

1
2 **IN THE UNITED STATES DISTRICT COURT FOR THE**
3 **EASTERN DISTRICT OF CALIFORNIA**
4
5
6

7 MATTHEW DURY,) 1:12-cv-01726 LJO GSA PC
8)
9 Plaintiff,) FINDINGS AND
10 v.) RECOMMENDATIONS THAT THIS
11) ACTION BE DISMISSED FOR
12 OFFICER ONTIVEROS, et al.,) FAILURE TO STATE A CLAIM
13)
14 Defendants.) OBJECTIONS DUE IN
15) THIRTY DAYS

16 **I. Screening Requirement**

17 Plaintiff is a federal prisoner proceeding pro se and in forma pauperis in this civil rights
18 action pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,
19 403 U.S. 388 (1971). This proceeding was referred to this court by Local Rule 72-302 pursuant
20 to 28 U.S.C. § 636(b)(1).

21 The Court is required to screen complaints brought by prisoners seeking relief against a
22 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).

23 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
24 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
25 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.

26 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
27 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
28

1 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
2 1915(e)(2)(B)(ii).

3 **II. Plaintiff’s Claims**

4 Plaintiff is an inmate in the custody of the U.S. Bureau of Prisons at USP Atwater.
5 Plaintiff’s sole statement of claim is that, as a result of certain behavior that Plaintiff was
6 engaged in, he was charged with a violation of 18 U.S.C. § 1001, a criminal offense.
7 Specifically, Plaintiff was charged with making a false statement because of his use of the
8 summons button. Plaintiff challenges Defendants’ conduct in charging him with this offense.
9
10

11 When a prisoner challenges the legality or duration of his custody, or raises a
12 constitutional challenge which could entitle him to an earlier release, his sole federal remedy is a
13 writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973); Young v. Kenny, 907 F.2d
14 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991).

15 Where the complaint states a habeas claim instead of a § 1983 claim, the court should
16 dismiss the claim without prejudice for failure to exhaust, rather than converting it to a habeas
17 action and addressing it on the merits. See Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997);
18 Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995). Where the complaint alleges
19 claims that sound in habeas and claims that do not, the court should allow the non-habeas claims
20 to proceed. See Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 681-82 (9th
21 Cir. 1984).

22
23
24 **III. Conclusion and Recommendation**

25 Plaintiff’s complaint does not state any cognizable claims under section 1983. Plaintiff’s
26 sole claim in this action is a challenge to his criminal process. Should Plaintiff succeed on his
27 claim, any criminal conviction would be necessarily invalidated. Because the Court finds that
28

1 this deficiency is not capable of being cured by amendment, the Court HEREBY
2 RECOMMENDS dismissal of this action, with prejudice, for failure to state a claim. Noll v.
3 Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

4
5 These Findings and Recommendations will be submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
7 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file
8 written objections with the Court. The document should be captioned “Objections to Magistrate
9 Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections
10 within the specified time may waive the right to appeal the District Court’s order. Martinez v.
11 Ylst, 951 F.2d 1153 (9th Cir. 1991).

12
13
14
15
16 IT IS SO ORDERED.

17 Dated: September 15, 2013

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE