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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LISA BELYEW,  
  
Plaintiff,  
  
v.  
  
JENNIFER DUPRE-TOKOS,  
  
Defendant.

No. 2:18-cv-0052-WBS-EFB P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Pro se plaintiff is a state prisoner proceeding in an action brought under 42 U.S.C. § 1983, and seeking leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

**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 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which

1 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such  
2 relief.” *Id.* § 1915A(b).

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

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

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

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

### 23 **III. Screening Order**

24 The court has reviewed plaintiff’s complaint (ECF No. 4) pursuant to § 1915A and finds it  
25 must be dismissed without leave to amend for failure to state a claim. At the time she filed her  
26 complaint, plaintiff was confined to a county jail. In the complaint, she alleges that she is a  
27 defendant in a state criminal proceeding and has been awaiting trial for over a year. She claims  
28 that a deputy district attorney is violating her due process rights by “maliciously/vindictively

1 prosecuting [her] with NO EVIDENCE!!!” ECF No. 4 at 3-4. She seeks damages as relief. *Id.*  
2 at 7. State prosecutors, however, are entitled to absolute prosecutorial immunity for acts taken in  
3 their official capacity. *See Kalina v. Fletcher*, 522 U.S. 118, 123–24 (1997); *Buckley v.*  
4 *Fitzsimmons*, 509 U.S. 259, 269–70 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 427, 430–31  
5 (1976) (holding that prosecutors are immune from civil suits for damages under § 1983 for  
6 initiating prosecutions and presenting cases). A malicious prosecution claim is also not viable  
7 given that plaintiff is still awaiting trial. *See Womack v. County of Amador*, 551 F. Supp. 2d  
8 1017, 1031 (E.D. Cal. 2008) (“If a plaintiff cannot establish [that the proceedings were pursued to  
9 a legal termination in his favor], his malicious prosecution action will fail.”). Thus, plaintiff  
10 cannot state a claim upon which relief can be granted and this action should be dismissed without  
11 leave to amend. *See Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009); *Silva v. Di Vittorio*,  
12 658 F.3d 1090, 1105 (9th Cir. 2011) (“Dismissal of a pro se complaint without leave to amend is  
13 proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by  
14 amendment.” (internal quotation marks omitted)); *Doe v. United States*, 58 F.3d 494, 497 (9th  
15 Cir. 1995) (“[A] district court should grant leave to amend even if no request to amend the  
16 pleading was made, unless it determines that the pleading could not be cured by the allegation of  
17 other facts.”).

#### 18 **IV. Conclusion**

19 Accordingly, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 5) is granted.
- 21 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected  
22 in accordance with the notice to the California Department of Corrections and  
23 Rehabilitation filed concurrently herewith.

24 Further, IT IS HEREBY RECOMMENDED that this action be dismissed for failure to  
25 state a claim pursuant to 28 U.S.C. § 1915A.

26 These findings and recommendations are submitted to the United States District Judge  
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
28 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned  
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
3 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
4 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

5 DATED: June 18, 2018.

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7 EDMUND F. BRENNAN  
8 UNITED STATES MAGISTRATE JUDGE  
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