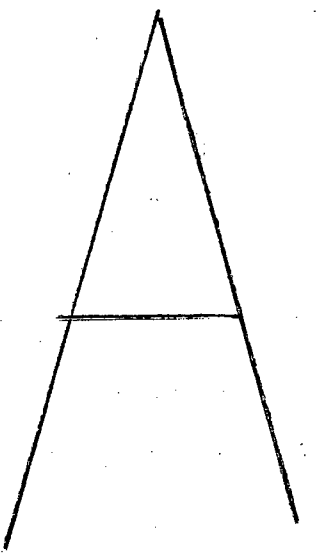
APPENDIX - A -



MARCH 14, 2018 FINAL DECISION AND OPINION OF THE NINTH CIRCUIT COURT

RECEIVED : 3/22/18

NOT FOR PUBLICATION

FILED

MAR 14 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILICH VARGAS, Plaintiff-Appellant, v. JOHN MCMAHON, San Bernardino County Sheriff, in his individual and official capacities; et al., Defendants-Appellees.	No. 16-55816 D.C. No. 5:16-cv-00231-R-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted March 13, 2018**

Before: THOMAS, Chief Judge, and TROTT and SILVERMAN, Circuit Judges.

Pretrial detainee Ilich Vargas appeals pro se from the district court's order denying his application to proceed in forma pauperis ("IFP") in his 42 U.S.C. § 1983 action alleging constitutional claims arising from his pending state criminal

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX - A -

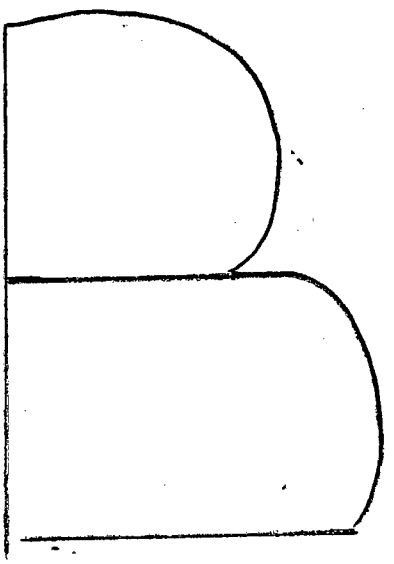
proceedings and his custody in San Bernardino County's West Valley Detention Center. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990). We affirm.

The district court did not abuse its discretion by denying Vargas's motion to proceed IFP because Vargas failed to allege facts in his proposed complaint sufficient to state a claim. *See id.* at 616-17 (district court may deny leave to proceed IFP "'at the outset if it appears from the face of the proposed complaint that the action is frivolous or without merit'") (quoting *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987).

AFFIRMED.

APPENDIX - A -

APPENDIX -B-



APRIL 20, 2016 ORDER TO DENY IFP AND DISMISS WITH DISTRICT COURT MAGISTRATE RECOMMENDATIONS TO DISMISS WITHOUT LEAVE TO AMEND

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INMATE # 1212341370

ILICH VARGAS,

PLAINTIFF(S)

v.

JOHN McMAHON, et al.,

DEFENDANT(S)

CASE NUMBER

EDCV 16-00231-R(KES)

ORDER RE REQUEST TO PROCEED WITHOUT PREPAYMENT OF FILING FEES

IT IS ORDERED that the Request to Proceed Without Prepayment of Filing Fees is hereby GRANTED.

IT IS FURTHER ORDERED that, in accordance with 28 U.S.C. § 1915, the prisoner-plaintiff owes the Court the total filing fee of $350.00. An initial partial filing fee of $ _____ must be paid within thirty (30) days of the date this order is filed. Failure to remit the initial partial filing fee may result in dismissal of the case. Thereafter, monthly payments shall be forwarded to the Court in accordance with 28 U.S.C. § 1915(b)(2).

Date

United States Magistrate Judge

IT IS RECOMMENDED that the Request to Proceed Without Prepayment of Filing Fees be **DENIED** for the following reason(s):

- ☐ Inadequate showing of indigency.
- ☐ Failure to authorize disbursements from prison trust account to pay filing fee.
- ☐ Failure to provide certified copy of trust fund statement for the last six (6) months.
- ☐ District Court lacks jurisdiction.
- ☐ Other _____
- ☒ Frivolous, malicious, or fails to state a claim upon which relief may be granted.
- ☒ Seeks monetary relief from a defendant immune from such relief.
- ☒ Leave to amend would be futile.
- ☐ This denial may constitute a strike under the "Three Strikes" provision governing the filing of prisoner suits. *See O'Neal v. Price*, 531 F.3d 1146, 1153 (9th Cir. 2008).

Comments:
See attached, Memorandum Recommending Dismissal of Complaint Without Leave to Amend.

April 20, 2016
Date

Karen E. Scott
Karen E. Scott
United States Magistrate Judge

IT IS ORDERED that the Request to Proceed Without Prepayment of Filing Fees is:

☐ **GRANTED. IT IS FURTHER ORDERED** that, in accordance with 28 U.S.C. § 1915, the prisoner-plaintiff owes the Court the total filing fee of $350.00. An initial partial filing fee of $ _____ must be paid within thirty (30) days of the date this order is filed. Failure to remit the initial partial filing fee may result in dismissal of the case. Thereafter, monthly payments shall be forwarded to the Court in accordance with 28 U.S.C. § 1915(b)(2).

☒ **DENIED**, and this case is hereby DISMISSED.

☐ **DENIED with leave to amend within 30 days.** if submitted with the Certified Trust Account Statem case number. If plaintiff fails to submit the required

nt to this Court, ize the same).

May 6, 2016
Date

United States District Judge

APPENDIX -B-

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ILICH VARGAS,
Plaintiff,
v.
JOHN MCMAHON, et al.,
Defendants.

Case No. CV 16-0231-R (KES)

MEMORANDUM RECOMMENDING DISMISSAL OF COMPLAINT WITHOUT LEAVE TO AMEND

On February 2, 2016, *pro se* prisoner Plaintiff Ilich Vargas ("Plaintiff") filed a civil rights complaint accompanied by an application to proceed *in forma pauperis* ("IFP") and a motion for appointment of counsel. (Dkt. 1 "Complaint;" Dkt. 3, 4.) Plaintiff's IFP application was denied with thirty days leave to amend for failure to submit a copy of his prison trust account statement. (Dkt. 6.)

On March 15, 2016, Plaintiff submitted the required trust account documentation. (Dkt. 7.) He also filed a second motion seeking appointment of counsel. (Dkt. 8.) Accordingly, the Court is now required to screen the Complaint to determine if the action (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief

against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). An action is frivolous if "it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). An action fails to state a claim if it fails to plead facts sufficient to suggest a plausible basis for the claim. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557-58 (2007); Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). An action is barred by absolute judicial immunity if it seeks damages against a judge for judicial acts. Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir.1986) (en banc).

For the reasons stated below, Plaintiff fails to state a claim on which relief can be granted. The Court therefore recommends that Plaintiff's IFP application be denied.

I.

FACTUAL BACKGROUND

On December 8, 2012, Plaintiff drove his Jeep Cherokee onto the southbound lanes of the I-15 freeway going the wrong way. Near Victorville, he collided with another driver head-on. The passenger in Plaintiff's car, Kellie Hughes, was killed, while Plaintiff and the driver of the other car were injured. Plaintiff was taken to the hospital with a shattered right knee cap. (Complaint, ¶ 181.) He was arrested on December 13, 2012. (See Ilich Vargas v. The State Bar of California, et al., Case No. CV 15-0293- R (MAN)[1], Dkt. 1-2 at 4.[2])

Plaintiff is currently being prosecuted in San Bernardino County Superior Court case no. FVI-1203282 for causing Ms. Hughes' death (the

[1] The Court may take judicial notice of its own files and records. Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1989).

[2] All page citations are to the CM/ECF pagination.

APPENDIX - B -

"Murder Case").[3] The charges against Plaintiff include violations of California Penal Code §§ 187 (murder), 191.5 (vehicular manslaughter while intoxicated) 69 (resisting arrest), and Vehicle Code § 23153 (driving under the influence). The Murder Case is presently set for trial on April 25, 2016.[4]

Plaintiff initially hired attorney David S. Chesley to defend him. According to Plaintiff, Attorney Chesley breached his duty to investigate Plaintiff's potential defenses and preserve evidence such as "a purse belonging to the victim which would have had evidence to support the reason why she attempted to throw her purse out the window and got snagged on the steering wheel, causing accident." (Case No. CV 15-0293-R (MAN), Dkt. 1 at 14.) Plaintiff also contends that his attorney should have investigated his estranged wife who may have been involved in a plot to kill him for insurance money. Plaintiff contends he was being chased and seeking aid from law enforcement when he drove onto the wrong side of the I-15. (Id., Dkt. 1-2 at 8-9.) His lawyers also should have obtained the recording of his hospital interrogation when he was "coerced and manipulated" to answer detectives' questions. (Id., at 10.)

Attorney Chesley represented Plaintiff from December 28, 2012 to March 26, 2013. (Id. at 10.) After Plaintiff fired Mr. Chesley, he was represented by San Bernardino County deputy public defender, Joshua Castro.

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[3] The Court may take judicial notice of the San Bernardino County Superior Court's online records. See, Fed. R. Evid. 201(b); Porter v. Ollison, 620 F.3d 952, 954-55 (9th Cir. 2010).

[4] At the preliminary hearing, CHP officers who responded to the scene testified that Plaintiff's blood was drawn within three hours of the accident, and it tested positive for methamphetamine and marijuana. (Dkt. 2 at 44; Dkt. 2-1 at 6-7.) They also testified that Plaintiff had two prior DUI convictions before the crash that killed Ms. Hughes. (Dkt. 2-1 at 3.)

(Id., Dkt. 1-3 at 18.) On March 7, 2014, Plaintiff brought a Faretta motion, and the trial court permitted him to represent himself. As of March 21, 2016, the San Bernardino County Superior Court's website still identifies Plaintiff as *pro se* in the Murder Case.

The San Bernardino County Superior Court's website also shows that Plaintiff has filed a number of motions in the Murder Case in connection with his self-representation, including motions for a legal runner, motions for additional phone calls and motions to obtain transcripts. The Superior Court appointed Plaintiff an investigator, Milton (or Leroy) Morris, but Plaintiff claims that he, too, was "incompetent and insufficient." (Complaint, ¶¶ 119, 156.)

In addition to the Murder Case, Plaintiff has been involved in numerous other legal actions, including all of the following:

• On February 19, 2015, Plaintiff filed a federal civil rights lawsuit against Attorney Chesley and the California State Bar. (Case No. CV 15-0293 R (MAN).) That case was dismissed as frivolous at the IFP screening stage. (Id., Dkt. 4.)

• In 2014, Plaintiff filed a malpractice lawsuit against Mr. Chesley in San Bernardino County Superior Court case no. CIVRS-1402000. The case was dismissed allegedly because Plaintiff missed a court appearance. (Id., Dkt. 1-1 at 13.)

• Plaintiff also filed a state bar Accusation against Attorney Chesley, which the California Supreme Court denied. Accusation of Vargas, 2014 Cal. LEXIS 10606 (Cal. Nov. 12, 2014).

• In 2008, Plaintiff pled guilty to assault with a deadly weapon in San Bernardino County Superior Court case no. FVI-702550. His defense attorney was Brian E. Skibby.

• In 2009, Plaintiff brought a civil suit against Mr. Skibby, San

APPENDIX -B-

Bernardino County Superior Court case no. CIVRS-1203309, alleging that he failed to advise Plaintiff competently concerning his plea agreement. (Id., Dkt. 1-1 at 10-11.)

• In the pending Murder Case, Plaintiff has filed at least six habeas petitions or other writs seeking relief from the California Court of Appeal, identified as appellate case nos. E061909 (alleging deprivation of necessary pro per services), E062348 (alleging 7 constitutional errors), E063723 (seeking to disqualify the judge), E065103, E065100, and E063885. (Complaint, ¶¶ 137, 273.) At least three of these have been summarily dismissed by the California Supreme Court, including most recently Vargas v. Superior Court, 2016 Cal. LEXIS 1283 (Cal. Mar. 9, 2016).

• Plaintiff alleges that he is (or was) involved in deportation proceedings. (See, Case No. CV 15-0293- R (MAN), Dkt. 1-8 at 50.)

• Plaintiff is a proposed class representative in pending Central District Case No. CV 14-02171-JGB (SP) alleging that the West Valley Detention Center ("WVDC") discriminates against gay and transgender inmates. Plaintiff is represented by counsel from the ACLU in that lawsuit and has been "very much active in assisting the attorneys ...." (Complaint, ¶ 232.)

II.

SUMMARY OF PLAINTIFF'S ALLEGATIONS AND IDENTIFIFCATION OF PLEADING DEFECTS

Plaintiff's claims are divided into five causes of action against five different groups of thirty-three Defendants. Each cause of action asserts multiple legal theories. Below, the Court summarizes his allegations in each cause of action and lists the reasons why Plaintiff fails to state a claim.

A. First Cause of Action

1. Defendants:

a. Joshua Castro, Plaintiff's public defender in the Murder

case, sued in his individual capacity for damages only;

b. Steve Bremser, an attorney with the San Bernardino County Public Defender's Office, sued in his individual capacity for damages only;

c. Phyllis Morris, an attorney with the San Bernardino County Public Defender's Office, sued in her individual capacity for damages only;

d. Shannon Faherty, the Deputy District Attorney prosecuting Plaintiff in the Murder Case, sued in her individual capacity for damages only;

e. Debra Harris, a judge of the San Bernardino Superior Court, sued in her individual and official capacity for declaratory relief only;

f. Steve C. Malone, a judge of the San Bernardino Superior Court, sued in his individual and official capacity for declaratory relief only;

g. Erin Alexander, a judge of the San Bernardino Superior Court, sued in her individual and official capacity for declaratory relief only; and

h. John Tomberlin, a judge of the San Bernardino Superior Court, sued in his individual and official capacity for declaratory relief only;

i. Eric M. Ferguson, a SBC Deputy District Attorney, sued in his individual capacity for damages only.

(Complaint, ¶¶ 33-38, 45-48, 52-53, 60.)

2. Factual Allegations

Plaintiff alleges the existence of a conspiracy between the named Defendants to deny him "meaningful access to the courts" by condoning the

APPENDIX -B-

ineffective performance of his former attorney, public defender Joshua Castro. (Id., ¶¶ 52, 66.) Plaintiff alleges that Defendants refused his requests to replace Mr. Castro with another public defender. (Id., ¶¶ 63-64.) As to the judicial Defendants, Plaintiff alleges that they unreasonably refused to order substitution of counsel in response to Plaintiff's five Marsden motions. (Id., ¶¶ 65, 68.) Plaintiff also alleges that in February 2014, the San Bernardino Superior Court denied his Faretta motion, thereby denying him the right to represent himself at the preliminary hearing, although the next month, the Superior Court granted his request to represent himself. (Id., ¶¶ 75, 78.) As to Mr. Castro, Plaintiff alleges that he intimidated Plaintiff with "brutal psychological manipulation" by telling him that if he wanted to control his own defense, then he would need to represent himself. (Id., ¶ 69.)

