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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY DICKERSON,
Plaintiff,
v.
STATE OF CALIFORNIA, et al.,
Defendants.

No. 2:16-cv-2910-KJM-EFB P

ORDER GRANTING IFP AND DISMISSING
COMPLAINT PURSUANT TO 28 U.S.C. §
1915A

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and a request for the appointment of counsel.

I. Request to Proceed In Forma Pauperis

Plaintiff’s 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).

II. Screening Requirement and Standards

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

1 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
2 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
3 relief.” *Id.* § 1915A(b).

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
6 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
7 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556
11 U.S. 662, 679 (2009).

12 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
13 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
14 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
15 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at
16 678.

17 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
18 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is liable for the
20 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a
21 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
22 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the
23 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

24 **III. Screening Order**

25 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A. The
26 complaint names the State of California and Nancy Smith as defendants. It does not include any
27 factual allegations or identify any claims for relief. It seeks “immediate release” in addition to
28 “damages.” ECF No. 1, § V. Although the Federal Rules adopt a flexible pleading policy, a

1 complaint must give fair notice and state the elements of the claim plainly and succinctly. *Jones*
2 *v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at
3 least some degree of particularity overt acts which defendants engaged in that support plaintiff's
4 claim. *Id.* Here, plaintiff fails to identify his intended claims for relief or link any defendant to a
5 federal constitutional or statutory violation of his rights. In addition, the State of California is not
6 a proper defendant and the request for immediate release in this civil rights action is improper.
7 Lastly, it is not clear from the complaint whether venue is proper in this district.

8 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
9 constitutional or statutory right; and (2) that the violation was committed by a person acting under
10 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d
11 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the
12 facts establish the defendant's personal involvement in the constitutional deprivation or a causal
13 connection between the defendant's wrongful conduct and the alleged constitutional deprivation.
14 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44
15 (9th Cir. 1978). Plaintiff may not sue any official on the theory that the official is liable for the
16 unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
17 He must identify the particular person or persons who violated his rights. He must also plead
18 facts showing how that particular person was involved in the alleged violation.

19 Moreover, the State of California is not a "person" within the meaning of § 1983 and is
20 immune from suit under the Eleventh Amendment. *Will v. Michigan Dep't of State Police*, 491
21 U.S. 58, 66 (1989); *see also Hafer v. Melo*, 502 U.S. 21, 30 (1991) (clarifying that Eleventh
22 Amendment does not bar suits against state officials sued in their individual capacities, nor does it
23 bar suits for prospective injunctive relief against state officials sued in their official capacities).

24 As a general rule, a challenge in federal court to the fact of conviction or the length of
25 confinement must be raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.
26 *See Preiser v. Rodriguez*, 411 U.S. 475 (1973). Where success in a section 1983 action would
27 implicitly question the validity of confinement or its duration, the plaintiff must first show that
28 the underlying conviction was reversed on direct appeal, expunged by executive order, declared

1 invalid by a state tribunal, or questioned by the grant of a writ of habeas corpus. *Heck v.*
2 *Humphrey*, 512 U.S. 477, 486-87 (1994); *Muhammad v. Close*, 540 U.S. 749, 751 (2004). To the
3 extent plaintiff seeks release from custody, a writ of habeas corpus is his sole remedy in federal
4 court, which he may pursue only after exhausting all of his constitutional claims in state court.

5 Further, because the complaint is devoid of factual allegations, the court cannot determine
6 whether venue in this district is proper. The federal venue statute provides that a civil action
7 “may be brought in (1) a judicial district in which any defendant resides, if all defendants are
8 residents of the State in which the district is located, (2) a judicial district in which a substantial
9 part of the events or omissions giving rise to the claim occurred, or a substantial part of property
10 that is the subject of the action is situated, or (3) if there is no district in which an action may
11 otherwise be brought as provided in this action, any judicial district in which any defendant is
12 subject to the court’s personal jurisdiction with respect to such action.” 28 U.S.C. § 1391(b). If
13 plaintiff’s claims arise from the conditions of confinement at his current place of incarceration, he
14 should commence a civil action pursuant to 42 U.S.C. § 1983 in the district of his confinement.

15 For these reasons, plaintiff’s complaint fails to state a claim upon which relief can be
16 granted. Plaintiff will be granted leave to file an amended complaint, if he can allege a
17 cognizable legal theory against a proper defendant and sufficient facts in support of that
18 cognizable legal theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (*en banc*)
19 (district courts must afford pro se litigants an opportunity to amend to correct any deficiency in
20 their complaints). Should plaintiff choose to file an amended complaint, the amended complaint
21 shall clearly set forth the claims and allegations against each defendant. Any amended complaint
22 must cure the deficiencies identified above and also adhere to the following requirements:

23 Any amended complaint must identify as a defendant only persons who personally
24 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
25 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
26 constitutional right if he does an act, participates in another’s act or omits to perform an act he is
27 legally required to do that causes the alleged deprivation).

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1 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).
2 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*
3 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

4 Any amended complaint must be written or typed so that it so that it is complete in itself
5 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
6 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
7 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
8 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes the original, the latter
9 being treated thereafter as non-existent.’”) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
10 1967)).

11 The court cautions plaintiff that failure to comply with the Federal Rules of Civil
12 Procedure, this court’s Local Rules, or any court order may result in this action being dismissed.
13 *See* E.D. Cal. L.R. 110.

14 **IV. Request for Appointment of Counsel**

15 Plaintiff requests that the court appoint counsel. District courts lack authority to require
16 counsel to represent indigent prisoners in section 1983 cases. *Mallard v. United States Dist.*
17 *Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney
18 to voluntarily to represent such a plaintiff. *See* 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935
19 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990).
20 When determining whether “exceptional circumstances” exist, the court must consider the
21 likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro
22 se in light of the complexity of the legal issues involved. *Palmer v. Valdez*, 560 F.3d 965, 970
23 (9th Cir. 2009). Having considered those factors, the court finds there are no exceptional
24 circumstances in this case.

25 **V. Summary of Order**

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 7) is granted.

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2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in accordance with the notice to the California Department of Corrections and Rehabilitation filed concurrently herewith.
3. The complaint is dismissed with leave to amend within 30 days. The complaint must bear the docket number assigned to this case and be titled "Amended Complaint." Failure to comply with this order will result in dismissal of this action for failure to prosecute. If plaintiff files an amended complaint stating a cognizable claim the court will proceed with service of process by the United States Marshal.
4. Plaintiff's request for the appointment of counsel (ECF No. 2) is denied without prejudice.

Dated: August 3, 2017.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE