

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 20 2022

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

In re: MICHAEL COTA.

No. 22-70003

MICHAEL COTA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEVADA, RENO,

Respondent,

JOHN MALONE; et al.,

Real Parties in Interest.

D.C. No.

3:21-cv-00329-MMD-CLB

District of Nevada,

Reno

ORDER

Before: TALLMAN, CHRISTEN, and NGUYEN, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

No further filings will be entertained in this closed case.

DENIED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

MICHAEL COTA,

Plaintiff,

v.

JOHN MALONE, *et al.*

Defendants.

Case No. 3:21-CV-00329-MMD-CLB

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE¹

[ECF Nos. 5, 6, 8, 11, 13]

10 Before the Court are Plaintiff Michael Cota's ("Cota") application to proceed *in*
11 *forma pauperis* (ECF No. 8), his second amended *pro se* civil rights complaint (ECF No.
12 6), his motion for a warrant (ECF No. 5), motion requesting correction of the Clerk's Error
13 re: ECF No. 6 (ECF No. 11), and motion containing requests for admissions pursuant to
14 Federal Rule of Civil Procedure 36. (ECF No. 13). For the reasons stated below, the
15 Court recommends that Cota's *in forma pauperis* application (ECF No. 8) be granted, his
16 outstanding motions, (ECF Nos. 5, 11, 13), be denied as moot, and his second amended
17 complaint, (ECF No. 6), be dismissed without prejudice and without leave to amend.

18 | I. ***IN FORMA PAUPERIS* APPLICATION**

19 A person may be granted permission to proceed *in forma pauperis* ("IFP") if the
20 person "submits an affidavit that includes a statement of all assets such [person]
21 possesses [and] that the person is unable pay such fees or give security therefore. Such
22 affidavit shall state the nature of the action, defense or appeal and affiant's belief that
23 the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d
24 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed

26 1 This Report and Recommendation is made to the Honorable Miranda M. Du,
27 United States District Judge. The action was referred to the undersigned Magistrate
 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 IFP, not just prisoner actions).

2 The Local Rules of Practice for the District of Nevada provide: "Any person who
3 is unable to prepay the fees in a civil case may apply to the court for authority to proceed
4 [IFP]. The application must be made on the form provided by the court and must include
5 a financial affidavit disclosing the applicant's income, assets, expenses, and liabilities."

6 LSR 1-1.

7 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with
8 some particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th
9 Cir. 1981) (quotation marks and citation omitted). A litigant need not "be absolutely
10 destitute to enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*,
11 335 U.S. 331, 339 (1948).

12 A review of the applications to proceed IFP reveals Cota cannot pay the filing fee;
13 therefore, the Court recommends that the application (ECF No. 8) be granted.

14 **II. SCREENING STANDARD**

15 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
16 provides, in relevant part, that "the court shall dismiss the case at any time if the court
17 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a
18 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
19 who is immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it
20 lacks an arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325
21 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims
22 against defendants who are immune from suit or claims of infringement of a legal interest
23 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
24 delusional scenarios). *Id.* at 327–28; see also *McKeever v. Block*, 932 F.2d 795, 798 (9th
25 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
26 standard applied in the context of a motion to dismiss under Federal Rule of Civil
27 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which
28 requires dismissal where the complaint fails to "state a claim for relief that is plausible on

1 its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

2 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
 3 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
 4 accept as true all well-pled factual allegations, set aside legal conclusions, and verify
 5 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.
 6 662, 679 (2009). The complaint need not contain detailed factual allegations, but must
 7 offer more than "a formulaic recitation of the elements of a cause of action" and "raise a
 8 right to relief above a speculative level." *Twombly*, 550 U.S. at 555. Particular care is
 9 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies
 10 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).
 11 Still, a liberal construction may not be used to supply an essential element of the claim
 12 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is
 13 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice
 14 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*
 15 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

16 **III. SCREENING OF SECOND AMENDED COMPLAINT**

17 In his second amended complaint ("SAC"), Cota sues Defendants John Malone,
 18 Thomas M. Gregory, Francisco Torres, Douglas County District Attorney, Douglas
 19 County Sheriff's Office, and John Enos under 42 U.S.C. § 1983. (See ECF No. 6.)² Cota
 20 alleges that the defendants concocted a plan to use Cota's juvenile record against him
 21 in violation of NRS 62H.030(2) in his underlying criminal cases. Cota claims that the use
 22 of his juvenile records, without a proper hearing and court order to open those

23
 24 ² Although the Douglas County District Attorney is not listed in the caption of the
 SAC, this defendant was listed twice in the body of the SAC as a named defendant. (ECF
 25 No. 6 at 2-3.) By contrast, Defendants Matthew Johnson, Francisco Torres, and John
 26 Enos are listed in the caption of the SAC, but not in the body of the document. (Compare
 ECF No. 6 at 1, with ECF No. 6 at 2-3.) Therefore, the Court has listed all defendants
 27 identified in the caption and body of the SAC and screens this matter as to all defendants
 identified herein.

1 proceedings, violated his due process and equal protection rights. (*Id.*) Cota also alleges
2 that these juvenile records were improperly utilized by the sentencing judge and Cota
3 received consecutive sentences in the underlying criminal cases even though this was
4 his first adult conviction. (*Id.*) Cota seeks monetary damages, attorney's fees and costs,
5 and such further relief that the Court deems equitable and proper. (*Id.* at 10.)

6 42 U.S.C. § 1983 aims "to deter state actors from using the badge of their authority
7 to deprive individuals of their federally guaranteed rights." *Anderson v. Warner*, 451 F.3d
8 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.
9 2000)). The statute "provides a federal cause of action against any person who, acting
10 under color of state law, deprives another of his federal rights[.]" *Conn v. Gabbert*, 526
11 U.S. 286, 290 (1999), and is "merely . . . the procedural device for enforcing substantive
12 provisions of the Constitution and federal statutes." *Crumpton v. Gates*, 947 F.2d 1418,
13 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation
14 of a federally-protected right by (2) a person or official who acts under the color of state
15 law. *Anderson*, 451 F.3d at 1067.

16 However, § 1983 is not a backdoor through which a federal court may overturn a
17 state court conviction or award relief related to the fact or duration of a sentence. Section
18 1983 and "the federal habeas corpus statute . . . both provide access to the federal courts
19 'for claims of unconstitutional treatment at the hands of state officials, . . . [but] they
20 different in their scope and operation.'" *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.
21 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take
22 care to prevent prisoners from relying on § 1983 to subvert the differing procedural
23 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at
24 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner
25 challenges the legality or duration of his custody, raises a constitutional challenge which
26 could entitle him to an earlier release, or seeks damages for purported deficiencies in
27 his state court criminal case, which effected a conviction or lengthier sentence, his sole
28 federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);

1 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v.*
 2 *Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where
 3 “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction
 4 or sentence,” then “the complaint must be dismissed unless the plaintiff can demonstrate
 5 that the conviction or sentence has already been invalidated.” *Heck*, 512 U.S. at 487.

6 It appears that Cota is challenging the constitutionality of his state court criminal
 7 convictions. Consequently, he must demonstrate that his conviction has been overturned
 8 to proceed in an action under § 1983. As he has not done so, his sole relief is a *habeas*
 9 *corpus* action. The Court, therefore, recommends that the SAC be dismissed without
 10 prejudice and without leave to amend.

11 To the extent Cota is asserting claims against the Douglas County District
 12 Attorney, this defendant is absolutely immune from suit under § 1983 as a state
 13 prosecutor. See *Imbler v. Pachtman*, 424 U.S. 409, 427, 430 (1976) (state prosecutors
 14 are absolutely immune from § 1983 actions when performing functions “intimately
 15 associated with the judicial phase of the criminal process.”). Moreover, Defendant
 16 Thomas Gregory, the sentencing judge in Cota’s underlying criminal cases, is also
 17 absolutely immune from suit under § 1983. See *Schucker v. Rockwood*, 846 F.2d 1202,
 18 1204 (9th Cir. 1988) (“Judges are absolutely immune from damage actions for judicial
 19 acts taken within the jurisdiction of their courts.... A judge loses absolute immunity only
 20 when [the judge] acts in the clear absence of all jurisdiction or performs an act that is not
 21 judicial in nature.”).

