UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 28 2020

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

ANDREW ANDERSEN, Plaintiff-Appellant, v. MARISELA MONTES, Commissioner of California Board of Parole Hearings; et al., Defendants-Appellees.	No. 19-15969 D.C. No. 1:16-cv-00236-DAD-SAB Eastern District of California, Fresno ORDER

Before: BERZON, N.R. SMITH, and MILLER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

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. Civ. P. 35.

Andersen's petition for panel rehearing and petition for rehearing en banc (Docket Entry Nos. 21, 22, and 23) are denied.

No further filings will be entertained in this closed case.

APPENDIX B

NOT FOR PUBLICATION

FILED

MAY 14 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW ANDERSEN, Plaintiff-Appellant, v. MARISELA MONTES, Commissioner of California Board of Parole Hearings; et al., Defendants-Appellees.	No. 19-15969 D.C. No. 1:16-cv-00236-DAD-SAB MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Submitted May 6, 2020**

Before: BERZON, N.R. SMITH, and MILLER, Circuit Judges.

California state prisoner Andrew Andersen appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging a First Amendment claim challenging the Board of Parole Hearings ("BPH") regulatory scheme for early parole determinations for prisoners with life sentences. We have

* 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).

jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under 28 U.S.C. § 1915A. *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). We affirm.

The district court properly dismissed Andersen's First Amendment facial challenge to the BPH regulations because Andersen failed to allege facts sufficient to show that the BPH regulations, Cal. Code. Regs. tit. 15, § 2281, were overly broad and therefore invalid on their face. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (explaining that to succeed on a facial attack under the First Amendment, a plaintiff must establish that "a substantial number of [the statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (citation and internal citations omitted)); *City of Houston v. Hill*, 482 U.S. 451, 458 (1987) ("Only a statute that is substantially overbroad may be invalidated on its face.").

To the extent that Andersen challenges the district court's dismissal of his "as-applied" challenge to the BPH regulations, Anderson's as-applied challenge was the subject of a prior appeal, *see Andersen v. Montes*, Case No. 17-16610. In 17-16610, this court concluded that the district court properly dismissed the claim. *Andersen v. Montes*, 708 Fed.Appx. 429 (9th Cir. 2017).

The district court did not abuse its discretion by denying Andersen further leave to amend because amendment would have been futile. *See Cervantes v.*

Countrywide Home Loans, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that a district court may deny leave to amend if amendment would be futile); *see also Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (a district court's discretion to deny leave to amend is particularly broad when it has already granted leave to amend).

We do not consider arguments and allegations raised for the first time on appeal, or arguments not specifically or distinctly raised in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANDREW S. ANDERSEN, Plaintiff, v. MARISELA MONTES, et al., Defendants.	No. 1:16-cv-00236-DAD-SAB ORDER DENYING MOTION FOR RECONSIDERATION (Doc. No. 53)

Plaintiff Andrew S. Andersen is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. On April 9, 2019, the undersigned issued an order adopting in full the assigned magistrate judge's November 28, 2018 findings and recommendations recommending dismissing plaintiff's third amended complaint without further leave to amend for failure to state a claim. (Doc. No. 51.)

On April 29, 2019, plaintiff moved this court for reconsideration of the April 9 order. (Doc. No. 53.) Therein, plaintiff concedes that the rights prisoners possess are more limited in scope than the constitutional rights held by non-incarcerated individuals, but continues to argue, as he did in his objections to the November 28, 2018 findings and recommendations (*see* Doc. No. 50), that the regulatory scheme of the California Board of Parole Hearings ("BPH") for determining whether to grant life prisoners release on parole violates the First Amendment because BPH regulations are overbroad and chill prisoners' thoughts and beliefs. (Doc. No. 53 at

4–5.) In the alternative, plaintiff asks this court for leave to file a fourth amended complaint, which he has attached to the pending motion. (Doc. No. 53 at 6–20.)

