UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 21 2020

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

IAN LAMONTE CORMIER,

Plaintiff-Appellant,

v.

JAMES COMEY, former attorney San Diego Public Defenders Office, in official capacity; et al.,

Defendants-Appellees.

No. 20-55320

D.C. No.
5:19-cv-01198-SVW-AFM
Central District of California,
Riverside

ORDER

Before: SILVERMAN, McKEOWN, and BRESS, Circuit Judges.

Upon a review of the record, the response to the court's June 16, 2020 order, and the opening brief received on April 21, 2020, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 6), *see* 28 U.S.C. § 1915(a), and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

DISMISSED.

Appendix-A

AT/MOATT

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IAN LaMONTE CORMIER, Plaintiff, v. JAMES COMEY, et al., Defendants.	Case No. 5:19-cv-01198-SVW-AFM **JUDGMENT**

Pursuant to the Court's Order Accepting the Report and Recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the action is dismissed without prejudice.

DATED: 2/13/20

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IAN LaMONTE CORMIER,

Plaintiff,

v.

JAMES COMEY, et al.,

Defendants.

Case No. 5:19-cv-01198-SVW-AFM

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report to which Petitioner has objected.

IT THEREFORE IS ORDERED that (1) the Report and Recommendation of the Magistrate Judge is accepted and adopted; and (2) Judgment shall be entered dismissing this action without prejudice.

DATED: 2/13/20

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

IAN LaMONTE CORMIER,

Plaintiff,

v.

JAMES COMEY, *et al.*,

Defendants.

Case No. 5:19-cv-01198-SVW (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY OF PROCEEDINGS

On June 28, 2019, plaintiff filed a Complaint in this *pro se* civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) The Complaint was signed by plaintiff on June 2, 2019. (*Id.* at 7, 14.) Plaintiff paid the filing fee on September 25, 2019. (ECF No. 18.) The Complaint arises, in part, from incidents that occurred while plaintiff was detained on criminal charges in San Diego County and in Riverside County. (ECF No. 1 at 1.) Plaintiff named as defendants more than ten individuals

who he identified as attorneys, two Superior Court judges, a District Attorney, one deputy sheriff, and several doctors. (*Id.* at 2, 8, 15-17.) The Complaint mentioned incident dates of 1985, 1986, 2013, and 2018. (*Id.* at 1, 3-5, 8.)

In accordance with the terms of the Prison Litigation Reform Act of 1995 ("PLRA"), the Court screened the Complaint prior to ordering service to determine whether the action is frivolous or malicious; or fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1). Following careful review of the Complaint, the Court found that the factual allegations appeared insufficient to state a claim upon which relief may be granted. Further, the Complaint failed to comply with Fed. R. Civ. P. 8 because it failed to state a short and plain statement of each claim that was sufficient to give each defendant fair notice of what plaintiff's claims were and the grounds upon which they rested. Accordingly, the Complaint was dismissed with leave to amend. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) ("A district court should not dismiss a *pro se* complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.") (internal quotation marks omitted).

In an Order Dismissing Complaint with Leave to Amend ("Order"; ECF No. 19) issued on November 19, 2019, the Court admonished plaintiff that many of his claims appeared to be barred by the statute of limitations and the factual allegations appeared insufficient to state a federal claim upon which relief may be granted. Plaintiff was ordered, if he desired to pursue this action, to file a First Amended Complaint no later than thirty (30) days from the date of the Order, remedying the deficiencies discussed therein. Further, plaintiff was admonished that, if he failed to timely file a First Amended Complaint or failed to remedy the deficiencies of his pleading, the Court would recommend that this action be dismissed without further leave to amend. (ECF No. 19.)

Plaintiff filed a First Amended Complaint ("FAC") on December 26, 2019. (ECF No. 20.) In the FAC, plaintiff continues to name as defendants attorneys that he identifies as public defenders, a district attorney, at least one judge of the California Superior Court, the Riverside District Attorney's Office, police officers with the Moreno Valley Police Department, doctors at the Riverside Community Hospital, and other private individuals. (*Id.* at 3-4, 33-35.) Plaintiff purports to raise three "claims," but each "claim" lists numerous legal grounds. (*Id.* at 5, 11, 21.) Plaintiff seeks only a "jury trial." (*Id.* at 6.)

