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

DAVID JESUS FARIS, JR.,

No. C 09-5396 WHA (PR)

Plaintiff,

**ORDER OF SERVICE; DENYING
APPOINTMENT OF COUNSEL**

v.

EDMUND G. BROWN, JR., Attorney
General of the State of California;
NANCY E. O'MALLEY, District
Attorney of the County of Alameda;
JOHN DOE #1, of the Oakland Police
Crime Laboratory; and JOHN DOE
#2, of Highland Hospital,

(Docket No. 3)

Defendants.

INTRODUCTION

Plaintiff, a California prisoner proceeding pro se, has filed a civil rights complaint under 42 U.S.C. 1983. He has been granted leave to proceed in forma pauperis in a separate order.

ANALYSIS

A. STANDARD OF REVIEW

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). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

1 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the
2 claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the
3 statement need only "give the defendant fair notice of what the . . . claim is and the grounds
4 upon which it rests."" *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citations omitted).
5 Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a
6 plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than
7 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
8 do. . . . Factual allegations must be enough to raise a right to relief above the speculative
9 level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A
10 complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.*
11 at 1986-87.

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

16 **B. LEGAL CLAIMS**

17 Plaintiff alleges in his complaint that he has requested from defendants that they release
18 biological evidence in their possession. Plaintiff would like access to such materials in order to
19 conduct a DNA analysis because he believes that it may provide that he was wrongfully
20 convicted of sexual assault in 1998. Defendants have refused to allow him or his trial attorney
21 access to the biological evidence. Plaintiff's allegations, when liberally construed, state a
22 cognizable claim for relief against defendants.

23 **C. PROPER DEFENDANTS**

24 Plaintiff names as defendants Bill Lockyer as the Attorney General of the State of
25 California, and Thomas J. Orloff as the District Attorney of the State of California. These
26 individuals no longer hold those elected positions, however. Nevertheless, the allegations in the
27 complaint, when liberally construed, indicate that petitioner means to name the current
28 occupants of those position. Accordingly, defendants Bill Lockyer and Thomas J. Orloff are

1 substituted herein by the current Attorney General, Edmund G. Brown, Jr., and the current
2 District Attorney, Nancy E. O'Malley.

3 **CONCLUSION**

4 1. The clerk shall substitute defendant Bill Lockyer with Edmund G. Brown, Jr., and
5 defendant Thomas J. Orloff with Nancy E. O'Malley on the court's docket. The clerk shall
6 issue summons and the United States Marshal shall serve, without prepayment of fees, copies of
7 the amended complaint in this matter and copies of this order upon defendants EDMUND G.
8 BROWN, JR., Attorney General of the State of California, and NANCY E. O'MALLEY,
9 District Attorney of Alameda County. Service may be ordered upon the two "Doe" defendants
10 once plaintiff has supplied the court with their names and addresses.

11 2. In order to expedite the resolution of this case, the court orders as follows:

12 a. No later than ninety days from the date this order is filed, defendants shall file
13 a motion for summary judgment or other dispositive motion. If defendants are of the opinion
14 that this case cannot be resolved by summary judgment, they shall so inform the court prior to
15 the date the summary judgment motion is due. All papers filed with the court shall be promptly
16 served on the plaintiff.

17 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the
18 court and served upon defendants no later than thirty days from the date of service of the
19 motion. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is
20 provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc),
21 and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

22 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to
23 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff
24 should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is
25 provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir.),
26 *cert. denied*, *Alameida v. Wyatt*, 124 S.Ct 50 (2003).

27 c. Defendants **shall** file a reply brief no later than fifteen days after the date of
28 service of the opposition.

1 d. The motion shall be deemed submitted as of the date the reply brief is due.
2 No hearing will be held on the motion unless the court so orders at a later date.

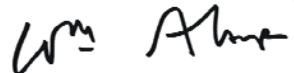
3 3. All communications by the plaintiff with the court must be served on defendant, or
4 defendant's counsel once counsel has been designated, by mailing a true copy of the document
5 to defendant or defendant's counsel.

6 4. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
7 informed of any change of address and must comply with the court's orders in a timely fashion.
8 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
9 Federal Rule of Civil Procedure 41(b).

10 5. Plaintiff's motion for appointment of counsel (docket number 3) is **DENIED** for lack
11 of good cause. Plaintiff should not file further requests for appointment of counsel in this
12 matter. His request will be reconsidered sua sponte at a later stage of this proceeding if
13 circumstances warrant.

14 **IT IS SO ORDERED.**

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16 Dated: November 30, 2009



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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NOTICE -- WARNING
(SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING
(EXHAUSTION)

If defendants file an unenumerated motion to dismiss for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion to dismiss and it is granted, your case will be dismissed and there will be no trial.