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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEVIN JOSEPH SMITH,

Plaintiff,

v.

ALEXIS T. WALLACE,

Defendant.

No. C10-5763 RBL/KLS

ORDER TO AMEND OR SHOW CAUSE

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Under separate Order, Plaintiff’s application to proceed *in forma pauperis* (Dkt. 1) has been granted. On October 14, 2010, Plaintiff filed his proposed civil rights complaint. Dkt. 1. After review, the court declines to serve the complaint because it is deficient.

DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

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1 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
2 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
3 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
5 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
6 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
7 to relief above the speculative level, on the assumption that all the allegations in the complaint
8 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)(citations omitted).
9 In other words, failure to present enough facts to state a claim for relief that is plausible on the
10 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

12 The court must construe the pleading in the light most favorable to plaintiff and resolve
13 all doubts in plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Although
14 complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law,
15 unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the
16 court can liberally construe plaintiff’s complaint, it cannot supply an essential fact an inmate has
17 failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673
18 F.2d 266, 268 (9th Cir. 1982)).

20 “Under Ninth Circuit case law, district courts are only required to grant leave to amend if
21 a complaint can possibly be saved. Courts are not required to grant leave to amend if a
22 complaint lacks merit entirely.” *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000). See also,
23 *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097, 1106 (9th Cir. 2004), citing
24 *Doe v. United States*, 58 F.3d 494, 497(9th Cir.1995) (“a district court should grant leave to
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1 amend even if no request to amend the pleading was made, unless it determines that the pleading
2 could not be cured by the allegation of other facts.”)

3 On the basis of these standards, Mr. Smith has failed to state a claim upon which relief
4 can be granted. Mr. Smith seeks \$300,000.00 from Alexis T. Wallace, a Kitsap county
5 prosecutor.¹ He alleges that Ms. Wallace maliciously prosecuted him and made false statements
6 in a Probable Cause Affidavit in bringing criminal charges against Mr. Smith. It appears that the
7 criminal case occurred in Kitsap County Court at some time in 2008. ECF No. 4. It is unclear
8 from Mr. Smith’s complaint, however, if the criminal charges were dismissed or if they resulted
9 in a judgment of conviction pursuant to which Mr. Smith is presently incarcerated.
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11 “To maintain an action for malicious prosecution, the plaintiff must allege and prove the
12 following: (1) that the prosecution claimed to have been malicious was instituted or continued by
13 the defendant; (2) that there was want of probable cause for the institution or continuation of the
14 prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the
15 proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the
16 plaintiff suffered injury or damage as a result of the prosecution. *Bender v. City of Seattle*, 99
17 Wn.2d 582, 593 (1983).
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19 Here, there is no allegation that the proceedings against Mr. Smith were terminated on the
20 merits in his favor or were abandoned. In order to recover damages for an alleged
21 unconstitutional conviction or imprisonment, or for other harm caused by actions whose
22 unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that
23 the conviction or sentence has been reversed on direct appeal, expunged by executive order,
24 declared invalid by a state tribunal authorized to make such determination, or called into
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¹ Plaintiff also names Russell D. Hauge, another Kitsap County prosecuting attorney, but states that his involvement
in the action is “to be determined.” ECF No. 4, p. 6.

1 question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck v.*
2 *Humphrey*, 512 U.S. 477, 486-87 (1994).

