

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA**

Benjamin Romero Lemus v. Tor Robinson

Lemus · No. 25-cv-00162-RBM-BLM · Decided January 28, 2026

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 BENJAMIN ROMERO LEMUS, Case No.: 25-cv-00162-RBM-BLM
CDCR #P-78464, 12 ORDER DIRECTING U.S. Plaintiff, 13 MARSHAL TO EFFECT
SERVICE vs. OF FIRST AMENDED COMPLAINT 14 AND SUMMONS ON DEFENDANT
TOR ROBINSON, Physician’s Assistant, 15 ROBINSON PURSUANT TO 28 Defendant. U.S.C.
§ 1915(d) & Fed.

R. Civ. P. 16 4(c)(3) 17 18 19 On January 21, 2025, Plaintiff Benjamin Romero Lemus, a state
inmate proceeding 20 pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983, along
with a motion to 21 proceed in forma pauperis (“IFP”). (Doc. 1–3.)

On May 7, 2025, the Court granted 22 Plaintiff leave to proceed IFP and dismissed the Complaint
with leave to amend for failure 23 to state a claim after notifying him of its pleading deficiencies.
(Doc. 4.) Following an 24 extension of time, Plaintiff filed a First Amended Complaint (“FAC”).
(Doc. 6.) 25 I. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b) 26 A. Standard of
Review 27 Because Plaintiff is a prisoner proceeding IFP, his FAC requires a pre-Answer 28
screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b).

The Court must sua sponte 1 dismiss a prisoner’s IFP complaint, or any portion of it, which is
frivolous, malicious, fails 2 to state a claim, or seeks damages from defendants who are immune.
Lopez v. Smith, 203 3 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (28 U.S.C. § 1915(e)(2));
Rhodes v. 4 Robinson, 621 F.3d 1002, 1004 (9th Cir. 2010) (28 U.S.C. § 1915A(b)).

5 “The standard for determining whether a plaintiff has failed to state a claim upon 6 which relief
can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of 7 Civil Procedure
12(b)(6) standard for failure to state a claim.” Watison v. Carter, 668 F.3d 8 1108, 1112 (9th Cir.
2012); see also Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 9 2012) (noting that § 1915A
screening “incorporates the familiar standard applied in the 10 context of failure to state a claim
under Federal Rule of Civil Procedure 12(b)(6).”) Rule 11 12(b)(6) requires a complaint to
“contain sufficient factual matter, accepted as true, to ‘state 12 a claim to relief that is plausible on
its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) 13 (quoting Bell Atl.

Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “Determining whether a 14 complaint states a plausible claim for relief [is]... a context-specific task that requires the 15 reviewing court to draw on its judicial experience and common sense.” Id. 16 B. Allegations in the FAC 17 Plaintiff alleges he underwent nasal surgery at an outside hospital on January 25, 18 2023, performed by Dr. Driskill, whose post-operative instructions included orders to 19 provide Plaintiff with regular meals, ice, drip pads, Tylenol and Motrin for anticipated pain, 20 and for the removal of the nose splint in seven days at the hospital or at the prison if the 21 prison physician felt comfortable doing so.

(Doc. 6 at 3–4.) Plaintiff returned to the prison 22 and was housed in the Correctional Treatment Center (“CTC”) triage and treatment area 23 waiting to be cleared to return to the yard, but was not provided any of those items. (Id. at 24 4.) While at CTC he experienced dizziness, headaches, facial, chest and chronic sinus pain, 25 and trouble breathing. (Id.)

He informed Nurse Giovanna and CTC medical staff that he 26 was in pain and having trouble breathing, but they “deliberately denied plaintiff access to 27 pain medication and Dr. Driskill’s post operative instructions.” (Id.) 28 /// 1 On February 1, 2023, Plaintiff had a post-op appointment with Physician’s Assistant 2 Robinson, the only Defendant named in this action.

(Id. at 5.) Robinson noticed excessive 3 swelling around Plaintiff’s eyes and nose and said, “let’s remove those.” (Id.) Plaintiff 4 asked for a numbing agent and Robinson chuckled and said, “let me consult with myself,” 5 and then said, “I don’t think so.” (Id. at 6.) Robinson had Plaintiff recline backwards and 6 inserted a tweezer-like instrument into his left nostril to remove the stitches and splint, 7 “causing plaintiff to cry from excruciating ‘sheer’ unbearable pain.” (Id.)

Based on 8 Plaintiff’s reaction, Robinson said he “needed to read up on the procedure” and left the 9 room. (Id.) When Robinson returned, Plaintiff asked him if he knew what he was doing 10 and why he had started a procedure with which he was unfamiliar. (Id.) Robinson tried 11 the same procedure on the right nostril with the same result. (Id.) “After three violent 12 forceful attempts,” Robinson removed the splints and stitches.