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of judgment." Relief under Rule 60 "is to be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances" exist. *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation omitted) (addressing reconsideration under Rules 60(b)(1)-(5)). The moving party "must demonstrate both injury and circumstances beyond his control." *Id.* (internal quotation marks and citation omitted). Further, Local Rule 230(j) requires, in relevant part, that plaintiff show "what new or different facts or circumstances are claimed to exist which did not exist or were not shown" previously, "what other grounds exist for the motion," and "why the facts or circumstances were not shown" at the time the substance of the order which is objected to was considered. "A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law," and it "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks and citations omitted).

Here, the pending motion falls far short of these standards. Plaintiff has not shown mistake, inadvertence, surprise, or excusable neglect; has not shown the existence of either newly discovered evidence or fraud; has not established that the judgment is either void or satisfied; and has not presented any other reasons justifying relief from judgment. Moreover, pursuant to the court's Local Rules, plaintiff has not shown "new or different facts or circumstances claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion." Local Rule 230(j). The pending motion essentially renews plaintiff's facial

challenge to BPH's parole procedures and regulations but, in doing so, he has provided no basis for the court to reconsider its prior order. Plaintiff contends that "[i]t is premature for the Court to rule that a regulation is not overbroad before inmates have an opportunity to present alternatives that are more narrowly tailored." (Doc. No. 53 at 4.) This argument, however, is unavailing. First, plaintiff cites to no authority in support of his position. Second, "[a] party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Arteaga v. Asset Acceptance, LLC*, 733 F. Supp. 2d 1218, 1236 (E.D. Cal. 2010) (citation omitted); *see also Sami Mitri v. Walgreen Co.*, No. 1:10-CV-538 AWI SKO, 2015 WL 1876133, at *1 (E.D. Cal. Apr. 10, 2015) ("Reconsideration should not be used merely to ask the court to rethink what it has already thought."). Third, the pending motion does not address, let alone dispute in any meaningful way, the analysis set forth in the November 28, 2018 findings and recommendations that the BPH regulations at issue are not overbroad because they set forth standards and objective factors that BPH is to consider when determining whether an inmate is suitable for release on parole. (Doc. Nos. 47 at 6–7; 51 at 2.) Accordingly, the court will deny plaintiff's motion for reconsideration.

Finally, the court denies plaintiff's request to file a fourth amended complaint. Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its pleading . . . with the court's leave [and] . . . [t]he court should freely give leave when justice so requires." In evaluating whether leave to amend should be given, the following factors should be considered: "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). "Futility alone can justify the denial of a motion for leave to amend." *Nunes v. Ashcroft*, 375 F.3d 805, 808; *see also Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("Where the legal basis for a cause of action is tenuous, futility supports the refusal to grant leave to amend.") However, "before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to amend effectively." *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th

Cir. 2012) (citation omitted). Here, the court concludes it would be futile to grant plaintiff further leave to amend because: (1) the court provided him with the applicable legal standards to allege a facial challenge to the parole procedure (*see* Doc. No. 32 at 2–3); (2) plaintiff has been granted three opportunities to mount such a facial challenge (*see* Doc. Nos. 32, 41, 43); and (3) his facial challenge to the BPH regulations fails as a matter of law.

Accordingly, plaintiff's motion for reconsideration (Doc. No. 53) is denied in its entirety.

IT IS SO ORDERED.

Dated: **June 3, 2019**

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ANDREW S. ANDERSEN, Plaintiff, v. MARISELA MONTES, et al., Defendants.	No. 1:16-cv-00236-DAD-SAB (PC) ORDER ADOPTING FINDINGS AND RECOMMENDATIONS AND DISMISSING ACTION FOR FAILURE TO STATE A CLAIM (Doc. No. 47)

Plaintiff Andrew S. Andersen is a state prisoner proceeding *pro se* in this civil rights action pursuant to 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 28, 2018, the assigned magistrate judge issued findings and recommendations, recommending that plaintiff's third amended complaint be dismissed for failure to state a cognizable claim without leave to amend. (Doc. No. 47.) The findings and recommendations were served on plaintiff and contained notice that any objections thereto were to be filed within twenty-one (21) days after service. (*Id.* at 8.) On December 17, 2018, plaintiff sought and received an extension of time to file objections to the findings and recommendations (Doc. Nos. 48, 49), and on January 16, 2019, plaintiff filed his objections (Doc. No. 50).