3 In addition, prisoners in state custody who wish to challenge the length of their
4 confinement in federal court by a petition for writ of habeas corpus are first required to exhaust
5 state judicial remedies, either on direct appeal or through collateral proceedings, by presenting
6 the highest state court available with a fair opportunity to rule on the merits of each and every
7 issue they seek to raise in federal court. *See* 28 U.S.C. § 2254(b)(c); *Granberry v. Greer*, 481
8 U.S. 129, 134 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982); *McNeeley v. Arave*, 842 F.2d 230,
9 231 (9th Cir. 1988). State remedies must be exhausted except in unusual circumstances.
10 *Granberry, supra*, at 134. If state remedies have not been exhausted, the district court must
11 dismiss the petition. *Rose, supra*, at 510; *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988).
12 As a dismissal solely for failure to exhaust is not a dismissal on the merits, *Howard v. Lewis*, 905
13 F.2d 1318, 1322-23 (9th Cir. 1990), it is not a bar to returning to federal court after state remedies
14 have been exhausted.
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17 It appears that Mr. Smith is requesting monetary compensation for his alleged unlawful
18 incarceration based on the malicious prosecution and false statements of the prosecuting
19 attorney. ECF No. 4, pp. 11-12. As noted above, however, Mr. Smith fails to allege that the
20 proceedings against him were terminated on the merits in his favor or were abandoned.
21 Additionally, before a prisoner may sue to recover damages for an alleged unconstitutional
22 conviction or imprisonment, or for other harm caused by actions whose unlawfulness would
23 render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or
24 sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a
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1 state tribunal authorized to make such determination, or called into question by a federal court's
2 issuance of a writ of habeas corpus.

3 Mr. Smith is further advised that a state prosecuting attorney who acts within the scope of
4 his or her duties in initiating and pursuing a criminal prosecution and presenting the State's case
5 is absolutely immune from a suit brought for damages under 42 U.S.C. § 1983, *Imbler v.*
6 *Pachtman*, 424 U.S. 409, 424, 427 (1976); *Ashelman v. Pope*, 793 F.2d 1072, 1076, 1078 (9th
7 Cir. 1986) (en banc), "insofar as that conduct is 'intimately associated with the judicial phase of
8 the criminal process,'" *Burns v. Reed*, 500 U.S. 478, 486 (1991)(quoting *Imbler*, 424 U.S. at
9 431). This is so even though the prosecutor has violated a plaintiff's constitutional rights, *Broom*
10 *v. Bogan*, 320 F.3d 1023, 1028-29 (9th Cir. 2003), or the prosecutor acts with malicious intent,
11 *Genzler v. Longanbach*, 410 F.3d 630, 637 (9th Cir.), cert. denied, 546 U.S. 1031, 126 S.Ct. 736,
12 546 U.S. 1031, 126 S.Ct. 737, 546 U.S. 1032, 126 S.Ct. 749 (2005); *Ashelman*, 793 F.2d at 1078.
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15 Due to the deficiencies described above, the Court will not serve the complaint. Mr.
16 Smith may file an amended complaint curing, if possible, the above noted deficiencies, or show
17 cause explaining why this matter should not be dismissed no later than **November 19, 2010**. If
18 Mr. Smith chooses to file an amended complaint, which seeks relief cognizable under 42 U.S.C.
19 § 1983, the amended complaint shall operate as a complete substitute for (rather than a mere
20 supplement to) the present complaint. Mr. Smith shall present his complaint on the form
21 provided by the Court. The amended complaint must be legibly rewritten or retyped in its
22 entirety, it should be an original and not a copy, it may not incorporate any part of the original
23 complaint by reference, and it must be clearly labeled the "First Amended Complaint" and Cause
24 Number C10-5763 RBL/KLS must be written in the caption. Additionally, Plaintiff must submit
25 a copy of the "First Amended Complaint" for service on each named Defendant.
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1 If Mr. Smith decides to file an amended civil rights complaint in this action, he is
2 cautioned that if the amended complaint is not timely filed or if he fails to adequately address the
3 issues raised herein on or before **November 19, 2010**, the Court will recommend dismissal of
4 this action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike”
5 under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner
6 who brings three or more civil actions or appeals which are dismissed on grounds they are
7 legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other
8 civil action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious
9 physical injury.” 28 U.S.C. § 1915(g).
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11 **The Clerk is directed to send Mr. Smith the appropriate form for filing a 42 U.S.C.**
12 **1983 civil rights complaint. The Clerk is further directed to send a copy of this Order and**
13 **a copy of the General Order to Plaintiff.**
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16 DATED this 25th day of October, 2010.

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18 Karen L. Strombom
19 United States Magistrate Judge
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