In accordance with the mandate of the PLRA, the Court once again has screened the FAC prior to ordering service to determine whether the action is frivolous or malicious; or fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief. Following careful review of the FAC, the Court finds that plaintiff has not corrected the deficiencies of his earlier pleading. Accordingly, for the reasons set forth below, the Court recommends that this action be dismissed without further leave to amend.

II. LEGAL STANDARDS

The Court's screening of the pleading under the foregoing statutes is governed by the following standards. A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) "lack of a cognizable legal theory;" or (2) insufficient "facts alleged under a cognizable legal theory." *See, e.g., Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017) (internal quotation marks omitted); *see also Rosati*, 791 F.3d at 1039 (when determining whether a complaint should be dismissed for failure to state a claim under the PLRA, the court applies the same standard as applied in a motion to dismiss pursuant to Rule 12(b)(6)). In determining whether the pleading states a claim on which relief may be granted, its allegations of material fact must be taken as true and construed in the light most favorable to plaintiff. *See, e.g., Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018). However, the "tenet that a court must accept as true all of the allegations contained

in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, a court first "discounts conclusory statements, which are not entitled to the presumption of truth, before determining whether a claim is plausible." *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013); *see also Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012). Nor is the Court "bound to accept as true a legal conclusion couched as a factual allegation or an unadorned, the-defendant-unlawfully-harmed-me accusation." *Keates v. Koile*, 883 F.3d 1228, 1243 (9th Cir. 2018) (internal quotation marks and citations omitted).

Further, since plaintiff is appearing *pro se*, the Court must construe the allegations of the pleading liberally and must afford plaintiff the benefit of any doubt. *See Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010); *see also Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008) (because plaintiff was proceeding *pro se*, "the district court was required to 'afford [him] the benefit of any doubt' in ascertaining what claims he 'raised in his complaint'") (alteration in original). Nevertheless, the Supreme Court has held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted, alteration in original); *see also Iqbal*, 556 U.S. at 678 (To avoid dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . 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." (internal citation omitted)).

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In addition, Fed. R. Civ. P. 8(a) ("Rule 8") states:

> A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . .; (2) *a short and plain statement of the claim* showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(Emphasis added). Further, Rule 8(d)(1) provides: "Each allegation must be simple, concise, and direct. No technical form is required."

Although the Court must construe a *pro se* plaintiff's pleadings liberally, a plaintiff nonetheless must allege a minimum factual and legal basis for each claim that is sufficient to give each defendant fair notice of what plaintiff's claims are and the grounds upon which they rest. *See, e.g., Brazil v. United States Dep't of the Navy*, 66 F.3d 193, 199 (9th Cir. 1995); *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991) (a complaint must give defendants fair notice of the claims against them). If a plaintiff fails to clearly and concisely set forth factual allegations sufficient to provide defendants with notice of which defendant is being sued on which theory and what relief is being sought against them, the pleading fails to comply with Rule 8. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981). A claim has "substantive plausibility" if a plaintiff alleges "simply, concisely, and directly [the] events" that entitle him to damages. *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014). Failure to comply with Rule 8 constitutes an independent basis for dismissal of a pleading that applies even if the claims are not found to be "wholly without merit." *See McHenry*, 84 F.3d at 1179.

III. DISCUSSION

A. Statute of Limitations

The FAC discusses incidents that occurred in 1985-86 (ECF No. 20 at 5, 7-10), 1992 (*id.* at 29), and 2013 (*id.* at 3, 18, 21-23). As in the Complaint, plaintiff's

"Claim I" arises from events that took place in 1985 to 1986, and plaintiff's "Claim II" arises, at least in part, from events that took place in 2013. As noted above, giving him the benefit of any doubt, plaintiff initiated this action when he signed his Complaint on June 2, 2019. (ECF No. 1 at 7, 14.)

