerra was not named as a defendant until October 25, 2018. Plaintiff has alleged no facts to show how any adverse action taken by Esquerra was causally connected to a lawsuit that was filed against other defendants for events that occurred at other prisons. Under Plaintiff's reasoning, any adverse action by any prison employee after a prisoner has filed a lawsuit would amount to retaliation, at least for pleading purposes, even if the adverse action was taken by a defendant not named in the lawsuit at a prison not referenced in the lawsuit. The law requires more to allege a causal connection for a First Amendment retaliation claim. *See Grenning v. Klemme*, 34 F. Supp.3d 1144, 1163 (E.D. Wash. 2014) ("Retaliation is not sufficiently alleged and cannot be proven by simply showing that a defendant prison official took adverse action after he knew the prisoner had engaged in other constitutionally protected activity.").

Because Plaintiff fails to allege a causal connection between any protected conduct and Esquerra's adverse actions, Plaintiff's claim for retaliation against Esquerra fails. The Court recommends dismissal of this claim.

C. Eighth Amendment Claims

Plaintiff was permitted to include in the TAC the surviving Eighth Amendment claims against Scheiffele, Gastelo, Phillips, Ward, and Floercky based on cell moves in violation of the Movement Warning. *See* Dkt. No. 78 at 11. There is also a surviving Eighth Amendment claim against Acuna, who Plaintiff has now named as a Doe defendant in the TAC. The Eighth Amendment claims against Defendants Asuncion, Scheiffele and Esquerra based on housing assignments with incompatible inmates have been dismissed with prejudice and without leave to amend from this action. *See* Dkt. Nos. 44, 50.

1. Defendants Scheiffele, Phillips, Ward and Floercky

Plaintiff alleges that he was moved 16 times during his 27 months at CMC, and that many of these moves violated a Movement Warning regarding stairs, a seizure risk, or a slip and fall risk because they were intra-facility moves that required Plaintiff to make six to eight trips up and down stairs to carry his property. *See* TAC at 8, 9. Plaintiff does not allege, however, that Defendants Scheiffele, Phillips, Ward or Floercky were aware of the Movement Warning or that they knew that requiring Plaintiff to move cells would put Plaintiff's health at risk. Moreover, although Plaintiff alleges these Defendants' involvement in specific moves on specific

dates, Plaintiff does not allege that any of those specific moves were intra-facility moves in violation of the Movement Warning that posed a substantial risk of serious harm to Plaintiff. Plaintiff's argument in his Opposition that Defendants should have been aware of the risk because Plaintiff is visibly overweight is not persuasive. Plaintiff did not include this allegation in his TAC. Even if he had, Plaintiff has not alleged any facts to support his apparent contention that requiring a visibly overweight inmate to move between floors would constitute a substantial risk of serious harm to that inmate's health.

Accordingly, Plaintiff fails to state a cognizable claim for deliberate indifference against Defendants Scheiffele, Phillips, Ward or Floercky based on cell moves that purportedly violated a Movement Warning. The Court recommends dismissal of these claims.

2. Defendant Gastelo

Plaintiff's Eighth Amendment claim against Defendant Gastelo is based on a theory of supervisory liability. However, Plaintiff has not alleged that Gastelo was personally involved in the cell moves or was aware that her subordinates were conducting moves that were in violation of the Movement Warning. Accordingly, Plaintiff fails to state an Eighth Amendment claim against Gastelo and the Court recommends that this claim be dismissed.

Because the Court finds that Plaintiff has not stated a cognizable Eighth Amendment claim against Defendants Scheiffele, Gastelo, Phillips, Ward and Floercky, the Court need not address Defendants' arguments on qualified immunity.

3. Acuna/John Doe

Plaintiff first named Acuna in the First Amended Complaint, filed on October 25, 2018. Dkt. No. 32. Acuna was again named in the SAC, filed on March 8, 2019. Dkt. No. 42. On July 18, 2019, the Court issued an order explaining that Plaintiff was responsible for service of the SAC because he is not proceeding *in forma pauperis*. Dkt. No. 52. The Court extended the 90-day period for service to expire on October 16, 2019. *Id.* Plaintiff was warned that his failure to effectuate service by that date may result in the dismissal of the action as to any unserved defendants. *Id.*

Although Plaintiff was able to serve Defendants, he was unable to serve Acuna. Defendants provided in their motion to dismiss the SAC that no correctional sergeant named Acuna is currently employed at CSP-Corcoran, nor was any such individual identified as having been employed at that facility in 2018. Dkt. No. 72 at 17n.12 & Decl. of Colin A. Shaff ¶ 5. Plaintiff acknowledged in his opposition to the motion to dismiss the SAC that Acuna had not been served and stipulated to a dismissal of Acuna without prejudice. Dkt. No. 74 at 26. In its order on Defendants' motion to dismiss the SAC, the Court explained that because it was providing Plaintiff with another opportunity to amend his complaint, he could voluntarily dismiss his claims against Acuna without prejudice by not including Acuna in a further amended complaint or by filing a notice of dismissal. Dkt. No.78.

