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

JOHN DONALD KELSO,

Plaintiff,

No. CIV S-11-0674 MCE EFB P

vs.

KENNYCUTT, et al.,

Defendants.

ORDER AND  
FINDINGS AND RECOMMENDATIONS

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John Donald Kelso, an inmate confined at Solano County Jail, filed this pro se civil rights action under 42 U.S.C. § 1983. In addition to filing a complaint, plaintiff has filed an application to proceed in forma pauperis and a “motion for a change of venue” and “dismissal.” Dckt. Nos. 2, 4, 8. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

**I. Request to Proceed In Forma Pauperis**

Plaintiff has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. Dckt. Nos. 2, 4. His application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

1 **II. Screening Order**

2 Pursuant to 28 U.S.C. § 1915A, the court shall review “a complaint in a civil action in  
3 which a prisoner seeks redress from a governmental entity or officer or employee of a  
4 governmental entity.” 28 U.S.C. § 1915A(a). “On review, the court shall identify cognizable  
5 claims or dismiss the complaint, or any portion of the complaint, if the complaint (1) is frivolous,  
6 malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief  
7 from a defendant who is immune from such relief.” *Id.* § 1915A(b).

8 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
9 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
10 the alleged violation was committed by a person acting under the color of state law. *West v.*  
11 *Atkins*, 487 U.S. 42, 48 (1988).

12 A district court must construe a pro se pleading “liberally” to determine if it states a  
13 claim and, prior to dismissal, tell a plaintiff of deficiencies in his complaint and give plaintiff an  
14 opportunity to cure them. *See Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000). While  
15 detailed factual allegations are not required, “[t]hreadbare recitals of the elements of a cause of  
16 action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 129 S.Ct.  
17 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff  
18 must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
19 plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570).

20 A claim has facial plausibility when the plaintiff pleads factual content that allows  
21 the court to draw the reasonable inference that the defendant is liable for the  
22 misconduct alleged. The plausibility standard is not akin to a “probability  
23 requirement,” but it asks for more than a sheer possibility that a defendant has  
acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
defendant’s liability, it stops short of the line between possibility and plausibility  
of entitlement to relief.

24 *Id.* (citations and quotation marks omitted). Although legal conclusions can provide the  
25 framework of a complaint, they must be supported by factual allegations, and are not entitled to  
26 the assumption of truth. *Id.* at 1950.

1 Plaintiff's complaint violates Rule 8(a) of the Federal Rules of Civil Procedure. The  
2 complaint is so inscrutable that the court cannot reasonably discharge its responsibility under  
3 § 1915A until plaintiff complies with the pleading requirements set forth in Rule 8. This rule  
4 requires the pleader to set forth his averments in a simple, concise, and direct manner. The  
5 degree of simplicity and conciseness required depends on the subject matter of the litigation, the  
6 nature of the claims or defenses presented and the number of parties involved. Wright & Miller,  
7 *Federal Practice & Procedure*, vol. 5 § 1281 & n. 12 (1990) (explaining that an antitrust or  
8 copyright pleading due to its complexity, must be pleaded with more detail than a simple  
9 negligence complaint). Before undertaking to determine whether the complaint may have merit,  
10 the court may insist upon compliance with its rules. *See McNeil v. United States*, 508 U.S. 106,  
11 113 (1993) (federal rules apply to all litigants, including prisoners lacking access to counsel);  
12 *see also Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (encouraging "firm application" of  
13 federal rules in prisoner cases).

14 The claims in plaintiff's complaint are so vague and conclusory that the court cannot  
15 determine what claim for relief is purportedly being asserted and against what party. For  
16 example, in the "Statement of Claim" section of the form complaint, plaintiff alleges, "My  
17 eyesight is in danger. They are trying to blind me. I have been raped more than 70 times."  
18 Dckt. No. 1 at 3. Plaintiff does not identify who the perpetrators of these alleged misdeeds are.  
19 In attached pages, plaintiff additionally seeks "a jury trial," "a change of venue on my (2970),"  
20 "a misdemeanor this time on my hearing & placement in a Free World psychiatric ward till I am  
21 found competent," "to be banned from Patton State Hospital," to be housed separately from  
22 "felony prisoners," an order to the state court requiring that it provide him with an evidentiary  
23 hearing and preliminary hearing, an order to "them to give me another paying job where ever I  
24 got if not set free (sic)," an order requiring the appointment of "a special master for the  
25 Department of Mental Health and the Department of Public Health," and to be given parole and  
26 "good time." *Id.* at 4-6. Plaintiff also lists a litany of complaints regarding conditions at Patton

1 State Hospital, interspersed with complaints about state criminal proceedings currently pending  
2 against him. *Id.* at 6-23.

3 Many of plaintiff's claims, to the extent they are understandable, were dismissed in Case  
4 No. Civ. S-09-2142 MCE KJM P. In that case, plaintiff also raised issues about Patton State  
5 Hospital and his state criminal case. Case No. Civ. S-09-2142 MCE KJM P, Dckt. No. 18 at 2-3.  
6 In dismissing the complaint, the court noted that, to the extent plaintiff's claims were  
7 comprehensible, they raised issues that must be challenged in a petition for writ of habeas corpus  
8 or issues regarding Patton State Hospital, which is not in this district. *Id.* The same is true here.  
9 Plaintiff's claims for release, parole, and good time, and his challenges to his state criminal  
10 proceedings must be pursued by habeas. *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973)  
11 ("Congress has determined that habeas corpus is the appropriate remedy for state prisoners  
12 attacking the validity of the fact or length of their confinement, and that specific determination  
13 must override the general terms of § 1983."). Patton State Hospital is no more in this district  
14 than it was when Case No. Civ. S-09-2142 MCE KJM P was dismissed on July 8, 2010. The  
15 court further notes that, to the extent plaintiff asks this court to issue orders compelling the state  
16 trial court to take some action in his case, the court lacks jurisdiction to do so. *Demos v. U.S.*  
17 *Dist. Ct.*, 925 F.2d 1160, 1161-62 (9th Cir. 1991) (federal courts lack jurisdiction to issue writs  
18 compelling state courts to take or refrain from taking some action).

19 Accordingly, if plaintiff wishes to continue this litigation he must file an amended  
20 complaint. A prisoner pursuing civil rights claims without counsel, like all other litigants, is  
21 required to obey the court's orders, including an order to amend his pleading. *Ferdik v.*  
22 *Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992); *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th  
23 Cir. 2002). His failure to obey the court's orders and the local and federal rules and meet his  
24 responsibilities in prosecuting this action may justify dismissal, including dismissal with  
25 prejudice. *Ferdik*, 963 F.2d at 1262-63 (affirming dismissal with prejudice for pro se prisoner's  
26 failure to comply with order requiring filing of amended civil rights complaint); *Pagtalunan*, 291

1 F.3d at 642 (affirming dismissal with prejudice for pro se prisoner's failure to comply with order  
2 requiring filing of amended habeas petition); *Moore v. United States*, 193 F.R.D. 647, 653 (N.D.  
3 Cal. 2000) (denying motion for leave to file third amended complaint and dismissing action with  
4 prejudice for pro se plaintiff's failure to comply with Rule 8); *Franklin v. Murphy*, 745 F.2d  
5 1221, 1232-33 (9th Cir. 1984) (affirming dismissal with prejudice for pro se prisoner's failure to  
6 prosecute); *Carey v. King*, 856 F.2d 1439, 1441 (9th Cir. 1988) (affirming dismissal without  
7 prejudice for pro se prisoner's failure to comply with local rule requiring he notify the court of  
8 any change of address).

9 Plaintiff's amended complaint must adhere to the following requirements:

10 It must be complete in itself without reference to any prior pleading. E.D. Cal. Local  
11 Rule 220; *see Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended  
12 complaint, the original pleading is superseded.

13 It must show that the federal court has jurisdiction and that plaintiff's action is brought in  
14 the right place, that plaintiff is entitled to relief if plaintiff's allegations are true, and must  
15 contain a request for particular relief. Plaintiff must identify as a defendant only persons who  
16 personally participated in a substantial way in depriving plaintiff of a federal constitutional right.  
17 *Johnson*, 588 F.2d at 743 (a person subjects another to the deprivation of a constitutional right if  
18 he does an act, participates in another's act or omits to perform an act he is legally required to do  
19 that causes the alleged deprivation). Plaintiff must inform the court how each defendant  
20 participated in any alleged deprivation of his constitutional rights. Plaintiff's amended  
21 complaint should not include claims seeking his immediate or speedier release from state  
22 custody, as such claims must be brought in a habeas corpus petition.

23 It must contain a caption including the name of the court and the names of all parties.  
24 Fed. R. Civ. P. 10(a).

25 Plaintiff may join multiple claims if they are all against a single defendant. Fed. R. Civ.  
26 P. 18(a). Unrelated claims against different defendants must be pursued in multiple lawsuits.