As the Court previously advised plaintiff, federal civil rights claims brought pursuant to § 1983 are subject to the forum state's statute of limitations applicable to personal injury claims. *See, e.g., Bird v. Dep't of Human Servs.*, 935 F.3d 738, 743 (9th Cir. 2019) (citing *Wilson v. Garcia*, 471 U.S. 261, 276 (1985)), *cert. denied,* (Jan. 13, 2020). Federal civil rights claims arising in California after 2003 are subject to the two-year limitations period set forth in Cal. Civ. Proc. Code § 335.1. *See, e.g., Maldonado v. Harris*, 370 F.3d 945, 954-55 (9th Cir. 2004). Federal law, however, determines when a civil rights claim accrues. *See McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019) ("the time at which a § 1983 claim accrues is a question of federal law" (internal quotation marks omitted)). A cause of action typically accrues under federal law as soon as a potential "plaintiff knows or has reason to know of the injury which is the basis of the action." *See Bird*, 935 F.3d at 743.

In addition, a federal court must give effect to a state's tolling provisions. *See Hardin v. Straub*, 490 U.S. 536, 539 (1989). Under California law, the continuous incarceration of a plaintiff is a disability that tolls the statute of limitations for a maximum of two years. *See* Cal. Civ. Proc. Code § 352.1; *see, e.g., Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004) (California provides for statutory tolling for a period of up to two years based on the disability of imprisonment); *Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994). Such tolling is applicable only if a plaintiff was imprisoned "at the time the claim accrued." *Elliott*, 25 F.3d at 802-03 (explaining that "actual, uninterrupted incarceration is the touchstone" for assessing tolling for the disability of "post-arrest custody") (citation omitted)).

Plaintiff's federal claims herein accrued no later than the day on which he learned of the events that gave rise to a specific civil rights claim. Giving plaintiff

the benefit of any doubt as a *pro se* litigant and even assuming for purposes of determining the adequacy of plaintiff's pleading that plaintiff was continually incarcerated at the relevant times, his uninterrupted incarceration would entitle plaintiff to a maximum of two years of statutory tolling for any claim. *See* Cal. Code Civ. Proc. § 352.1(a) (expressly limiting tolling arising from incarceration to a period not to exceed two years). Absent other grounds for tolling, therefore, all of plaintiff's federal civil rights claims raised in this action are time-barred to the extent that they accrued prior to June 2015.

The Court previously admonished plaintiff that his first two claims in the Complaint appeared to be barred by the statute of limitations. (ECF No. 19 at 5-6.) In his FAC, however, plaintiff reiterates many of the same factual allegations and again raises claims that appear on the face of the FAC to be barred by the statute of limitations. In his FAC, plaintiff does not set forth any factual allegations to suggest he may be entitled to additional tolling. Once again, plaintiff's "Claim I" and "Claim II" appear to be time-barred. *See Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013) (pleading may be dismissed on statute of limitations grounds if "the statute of limitations issues are apparent on the face of the complaint").

B. Absolute Immunity

In his FAC, plaintiff continues to name as defendants at least two Superior Court judges and one district attorney. (ECF No. 20 at 3-4, 24, 34.) These claims are barred by absolute immunity.

As the Court previously advised plaintiff, judicial defendants are absolutely immune from federal civil rights suits for acts performed in their judicial capacity. *Mireles v. Waco*, 502 U.S. 9, 11 (1991); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc). Further, judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Moore v. Brewster*, 96 F.3d 1240, 1244 (9th Cir. 1996). Judicial immunity is not lost if a plaintiff alleges that an action was erroneous, was malicious, or was in

bad faith. *Mireles*, 502 U.S. at 11-12; *Stump v. Sparkman*, 435 U.S. 349, 356 (1978) ("[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority"). Rather, judicial immunity is lost only if an action is taken in the "clear absence" of jurisdiction, such as when judicial officers "rule on matters belonging to categories which the law has expressly placed beyond their purview." *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 369-70 (9th Cir. 1981) (discussing the distinction between actions taken "in clear absence of all jurisdiction" and those taken merely "in excess of jurisdiction").

To the extent that plaintiff is raising any federal claims against Judge Jones or Judge Gunn (*id.* at 17-19, 24, 34) that are not barred by the statute of limitations, plaintiff's factual allegations arise solely from actions that were taken by these judges in their judicial capacities. Accordingly, Judge Jones and Judge Gunn are entitled to absolute immunity from suit for any timely claims in plaintiff's FAC.

