NOT FOR PUBLICATION

FILED

JUN 20 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL VICTORY, Plaintiff-Appellant, v. BOARD OF PAROLE HEARINGS; et al., Defendants-Appellees.	No. 17-15953 D.C. No. 2:16-cv-00997-WBS-CKD MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted June 12, 2018**

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

California state prisoner Michael Victory appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging federal claims in connection with his parole hearing. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's dismissal under 28 U.S.C. § 1915A. *Wilhelm*

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* 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).

v. Rotman, 680 F.3d 1113, 1118 (9th Cir. 2012). We affirm.

The district court properly dismissed Victory's as-applied challenges to his parole hearing because Victory failed to allege facts sufficient to show that the parole hearing denied him due process, including "an opportunity to be heard and [] a statement of the reasons why parole was denied." *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (a federal due process claim in parole context requires only that prisoner be provided with an opportunity to be heard and a statement of the reasons why parole was denied); *see also Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (a prisoner may challenge procedures used in parole hearing under § 1983 provided he does not seek "immediate or speedier release").

The district court properly dismissed as barred by the *Rooker–Feldman* doctrine Victory's claim alleging legal errors in his California state habeas proceeding. *See Noel v. Hall*, 341 F.3d 1148, 1155-57 (9th Cir. 2003) (*Rooker–Feldman* doctrine bars de facto appeal of a state court decision).

The district court properly dismissed Victory's claim against the state-court clerk defendants because these defendants are protected by absolute quasi-judicial immunity. *See Mullis v. U.S. Bankr. Court*, 828 F.2d 1385, 1390 (9th Cir. 1987) (court clerks have absolute quasi-judicial immunity from damages for civil rights

violations when they perform tasks that are an integral part of the judicial process).

The district court did not abuse its discretion by denying class certification. *See* Fed. R. Civ. P. 23(a); *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 690 (9th Cir. 2018) (standard of review).

The district court did not abuse its discretion by dismissing Victory's action without further leave to amend. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile).

Victory's motion to supplement exhibits (Docket Entry No. 17) is denied.

AFFIRMED.

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FOR THE NINTH CIRCUIT

MICHAEL VICTORY, Plaintiff-Appellant, v. BOARD OF PAROLE HEARINGS; et al., Defendants-Appellees.	No. 17-15953 D.C. No. 2:16-cv-00997-WBS-CKD Eastern District of California, Sacramento ORDER

Before: RAWLINSON, CLIFTON, and NGUYEN, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Victory's petition for rehearing en banc (Docket Entry No. 24) is denied.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

MICHAEL A. VICTORY,

CASE NO: **2:16-CV-00997-WBS-CKD**

V.

BOARD OF PAROLE HEARINGS, ET AL.,

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 4/13/17

Marianne Matherly
Clerk of Court

ENTERED: **April 13, 2017**

by: /s/ R. Becknal
Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL A. VICTORY,

Plaintiff,

v.

BOARD OF PAROLE HEARINGS, et al.,

Defendants.

No. 2:16-cv-0997 WBS CKD P

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On November 4, 2016, the magistrate judge filed findings and recommendations herein which were served on plaintiff and which contained notice to plaintiff that any objections to the findings and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

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Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed November 4, 2016, are adopted in full;
2. Plaintiff's motion for class certification (ECF No. 23) is denied;
3. The complaint is dismissed with prejudice; and
4. The Clerk of the Court is directed to close this case.

Dated: April 13, 2017

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL A. VICTORY,

Plaintiff,

v.

BOARD OF PAROLE HEARINGS, et al.,

Defendants.

No. 2:16-cv-0997 WBS CKD P

FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. He commenced this action on May 11, 2016. On June 9, 2016, plaintiff filed a motion to amend the complaint along with a proposed amended complaint. On June 17, 2016, the undersigned granted leave to amend along with plaintiff's motion to proceed in forma pauperis. This action proceeds on the amended complaint filed June 9, 2016. (ECF No. 8-1.)

II. Screening Standard

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).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

In order to avoid dismissal for failure to state a claim a complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. When considering whether a complaint states a claim upon which relief can be granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

III. Discussion

Plaintiff names as defendants three officials at the state's Board of Parole Hearings (BPH), three state court clerks, and two prison officials who denied an inmate appeal related to his claims. Plaintiff asserts seven grounds for relief, discussed below.

A. Denial of Parole Claims

Four of plaintiff's claims concern the BPH's decision to deny him parole after a hearing in February 2013.

Claim 1. Plaintiff alleges that, at a 2009 hearing before defendant BPH Deputy Commissioner Martin, Martin informed him that "the BPH had a policy to deny parole at Initial

Hearings for the purpose of testing the inmate's future behavior to receiving negative news in a prison setting. Martin also informed Victory that a refusal to discuss the offense would result in being denied parole." (ECF No. 8-1 at 3.)

In February 2013, Martin and defendant Anderson presided over plaintiff's initial hearing. (Id.) Plaintiff took his counsel's advice not to discuss the facts of his commitment offense and, after a five-hour hearing, was denied parole for five years. (Id. at 4.) Plaintiff asserts that BPH officials' "sub rosa policy of denying parole at 99.6% of initial hearings based on an individual's offense" violates the federal due process rights of life term inmates, including himself. (Id.)

Plaintiff seeks to litigate this claim as a class action; however, he has made no motion pursuant to Federal Rule of Civil Procedure 23 seeking to have the court certify this matter as a class action. Moreover, plaintiff is a non-lawyer proceeding without counsel. It is well established that a layperson cannot ordinarily represent the interests of a class. See Fed. R. Civ. P. 23(a)(4) (requiring that class representative be able to "fairly and adequately protect the interests of the class"); see also McShane v. United States, 366 F.2d 286, 288 (9th Cir. 1966) (lay person lacks authority to appear as attorney for others). Accordingly, the court will treat this ground as an individual claim for relief.

