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

SIDNEY PETILLO,

Plaintiff,

No. CIV S-09-3349 KJM P

vs.

J. WALKER, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$43.37 will be assessed by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the

1 preceding month's income credited to plaintiff's prison trust account. These payments will be  
2 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's  
3 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief  
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised  
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may  
8 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28  
9 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in  
11 fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-  
12 28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
13 indisputably meritless legal theory or where the factual contentions are clearly baseless.  
14 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however  
15 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d  
16 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

17 In order to avoid dismissal for failure to state a claim a complaint must contain  
18 more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements  
19 of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other  
20 words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
21 statements do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a  
22 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.  
23 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
24 draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129  
25 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be  
26 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200

1 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.  
2 Rhodes, 416 U.S. 232, 236 (1974).

3           The court finds the allegations in plaintiff's complaint so vague and conclusory  
4 that it fails to state a claim upon which relief can be granted. Although the Federal Rules of  
5 Civil Procedure adopt a flexible pleading policy, a complaint must give fair notice and state the  
6 elements of the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d  
7 646, 649 (9th Cir. 1984). Plaintiff must allege with at least some degree of particularity overt  
8 acts which defendants engaged in that support plaintiff's claim. Id. Plaintiff's complaint must be  
9 dismissed. The court will, however, grant leave to file an amended complaint.

10           If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
11 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See  
12 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms  
13 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless  
14 there is some affirmative link or connection between a defendant's actions and the claimed  
15 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.  
16 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory  
17 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
18 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

19           Plaintiff's primary concern appears to be the destruction or taking of his personal  
20 property. Plaintiff is informed that the United States Supreme Court has held that "an  
21 unauthorized intentional deprivation of property by a state employee does not constitute a  
22 violation of the procedural requirements of the Due Process Clause of the Fourteenth  
23 Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v.  
24 Palmer, 468 U.S. 517, 533 (1984). Thus, where the state provides a meaningful postdeprivation  
25 remedy, as California does, only authorized, intentional deprivations constitute actionable  
26 violations of the Due Process Clause. An authorized deprivation is one carried out pursuant to

1 established state procedures, regulations, or statutes. Piatt v. McDougall, 773 F.2d 1032, 1036  
2 (9th Cir. 1985); see also Knudson v. City of Ellensburg, 832 F.2d 1142, 1149 (9th Cir. 1987).

3 Plaintiff is also informed that the court cannot refer to a prior pleading in order to  
4 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended  
5 complaint be complete in itself without reference to any prior pleading. This is because, as a  
6 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
7 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
8 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
9 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

10 In accordance with the above, IT IS HEREBY ORDERED that:

11 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

12 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.  
13 Plaintiff is assessed an initial partial filing fee of \$43.37. All fees shall be collected and paid in  
14 accordance with this court's order to the Director of the California Department of Corrections  
15 and Rehabilitation filed concurrently herewith.

16 3. Plaintiff's complaint is dismissed.

17 4. Plaintiff is granted thirty days from the date of service of this order to file an  
18 amended complaint that complies with the requirements of the Civil Rights Act, the Federal  
19 Rules of Civil Procedure, and the Local Rules of Practice; the amended complaint must bear the  
20 docket number assigned this case and must be labeled "Amended Complaint"; plaintiff must file  
21 an original and two copies of the amended complaint; failure to file an amended complaint in  
22 accordance with this order will result in a recommendation that this action be dismissed.

23 DATED: May 19, 2010.

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25 U.S. MAGISTRATE JUDGE  
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