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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

KEVIN BARTHOLOMEW,

No. CIV S-09-0529-CMK-P

Plaintiff,

vs.

ORDER

J.W. HAVILIN,

Defendant.

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Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s complaint (Doc. 1).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that complaints contain a “. . . short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This means that claims must be stated simply, concisely, and directly. See *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the complaint gives the defendant fair notice of the plaintiff’s claim and the grounds upon

1 which it rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must  
2 allege with at least some degree of particularity overt acts by specific defendants which support  
3 the claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is  
4 impossible for the court to conduct the screening required by law when the allegations are vague  
5 and conclusory.

6           Plaintiff claims that he was denied due process in the context of a prison  
7 disciplinary hearing which resulted in, among other things, the loss of 121 days of credits.  
8 Plaintiff seeks restoration of these credits. When a state prisoner challenges the legality of his  
9 custody and the relief he seeks is a determination that he is entitled to an earlier or immediate  
10 release, such a challenge is not cognizable under 42 U.S.C. § 1983 and the prisoner's sole federal  
11 remedy is a petition for a writ of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475, 500  
12 (1973); see also Neal v. Shimoda, 131 F.3d 818, 824 (9th Cir. 1997); Trimble v. City of Santa  
13 Rosa, 49 F.3d 583, 586 (9th Cir. 1995) (per curiam). Thus, where a § 1983 action seeking  
14 monetary damages or declaratory relief alleges constitutional violations which would necessarily  
15 imply the invalidity of the prisoner's underlying conviction or sentence, or the result of a prison  
16 disciplinary hearing, such a claim is not cognizable under § 1983 unless the conviction or  
17 sentence has first been invalidated on appeal, by habeas petition, or through some similar  
18 proceeding. See Edwards v. Balisok, 520 U.S. 641, 646 (1987) (holding that § 1983 claim not  
19 cognizable because allegations of procedural defects and a biased hearing officer implied the  
20 invalidity of the underlying prison disciplinary sanction); Heck v. Humphrey, 512 U.S. 477, 483-  
21 84 (1994) (concluding that § 1983 not cognizable because allegations were akin to malicious  
22 prosecution action which includes as an element a finding that the criminal proceeding was  
23 concluded in plaintiff's favor); Butterfield v. Bail, 120 F.3d 1023, 1024-25 (9th Cir. 1997)  
24 (concluding that § 1983 claim not cognizable because allegations of procedural defects were an  
25 attempt to challenge substantive result in parole hearing); cf. Neal, 131 F.3d at 824 (concluding  
26 that § 1983 claim was cognizable because challenge was to conditions for parole eligibility and

1 not to any particular parole determination). In particular, where the claim involves loss of good-  
2 time credits as a result of an adverse prison disciplinary finding, the claim is not cognizable. See  
3 Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997). If a § 1983 complaint states claims which  
4 sound in habeas, the court should not convert the complaint into a habeas petition. See id.;  
5 Trimble, 49 F.3d at 586. Rather, such claims must be dismissed without prejudice and the  
6 complaint should proceed on any remaining cognizable § 1983 claims. See Balisok, 520 U.S. at  
7 649; Heck, 512 U.S. at 487; Trimble, 49 F.3d at 585.

8           Because plaintiff seeks restoration of lost credits, his claim is not cognizable  
9 under § 1983. It appears that plaintiff realizes that his claim sounds in habeas given that he  
10 attaches to the complaint a state court order denying habeas corpus relief. Plaintiff simply chose  
11 the wrong type of action when filing in this court. This action should be dismissed without  
12 prejudice to plaintiff filing a habeas corpus action under § 2254.

13           Because it does not appear possible that the deficiencies identified herein can be  
14 cured by amending the complaint, plaintiff is not entitled to leave to amend prior to dismissal of  
15 the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc).  
16 Plaintiff shall show cause in writing, within 30 days of the date of this order, why this action  
17 should not be dismissed for failure to state a claim. Plaintiff is warned that failure to respond to  
18 this order may result in dismissal of the action for the reasons outlined above, as well as for  
19 failure to prosecute and comply with court rules and orders. See Local Rule 11-110.

20           IT IS SO ORDERED.

21  
22 DATED: April 13, 2009

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25 **CRAIG M. KELLISON**  
26 UNITED STATES MAGISTRATE JUDGE