Claim 2. At his 2013 parole hearing, plaintiff invoked his Fifth Amendment right to remain silent, as advised by counsel, and did not answer questions about the commitment offense. (ECF No. 8-1 at 4.) Plaintiff asserts that defendants Anderson and Martin violated his right to remain silent, as plaintiff's silence was a factor in their decision to deny parole. (Id.)

Claim 3. Plaintiff asserts that, at his 2013 parole hearing, Anderson and Martin "relied on evidence that was previously ruled as prejudicial and inadmissible by the trial court." (Id.) Plaintiff claims this violated his right to a fair and impartial hearing. (Id. at 5.)

Claim 7. Plaintiff asserts that defendants at his 2013 hearing imposed an excessive five-year denial of parole in violation of the Ex Post Facto Clause. (Id. at 7.)

State prisoners may challenge the constitutionality of state parole procedures in an action under §1983 seeking declaratory and injunctive relief. Wilkinson v. Dotson, 544 U.S. 74, 76 (2005). In Wilkinson, the United States Supreme Court addressed the issue of whether an inmate

could challenge a parole denial via § 1983 rather than habeas corpus. Id. at 74. The Court determined that an inmate may initiate a § 1983 action to seek invalidation of "state procedures used to deny parole eligibility ... and parole suitability," but he may not seek "an injunction ordering his immediate or speedier release into the community." Id. at 82. At most, an inmate can seek as a remedy "consideration of a new parole application" or "a new parole hearing," which may or may not result in an actual grant of parole. Id.

Here, plaintiff does not point to any BPH procedures that potentially violate his federal due process rights. In Swarthout v. Cooke, 562 U.S. 216 (2011), the Supreme Court held that, even if a California prisoner has a state-created liberty interest in parole, the only federal due process to which a prisoner challenging the denial of parole is entitled is the minimal procedural due process protections set forth in Greenholtz v. Inmates of Nebraska Penal and Corrections Complex, 442 U.S. 1, 16 (1979) (i.e., an opportunity to be heard and a statement of reasons for the denial). Id. at 220. Under Swarthout, "it is no federal concern...whether California's 'some evidence' rule of judicial review (a procedure beyond what the Constitution demands) was correctly applied." See id. at 220-21. Plaintiff does not allege that these minimal procedural due process protections were not met.

To the extent plaintiff claims his custody violates the constitution, his claims are barred by Heck v. Humphrey, 512 U.S. 477 (1994). Heck holds that federal challenges, which, if successful, would necessarily imply the invalidity of incarceration or its duration, must be brought by way of petition for writ of habeas corpus, after exhausting appropriate avenues of relief. Muhammad v. Close, 540 U.S. 749, 750–751 (2004). Accordingly, "a state prisoner's [section] 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration." Wilkinson, 544 U.S at 81–82. See Butterfield v. Bail, 120 F3d 1023, 1024 (9th Cir. 1997) ("Few things implicate the validity of continued confinement more directly than the allegedly improper denial of parole.").

For these reasons, plaintiff's parole claims should be dismissed.

B. State Habeas Claims

Claims 4 & 5. These claims concern state habeas proceedings challenging plaintiff's 2013 denial of parole. Plaintiff claims the superior court "failed to properly adjudicate the merits" of his habeas petition and that defendant court clerks "failed to fulfill their ministerial duties" with respect to his state litigation. (Id. at 5-6.) Plaintiff asks this court to "remand" his habeas petition to the state courts and order state judges and staff to take certain actions in plaintiff's case. (Id. at 7.)

Plaintiff fails to state a cognizable claim on the facts alleged. See Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003) (Rooker-Feldman doctrine "prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state court judgments."); see also In re Castillo, 297 F.3d 940, 952 (9th Cir. 2002) (extending absolute quasi-judicial immunity to court clerks for administrative acts which are part of the judicial function). Thus these claims should be dismissed as well.

C. Inmate Appeal Claim

Claim 6. Plaintiff alleges that defendants Hodges and Lozano denied his inmate appeal seeking access to confidential documents in his Central File. Plaintiff claims that defendants' denial of his grievance violated his right to due process. (ECF No. 8-1 at 6.) Inmates have no Constitutional right to a specific prison grievance procedure. See Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003), citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); see also McCoy v. Roe, 509 Fed. Appx. 660, 660 (9th Cir. Feb.19, 2013) (affirming dismissal of claims arising from defendants' handling of prisoner's grievances) (citing Ramirez). Thus this claim is also subject to dismissal.

In sum, plaintiff's complaint should be dismissed in its entirety for the reasons set forth above.

IV. No Leave to Amend

If the court finds that a complaint should be dismissed for failure to state a claim, the court has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000) (en banc). Leave to amend should be granted if it appears possible that the

defects in the complaint could be corrected, especially if a plaintiff is pro se. Id. at 1130-31; see also Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) ("A pro se litigant must be given leave to amend his or her complaint, and some notice of its deficiencies, unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.") (citing Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987)). However, if, after careful consideration, it is clear that a complaint cannot be cured by amendment, the court may dismiss without leave to amend. Cato, 70 F.3d at 1005-06.

Here, as it appears amendment would be futile, the undersigned will recommend that this action be dismissed without leave to amend.

Accordingly, IT IS HEREBY RECOMMENDED that the complaint be dismissed without prejudice and this case closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, plaintiff may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: November 4, 2016

Carolyn K. Delaney

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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Additional material from this filing is available in the Clerk's Office.