22 Finally, in light of this Report and Recommendation, the Court also recommends
 23 that Cota’s motion requesting a warrant (ECF No. 5), motion requesting correction of the
 24 Clerk’s Error re: ECF No. 6 (ECF No. 11), and motion containing requests for admissions
 25 pursuant to Federal Rule of Civil Procedure 36 (ECF No. 13), be denied as moot.

26 **IV. CONCLUSION**

27 For the reasons articulated above, the Court recommends that Cota’s application
 28 to proceed *in forma pauperis* (ECF No. 8) be granted, and his second amended complaint

1 (ECF No. 6) be dismissed without prejudice and without leave to amend.

2 The parties are advised:

3 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
4 Practice, the parties may file specific written objections to this Report and
5 Recommendation within fourteen days of receipt. These objections should be entitled
6 "Objections to Magistrate Judge's Report and Recommendation" and should be
7 accompanied by points and authorities for consideration by the District Court.

8 2. This Report and Recommendation is not an appealable order and any
9 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the
10 District Court's judgment.

11 **V. RECOMMENDATION**

12 **IT IS THEREFORE RECOMMENDED** that Cota's application to proceed *in forma*
13 *pauperis* (ECF No. 8) be **GRANTED**;

14 **IT IS FURTHER RECOMMENDED** that Cota's motion requesting a warrant,
15 motion for correction of the Clerk's Error re: ECF No. 6 and motion containing requests
16 for admissions pursuant to Federal Rule of Civil Procedure 36, (ECF Nos. 5, 11, 13), be
17 **DENIED as moot**; and,

18 **IT IS FURTHER RECOMMENDED** that Cota's second amended complaint (ECF
19 No. 6) be **DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND**.

20 **DATED:** September 24, 2021.

21 
22 **UNITED STATES MAGISTRATE JUDGE**

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MICHAEL COTA,

Plaintiff,

Case No. 3:21-cv-00329-MMD-CLB

v.

JOHN MALONE, et al.,

Defendants.

ORDER

I. SUMMARY

Pro se Plaintiff Michael Cota, who is incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), submitted a civil rights second amended complaint under 42 U.S.C. § 1983. (ECF No. 6 (“SAC”).) Cota also submitted an application to proceed *in forma pauperis*. (ECF No. 8.) Before the Court is the Report and Recommendation of United States Magistrate Judge Carla L. Baldwin. (ECF No. 14 (“R&R”).) Judge Baldwin’s R&R recommends that Cota’s application to proceed *in forma pauperis* be granted, the SAC be dismissed without prejudice and without leave to amend, and Cota’s pending motions (ECF Nos. 5, 11, 13) be denied as moot. Shortly after the R&R issued, Cota timely filed an objection to the R&R (ECF No. 17 (“Objection”)) and filed additional motions (ECF Nos. 15, 18, 19). Because the Court agrees with Judge Baldwin—and as further explained below—the Court will overrule Cota’s Objection, adopt the R&R in full, and deny the additional motions as moot.

II. BACKGROUND

In the SAC, Cota names the following individuals as Defendants: John Malone, Thomas Gregory, Matthew Johnson, Francisco Torres, and John Enos. (ECF No. 6.)¹ Cota alleges that Defendants Malone, Gregory, and Johnson orchestrated a plan to use Cota's juvenile records against him in his underlying criminal cases, in violation on NRS

¹The Court notes that the named Defendants were compiled from both the caption and the body of the SAC.

