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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

LARRY SERMENO,	)	Case No.: 1:18-cv-00574-SAB (PC)
	)	
Plaintiff,	)	
	)	
v.	)	ORDER DIRECTING CLERK OF COURT TO
	)	RANDOMLY ASSIGN A DISTRICT JUDGE TO
	)	THIS ACTION
M. RAMSEY, et.al.,	)	
	)	FINDINGS AND RECOMMENDATIONS
Defendants.	)	RECOMMENDING DISMISSAL OF
	)	COMPLAINT, WITHOUT PREJUDICE
	)	
	)	[ECF No. 1]
	)	
	)	
	)	

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Plaintiff Larry Sermeno is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Currently before the Court is Plaintiff’s complaint, filed April 30, 2018.

**I.  
SCREENING REQUIREMENT**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or that

1 “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §  
2 1915(e)(2)(B).

3 A complaint must contain “a short and plain statement of the claim showing that the pleader is  
4 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but  
5 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
6 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,  
7 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally  
8 participated in the deprivation of Plaintiff’s rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.  
9 2002).

10 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally  
11 construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121  
12 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be facially plausible,  
13 which requires sufficient factual detail to allow the Court to reasonably infer that each named  
14 defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,  
15 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant has acted unlawfully” is not  
16 sufficient, and “facts that are ‘merely consistent with’ a defendant’s liability” falls short of satisfying  
17 the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

## 18 II.

### 19 COMPLAINT ALLEGATIONS

20 Plaintiff names Michael Ramsey (District Attorney in Butte County) and Xavier Becerra  
21 (Attorney General of California), as Defendants.

22 Michael Ramsey has a custom, usage, procedure, policy and/or practice to allow a blanket  
23 mandate for his deputy district attorneys to charge under California Penal Code section 667.5 in  
24 addition to charging under California Criminal Procedure Rules of Pleading section 969f, “charging a  
25 serious felony.”

26 On December 15, 2011, a deputy charged Plaintiff with a violation of sections 667.5 and 969f,  
27 which lead to the clerk of the court to limit his credit earnings under California Penal Code section  
28 2933. Plaintiff was charged as a serious felon but the great bodily injury enhancement included a

1 notation to California Penal Code 667.5 which is void. The great bodily injury enhancement requires  
2 direct injury (personal infliction) and section 667.5 is for proximate causation. Section 667.5 is also  
3 for prior prison terms to enhance a new offense and requires the state procedures to be followed to  
4 enable the district attorney to properly charge. Plaintiff has no prior three strike felonies. Plaintiff  
5 accepted a plea deal that specifically stated section 667.5 was no applicable and the case was not a  
6 new offense with prior offenses. The mistake by the district attorney's office has limited Plaintiff's  
7 credits when it should have been California Penal Code section 4019, and California Penal Code  
8 section 2933.1 is not applicable to Plaintiff's case.

9 Plaintiff contends his sentence has been unlawful since early 2015. Prison officials refused to  
10 calculate Plaintiff's sentence term at 50% and continue to refuse based on the defect in the notation to  
11 section 667.5(c)(8) for the great bodily injury enhancement and abstract of judgment. Plaintiff  
12 submits that once the error is corrected, he will be entitled to discharge or "near" discharge from  
13 prison.

### 14 **III.**

### 15 **DISCUSSION**

16 "Federal law opens two main avenues to relief on complaints related to imprisonment: a  
17 petition for writ of habeas corpus, 28 U.S.C. § 2254, and a complaint under ... 42 U.S.C. § 1983."  
18 Muhammad v. Close, 540 U.S. 749, 750 (2004) (per curiam). "Challenges to the validity of any  
19 confinement or to particulars affecting its duration are the province of habeas corpus; requests for  
20 relief turning on circumstances of confinement may be presented in a § 1983 action." Id. (internal  
21 citation omitted). Federal courts lack habeas jurisdiction over claims by state prisoners that are not  
22 within "the core of habeas corpus." Nettles v. Grounds, 830 F.3d 922, 934 (9th Cir. 2016) (en banc),  
23 cert. denied, 137 S.Ct. 645 (2017). A prisoner's claims are within the core of habeas corpus if they  
24 challenge the fact or duration of his conviction or sentence. Id. at 934. "[W]hen a prisoner's claim  
25 would not 'necessarily spell speedier release,' that claim does not lie at 'the core of habeas corpus,'  
26 and may be brought, if at all, under § 1983." Skinner v. Switzer, 562 U.S. 521, 534 n.13 (2011)  
27 (citing Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)); Nettles, 830 F.3d at 934.

1 It is clear from Plaintiff's allegations that his claim affects the duration of his sentence. As  
2 such, the proper avenue to seek such relief is by way of habeas corpus petition filed pursuant to 28  
3 U.S.C. § 2254. Plaintiff is advised that the proper venue for challenging the execution of his sentence  
4 is the district court containing the sentencing court, while the proper venue to challenge the execution  
5 of his sentence is the district court containing the prison in which Petitioner is incarcerated. 28 U.S.C.  
6 § 2241(d). Accordingly, to the extent Plaintiff wishes to challenge the duration of his confinement he  
7 must file a habeas corpus petition in the district court containing the sentencing court. Therefore,  
8 Plaintiff's complaint must be dismissed. Although the Court would generally grant Plaintiff leave to  
9 amend in light of his pro se status, amendment is futile in this instance because the deficiencies cannot  
10 be cured by amendment. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000); Schmier v. U.S.  
11 Court of Appeals for the Ninth Circuit, 279 F.3d 817, 824 (9th Cir. 2002) (recognizing "[f]utility of  
12 amendment" as a proper basis for dismissal without leave to amend); see also Trimble v. City of Santa  
13 Rosa, 49 F.3d 583, 586 (9th Cir. 1995) (a civil rights complaint seeking habeas relief should be  
14 dismissed without prejudice to filing as a petition for writ of habeas corpus).

#### 15 IV.

#### 16 RECOMMENDATIONS

17 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 18 1. The instant action be dismissed for failure to state a cognizable claim under 42  
19 U.S.C. § 1983;
- 20 2. The Clerk of Court be directed to terminate this action; and
- 21 3. The Office of the Clerk is directed to randomly assign this action to a District  
22 Judge.

23 These Findings and Recommendations will be submitted to the United States District Judge  
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-one (21)**  
25 **days** after being served with these Findings and Recommendations, Plaintiff may file written  
26 objections with the Court. The document should be captioned "Objections to Magistrate Judge's  
27 Findings and Recommendations." Plaintiff is advised that failure to file objections within the  
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1 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-  
2 39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)

3  
4 IT IS SO ORDERED.

5 Dated: May 3, 2018



UNITED STATES MAGISTRATE JUDGE