(Id.) Plaintiff claims that 13 by failing to provide pain medication before the procedure Robinson created an 14 unreasonable risk of serious harm which constituted deliberate indifference to a serious 15 medical need. (Id. at 7.) 16 After the procedure Plaintiff was unable to breathe properly and thought Robinson 17 had damaged his nose, so he submitted an urgent care request form.

(Id.) On February 3, 18 2023, Plaintiff had a telemedicine visit with Dr. Driskill, who determined he had a nasal 19 obstruction and purulent nasal drainage, and prescribed antibiotics to combat an infection 20 developing in his lungs. (Id.) Between February and April 2023, Plaintiff was treated for 21 breathing difficulties at CTC and contracted multifocal pneumonia and chronic bronchitis 22 because of Robinson’s actions.

(Id.) Plaintiff states that he endured breathing difficulty, 23 chest pain and coughing up green phlegm for 15 months, during which he was prescribed 24 two courses of antibiotics. (Id. at 7–8.) 25 On April 5, 2024, Plaintiff had a teleconference with Dr. Driskill who diagnosed 26 Plaintiff with a deviated septum, turbinate hypotrophy, purulent mucus, and deviated nasal 27 bones.

(Id. at 8.) Dr. Driskill noted that Plaintiff’s nose was “not how he left it” after the 28 first surgery, “shook his head in disbelief,” and recommended a second surgery, after which 1 he stated he would remove the stitches himself at the hospital. (Id.) A second surgery took 2 place on May 1, 2024. (Id. at 9.) Plaintiff claims Robinson was deliberately indifferent to 3 his medical needs in violation of the Eighth Amendment by conducting a procedure he was 4 not qualified to perform which resulted in 15 months of pain and suffering, a second 5 surgery, and permanent damage to his nasal structure.

(Id. at 9–12.) 6 C. Discussion 7 The Eighth Amendment’s prohibition on the infliction of cruel and unusual 8 punishment “establish the government’s obligation to provide medical care for those whom 9 it is punishing by incarceration.” *Estelle v. Gamble*, 429 U.S. 97, 101–03 (1976). 10 “Deliberate indifference ‘may appear when prison officials deny, delay or intentionally 11 interfere with medical treatment.’” *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir.

12 2014) (quoting *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988)). 13 “[A] prison official violates the Eighth Amendment only when two requirements are 14 met. First, the deprivation alleged must be, objectively, ‘sufficiently serious.’” *Farmer v. 15 Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). 16 Second, Plaintiff must allege the prison official he seeks to hold liable had a “‘sufficiently 17 culpable state of mind,’” that is “[i]n prison conditions cases ... one of ‘deliberate 18 indifference’ to inmate health or safety.” *Id.* (quoting *Wilson*, 501 U.S. at 302–03).

A 19 prison official can be held liable only if he “knows of and disregards an excessive risk to 20 inmate health and safety;” he “must both be aware of facts from which the inference could 21 be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” 22 *Id.* at 837. 23 Plaintiff has plausibly alleged a serious medical need.

See *Doty v. Cnty. of Lassen*, 24 37 F.3d 540, 546 n.3 (9th Cir. 1994) (“[I]ndicia of a ‘serious’ medical need include (1) the 25 existence of an injury that a reasonable doctor would find important and worthy of 26 comment or treatment, (2) the presence of a medical condition that significantly affects an 27 individual’s daily activities, and (3) the existence of chronic or substantial pain.”) 28 /// 1 Deliberate indifference to that serious medical need can be shown where the chosen 2 course of medical treatment was “medically unacceptable under the circumstances” and 3 chosen “in conscious disregard of an excessive risk to the prisoner’s health.” *Toguchi v. 4 Chung*, 391 F.3d 1051, 1058 (9th Cir.

2004). However, allegations of inadequate medical 5 treatment, medical malpractice, or even gross negligence by themselves do not rise to the 6 level of an Eighth Amendment violation. See *Farmer*, 511 U.S. at 835 (“[N]egligen(ce) in 7 diagnosing or treating a medical condition” does not amount to deliberate indifference) 8 (quoting *Estelle*, 429 U.S. at 106); see also *Estelle*, 429 U.S. at 106 (“an inadvertent failure 9 to provide adequate medical care,” negligence, “or malpractice does not become a 10 constitutional violation merely because the victim is a prisoner.”).

11 Plaintiff alleges Robinson was unqualified to perform the procedure used to remove 12 the splint and stitches, as shown by having stopped during the first attempt when Plaintiff 13 cried in pain, excused himself because he “needed to read up on the procedure,” then 14 returned and removed the splint and stitches on the third try following another failed 15 attempt which caused Plaintiff excruciating pain, ultimately resulting in permanent damage 16 to Plaintiff’s nose.