Plaintiff alleges that the Defendants' actions deprived him of rights under the 1st, 5th, 6th and 14th Amendments. (Id., ¶ 52.) Plaintiff further alleges that the Defendants' actions were motivated by intent to discriminate against the protected class of indigent criminal defendants, to which he belongs. (Id., ¶ 83.) Plaintiff seeks compensatory and punitive damages, as well as declaratory and injunctive relief. (Id., ¶¶ 101-02, 283.) Plaintiff prays for (1) a declaration that Defendants' acts/omissions violated Plaintiff's civil rights, (2) an injunction requiring Defendants to appoint a more effective public defender to represent Plaintiff in the Murder Case, and (3) an injunction prohibiting Defendants from taking any actions that would interfere with his relationship with his to-be-appointed public defender, or his right to represent himself. (Id., Prayer, ¶¶ 1-2.)

3. Legal Claims

In his first cause of action, Plaintiff asserts seven "counts" arising under (1) 28 U.S.C. §§ 2201, 2201 (equitable relief), (2) 42 U.S.C. § 1983 (violation of civil rights), (3) 42 U.S.C. § 1985(3) (conspiracy to violate civil rights), (4) 42

U.S.C. § 1986 (failure to prevent conspiracy to violate civil rights), (5) California Civil Code § 52.1 (the "Unruh Civil Rights Act") for violation of civil rights by coercion and intimidation, (6) legal malpractice (only against the public defender Defendants: Castro, Morris and Bremser), and (7) intentional infliction of emotional distress ("IIED"). (Complaint, ¶ 283.)

4. Pleading Defects

a. Immunities Defeat All of Plaintiff's Claims for Damages.

All of the Defendants named in Plaintiff's first cause of action are either judges, public defenders or prosecutors in the Murder Case. As such, they have absolute immunity, and they cannot be sued for damages for acts or omission related to their roles in the criminal justice system. As for Plaintiff's claims against the judges, the Supreme Court has conclusively granted absolute immunity to judges from damage liability for acts of a judicial nature. Forrester v. White, 484 U.S. 219, 227–229 (1988); see also Stump v. Sparkman, 435 U.S. 349, 355–57 (1978); Pierson v. Ray, 386 U.S. 547, 553–55 (1967); see also Mireles v. Waco, 502 U.S. 9, 11-13 (1991); Dennis v. Sparks, 449 U.S. 24, 27 (1980); Miller v. Davis, 521 F.3d 1142, 1145 (9th Cir. 2008).

Further, a prosecutor is generally immune from civil suits for damages under section 1983. Imbler v. Pachtman, 424 U.S. 409, 431 (1976). Absolute immunity applies to activities related to the initiation and presentation of criminal prosecutions and which occur in the course of the prosecutor's advocacy for the state. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). A prosecutor is immune even when the prosecutor's malicious or dishonest action deprived the defendant of his or her liberty. Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986).

As for the public defenders, defense counsel in general do not act under color of state law when representing the defendant, and this rule also applies to

APPENDIX - B -

court-appointed private counsel. Polk County v. Dodson, 454 U.S. 312, 319-22 (1981). In order to state a claim against defense counsel for a violation of his civil rights, Plaintiff's allegations must be sufficient to state a claim of conspiracy between defense counsel and state officials. See, e.g., Tower v. Glover, 467 U.S. 914, 922-23 (1984); Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir. 1996). Plaintiff has failed to sufficiently state a conspiracy claim as noted below.

Under the Eleventh Amendment, states that have not waived sovereign immunity "may not be sued by private individuals in federal court." Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001). Interpreting section 1983 in light of this immunity, governmental entities that are "arms of the State" cannot be sued in section 1983 actions. Will v. Mich. Dep't of State Police, 491 U.S. 58, 70 (1989). Superior courts in California are state agencies. See Cal. Const. art. 6 §§ 1, 5. Any suit against a superior court (or a judge of the superior court in his/her official capacity) is a suit against the State, and thus barred by the Eleventh Amendment. Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1110 (9th Cir. 1987).

In Simmons v. Sacramento County Superior Court, 318 F.3d 1156 (9th Cir. 2003), plaintiff was prevented from appearing in court to prosecute a civil lawsuit after he was arrested on unrelated charges, causing the judge to enter a default judgment against him. Plaintiff filed a section 1983 action against the judge, the superior court and the court employees responsible for docketing. Id. at 1159. The Ninth Circuit affirmed the dismissal of such allegations for failure to state a claim. Specifically, the Ninth Circuit held that plaintiff could not state a claim against the "Sacramento County Superior Court (or its employees), because such suits are barred by the Eleventh Amendment." Id. at 1161. Applying this same reasoning, Plaintiff's claims against the judges of

the San Bernardino County Superior Court judges are also barred by Eleventh Amendment immunity.

b. Lack of Discriminatory Animus Targeting a Protected Class Defeats Plaintiff's Section 1985 and 1986 Claims.

A claim under 42 U.S.C. § 1985(3) requires a showing of (1) a conspiracy, (2) for the purpose of depriving a person of equal protection or the equal privileges of the law, (3) an act in furtherance of the conspiracy, and (4) a deprivation of a right or privilege of United States citizenship, or injury to the person or his property. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). The deprivation must be motivated by discriminatory animus directed against a suspect class. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993); Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989).

Indigent prisoners are not a suspect class, so Plaintiff fails to state a claim under 42 U.S.C. § 1985(3). Rodriguez v. Cook, 169 F.3d 1176, 1179 (9th Cir. 1999).

"A claim can be stated under section 1986 only if the complaint contains a valid claim under section 1985." Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 626 (9th Cir. 1988). Because Plaintiff cannot state a claim under section 1985, so too his claims under section 1986 fail.

c. Lack of Federal Jurisdiction Defeats Plaintiff's Injunctive Relief Claims.

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, federal courts "must determine that they have jurisdiction before proceeding to the merits." Lance v. Coffman, 549 U.S. 437, 439 (2007). The Rooker-Feldman doctrine generally applies to cases filed "by state court losers complaining of injuries caused by state-court judgments ... and inviting district court review and rejection of

APPENDIX - B -

those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005). The doctrine springs from the fact that "lower federal courts possess no power whatever to sit in direct review of state court decisions." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 (1983). Where the Rooker-Feldman doctrine applies, federal district courts lack subject matter jurisdiction. Id. at 486-87.

Claims in a federal lawsuit invite district court review of a state court decision when the federal claims are "inextricably intertwined" with the state court's decision. Id. at 483 ("If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's [decision], then the district court is in essence being called upon to review the state-court decision. This the district court may not do.") Federal claims are "inextricably intertwined" with the state court's decision when the federal lawsuit is a "de facto appeal" from the state court's ruling because "the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules." Reusser v. Wachovia Bank, N.A., 525 F.3d 855, 859 (9th Cir. 2008) (borrowers' § 1983 claim was a de facto appeal from the state court's refusal to vacate its default judgment in favor of lender); see also Bianchi v. Rylaarsdam, 334 F.3d 895, 896 (9th Cir. 2003) (litigant's 42 U.S.C. §§ 1982 and 1988 claims were a de facto appeal from an adverse appellate decision allegedly tainted by judicial bias).

Most of Plaintiff's claims for declaratory or injunctive relief against the judicial Defendants are a de facto request for appellate review of their earlier decisions concerning management of the Murder Case (e.g., refusing to let Plaintiff represent himself at the preliminary hearing or denying Plaintiff's motions for additional, free legal services). Under the Rooker-Feldman doctrine, this Court lacks jurisdiction to hear such claims.

