

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 MONTGOMERY CARL AKERS,

No. C 09-03547 SBA (PR)

4 Plaintiff,

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

5 v.

6 JACQUELYN E. ROKUSEK, et al.,

7 Defendants.
8
9 _____/

10 Plaintiff Montgomery Carl Akers, a federal prisoner in custody at the U.S. Penitentiary Max
11 in Florence, Colorado, has filed this pro se civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff
12 has also filed an application for in forma pauperis status.

13 **DISCUSSION**14 **I. Standard of Review**

15 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
16 redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.
17 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that
18 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary
19 relief from a defendant who is immune from such relief. See id. § 1915A(b)(1), (2). Pro se
20 pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d
21 696, 699 (9th Cir. 1988).

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

23 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the
24 alleged violation was committed by a person acting under color of state law. See West v. Atkins,
25 487 U.S. 42, 48 (1988).

26 **II. Property Claim**

27 In his complaint, Plaintiff alleges that Assistant United States Attorney Jacquelyn E.
28 Rokusek as well as Melissa Doe and Raymond Lapietra from the Federal Bureau of Investigation

1 have "violated his Fourth Amendment rights" by taking property found in March, 2008 at his
2 business, 19213 El Camino Real, Sunnyvale, California. Plaintiff further states that Defendants
3 claimed they had a warrant to search his business and "confiscated negotiable instruments of an
4 undetermined value." (Compl. at 3.)

5 Plaintiff, who is currently serving his federal sentence, moves the Court for return of the
6 seized property, "costs of litigation," and injunctive relief.

7 It is unclear from the contents of the complaint whether Plaintiff is challenging a seizure that
8 is related to his federal criminal conviction. If so, his request should be presented as a motion to
9 return property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, and such a
10 motion should be filed in his federal criminal case instead of a separate civil action. Accordingly,
11 Plaintiff's complaint is DISMISSED with leave to amend in order to give Plaintiff the opportunity to
12 explain whether he is challenging a seizure related to his federal criminal conviction. Plaintiff shall
13 also supply the Court with information about his federal criminal conviction, including the case
14 number of his federal criminal case, the charges he has been convicted of, and the terms of his
15 sentence.

16 **CONCLUSION**


- 17 1. Leave to proceed in forma pauperis is GRANTED (docket no. 2).
18 2. Plaintiff's complaint is DISMISSED with leave to amend as directed above. The
19 amended pleading must be in the Court's civil rights complaint form and must include the caption
20 and civil case number used in this Order -- No. C 09-3547 SBA (PR) -- and the words AMENDED
21 COMPLAINT on the first page.

22 **Failure to file a proper amended complaint within thirty (30) days of this Order will**
23 **result in the dismissal of this action.**

- 24 3. The Clerk of the Court shall provide Plaintiff with a blank civil rights complaint
25 form.

26 IT IS SO ORDERED.

27 DATED: 11/16/09

28 
SAUNDRA BROWN ARMSTRONG
United States District Judge

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

4 MONTGOMERY CARL AKERS,

5 Plaintiff,

6 v.

7 JACQUELYN E. ROKUSEK et al,

8 Defendant.

Case Number: CV09-03547 SBA

CERTIFICATE OF SERVICE

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

11 That on November 18, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Montgomery Carl Akers 02866-081
16 U.S. Penitentiary Max
17 P.O. Box 8500
18 Florence, CO 81226

19 Dated: November 18, 2009

20 Richard W. Wiekling, Clerk
21 By: LISA R CLARK, Deputy Clerk
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