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In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the undersigned has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including plaintiff's objections, the undersigned concludes that the findings and recommendations are supported by the record and proper analysis.

Plaintiff's third amended complaint asserts a facial challenge, arguing that the regulatory scheme of the California Board of Parole Hearings ("BPH") for determining whether to grant life prisoners release on parole violates the First Amendment. (Doc. No. 46.) Specifically, plaintiff argues that BPH "delegates overly broad discretion to government officials in making suitability decisions" and that "[t]here is nothing in the regulations that prevent government officials from making content-of-speech-based decisions." (*Id.* at 8.) Plaintiff also contends that BPH "lacks procedures and safeguards to timely challenge a content-based decision for being overbroad, vague, capricious, arbitrary, biased or any other type of First Amendment challenge." (*Id.* at 10.) The pending findings and recommendations, however, correctly point out that the regulations plaintiff takes issue with do not implicate the First Amendment because (1) the Supreme Court has "maintained that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large," *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), and (2) the regulations at issue are not overly broad, as they set forth standards and objective factors that the BPH is to consider when determining whether an inmate is suitable for release on parole. (Doc. No. 47 at 6–7.) Moreover, the magistrate judge also correctly notes that review of a BPH's decision is possible by way of a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. (*Id.* at 7); *see also Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) ("[A] prisoner subject to a parole statute . . . receive[s] adequate process when he [i]s allowed an opportunity to be heard and [i]s provided a statement of the reasons why parole was denied. The Constitution . . . does not require more.") (internal quotation marks and citations omitted). While plaintiff advances several arguments in his objections to the pending findings and recommendations, he does not meaningfully dispute or address the three key findings outlined above. The combination of these findings, however, is fatal to plaintiff's First Amendment facial challenge to

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BPH's regulatory scheme for determining whether to grant life prisoners release on parole. (*See* Doc. No. 50.)

Finally, the undersigned adopts the magistrate judge's recommendation to dismiss this action without leave to amend. Plaintiff has been afforded three opportunities to amend his complaint and it is clear to the undersigned that the granting of further leave to amend would be futile, since it does not appear that plaintiff in good faith can allege additional facts to support a First Amendment facial challenge to the BPH regulations he seeks to challenge. *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) ("Where the legal basis for a cause of action is tenuous, futility supports the refusal to grant leave to amend.")

Accordingly,

1. The findings and recommendations filed on November 28, 2018 (Doc. No. 47) are adopted in full;
2. Plaintiff's third amended complaint (Doc. No. 46) is dismissed without leave to amend for failure to state a cognizable claim; and
3. The Clerk of the Court is directed to close this case.

IT IS SO ORDERED.

Dated: **April 9, 2019**

UNITED STATES DISTRICT JUDGE

Munson Co., Inc., 467 U.S. 947, 966, n.13 (1983) (citing Vill. Of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637-639 (1980)). The Supreme Court has recognized that the point of an overbreadth challenge "is that there is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands." Joseph H. Munson Co., Inc., 467 U.S. at 966 n.13. Therefore, to succeed in an overbreadth challenge, a plaintiff must "demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [statute] cannot be applied constitutionally." N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 14 (1988).

Pursuant to California Code of Regulations, Title 15, section 2281, the determination of suitability is set forth as follows:

> (a) General. The panel shall first determine whether a prisoner is suitable for release on parole. Regardless of the length of time service, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison.
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> (b) Information Consideration. All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's: social history, past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliability documented; the base and other commitment offense, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability.
>
> (c) Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:
>
> (1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:
>
> (A) Multiple victims were attacked, injured or killed in the same or separate incidents.
>
> (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at any early age.