1 “The controlling principle appears in Fed. R. Civ. P. 18(a): ‘A party asserting a claim . . . may  
2 join, [] as independent or as alternate claims, as many claims . . . as the party has against an  
3 opposing party.’ Thus multiple claims against a single party are fine, but Claim A against  
4 Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims  
5 against different defendants belong in different suits, not only to prevent the sort of morass [a  
6 multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners pay the  
7 required filing fees-for the Prison Litigation Reform Act limits to 3 the number of frivolous suits  
8 or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C. §  
9 1915(g).” *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007); *see also* Fed. R. Civ. P. 20(a)(2)  
10 (joinder of defendants not permitted unless both commonality and same transaction requirements  
11 are satisfied). Plaintiff may not change the nature of this suit by alleging new, unrelated claims  
12 in an amended complaint. *George*, 507 F.3d at 607 (no “buckshot” complaints).

13 The allegations must be short and plain, simple and direct and describe the relief plaintiff  
14 seeks. Fed. R. Civ. P. 8(a); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *Galbraith v.*  
15 *County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002). A long, rambling pleading,  
16 including many defendants with unexplained, tenuous or implausible connection to the alleged  
17 constitutional injury or joining a series of unrelated claims against many defendants very likely  
18 will result in delaying the review required by 28 U.S.C. § 1915 and an order dismissing  
19 plaintiff’s action pursuant to Rule 41 of the Federal Rules of Civil Procedure for violation of  
20 these instructions.

21 Plaintiff must sign the complaint. Fed. R. Civ. P. 11(a). By signing an amended  
22 complaint, plaintiff certifies he has made reasonable inquiry and has evidentiary support for his  
23 allegations and that for violation of this rule the court may impose sanctions sufficient to deter  
24 repetition by plaintiff or others. Fed. R. Civ. P. 11.

25 A prisoner may bring no § 1983 action until he has exhausted such administrative  
26 remedies as are available to him. 42 U.S.C. § 1997e(a). The requirement is mandatory. *Booth*

1 *v. Churner*, 532 U.S. 731, 741 (2001). By signing an amended complaint plaintiff certifies his  
2 claims are warranted by existing law, including the law that he exhaust administrative remedies,  
3 and that for violation of this rule plaintiff risks dismissal of his entire action.

4 **III. Motions to Change Venue and for Dismissal of State Criminal Case**

5 On April 27, 2011, plaintiff filed a “motion for a change of venue” and a “motion for  
6 dismissal.” Dckt. No. 8. Plaintiff alleges that a Judge Kennycutt and other unnamed judges of  
7 the Solano Superior Court have taken various adverse actions against him in criminal  
8 proceedings over the past many years and asks for an order “changing venue,” presumably to  
9 transfer his state court case to a different state trial court. As mentioned earlier, however, this  
10 court lacks jurisdiction to issue a writ compelling the state court to transfer plaintiff’s case. *See*  
11 *Demos*, 925 F.2d at 1161-62. Accordingly, plaintiff’s motion for a change of venue should be  
12 denied.

13 Plaintiff’s “motion for dismissal” is somewhat paradoxical. Plaintiff appears to allege  
14 that the criminal proceedings, or possibly civil commitment proceedings, currently pending  
15 against him are unconstitutional because they are premised on a doctor’s opinion that he will  
16 commit a felony in the future, when plaintiff avers he will at the most commit “one misdemeanor  
17 and lie about my age maybe.” Dckt. No. 8 at 9. To the extent that the undersigned can  
18 understand the motion, it appears to seek plaintiff’s release from state custody or various orders  
19 from this court to the state court regarding how to conduct the proceeding. As previously stated,  
20 the court cannot issue a writ compelling the state court to conduct its proceedings in a particular  
21 manner, and any challenge plaintiff wishes to make to his incarceration or its duration must be  
22 brought in a petition for writ of habeas corpus. Accordingly, the undersigned recommends that  
23 plaintiff’s motion for dismissal be denied.

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1 **IV. Order and Recommendation**

2 Accordingly, it hereby is ORDERED that:

3 1. Plaintiff's request to proceed in forma pauperis is granted.

4 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in  
5 accordance with the notice to the Solano County Jail filed concurrently herewith.

6 3. Plaintiff's complaint is dismissed with leave to amend within 30 days. Any amended  
7 complaint must bear the docket number assigned to this case and be titled "First Amended  
8 Complaint." Failure to comply with this order will result in a recommendation that this action be  
9 dismissed.

10 It is further RECOMMENDED that plaintiff's April 27, 2011 motions for a change of  
11 venue and for dismissal (Dckt. No. 8) be denied.

12 These findings and recommendations are submitted to the United States District Judge  
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
14 after being served with these findings and recommendations, any party may file written  
15 objections with the court and serve a copy on all parties. Such a document should be captioned  
16 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
17 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
18 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

19 Dated: September 19, 2011.

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21 EDMUND F. BRENNAN  
22 UNITED STATES MAGISTRATE JUDGE  
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