To the extent that Plaintiff seeks prospective injunctive relief against the judicial Defendants commanding them to enter certain future orders in the Murder Case (e.g., to grant Plaintiff's motion for a new public defender or a legal runner, etc.), this Court is barred from granting such relief by the Anti–Injunction Act which bars federal courts from enjoining proceedings in state court "except as authorized by Act of Congress or where necessary in aid of its jurisdiction...." 28 U.S.C. § 2283. Moreover, a losing party in a state court proceeding is barred from seeking review of the judgment in a federal district court by claiming that the state court judgment violated the loser's federal constitutional rights which were "inextricably intertwined" in the state court proceedings. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

Moreover, to the extent that Plaintiff alleges that Defendants' actions render his continuing custody illegal, Plaintiff must raise such a claim via a petition for writ of habeas corpus. Because Plaintiff is incarcerated at WVDC, and is awaiting the outcome of a pending state criminal proceeding, his claims are premature under Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court held that if a judgment in favor of a plaintiff in a civil rights action would necessarily imply the invalidity of his or her conviction or sentence, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has been invalidated. Id. at 486-87; see also Smith v. City of Hemet, 394 F.3d 689, 695 (9th Cir. 2005) (en banc) ("Heck says that if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed." (internal quotation marks omitted)). Thus, the "relevant question" in a § 1983 suit is whether success would "'necessarily imply' or 'demonstrate' the invalidity of the earlier

APPENDIX - B -

conviction or sentence." Smith, 394 F.3d at 695 (quoting Heck, 512 U.S. at 487). Because it appears that Plaintiff has not yet been convicted of a crime, it is impossible to know whether his claims concerning his illegal confinement are barred by Heck. If Plaintiff is eventually convicted of the crimes for which he was arrested then certain of his § 1983 claims would likely be Heck-barred because success on the claims would necessarily imply the invalidity of the underlying convictions. See, e.g., Guerrero v. Gates, 442 F.3d 697, 703 (9th Cir. 2006) ("Wrongful arrest, malicious prosecution, and a conspiracy among Los Angeles officials to bring false charges against [plaintiff] could not have occurred unless he were innocent of the crimes for which he was convicted."); Harvey v. Waldron, 210 F.3d 1008, 1014 (9th Cir. 2000); Alvarez-Machain v. United States, 107 F.3d 696, 700-01 (9th Cir. 1997).

B. Second Cause of Action

1. Defendants:

a. John McMahon, the San Bernardino County Sheriff, sued in his individual capacity for damages and his official capacity for injunctive relief;

b. P. Ramer, San Bernardino County Sheriff deputy ("SBCSD") in charge of the law library at the West Valley Detention Center, sued in her individual capacity for damages only;

c. Officer Vanderkallen, SBCSD in charge of the law library at the West Valley Detention Center, sued in her individual capacity for damages only;

d. B. Wielbeld, SBCSD with rank of sergeant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

e. Greg Garland, Deputy Chief in charge of correctional bureau that oversees all SBC jail facilities, sued in his individual capacity for damages only;

f. Jeff Rose, SBCSD with rank of captain and commanding officer at West Valley Detention Center, sued in his individual capacity for damages only;

g. James Mahan, SBCSD with rank of sergeant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

h. Chriss Fisher, SBCSD with rank of lieutenant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

i. L. Savage, SBCSD with rank of lieutenant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

j. D. Gould, SBCSD with rank of sergeant and involved in management at the West Valley Detention Center, sued in her individual capacity for damages only;

k. L. Wilterding, SBCSD with rank of lieutenant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

l. Debra Harris, a judge of the San Bernardino Superior Court, sued in her individual and official capacity for declaratory relief only;

m. John Tomberlin, a judge of the San Bernardino Superior Court, sued in his individual and official capacity for declaratory relief only;

n. Shannon Faherty, the Deputy District Attorney prosecuting

APPENDIX - B -

Plaintiff in the Murder Case, sued in her individual capacity for damages only;

o. Eric M. Ferguson, a SBC Deputy District Attorney, sued in his individual capacity for damages only;

(Complaint, ¶¶ 7-16, 19, 33-35, 38, 54-55, 104.)

2. Factual Allegations

Plaintiff alleges the existence of a conspiracy to interfere with his civil rights, including his right to present a defense in the Murder Case. (Id., ¶ 54.) He alleges the judicial Defendants deprived him of his right to represent himself at the preliminary hearing and improperly raised his bail to $1,000,000. (Id., ¶ 104.) With regard to the Sheriff's Department employees, he alleges that they have enacted and enforced policies that serve to "prevent and deprive the indigent self-represented defendant" from preparing his defense. (Id., ¶¶ 108, 145-47) He alleges he receives inadequate law library access and telephone privileges. (Id., ¶ 107.) He alleges Defendants' actions are intended to induce him to feel "helplessness and desperation" so that he will give up representing himself and submit to ineffective representation by the public defender's office. (Id., ¶ 109.)

The Complaint identifies at least eleven motions Plaintiff has filed in the Murder case related to access to legal services (e.g., a legal runner, funds, legal supplies, phone card, transcripts, law library access). (Id., ¶¶ 112, 275.) In addition to these written motions, Plaintiff alleges he has made numerous oral requests for such services. (Id., ¶ 114.)

Plaintiff alleges that the trial judge in the Murder Case, Judge Tomberlin, denied these motions and oral requests, although some must have been granted, because Plaintiff admits that he received some transcripts, an order entitling him to certain writing supplies and a court-appointed investigator. (Id., ¶¶ 113, 115, 119, 126.). Plaintiff alleges that Judge

Tomberlin is "biased" and holds "discriminatory animus" against Plaintiff "simply because Plaintiff chose to exercise his right to represent himself." (Id., ¶ 115.) Plaintiff has attempted unsuccessfully to disqualify Judge Tomberlin. (Id., ¶ at 122.) Plaintiff alleges that in opposing his petition for writ of mandate, the District Attorney's office misrepresented how many motions for *pro se* services Judge Tomberlin granted (asserting Judge Tomberlin "NEVER issued those Court orders"). (Id., ¶ 117.) As a result, Plaintiff believes that the Fourth District Court of Appeal was "misled" and "induced to make a determination against Plaintiff." (Id., ¶ 118.)

With regard to legal services, Plaintiff admits he receives a weekly allotment of free paper, a pencil and an eraser, but alleges these supplies are not enough. (Id., ¶¶ 127, 140(e).) He receives four hours of weekly access to the law library, but this, too, is not enough. (Id., ¶ 140(a).) He is permitted to request research on five legal issues each week from a third-party agency, Legal Research Associates Sevices, and he can use Lexis, but he cannot copy information from Lexis directly into motions or letters. (Id., ¶ 140(b); Dkt. 2-3 at 20, 24.) Since April 2015, he has been provided with a free phone card every month allowing him to make $20 worth of calls, but he contends this is insufficient. (Complaint, ¶ 140(c).) He also contends that mail delivery at the WVDC takes too long. (Id., ¶ 140(h).)

After winning his motion to represent himself, Plaintiff later asked for a lawyer to assist him, but he wants a lawyer who will do his bidding, not "take charge" of his defense. (Id., ¶¶ 130-32.) Plaintiff complains that Defendants want "to FORCE upon the Plaintiff an attorney to completely control and take charge over the Plaintiff's criminal case." (Id., ¶ 132.)

3. Legal Claims

In his second cause of action, Plaintiff asserts five "counts" arising under (1) 28 U.S.C. §§ 2201, 2201 (equitable relief), (2) 42 U.S.C. § 1983 (violation of

civil rights), (3) 42 U.S.C. § 1985(3) (conspiracy to violate civil rights), (4) 42 U.S.C. § 1986 (failure to prevent conspiracy to violate civil rights), and (5) California Civil Code § 52.1 (the "Unruh Civil Rights Act") for violation of civil rights by coercion and intimidation. (Complaint, ¶ 284.)