(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

(d) Circumstances Tending to Show Suitability. The following circumstances each tend to show that the prisoner is suitable for release. The circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate suitability include:

(1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.

(2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.

(3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or the prisoner has given indications that he understands the nature and magnitude of the offense.

(4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress had built over a long period of time.

(5) Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.

(6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.

(7) Age. The prisoner's present age reduces the probability of recidivism.

(8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.

(9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.

Cal. Code. Regs. tit. 15, § 2281(a)-(d). Section 2255 states that "[e]very prisoner and his attorney if he was represented by an attorney at a [parole] hearing shall receive a copy of the decision specifying the decision, the information considered and the reasons for the decision." Cal. Code 15 C.C.R. § 2255.

The text of the parole suitability statute does not implicate the First Amendment and Plaintiff's facial challenges do not implicate the First Amendment.[1] Plaintiff contends that the BPH regulatory scheme as set forth in Title 15 of California Code of Regulations sections 2281 and 2255 does not prevent the BPH panel from issuing decisions based on content-of-speech. Plaintiff relies on the decision in Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992), to support his position. The Forsyth County case involved a facial challenge to a county ordinance which required citizens to obtain a permit before holding a parade or assembly on public property. The ordinance, on its face and in practice, gave the licensing authority "unfettered" discretion to set the amount of a parade permit fee, or even to waive it entirely. Forsyth Ctny, 505 U.S. at 131-32. The Court overturned the ordinance because it lack procedural safeguards to prevent viewpoint discrimination. The county administrator could freely decide "[w]hether or not, in any given instance, the fee would include any or all of the county's administrative and security expenses." Id. at 131. There, the fee imposed upon an applicant was not tethered to any particular costs burne by the county, nor to any other objective criteria. Rather, "[t]he decision how much to charge for police protection or administrative time—or

[1] Indeed, the Supreme Court has recognized that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large. See Shaw v. Murphy, 532 U.S. 223, 229 (2001).

even whether to charge at all—[was] left to the whim of the administrator," based on "his own judgment of what would be reasonable. Id. at 132-33. Because the ordinance lacked criteria to guide official discretion and prevent arbitrary decision making, the ordinance violated the First Amendment. Id. at 133-34.[2]

In this instance, the parole suitability criteria does not involve "unbridled discretion" to the BPH panel in determining whether an inmate is suitable for release on parole. Nor does the regulation set forth an overly vague criteria for assessing whether an inmate is suitable for parole. Section 2281 provides an articulated standard and "objective factors" that the BPH are to consider when determining whether an inmate is suitable for release on parole.[3] The parole statute provides narrow objectives and definite standards to guide the BPH and therefore is not invalid on its face. Forsyth Cnty., 505 U.S. at 131. In addition, and contrary to Plaintiff's contention, the BPH's decision is subject to judicial review, by way of habeas corpus petition filed pursuant to 28 U.S.C. § 2254. In Swarthout v. Cooke, 562 U.S. 216 (2011), the Supreme Court held that "the responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts, and is no part of the Ninth Circuit's business." 562 U.S. at 222. The Supreme Court stated that a federal habeas court's inquiry into whether a prisoner denied parole received due process is limited to determining "was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied." Id. at 220 (citing Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 16 (1979)).

For the foregoing reasons, Plaintiff fails to state a cognizable First Amendment claim based on overbreadth of the parole suitability statutes.

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[2] The Court noted that "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." Forsyth Cnty., 505 U.S. at 133 n.10.

[3] Moreover, Plaintiff has raised similar arguments in two prior actions, both of which were dismissed. See Andersen v. Beard, No. C 11-03752 YGR (PR), 2014 WL 232108 (N.D. Cal.) (dismissed on January 21, 2014, for failure to state a cognizable claim for relief; Andersen v. Chavez, No. 1:16-cv-00368-LJO-BAM (PC), 2017 WL 5608089 (E.D. Cal.) (dismissed on February 9, 2017, for failure to state a cognizable claim for relief).