Similarly, to the extent that plaintiff is purporting to raise any claims against District Attorney Hostin that are not barred by the statute of limitations (*see id.* at 3, 24, 34), this defendant also is entitled to absolute immunity for any claims for damages arising from plaintiff's criminal prosecution. As the Court previously advised plaintiff, prosecutors are entitled to absolute immunity from damages liability when they engage in activities "intimately associated with the judicial phase of the criminal process," such as the prosecution and presentation of the state's case. *See Imbler v. Pachtman*, 424 U.S. 409, 427, 430-31 (1976). This immunity applies even if it "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler*, 424 U.S. at 427. However, it is the nature of the function performed, not the role or title of the actor that determines the scope of absolute immunity. *See Engebretson v. Mahoney*, 724 F.3d 1034, 1039 (9th Cir. 2013) ("the Supreme Court has emphasized this functional approach for determining when public officials may claim absolute immunity under § 1983"). Thus, District Attorney Hostin is entitled to absolute

immunity from any claims arising from acts to initiate or present a criminal prosecution against plaintiff. *See, e.g., Stapley v. Pestalozzi*, 733 F.3d 804, 809 (9th Cir. 2013) ("prosecutors have absolute immunity under § 1983 for a decision to initiate a criminal prosecution").

C. Rule 8

Plaintiff's FAC again violates Rule 8 in that the FAC fails to allege a minimum factual and legal basis for and federal claim that is sufficient to give each defendant fair notice of what plaintiff's claims are and which factual allegations give rise to each claim.

As the Court previously advised plaintiff, plaintiff must identify which defendant is alleged to have caused each referenced violation of federal law or the federal constitution. For example, plaintiff's "Claim III" lists a right to a speedy trial, due process, right to a jury trial, judicial misconduct, cruel and unusual punishment, prosecutorial misconduct, as well as legal theories that simply do not give rise to claims under 42 U.S.C. § 1983 such as fraud, gross negligence, intentional infliction of emotional distress, "conflict of interest," attempted murder, and assault with a deadly weapon. (ECF No. 20 at 21.) In addition, in a section of the FAC entitled "(Defendant [sic] Cont'd)," plaintiff alleges that similar "civil rights have been violated" and lists many defendants. (*Id.* at 33-35.) However, plaintiff has failed to identify which of the numerous defendants referenced in the FAC are alleged to have caused each of these alleged civil rights violations at what time.

As the Court has previously advised plaintiff, to state a federal civil rights claim against a particular defendant, plaintiff must allege that each defendant deprived him of a right guaranteed under the United States Constitution or a federal statute, and that the "deprivation was committed by a person acting under color of state law." *See West v. Atkins*, 487 U.S. 42, 48 (1988). "A person deprives another 'of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act

which he is legally required to do that *causes* the deprivation of which [the plaintiff complains].'" *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (emphasis and alteration in original). Further, the "under-color-of-state-law" requirement excludes from the reach of § 1983 all "merely private conduct, no matter how discriminatory or wrongful." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). Thus, the "ultimate issue in determining whether a person is subject to suit under § 1983" is whether "the alleged infringement of federal rights is fairly attributable" to the government. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). Plaintiff's FAC again combines claims that appear to arise under federal law or the United States Constitution with claims that arise under state law, such as intentional infliction of emotional distress, fraud, or negligence, rendering it impossible for each defendant to determine what (if any) claim arising under federal law or the United States Constitution is raised against him or her.

Further, in his "Claim III," plaintiff includes, *inter alia*, factual allegations pertaining to his registration at the Moreno Valley Police Department pursuant to state law from 2013 through October 2018, an alleged "false arrest" in October 2018 by Moreno Valley Police officers, an "attack" against plaintiff by plaintiff's neighbor, and an interrogation by Moreno Valley Police officers, followed by plaintiff being "booked at Robert Presley Detention Center" where he was denied a "speedy trial." (ECF No. 20 at 21-24.) Plaintiff also alleges various violations during a trial for which numerous appointed attorneys declined to represent plaintiff (*id.* at 24-25) and interviews by multiple doctors during mental evaluations (apparently during the course of his trial) at the Riverside County Jail, the Riverside Community Hospital, and the Patton State Hospital. (*Id.* at 25-27.) All of these various factual allegations are grouped into plaintiff's "Claim III." It seems clear that the defendants located in Riverside County did not cause any of the claims that arose at the Patton State Hospital, which is located in San Bernardino County. Nor are any police officers who allegedly violated his rights during an arrest or interrogation plausibly

responsible for causing any federal civil rights violation during plaintiff's mental evaluations at several medical facilities. Accordingly, it remains entirely unclear which factual allegations pertain to what claims against which defendant.