Plaintiff alleges that Defendants deprived him of his rights under the 1st, 5th, 6th , 8th and 14th Amendments. (Id., ¶¶ 54, 144.) Again, he seeks compensatory and punitive damages as well as declaratory and injunctive relief. (Id., ¶¶ 164-67, 284.) Specifically, he seeks an injunction ordering Defendants to provide him with "sufficient and effective access to fundamentally necessary resources and services ...." which must include "sufficient" photocopies, calls, typing equipment, officially signed subpoena forms, prompt legal mail service, legal research" and other unspecified "pro per privileges." (Id., Prayer, ¶ 2(d).)

4. Pleading Defects.

As to the judicial Defendants also named in the first cause of action, the second cause of action suffers from all of the same pleading defects identified above.

More fundamentally, the Court finds that Plaintiff has failed to state a claim for deprivation of access to the courts or essential legal supplies. Plaintiff's history of filings shows clearly that Plaintiff is able to file matters in court. The law library access, free paper, pencils, phone cards and other items that Plaintiff admits he is currently receiving are consistent with his constitutional rights.

Inmates have a fundamental constitutional right of access to the courts. Lewis v. Casey, 518 U.S. 343, 346 (1996) (citing Bounds v. Smith, 430 U.S. 817, 821 (1977)); Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011). The right is limited to the filing of direct criminal appeals, habeas petitions, and

APPENDIX - B -

civil rights actions. Lewis, 518 U.S. at 354. The right also includes access to adequate law libraries. Bounds, 430 U.S. at 828. Claims for denial of access to the courts may arise from the frustration or hindrance of "a litigating opportunity yet to be gained" (forward-looking access claims) or the loss of a meritorious suit that "cannot now be tried" (backward-looking access claims). Christopher v. Harbury, 536 U.S. 403, 413–14 (2002). A plaintiff alleging denial of access to the courts must allege an actual injury by being shut out of court. Lewis, 518 U.S. at 351. "Actual injury" is defined as "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim." Id. at 348 (internal quotation marks omitted). "[M]eaningful access to the courts is the touchstone," and to state a claim the plaintiff must therefore "demonstrate that the alleged [violation] . . . hindered his efforts to pursue a legal claim." Id. at 351 (internal quotation marks and citation omitted).

Prison inmates retain a right, protected by the First Amendment, "to communicate with persons outside of prison walls. Use of a telephone provides a *means* of exercising this right." Valdez v Rosenbaum, 302 F. 3d 1039, 1048 (9th Cir. 2002). The right may be restricted if the restriction is "reasonably related to legitimate penological interests." Id. (quoting Turner v. Safley, 482 U.S. 78, 89 (1986)). See, Johnson v. State of California, 207 F.3d 650, 655 (9th Cir. 2000); Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996). As noted above, Plaintiff has been provided with telephone access. Plaintiff's complaint that the amount of access is insufficient fails to state a claim.

Moreover, to the extent Plaintiff is a pretrial detainee and is representing himself pro per in the underlying criminal action, he may raise his allegations concerning access to legal resources and services before the trial court, and any related civil rights claims would have to be stayed in this Court. Cf. Rivas v.

APPENDIX - B-

Cal. Franchise Tax Bd., 619 F. Supp. 2d 994, 1000 n.2, 1006 (E.D. Cal. 2008) (noting that civil rights claims of denial of access to counsel "might impugn the integrity of the criminal investigation" and staying such claims under Heck, 512 U.S. at 497-98, and Wallace v. Kato, 549 U.S. 384, 393-94 (2007)).

C. Third Cause of Action

1. Defendants:

a. San Bernardino County Sheriff's Department (the "Sheriff's Department");

b. San Bernardino County (the "County");

c. John McMahon, the San Bernardino County Sheriff, sued in his individual capacity for damages and his official capacity for injunctive relief;

d. Greg Garland, Deputy Chief in charge of correctional bureau that oversees all SBC jail facilities, sued in his individual capacity for damages only;

e. Jeff Rose, SBCSD with rank of captain and commanding officer at West Valley Detention Center, sued in his individual capacity for damages only; and

f. L. Savage, SBCSD with rank of lieutenant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only.

(Complaint, ¶¶ 7, 10-11, 39-40, 56, 170.)

2. Factual Allegations

Plaintiff alleges that "by wanton negligence and/or intentional negligence," the County failed to fix or maintain the plumbing system at the WVDC, resulting in a leaky pipe that flooded the restroom. Water on the floor caused Plaintiff to "slip and fall on 9/29/13" which aggravated the injury to his right knee, as "discovered 1/24/14," and will now require surgery. (Id.,

¶¶ 56, 187.) Plaintiff alleges that Defendants knew about the slippery conditions and should have repaired the pipes or "installed slip resistant flooring." (Id., ¶ 183.)

Plaintiff admits that the day of his slip and fall and also next day, he spoke to a nurse because he was already scheduled for physical therapy sessions every two to three days. (Id., ¶ 191) Plaintiff also already had a walker to assist him. (Id.) The nurse referred him to the orthopedic division, and he received an appointment on October 4, 2013.[5] The orthopedic division took x-rays. On January 21, 2014, he was transported to the hospital for an MRI. (Id., ¶ 192.) The MRI revealed a torn tendon, so he had surgery on April 21, 2014 to repair it. (Id., ¶ 193.)

The October 18, 2013 investigation of Plaintiff's grievance submitted in connection with his allegedly slipping on the wet floor notes that while Plaintiff saw a doctor on the day of the fall, he failed to advise that doctor he had fallen. In fact, although he was "seen by several medical staff on a regular basis" between September 29 and October 18, 2013, he failed to tell any of them that he fell on September 29, 2013. (Dkt. 2-5 at 8.)

3. Legal Claims

In his third cause of action, Plaintiff asserts two "counts" arising under (1) 28 U.S.C. §§ 2201, 2201 (equitable relief) and (2) 42 U.S.C. § 1983 (violation of civil rights). (Complaint, ¶ 285.) He alleges Defendants subjected him to cruel and unusual punishment in violation of his rights under the 8th and 14th Amendments by subjecting him to unsafe bathroom conditions. (Id.

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[5] Plaintiff's account of the sequence of events differs from that described in the exhibits to the Complaint. On September 13, 2013 (i.e., before the alleged fall), Plaintiff was already scheduled for an appointment at the orthopedic clinic. (Dkt 2-6 at 19.)

APPENDIX - B -

at ¶¶ 56, 194.) He seeks compensatory and punitive damages, as well as an injunction ordering Defendants to fix the unsafe plumbing at WVDC. (Id. at ¶¶ 194, Prayer, ¶ 2(f).)

4. Pleading Defects

A negligent act by a person acting under color of law does not rise to the level of a constitutional violation. County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998); Daniels v. Williams, 474 U.S. 327, 328 (1986); Davidson v. Cannon, 474 U.S. 344, 348 (1986).

Prisoners alleging Eighth Amendment violations based on unsafe conditions must demonstrate more than mere negligence and must demonstrate that prison officials were deliberately indifferent to the prisoners' health or safety by subjecting them to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 833 (1994). Plaintiff has failed to allege that Defendants were "deliberately indifferent" to his health or safety; rather, Plaintiff has plead negligence which fails to state a constitutional claim.

D. Fourth Cause of Action

1. Defendants:

The Defendants named in this cause of action are the same five Defendants named in the Third Cause of Action. (Complaint, ¶¶ 57, 195.)

2. Factual Allegations

The named Defendants were allegedly deliberately indifferent to Plaintiff's medical needs concerning his knee injury. (Id., ¶ 198.) Plaintiff alleges that before the slip and fall incident in September 2013, Defendants denied him appropriate physical therapy. He contends that had his right knee been stronger, he would not have injured it to the point of needing surgery when he slipped. (Id., ¶¶ 57, 210.) He admits he was scheduled for physical therapy every two or three days, but contends he was entitled to daily physical

therapy. (Id., ¶¶ 191, 209.)