Plaintiff kept the allegations against Acuna in his TAC but named him as a Doe defendant. *See* TAC at 16. Plaintiff provides in the TAC that he does not know the complete identity and location of Acuna and that he will amend the complaint to substitute

the true name when ascertained. *Id.*

Under Federal Rule of Civil Procedure 4(m) ("Rule 4(m)"), if a defendant is not served within 90 days after the complaint is filed, the court, on motion or on its own after notice to the plaintiff, must dismiss the action without prejudice against that defendant or order that service be made within a specific time. Fed. R. Civ. P. 4(m). "Rule 4(m) requires a two-step analysis in deciding whether or not to extend the prescribed time period for the service of a complaint." *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) (citations omitted). "First, upon a showing of good cause for the defective service, the court must extend the time period. Second, if there is no good cause, the court has the discretion to dismiss without prejudice or to extend the time period." *Id.* The "good cause" exception applies only in "limited circumstances" and is not satisfied by "inadvertent error or ignorance of the governing rules." *Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992) (citing *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985)) (overruled on other grounds). In making extension decisions under Rule 4(m), a district court may consider factors "like a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service." *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007).

Here, the Court finds that Acuna/John Doe should be dismissed from this action without prejudice for Plaintiff's failure to timely serve.[4] "The

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[4] Plaintiff was previously advised that his failure to serve may result in dismissal without prejudice of any unserved defendants. Dkt. No. 52. This Report and Recommendation provides additional notice to Plaintiff of the Court's intent to dismiss Acuna/John Doe for failure to timely serve.

90-day deadline under Rule 4(m) applies to service on Doe Defendants." *Thompson v. Gomez*, No. 1:18-cv-00125-JLO-SAB (PC), 2020 WL 417773, at *2 (E.D. Cal. Jan. 27, 2020) (citing *Ticketmaster L.L.C. v. Prestige Entm't W., Inc.*, 315 F. Supp. 3d 1147, 1158 (C.D. Cal. 2018); *Tabi v. Doe*, No. EDCV 18-714 DMG (JC), 2019 WL 4013444, at *1 (C.D. Cal. Aug. 26, 2019)). Plaintiff acknowledges that he has been unable to serve this defendant and at one point appeared to agree to a dismissal without prejudice of this defendant. *See* Dkt. No. 74 at 26. Plaintiff has not requested additional time to serve this defendant.

The Court observes that Plaintiff's claims against Acuna would likely not be time-barred even if they are dismissed without prejudice. The allegations against Acuna involve events that occurred in 2018 when Plaintiff was housed at CSP-Corcoran. *See* TAC at 21 (providing that Plaintiff was transferred to CSP-Corcoran in July 2018). The time for bringing any Section 1983 claims against Acuna likely has not yet run in light of California's two-year statute of limitations for personal injury actions and two-year statutory tolling of the limitations period for imprisonment. Accordingly, the Court recommends that Acuna/John Doe be dismissed from this action without prejudice for Plaintiff's failure to timely serve this defendant.

D. Leave to Amend

Plaintiff has been provided three opportunities to amend his complaint. Further leave to amend is not warranted considering Plaintiff's repeated failure

to cure the pleading deficiencies identified by the Court. *See Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) ("It is generally our policy to permit amendment with extreme liberality, although when a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad." (citation and internal quotation marks omitted)).

VI. RECOMMENDATION

For the reasons stated above, IT IS RECOMMENDED that the District Court issue an Order:

(1) accepting and adopting this Report and Recommendation;

(2) GRANTING Defendant's Motion to Dismiss and dismissing Plaintiff's claims against Defendants Gastelo, Asuncion, Scheiffele, Phillips, Ward, Floercky, and Esquerra with prejudice and without leave to amend; and

(3) dismissing Plaintiff's claims against Acuna/John Doe without prejudice.

DATED: November 25, 2020

/s/_____

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 29543-0001

Oct. 09, 2018

Mr. Robert Snyder,
Prisoner ID #AC9136
Donovan Correctional
Center, A2-Cell 125
San Diego, CA 92179

Re: Robert R. Snyder v. California Department of Corrections, et al.	No. 18-171

Dear Mr. Snyder:
The Court today entered the following order in the above-entitled case:

The petition for certiorari is **DENIED.**

Sincerely,

/s/_____
Scott S. Harris, Clerk