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

MARK A. SMITH,

Plaintiff,

No. CIV S-10-1415 FCD GGH P

vs.

SUPERIOR COURT OF  
SOLANO COUNTY,

Defendants.

FINDINGS & RECOMMENDATIONS

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Plaintiff is civilly committed to a state hospital and has filed an action in this court. On June 18, 2010, the court dismissed plaintiff's action with leave to amend, noting that it was not clear if plaintiff was filing an action pursuant to 42 U.S.C. § 1983 or a writ of habeas corpus. Plaintiff was told the differences between the actions and provided forms for filing both actions. The court noted that in the last two years plaintiff has filed several cases in the court with similar problems including two before the undersigned, CIV 08-2655 GGH and CIV 09-2800 FCD GGH. The undersigned stated that plaintiff would be given only one additional opportunity to file a proper action. On June 28, 2010, plaintiff filed a first amended prisoner civil rights complaint that contains the forms for both civil rights actions and writs of habeas corpus.

1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 A complaint must contain more than a “formulaic recitation of the elements of a  
9 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the  
10 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).  
11 “The pleading must contain something more...than...a statement of facts that merely creates a  
12 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal  
13 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient  
14 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft  
15 v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127  
16 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows  
17 the court to draw the reasonable inference that the defendant is liable for the misconduct  
18 alleged.” Id.

19 Pro se pleadings are liberally construed. See Haines v. Kerner, 404 U.S. 519,  
20 520-21, 92 S. Ct. 594, 595-96 (1972); Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th  
21 Cir. 1988). Unless it is clear that no amendment can cure the defects of a complaint, a pro se  
22 plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before  
23 dismissal. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987); Franklin, 745 F.2d at 1230.

24 Plaintiff’s first amended complaint contains the same deficiencies as the prior  
25 complaint. Plaintiff seeks a new trial and to overturn his sentence. Plaintiff also accuses the  
26 Superior Court of discrimination, slander and fraud. Plaintiff also refers the court to his other

1 case and appeal for more information, but provides neither document. While this action could be  
2 construed as a writ of habeas corpus, it is too unintelligible to be certain. Plaintiff has shown that  
3 he is unable to amend to provide a more clear statement of the relief he seeks.

4           “A pro se litigant must be given leave to amend his or her complaint unless it is  
5 ‘absolutely clear that the deficiencies of the complaint could not be cured by amendment.’”  
6 Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988), quoting Noll [v.  
7 Carlson], 809 F.2d 1446, 1448 (in turn, quoting Broughton v. Cutter Laboratories, 622 F.2d 458,  
8 460 (9th Cir.1980) (per curiam)); accord Eldridge v. Block, 832 F.2d 1132, 1135-36 (9th  
9 Cir.1987). Liberality in granting a plaintiff leave to amend “is subject to the qualification that the  
10 amendment not cause undue prejudice to the defendant, is not sought in bad faith, and is not  
11 futile.” Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9<sup>th</sup> Cir. 2001), quoting  
12 Bowles v. Reade, 198 F.3d 752, 757 (9th Cir.1999). “Under Ninth Circuit case law, district  
13 courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are  
14 not required to grant leave to amend if a complaint lacks merit entirely.” Lopez v. Smith, 203  
15 F.3d 1122, 1129 (9th Cir. 2000) (“[A] district court retains its discretion over the terms of a  
16 dismissal for failure to state a claim, including whether to make the dismissal with or without  
17 leave to amend.”) See also, Smith v. Pacific Properties and Development Corp., 358 F.3d 1097,  
18 1106 (9th Cir. 2004), citing Doe v. United States, 58 F.3d 494, 497(9th Cir.1995) (“a district  
19 court should grant leave to amend even if no request to amend the pleading was made, unless it  
20 determines that the pleading could not be cured by the allegation of other facts.”). This appears  
21 to be one of those relatively rare cases when to grant plaintiff further leave to amend would be  
22 patently futile.

23           For the reasons set forth above, this court finds that plaintiff’s complaint is wholly  
24 frivolous, with defects for which no amount of amendment could provide a cure, and for which  
25 the undersigned must recommend dismissal with prejudice.

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