The Court previously admonished plaintiff that, to the extent he wished to state a federal civil rights claim against any specific defendant, plaintiff must set forth a separate, short, and plain statement of the actions that each defendant is alleged to have taken, or failed to have taken, that caused each violation of a right guaranteed under the United States Constitution or a federal statute. *See West*, 487 U.S. at 48. Plaintiff's FAC entirely fails to do so.

Additionally, plaintiff's FAC again names numerous attorneys as defendants. These attorneys apparently either represented plaintiff in criminal proceedings or declined to be appointed to represent plaintiff. As the Court previously advised plaintiff, a private individual, such as an attorney, may be considered to be acting under color of state law only if a private party intentionally engages in joint action with a state official to deprive someone of a constitutional right. *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir. 1989) (en banc) ("Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights."). An attorney, even if appointed by a court or government entity, is a private party who does **not** act under color of state law. *See Polk County v. Dodson*, 454 U.S. 312, 318-19, n.9, 325 (1981) ("a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of §1983," regardless of "whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program"); *Miranda v. Clark County*, 319 F.3d 465, 468-69 (9th Cir. 2003) (en banc) (a public defender performing the role of an attorney for a client is not a state actor under §1983); *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) (a "bare allegation" that a private person acted jointly with state officials is insufficient to state a claim under §1983). Here, it appears to the Court

that plaintiff's federal claims against the attorneys (if any) who are named as defendants do not arise from actions taken by any attorney outside of that attorney's role acting as an attorney for plaintiff. Accordingly, the named attorneys are not state actors, and plaintiff may not raise a federal civil rights claim pursuant to § 1983 against such defendants.

Finally, because plaintiff's FAC continues to raise numerous claims under multiple legal grounds within each "clam," and because all defendants named in this action are not alleged to have participated in all parts of the alleged events, the FAC fails to meet the minimal requirement of Rule 8 that a pleading allow each defendant to discern what he or she is being sued for. *See McHenry*, 84 F.3d at 1177; *see also Twombly*, 550 U.S. at 555 ("[f]actual allegations must be enough to raise a right to relief above the speculative level"). The Court is mindful that, because plaintiff is appearing *pro se*, the allegations of the FAC must be construed liberally and plaintiff must be afforded the benefit of any doubt. That said, the Supreme Court has made clear that the Court has "no obligation to act as counsel or paralegal to *pro se* litigants." *Pliler v. Ford*, 542 U.S. 225, 231 (2004). In addition, the Supreme Court has held that, while a plaintiff need not plead the legal basis for a claim, the plaintiff must allege "simply, concisely, and directly events" that are sufficient to inform the defendants of the factual grounds for each claim. *Johnson*, 574 U.S. at 12.

Accordingly, the Court finds that plaintiff's FAC violates Rule 8 because it fails to set forth a simple, concise, and direct statement of the factual basis of each of plaintiff's claims against each defendant.

D. Heck

In his FAC, plaintiff names judges, prosecutors, and numerous attorneys who apparently have some relationship to criminal charges against plaintiff. Plaintiff alleges that, in at least one criminal case, he was convicted and in one case he accepted a plea deal. (ECF No. 20 at 9-10, 32.) However, plaintiff may not challenge the validity or duration of an allegedly unlawful conviction in a federal civil rights

action. To the extent that plaintiff may be seeking to have a criminal conviction set aside, a petition for habeas corpus is a prisoner's sole judicial remedy when "attacking the validity of the fact or length of ... confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973); *Nettles v. Grounds*, 830 F.3d 922, 929 (9th Cir. 2016) (en banc) (the Supreme Court has held "that habeas is the exclusive vehicle for claims brought by state prisoners that fall within the core of habeas and that such claims may not be brought under § 1983"). Accordingly, to the extent that plaintiff may be seeking habeas relief, plaintiff's claims should be dismissed without prejudice to allow plaintiff to raise them in a petition for writ of habeas corpus. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 586 (9th Cir. 1995).

