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

LARRY HISTON,	)	No. C 11-5210 JSW (PR)
	)	
Plaintiff,	)	<b>ORDER OF SERVICE</b>
	)	
v.	)	
	)	
KELLY MITCHELL,	)	
	)	
Defendant.	)	
_____	)	

**INTRODUCTION**

Plaintiff, a California prisoner proceeding pro se, filed this civil rights action under 42 U.S.C. § 1983 against Kelly Mitchell, an Associate Warden at San Quentin State Prison (“SQSP”). Plaintiff is granted leave to proceed in forma pauperis in a separate order. The Court now reviews the complaint and orders it served upon Mitchell.

**DISCUSSION**

I. 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 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 of the claim showing that the pleader is entitled to relief." "Specific facts are not

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

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements:

13 (1) that a right secured by the Constitution or laws of the United States was violated, and  
14 (2) that the alleged violation was committed by a person acting under the color of state  
15 law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

## 16 II. Legal Claims

17 Plaintiff alleges that Mitchell illegally confiscated his legal property. As a  
18 consequence of not having his legal papers, Plaintiff missed a deadline for filing a  
19 petition for a writ of certiorari to the United States Supreme Court. He was subsequently  
20 given back his legal papers, but by then it was too late to file the cert petition. Plaintiff  
21 claims that Mitchell's actions violated his rights to due process and to access the courts.

22 Plaintiff's right to due process is not implicated by the allegedly illegal  
23 confiscation of his property. If the deprivation of property was random and  
24 unauthorized, neither the negligent nor intentional deprivation of property states a due  
25 process claim under Section 1983. *Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981),  
26 *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).  
27 The availability of an adequate state post-deprivation remedy, e.g., a state tort action,  
28 precludes relief because it provides sufficient procedural due process. *See Zinermon v.*

1 *Burch*, 494 U.S. 113, 128 (1990) (where state cannot foresee, and therefore provide  
2 meaningful hearing prior to, deprivation statutory provision for post-deprivation hearing  
3 or common law tort remedy for erroneous deprivation satisfies due process). California  
4 law provides such an adequate post-deprivation remedy. *See Barnett v. Centoni*, 31 F.3d  
5 813, 816-17 (9th Cir. 1994) (citing Cal. Gov't. Code §§ 810-895). Accordingly,  
6 Plaintiff's allegations that the unauthorized deprivation of his personal property violated  
7 his right to due process does not state a cognizable claim under Section 1983.

8 Plaintiff's allegations, when liberally construed, do state a cognizable claim for  
9 the violation of his constitutional right of access to the courts, however.

### 10 CONCLUSION

11 1. The Clerk of the Court shall issue summons and the United States Marshal  
12 shall serve, without prepayment of fees, a copy of the complaint and all attachments  
13 thereto, and a copy of this order upon the Kelly Mitchell, an Associate Warden at San  
14 Quentin State Prison.

15 The Clerk shall also mail a courtesy copy of the complaint and this order to the  
16 California Attorney General's Office of the Northern District of California.

17 The Clerk shall also serve a copy of this order on Plaintiff.

18 2. Defendants shall answer the complaint in accordance with the Federal Rules of  
19 Civil Procedure. In order to expedite the resolution of this case, the Court orders as  
20 follows:

21 a. No later than **ninety (90) days** from the date this order is filed,  
22 Defendant shall either file a motion for summary judgment or other dispositive motion,  
23 or a notice to the Court that they are of the opinion that this matter cannot be resolved by  
24 dispositive motion. The motion shall be supported by adequate factual documentation  
25 and shall conform in all respects to Federal Rule of Civil Procedure 56.

26 **Defendant is advised that summary judgment cannot be granted, nor**  
27 **qualified immunity found, if material facts are in dispute. If defendants are of the**  
28 **opinion that this case cannot be resolved by summary judgment, they shall so**

1 **inform the Court prior to the date the summary judgment motion is due.**

2 All papers filed with the Court shall be promptly served on the Plaintiff.

3 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with  
4 the court and served upon defendants no later than thirty days from the date of service of  
5 the motion. Plaintiff must read the attached page headed "NOTICE -- WARNING,"  
6 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.  
7 1998) (en banc), and *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

8 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed  
9 to exhaust his available administrative remedies, plaintiff should take note of the  
10 attached page headed "NOTICE -- WARNING (EXHAUSTION)." *See Wyatt v.*  
11 *Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003)

12 c. Defendants shall file a reply brief no later than **fifteen (15) days** after  
13 Plaintiff's opposition is filed.

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

16 4. Discovery may be taken in accordance with the Federal Rules of Civil  
17 Procedure. No further Court order under Federal Rule of Civil Procedure 30(a)(2) or  
18 Local Rule 16 is required before the parties may conduct discovery.

19 5. Extensions of time are not favored, though reasonable extensions will be  
20 granted. Any motion for an extension of time must be filed no later than **five** days prior  
21 to the deadline sought to be extended.

22 6. All communications by Plaintiff with the Court must be served on Defendant,  
23 or Defendant's counsel once counsel has been designated, by mailing a true copy of the  
24 document to Defendant or Defendant's counsel.

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4  
5

6 LARRY HISTON,

7 Plaintiff,

8 v.

9 KELLY MITCHELL et al,

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

Case Number: CV11-05210 JSW

**CERTIFICATE OF SERVICE**

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

13 That on November 2, 2011, I SERVED a true and correct copy(ies) of the attached, by placing  
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office  
delivery receptacle located in the Clerk's office.

16  
17 Larry Histon  
18 J79124  
19 San Quentin State Prison  
San Quentin, CA 94974

20 Dated: November 2, 2011

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