After the slip and fall, Plaintiff contends he was unable to do his prescribed physical therapy because the pain was too great, and Defendants refused to give him a sufficiently high dosage of pain medication. (Id., ¶¶ 204-05, 212-215.) Plaintiff contends that he filed numerous grievances over his medical care. (Id., ¶ 216.) Indeed, in January 2013, he reported that he has been in pain since he was arrested in 2012 and received insufficient medication. (Dkt. 2-6 at 7.) In September 2013 and again in June 2014, WVDC determined that he had been receiving the medications ordered for him. (Dkt. 2-5 at 19; Dkt. 2-6 at 19.)

3. Legal Claims

In his fourth cause of action, Plaintiff asserts three "counts" arising under (1) 28 U.S.C. §§ 2201, 2201 (equitable relief), (2) 42 U.S.C. § 1983 (violation of civil rights guaranteed by the 8th and 14th Amendments) and (3) IIED. (Complaint, ¶¶ 56, 286.) He seeks compensatory and punitive damages, plus an injunction ordering Defendants to provide him with medical care consistent with prevailing standards. (Id., ¶ 217, Prayer, ¶ 2(g), (h).)

4. Defects

Based on the facts admitted, Plaintiff has not alleged deliberate indifference to his medical needs. To the contrary, he received prompt and effective treatment. With regard to pain medication, his allegation is that he should have been prescribed higher dosages or stronger medication – not that the WVDC failed to provide him with the medications prescribed. Doctors working in a prison environment are reasonably cautious when prescribing pain medication, particular to an inmate with a history of substance abuse. A difference of opinion between a physician and the prisoner or between medical professionals concerning what medical care is appropriate does not amount to

Appendix - B -

deliberate indifference. See Snow v. McDaniel, 681 F.3d 978, 987-88 (9th Cir. 2012).

Further, a dispute between a prisoner and prison officials over the necessity for or extent of medical treatment does not raise a claim under § 1983. See Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Shields v. Kunkel, 442 F.2d 409 410 (9th Cir. 1971); Mayfield v. Craven, 433 F.2d 873 (9th Cir. 1970).

The Eighth Amendment's prohibition against cruel and unusual punishment encompasses the government's obligation to provide adequate medical care to prisoners. Estelle v. Gamble, 429 U.S. 97, 103 (1976); see also Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232, 1242-43 (9th Cir. 2010) (analyzing pretrial detainee's 14th Amendment due process claim under same framework as Eighth Amendment claim). In order to establish an Eighth Amendment claim based on inadequate medical care, a plaintiff must show that the defendant was deliberately indifferent to his serious medical needs. Helling v. McKinney, 509 U.S. 25, 32 (1993). A "serious" medical need arises when failure to treat the plaintiff could result in serious injury or the "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 104-05. Deliberate indifference requires "a state of mind more blameworthy than negligence," and the defendant acts with deliberate indifference only if he knows of and recklessly disregards the serious medical risk. Farmer, 511 U.S. at 835. In particular, deliberate indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc)). The defendant

must purposefully ignore or fail to respond to the plaintiff's pain or medical needs. McGuckin, 974 F.2d at 1060.

Mere negligence in diagnosing or treating a medical condition is not violative of constitutional standards. Medical malpractice, even gross medical malpractice, does not amount to a violation of the Eighth Amendment. Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980).

While Plaintiff appears dissatisfied with the manner in which Defendants addressed his pain, he offers no evidence that the treatment chosen by Defendants was medically unacceptable or that decisions regarding Plaintiff's course of treatment were made in a conscious disregard of an excessive risk to Plaintiff's health.

E. Fifth Cause of Action

1. Defendants

a. The Sheriff's Department;

b. Eight employees of the Sheriff's Department already identified above (i.e., McMahon, Garland, Rose, Mahan, Fisher, Gould, Wilterding and Wielbeld);

c. S. Henry, SBCSD with rank of sergeant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

d. G. Esmond, SBCSD with rank of sergeant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

e. Armando Castillo, SBCSD with rank of corporal and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

f. J. Spinney, SBCSD with rank of deputy and involved in

APPENDIX - B -

management at the West Valley Detention Center, sued in his individual capacity for damages only;

g. Officer Villanuava, SBCSD with rank of deputy and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

h. Officer Powell, SBCSD with rank of deputy and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

i. T. Newton, SBCSD with rank of lieutenant and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

j. C. Bean, SBCSD with rank of deputy and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only;

k. J. Noll, SBCSD with rank of deputy and involved in management at the West Valley Detention Center, sued in his individual capacity for damages only; and

l. Deputy Hunsicker, employed at classification division of West Valley Detention Center.

(Complaint, ¶¶ 17-18, 20-26, 58, 218, 245.)

2. Factual Allegations

Plaintiff contends that the named Defendants retaliated against Plaintiff for exercising the WVDC's grievance procedure and for being a class representative in the ACLU lawsuit challenging the treatment of gay inmates. (Id. at ¶¶ 58, 224.) Their retaliation took the form of initiating disciplinary proceedings and imposing punishments based on "allegations against Plaintiff that were frivolous, wrong, incorrect or false." (Id., ¶ 59.) Plaintiff alleges his civil rights were violated by six incidents, described below. As to each,

Plaintiff alleges that before being subjected to prison discipline (e.g., denied magazines, recreation time, canteen privileges or family visits), he was entitled to written notice of the charges against him, adequate time to prepare a defense, the ability to present exculpatory witnesses and evidence, and a hearing before an impartial officer. (Id., ¶¶ 218-19.) Plaintiff alleges that any disciplinary actions taken before March 2015 were "unfair and oppressive," because the WVDC had no cameras. As a result, officers had no way to "verify the facts" of any particular incident and tended to believe the guards rather than the inmates, who were left with "absolutely no means to disprove, discredit or refute any accusations." (Id., ¶¶ 225-28.)

Incident One: Officer Bean initiated disciplinary action against Plaintiff on December 2, 2015 "alleging that Plaintiff was seen fighting and punching another inmate" named Diaz. (Id., ¶ 229) At the time of the "fight," Plaintiff was sitting at a table with Diaz and four other inmates providing legal information. (Id., ¶ 233.) Plaintiff does not deny that he and Diaz hit each other, but he contends that the officers "had mistakenly misrepresented friendly interaction between two good friends as something completely incorrect." (Id., ¶¶ 229, 233) When the "false accusations were upheld, supported and enforced" by Defendants Castillo, Fischer, Wilterding and Gould, Plaintiff was sent to segregated housing for 10 days. (Id., ¶¶ 230, 234.)

The Inmate Discipline form says that Deputy Caballero witnesses both inmates "attempting to hit each other with their fists multiple times." (Dkt. 2-6 at 24.) Plaintiff's response at the time was not that the officer mistook horseplay for a fight, but rather "we didn't hit each other." (Id.) The disciplinary action and resulting grievance/appeal were investigated by officers not involved in the initial incident. (Dkt. 2-7 at 3.)

Incident Two: On December 15, 2014, Officer Noll cited Plaintiff for "grievance system abuse" when Plaintiff filed a duplicative grievance

APPENDIX - B -

complaining about his lack of access to photocopies. (Complaint, ¶¶ 235-37.) Plaintiff asked to present a "defense" that he had never received a final response to his earlier grievance. (Id., ¶ 238.) The reviewing sergeant determined that such evidence would be irrelevant, and he limited Plaintiff to his cell for 10 days which meant no family holiday visits. (Id., ¶¶ 238-39.)

Plaintiff submitted the Inmate Discipline Report for this incident. (Dkt. 2-3 at 41.) It explains that inmates are allowed to appeal adverse grievance rulings twice, but Plaintiff appealed his grievance four times.