(Doc. 6 at 6–7.) This allegedly occurred in violation of Dr. Driskill’s 17 post operative orders that the stitches and splint should be removed at the hospital unless a 18 prison physician determined they could safely be removed at the prison. (Id.) Plaintiff 19 alleges Dr. Driskill “shook his head in disbelief” when he examined Plaintiff and ordered 20 a second surgery which should not have been necessary.

(Id. at 8.) Thus, Robinson, a 21 physician’s assistant, allegedly made the decision to remove the stitches and splint knowing 22 that Dr. Driskill wanted that procedure to be done at the hospital unless a prison physician 23 determined it could be performed at the prison, and completed the procedure only after two 24 failed attempts which caused Plaintiff excruciating pain and permanent damage, between 25 which he had to read up on the procedure.

26 Given the Court is required to “accept all factual allegations in the [FAC] as true and 27 construe [them] in the light most favorable to [plaintiff,] at this stage, and the “low 28 threshold” to pass screening, *Wilhelm*, 680 F.3d at 1123, Plaintiff has plausibly alleged an 1 Eighth Amendment deliberate indifference claim against Robinson, who, by knowingly 2 ignoring Dr. Driskill’s order that only a physician should decide whether the stitches and 3 splint be taken out at the prison or the hospital, chose a course of medical treatment that 4 was “medically unacceptable under the circumstances... in conscious disregard of an 5 excessive risk to the prisoner’s health.” *Toguchi*, 391 F.3d at 1058; see also *Colwell*, 763 6 F.3d at 1066 (deliberate indifference may be shown when prison officials “intentionally 7 interfere with medical treatment.”); *Farmer*, 511 U.S. at 837 (a prison official can be held 8 liable if he “knows of and disregards an excessive risk to inmate health or safety.”) 9 Accordingly, Plaintiff is entitled to have the U.S. Marshal effect service of the 10 summons and FAC against Defendant Robinson.

See 28 U.S.C. § 1915(d) (“The officers 11 of the court shall issue and serve all process, and perform all duties in [IFP] cases.”); Fed. 12 R. Civ. P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal 13 or deputy marshal... if the plaintiff is authorized to proceed

in forma pauperis under 28 U.S.C. § 1915.”) 15 II. Conclusion and Orders 16 Accordingly, the Court: 17 1) DIRECTS the Clerk to issue a summons as to the First Amended Complaint 18 (Doc.

6) for Defendant Robinson and forward it to Plaintiff along with a blank U.S. Marshal 19 Form 285. The Clerk will provide Plaintiff with certified copies of the First Amended 20 Complaint and summons for use in serving this Defendant. Upon receipt of this “In Forma 21 Pauperis Package,” Plaintiff must complete the USM Form 285 as completely and 22 accurately as possible, include an address where Defendant may be found and/or subject 23 to service pursuant to S.D.

Cal. CivLR 4.1(c), and return the forms to the United States 24 Marshal according to the instructions the Clerk provides in the letter accompanying the In 25 Forma Pauperis Package. 26 2) ORDERS the U.S. Marshal to serve a copy of the First Amended Complaint 27 and summons upon Defendant Robinson as directed by Plaintiff on the USM Form 285. 28 Costs of service will be advanced by the United States.

See 28 U.S.C. § 1915(d); Fed. R. 1 P. 4(c)(3). 2 3) ORDERS Defendant, once served, to respond to Plaintiff's First Amended 3 ||Complaint and any subsequent pleading filed in this matter in which defendant is named 4 ||as a party within the time provided by the applicable provisions of Federal Rules of Civil 5 ||Procedure 12(a) and 15(a)(3). See 42 U.S.C. § 1997e(g)(2) (while defendant may 6 || occasionally be permitted to “waive the right to reply to any action brought by a prisoner 7 ||confined in any jail, prison, or other correctional facility under section 1983,” once the 8 Court has conducted its sua sponte screening defendant is required to respond).

9 4) ORDERS Plaintiff, after service has been made by the U.S. Marshal, to serve 10 ||}upon Defendant, or if appearance has been entered by counsel, upon Defendant's counsel, 11 copy of every further pleading, motion, or other document submitted for the Court's 12 || consideration pursuant to Federal Rule of Civil Procedure 5(b). Plaintiff must include with 13 every original document sought to be filed with the Clerk, a certificate stating the manner 14 which a true and correct copy of that document has been served on defendants or their 15 || counsel, and the date of that service.

See S.D. Cal. CivLR 5.2. Any document received by 16 Court which has not been properly filed with the Clerk, or which fails to include a 17 || Certificate of Service upon a defendant, or their counsel, may be disregarded. 18 IT IS SO ORDERED. 19 || Dated: January 28, 2026 Fe Le;? L □ 20 HON. RUTH BERMUDEZ MONTENEGRO 21 UNITED STATES DISTRICT JUDGE 22 23 24 25 26 27 28 NE.

ANIZLADDAAT DIV