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**FILED**

MAY 03 2011

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

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

WILLIAM KIRKPATRICK, JR.,  
Plaintiff,  
v.  
MICHAEL MARTEL, et al.,  
Defendants.

No. C 11-1395 JSW (PR)  
**ORDER OF DISMISSAL**

**INTRODUCTION**

Plaintiff has filed this pro se civil rights complaint under 42 U.S.C. § 1983. His application to proceed *in forma pauperis* is granted in a separate order. This Court now reviews the complaint pursuant to 28 U.S.C. § 1915A, and dismisses it without prejudice for failure to exhaust.

**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). 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 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement

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1 of the claim showing that the pleader is entitled to relief." "Specific facts are not  
2 necessary; the statement need only "give the defendant fair notice of what the . . . claim  
3 is and the grounds upon which it rests." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200  
4 (2007) (citations omitted). Although in order to state a claim a complaint "does not need  
5 detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds of his  
6 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic  
7 recitation of the elements of a cause of action will not do. . . . Factual allegations must  
8 be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v.*  
9 *Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer  
10 "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974. Pro se  
11 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696,  
12 699 (9th Cir. 1990).

### 13 LEGAL CLAIMS

14 Section 1997e of Title 42 of the United States Code provides that "[n]o action  
15 shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other  
16 Federal law, by a prisoner confined in any jail, prison, or other correctional facility until  
17 such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).  
18 Compliance with the exhaustion requirement is mandatory. *Porter v. Nussle*, 534 U.S.  
19 516, 524 (2002); *Booth v. Churner*, 532 U.S. 731, 739-40 & n.5 (2001). The  
20 administrative remedies need not meet federal standards, nor need they be "plain, speedy  
21 and effective." *Porter*, 534 U.S. at 524.

22 Although nonexhaustion under Section 1997e(a) is an affirmative defense, a  
23 prisoner's concession to nonexhaustion is a valid ground for dismissal. *Wyatt v.*  
24 *Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). Accordingly, a claim may be  
25 dismissed without prejudice if it is clear from the record that the prisoner concedes that  
26 he did not exhaust administrative remedies. *Ibid.*

27 The State of California provides its inmates and parolees the right to appeal  
28 administratively "any departmental decision, action, condition or policy perceived by

1 those individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, §  
2 3084.1(a). In order to exhaust available administrative remedies within this system, a  
3 prisoner must proceed through several levels of appeal: (1) informal resolution, (2)  
4 formal written appeal on a CDC 602 inmate appeal form, (3) second level appeal to the  
5 institution head or designee, and (4) third level appeal to the Director of the California  
6 Department of Corrections. *Id.* § 3084.5; *Barry v. Ratelle*, 985 F. Supp. 1235, 1237  
7 (S.D. Cal. 1997). This satisfies the administrative remedies exhaustion requirement  
8 under § 1997e(a). *Id.* at 1237-38.

9 Plaintiff states in his complaint that he only filed an administrative appeal  
10 regarding his claims at the first formal levels, and that he did not appeal his claims to the  
11 higher level of appeal available to him. (Pet. at 1-2.) Plaintiff states that "there was no  
12 need" to appeal to the higher levels because "it was obvious the psyc dept was  
13 mocking/harassing me!" (*Id.* at 2.) Even if true, this does not excuse his obligation to  
14 exhaust all available administrative remedies, including the second and third formal  
15 levels of review provided by the California prisons. Moreover, by raising his concerns at  
16 the higher levels of administrative review available to him he will bring his predicament  
17 to the attention of prison officials, including those of greater authority, which may well  
18 remedy the alleged problems he is experiencing in his prison and provide him redress  
19 more rapidly than a federal lawsuit. As Plaintiff has not presented grounds for excusing  
20 the exhaustion requirement, and he has clearly pleaded that he has not exhausted his  
21 available administrative remedies, his complaint must be dismissed.

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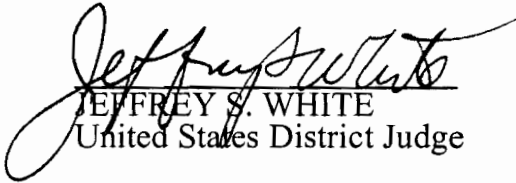
1 **CONCLUSION**

2 This case is DISMISSED without prejudice to filing a new case after Plaintiff has  
3 exhausted his available administrative remedies.

4 The Clerk shall enter judgment and close the file.

5 IT IS SO ORDERED.

6  
7 DATED: ~~MAY 09 2011~~

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9 JEFFREY S. WHITE  
10 United States District Judge  
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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4

5 WILLIAM KIRKPATRICK et al,

Case Number: CV11-01395 JSW

6 Plaintiff,

**CERTIFICATE OF SERVICE**

7 v.

8 MICHAEL MARTEL et al,

9 Defendant.  
10 \_\_\_\_\_ /

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
12 Court, Northern District of California.

13 That on May 3, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
14 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
15 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
16 receptacle located in the Clerk's office.

17 William Kirkpatrick  
18 C91406  
19 San Quentin State Prison  
20 San Quentin, CA 94964

Dated: May 3, 2011

*Jennifer Ottolini*  
Richard W. Wieking, Clerk  
By: Jennifer Ottolini, Deputy Clerk

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