Incident Three: On January 27, 2015, upon returning to the WVDC "from a long day at court," Plaintiff was informed that he was to be moved into cell 12/A-8 with an inmate who had a history of assaulting his cell mates. (Complaint, ¶¶ 243 -44.) Plaintiff agreed to go to cell 12/A-8, but only if the officer sending him there would stand by the door to prevent an assault because Plaintiff felt he was being "set up." (Id., ¶ 246.) He told the officer he would sue him for any injuries. (Id.) Plaintiff was ultimately handcuffed and sent to segregated housing for refusing to obey an order. (Id., ¶ 245.)

The Inmate Discipline Report and related appeal state that Plaintiff refused to go to cell 12/A-8 because he believed the inmate housed there was mentally ill. (Dkt. 2-7 at 13-19.) Several inmates were moved that same day, and staff explained his move was not retaliatory. (Id.)

Incident Four: On May 17, 2015, Officer Powell initiated disciplinary proceedings against Plaintiff claiming that Plaintiff lied about whom he was contacting during a "legal" call. When inmates are on disciplinary lockdown, they are not permitted to make personal calls, but they can make legal calls during the thirty minutes that they are permitted to leave their cells. (Complaint, ¶ 248.) On this occasion at 10 p.m., Plaintiff asked for and received permission to call his "legal runner." (Id., ¶ 250.) He called his "close friend" Damien Liggins, because he and Plaintiff's mother are providing

legal assistance, such as help with internet searches and photocopying. (Id., ¶¶ 248-49.) When Officer Powell heard how the call began, he determined Plaintiff was not calling his lawyer and ended the call. (Id., ¶ 251.) Plaintiff wanted to call a witness or play a recording to demonstrate that he asked to call his "legal runner," not his attorney, but he was not permitted to do so. (Id., ¶¶ 252-53.)

The account by Deputy McCall of this incident is different. According to the Inmate Discipline Report, Plaintiff said he needed to call his attorney to find out if a court date had been cancelled. (Dkt. 2-7 at 20.) Deputy McCall let him place the call, but called a sergeant to check the rules governing legal calls for inmates on discipline, since Plaintiff was on discipline for manufacturing/possession of Pruno.[6] He learned that inmates on discipline are only allowed to call their attorneys during business hours, so he instructed Plaintiff to end the call. When Plaintiff kept talking, Deputy McCall heard him ask, "How are you feeling? Are you sleeping OK?" Thinking these were odd questions to ask an attorney, Deputy McCall asked Plaintiff if he was really talking to his attorney, at which point Plaintiff said, "Well kind of, it is a legal runner." (Id.)

According to the WVDC rules, *pro se* litigants who wish to use a legal runner must have that person complete an application and it must be approved. (Dkt. 2 at 12-14.) The subsequent investigation of this incident revealed that at the time of the call, Plaintiff did not have an approved legal runner. (Dkt. 2-7 at 22.) When confronted with this, Plaintiff admitted that he

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[6] According to Wikipedia, Pruno, also known as prison wine, is a "an alcoholic beverage variously made from apples, oranges, fruit cocktail, candy, ketchup, sugar, milk, and possibly other ingredients, including crumbled bread."

APPENDIX -B-

did not have an approved legal runner. (Dkt. 2-8 at 1.) Plaintiff placed the call using another inmate's PIN, such that the other inmate was charged for the call, another rule violation. (Dkt. 2-7 at 24.)

Incident Five: On July 8, 2015, Officers Spinney and Villanuava initiated disciplinary proceedings alleging Plaintiff used curse words to the unit control officer, Officer Villanuava. (Complaint, ¶ 254.) Another inmate in the next cell, Larry Meyers, was willing to testify at the review hearing that he had uttered the curse words, but at another inmate, not the officer. (Id., ¶ 255.) The review board refused to let Plaintiff call inmate Meyers as a witness.

According to the Inmate Discipline Report, Officer Villanuava noticed Plaintiff out of his cell using the phone and told him to go back in his cell because he was on discipline. (Dkt. 2-8 at 2, 4.) Plaintiff ignored the command and instead took a shower. After the shower, he went back to his cell but did not close the door. When Officer Villanuava told him to close the cell door, she heard him respond, "f*** you." (Id.)

Incident Six: On August 5, 2015, Officer Wielbeld initiated a cell search of Plaintiff's cell. Through this search, "harmless items were found and confiscated" including an ink pen, playing dice, a pillow and ibuprofen. (Complaint, ¶ 257.) Plaintiff admits these items were "considered contraband," but he contends that the initial decision to place him on discipline for thirty days was excessive. (Id., ¶ 259.) He filed a grievance and the time of the imposed discipline was reduced from thirty days to seven. (Id., ¶ 261.) Plaintiff contends that disciplinary action should have been taken against the officers who originally imposed thirty days.

Plaintiff submitted the Inmate Grievance Investigation form related to this incident. (Dkt. 2-4 at 6.) Officer Wiebeld says that he searched Plaintiff's cell to determine if Plaintiff had more than the permitted amount of writing supplies. He found 45 pencils, 29 erasers, a Sharpie pen, an ink pen and

numerous sheets of blank paper. This matter was investigated by an officer named "S. Henry," and the disciplinary decision was reviewed and approved by two other officers not involved in the incident. (Id.)

With regard to the pillow, it was made from torn sheets and mattress stuffing, demonstrating destruction of County property. (Dkt. 2-8 at 9-10.) Plaintiff was ultimately disciplined seven days for this incident, which is the normal penalty for destruction of County property. (Id.)

3. Legal Claims

In his fifth cause of action, Plaintiff asserts three "counts" arising under (1) 28 U.S.C. §§ 2201, 2201 (equitable relief), (2) 42 U.S.C. § 1983 (violation of civil rights), (3) California Civil Code § 52.1 (the "Unruh Civil Rights Act") for violation of civil rights by coercion and intimidation, and (4) IIED. (Complaint, ¶ 287.) Plaintiff contends Defendants deprived him of rights guaranteed by the 1st, 5th, 8th and 14th Amendments. (Id., ¶¶ 59, 223.) Plaintiff seeks an injunction commanding Defendants to stop acting in the manner described in the Complaint. (Id., ¶ 270.) He also prays for an order requiring WVDC to (1) hold all disciplinary hearings in front of an "impartial, neutral and disinterested custodial officer" and to allow Plaintiff to present anything he considers to be exculpatory evidence, (2) review Plaintiff's classification status and adjust it to less restrictive housing[7], and (3) vacate the disciplinary determinations made against Plaintiff in the six incidents described in the Complaint. (Id., Prayer ¶ 2(i), (j), (k).)

4. Pleading Defects

To the extent that Plaintiff may be purporting to state a claim against Defendants arising from any alleged failure to respond to or act upon

[7] Prisoners have no liberty interest in their classification status. See Myron v. Terhune, 476 F.3d 716, 718 (9th Cir. 2007).

APPENDIX - B -

Plaintiff's administrative grievances, such allegations simply fail to state any federal civil rights claim on which relief may be granted. Although Plaintiff appears to allege that grievances were not properly handled, Plaintiff has no constitutional right to an effective grievance or appeal procedure, and the mere participation of prison officials in Plaintiff's administrative appeal process is an insufficient basis on which to state a federal civil rights claim against such defendants. See Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (holding that a prisoner has no constitutional right to an effective grievance or appeal procedure); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); see also George v. Smith, 507 F.3d 605, 609-10 (7th Cir. 2007) (holding that only persons who cause or participate in civil rights violations can be held responsible and that "[r]uling against a prisoner on an administrative complaint does not cause or contribute to the violation"); Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999) (holding that prison officials whose only roles involved the denial of the prisoner's administrative grievances cannot be held liable under § 1983), cert. denied, 530 U.S. 1264 (2000); Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) ("[A prison grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates."); Wright v. Shapirshteyn, 2009 WL 361951, *3 (E.D. Cal. Feb. 12, 2009) (noting that "where a defendant's only involvement in the allegedly unconstitutional conduct is the denial of administrative grievances, the failure to intervene on a prisoner's behalf to remedy alleged unconstitutional behavior does not amount to active unconstitutional behavior for purposes of § 1983").

"Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Wolff v. McDonnell, 418 U.S. 539, 556 (1974). Rather, the Supreme Court has held that, in the context of prison disciplinary hearings, due process requires only certain procedural safeguards: (1) the inmate should receive

"advance written notice of the claimed violation" so the inmate can marshal the facts and prepare a defense; (2) "[a]t least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare" for the hearing; (3) the inmate "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals;" (4) "[w]here an illiterate inmate is involved, ... or [where] the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case," the inmate should be given assistance at the hearing; and (5) the inmate should receive "a written statement by the factfinder as to the evidence relied on and reasons for the disciplinary action taken." Wolff, 418 U.S. at 563-70 (internal quotation marks omitted).

While inmates should generally be allowed to call witnesses and present documentary evidence in their defense, such procedures are not required and must be balanced against countervailing interests. Wolff, 418 U.S. at 566. (providing examples of reasons why a prison might not follow such procedures including security concerns, reasonable time limits or lack of necessity). "Any less flexible rule appears untenable as a constitutional matter ...." Id. at 566. Inmates do not have a constitutional right to confrontation and cross-examination in disciplinary proceedings, as "there would be considerable potential for havoc inside the prison walls." Id. at 567.

Inmates are entitled to a fair and impartial decision-maker at disciplinary hearings. See Edwards v. Balisok 520 U.S. 641, 647 (1997) ("The due process requirements for a prison disciplinary hearing are in many respects less demanding than those for criminal prosecution, but they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence.") "[P]rovided that no member of the disciplinary

committee has participated or will participate in the case as an investigating or reviewing officer, or either is a witness or has personal knowledge of material facts related to the involvement of the accused inmate in the specific alleged infraction (or is otherwise personally interested in the outcome of the disciplinary proceeding), a hearing board comprised of prison officials will satisfy the due process requirement of a "'neutral and detached' hearing body." Clutchette v. Procunier, 497 F.2d 809, 820 (9th Cir. Cal. 1974) modified, 510 F.2d 613 (9th Cir. 1974) rev'd on other grounds sub. nom. Baxter v. Palmigiano, 425 U.S. 308(1976).

Further, "the requirements of due process are satisfied if some evidence supports the [disciplinary] decision." Superintendent Mass. Corr. Inst. v. Hill, 472 U.S. 445, 455 (1985); Burnsworth v. Gunderson, 179 F. 3d 771, 773 (9th Cir. 1999). Here, with respect to Incidents One, Two, Three, Four and Five, there was testimony by prison officials who witnessed the rules violations; thus, there was "some evidence" to support the findings of the disciplinary board. With respect to Incidents Two, Four and Six, Plaintiff admitted the rules violations, thereby providing "some evidence" to support the disciplinary decisions. Plaintiff does not have a constitutional right to offer an "excuse" for admitted rules violations. As long as the minimal protections outlined in Wolff were provided, which Plaintiff's allegations demonstrate they were, then due process was satisfied.

Here, Plaintiff filed a grievance alleging that he was not allowed to present witness statements, documentation and proof that would refute the discipline allegations in violation of Title 15, Section 1081. (Dkt. 2-7 at 5.) The WVDC, however, followed the Minimum Standards for Local Detention Facilities, Title 15, Section 1081. (Id.) According to those standards, major violations of institutional rules shall be reported in writing by the staff member observing the act and submitted to the disciplinary officer. The inmate shall be

APPENDIX - B

informed of the charges in writing. The consequences of a major violation may include, but are not limited to, loss of good time/work time, placement in disciplinary isolation, disciplinary isolation, or loss of privileges mandated by regulations. In addition, charges pending against an inmate shall be acted on no sooner than 24 hours after the report has been submitted to the disciplinary officer and the inmate has been informed of the charges in writing. A violation shall be acted on no later than 72 hours after an inmate has been informed of the charges in writing. The inmate may waive the 24 hour limitation. The inmate shall be permitted to appear on his own behalf at the time of the hearing. Subsequent to final disposition of the disciplinary charges by the disciplinary officer, the charges shall be reviewed by the facility manager or designee. The inmate shall be advised of the action taken by the disciplinary officer by a copy of the record required by PC § 4019.5.

Each of Plaintiff's disciplinary charges was reviewed, and it was found that the Department conducted the discipline hearings in compliance with Title 15, Section 1081 and Departmental policy. Plaintiff's assertions to the contrary were determined to be unfounded. More fundamentally, there is no independent cause of action for a violation of Title 15 regulations. Davis v. Kissinger, 2009 WL 256574, *12 n.4 (E.D. Cal. 2009). "To the extent that the violation of a state law amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, [s]ection 1983 offers no redress." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997), quoting Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 370 (9th Cir. 1996).

III.

LEAVE TO AMEND WOULD BE FUTILE

A *pro se* litigant must be given leave to amend unless it is clear he cannot cure the deficiencies. Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987). If,

APPENDIX - B -

however, after careful consideration, it is clear that a complaint cannot be cured by amendment, the Court may dismiss without leave to amend. Cato v. United States, 70 F.3d 1103, 1105-06; see also, Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083, 1088 (9th Cir. 2002) (holding that "there is no need to prolong the litigation by permitting further amendment" where the "basic flaw" in the pleading cannot be cured by amendment); Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002) (holding that "[b]ecause any amendment would be futile, there was no need to prolong the litigation by permitting further amendment.").

Having broadly construed and assumed the truth of the allegations, the Court is persuaded that there is no basis for concluding that Plaintiff's claims can be saved through amendment of the Complaint. See Nietzke, 490 U.S. at 327 (a court may exercise its discretion and deny leave to amend when it is clear that the plaintiff cannot allege any set of facts that would entitle her to relief).

IV.

RECOMMENDATION

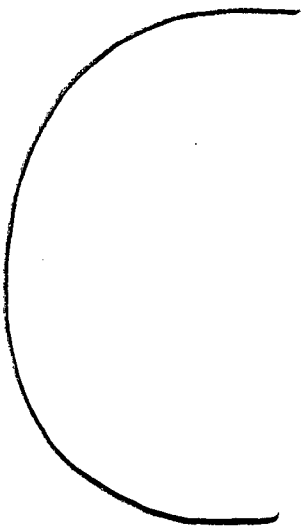
Plaintiff asserts five causes of action against thirty-three named Defendants. For the reasons stated above, Plaintiff fails to state a claim on which relief may be granted. Accordingly, it is recommended that Plaintiff's IFP application be denied.

Dated: 4/20/16

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

APPENDIX -C-



APRIL 27, 2018 DENIAL OF PETITION FOR REHEARING AND REHEARING EN-BANC CONSIDERED AS PETITION FOR RECONSIDERATION AND RECONSIDERATION EN-BANK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ILICH VARGAS, Plaintiff-Appellant, v. JOHN MCMAHON, San Bernardino County Sheriff, in his individual and official capacities; et al., Defendants-Appellees.	No. 16-55816 D.C. No. 5:16-cv-00231-R-KES Central District of California, Riverside ORDER

Before: THOMAS, Chief Judge, and TROTT and SILVERMAN, Circuit Judges.

Appellant's motion to permit enlargement of the page limit for his petition for rehearing and petition for rehearing en banc is GRANTED.

Because the mandate has already issued and Appellant's filing is untimely, we treat Appellant's petition for rehearing and rehearing en banc as a combined motion for reconsideration and motion for reconsideration en banc. The motion for reconsideration is DENIED and the motion for reconsideration en banc is DENIED on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX - C -