Further, if plaintiff is attempting to use this civil rights action to seek monetary damages for an "allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid" where success would *necessarily* imply the invalidity of the fact or duration of his confinement, his claims are not cognizable under § 1983 unless and until plaintiff can show that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) (prisoner's civil rights action is barred "*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration" (emphasis in original)). Accordingly, if the success of any of plaintiff's claims herein would *necessarily* implicate the fact or length of plaintiff's incarceration, such claims are barred in this civil rights action unless and until plaintiff can demonstrate that his relevant conviction(s) already has been invalidated.

E. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction and have subject matter jurisdiction only over matters authorized by the Constitution and Congress. *See, e.g.,*

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994). It is this Court's duty to examine its own subject matter jurisdiction, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006), and the Court may dismiss a case summarily if there is an obvious jurisdictional issue. *See Scholastic Entm't, Inc. v. Fox Entm't Grp., Inc.*, 336 F.3d 982, 985 (9th Cir. 2003). "Absent a substantial federal question," a district court lacks subject matter jurisdiction, and claims that are "wholly insubstantial" or "obviously frivolous" are insufficient to "raise a substantial federal question for jurisdictional purposes." *Shapiro v. McManus*, 136 S. Ct. 450, 455-56 (2015). A "plaintiff bears the burden of proving" the existence of subject matter jurisdiction and "must allege facts, not mere legal conclusions" to support the court's jurisdiction. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

In this case, as discussed above, plaintiff's FAC does not allege any claims arising under federal law that have an arguable basis in fact or law. *See Denton v. Hernandez*, 504 U.S. 25, 31-33 (1992); *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Because plaintiff's FAC fails to allege facts to plausibly give rise to any claim arising under the United States Constitution or a federal statute against any defendant who is not immune from such claims, the Court lacks subject matter jurisdiction over the claims in this action.

F. Leave to Amend

Because plaintiff is appearing *pro se* in this action, the Court has construed the allegations of the FAC liberally and has afforded plaintiff the benefit of any doubt. That said, the Supreme Court has made clear that the Court has "no obligation to act as counsel or paralegal to *pro se* litigants." *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007). In the prior Order, plaintiff was admonished that, if he failed to remedy the deficiencies of his Complaint as discussed therein, then the Court would recommend that the action be dismissed. In that Order, the Court also provided plaintiff with notice of the deficiencies in his

pleading, yet plaintiff has failed to cure any of those deficiencies in his amended pleading.

Because plaintiff's FAC again violates Rule 8, raises claims against defendants who are immune from liability, again raises claims in a civil rights action that must be raised in a petition for writ of habeas corpus, and again fails to state any federal claim upon which relief may be granted, it has become absolutely clear to the Court that plaintiff will not be able to correct the deficiencies in his pleading with further amendment. *See, e.g., Gottschalk v. City & County of San Francisco*, 964 F. Supp. 2d 1147, 1156-57 (N.D. Cal. 2013) (granting defendants' motion to dismiss for failure to comply with Rule 8 and the court's orders to correct deficiencies in earlier pleadings). Therefore, the Court finds that providing plaintiff with additional opportunities to amend his pleading would be futile. *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009) ("A district court does not err in denying leave to amend where the amendment would be futile.").

IV. RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge issue an Order: (1) accepting and adopting this Report and Recommendation; and (2) directing that judgment be entered dismissing the case without prejudice.

DATED: 1/16/2020

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 3 2020

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

IAN LAMONTE CORMIER, Plaintiff-Appellant, v. JAMES COMEY, former attorney San Diego Public Defenders Office, in official capacity; et al., Defendants-Appellees.	No. 20-55320 D.C. No. 5:19-cv-01198-SVW-AFM Central District of California, Riverside ORDER

Before: SILVERMAN, McKEOWN, and BRESS, Circuit Judges.

The motion for reconsideration en banc (Docket Entry No. 11) 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-B

AT/MOATT