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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LARRY ALTAMIRANO SERMENO,
Plaintiff,
v.
KIMBERLY FLENER,
Defendant.

No. 2:18-cv-01040 CKD P

ORDER

Plaintiff is a state prisoner proceeding pro se and seeking relief pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1) and plaintiff has consented to have all matters in this action before a United States Magistrate Judge. See 28 U.S.C. § 636(c).

Plaintiff requests leave to proceed in forma pauperis. Since plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a), his request 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). 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 preceding month's income credited to plaintiff's prison trust account. These payments will be forwarded by

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1 the appropriate agency to the Clerk of the Court each time the amount in plaintiff's account
2 exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

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

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

15 In order to avoid dismissal for failure to state a claim a complaint must contain more than
16 "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause
17 of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,
18 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
19 statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim
20 upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A
21 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw
22 the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S.
23 at 678. When considering whether a complaint states a claim upon which relief can be granted,
24 the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007),
25 and construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416
26 U.S. 232, 236 (1974).

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1 In his complaint, plaintiff asserts that procedures in effect at the Superior Court of Butte
2 County are causing California Department of Corrections and Rehabilitation officials to
3 miscalculate plaintiff's sentence to his detriment. When a state prisoner challenges the legality of
4 his custody and the relief he seeks is the determination of his entitlement to an earlier or
5 immediate release, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411
6 U.S. 475, 500 (1973).¹ This being the case, plaintiff's complaint fails to state a claim upon which
7 relief can be granted under § 1983 and must be dismissed. The court will, however, grant
8 plaintiff one opportunity to state a claim upon which relief may be granted in a § 1983 action.

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

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

17 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) is granted.

18 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. All fees
19 shall be collected and paid in accordance with this court's order to the Director of the California
20 Department of Corrections and Rehabilitation filed concurrently herewith.

21 3. Plaintiff's complaint is dismissed.

22 4. Plaintiff is granted thirty days from the date of service of this order to file an amended
23 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil
24 Procedure, and the Local Rules of Practice. The amended complaint must bear the docket
25 number assigned this case and must be labeled "Amended Complaint." Failure to file an

26 ¹ Plaintiff is informed that if he ultimately wishes to seek habeas corpus relief in this court, he
27 must first present any claim presented in his federal habeas petition to California Supreme Court.
28 See Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th
Cir. 1986).

1 amended complaint in accordance with this order will result in a recommendation that this action
2 be dismissed.

3 Dated: September 13, 2018



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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