1 § 62H.030(2). (*Id.* at 4.) In the relevant criminal cases against Cota, Malone was Cota's
2 defense attorney, Gregory was the presiding state court judge, and Johnson was the
3 district attorney. (*Id.* at 37.) Cota alleges that his due process and equal protection rights,
4 and his right against cruel and unusual punishment, were violated when his juvenile
5 records were used without a proper hearing and a court order. (*Id.* at 5-7.)

6 **III. LEGAL STANDARD**

7 **A. Review of the Magistrate Judge's Recommendation**

8 This Court "may accept, reject, or modify, in whole or in part, the findings or
9 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
10 timely objects to a magistrate judge's report and recommendation, then the Court is
11 required to "make a *de novo* determination of those portions of the [report and
12 recommendation] to which objection is made." *Id.* The Court's review is thus *de novo*
13 because Cota filed the Objection. (ECF No. 16.)

14 **IV. DISCUSSION**

15 Following a *de novo* review of the R&R and other records in this case, the Court
16 finds good cause to accept and adopt Judge Baldwin's R&R in full.

17 Judge Baldwin recommends that this Court grant Cota's application to proceed *in*
18 *forma pauperis*, that his pending motions be denied, and that the SAC be dismissed
19 without prejudice and without leave to amend. (ECF No. 14.) In recommending the
20 dismissal of this action, Judge Baldwin found that Cota appears to be challenging the
21 constitutionality of his state court criminal convictions but had not demonstrated, pursuant
22 to *Heck v. Humphrey*, 512 U.S. 477, 487 (1998), that his conviction or sentence had been
23 invalidated. (*Id.* at 5.) Additionally, Judge Baldwin found that Defendants Johnson and
24 Gregory have absolute immunity from § 1983 cases, respectively as a state prosecutor
25 and sentencing judge. (*Id.*)

26 In his Objection, Cota makes the following three arguments: (1) Judge Baldwin
27 incorrectly names Defendants in the R&R; (2) Defendants Gregory and Johnson abused
28 their authority; and (3) Defendant Johnson violated NRS § 62H.030(2) when he illegally

1 held onto Cota's juvenile records for years and then used them against Cota in his criminal
2 case. However, the Court does not find these arguments convincing.

3 None of Cota's arguments address why the Court should not dismiss this action
4 pursuant to *Heck*, 512 U.S. at 487. Nor does Cota argue or demonstrate his criminal
5 conviction or sentence has been overturned for this action to proceed under § 1983.
6 Because Cota appears to be challenging the constitutionality of his state court criminal
7 convictions, the more proper federal remedy is a writ of *habeas corpus*, rather than a §
8 1983 action. See *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Heck*, 512 U.S. at 481;
9 *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973);
10 *Simpson v. Thomas*, 528 F.3d 685, 692-93 (9th Cir. 2008). Moreover, Cota merely states
11 that Defendants Gregory and Johnson abused their authority but offer no arguments or
12 evidence as to why absolute immunity from § 1983 cases is not warranted for these
13 Defendants in this instance. As such, the Court overrules Cota's Objection and will adopt
14 the R&R in full.

15 | V. CONCLUSION

16 It is therefore ordered that Plaintiff Michael Cota's Objection (ECF No. 16) is
17 overruled.

18 It is further ordered that the Report and Recommendation of Magistrate Judge
19 Carla L. Baldwin (ECF No. 14) is accepted and adopted in full.

20 It is further ordered that Cota's application to proceed *in forma pauperis* (ECF No.
21 8) is granted.

22 It is further ordered that Cota's second amended complaint (ECF No. 6) is
23 dismissed without prejudice and without leave to amend.

24 It is further ordered that Cota's pending motions (ECF Nos. 5, 11, 13, 15, 18, 19)
25 are denied as moot.

26 DATED THIS 27th Day of January 2022.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE

✓
**IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK**

MICHAEL LUIS COTA,
Appellant,
vs.

WILLIAM A. GITTERE, WARDEN, NEVADA
DEPARTMENT OF CORRECTIONS,
Respondent.

Supreme Court No. 83773
District Court Case No. 18-CR-00084; 18-CR-
00116

RECEIPT FOR DOCUMENTS

TO: Michael Luis Cota
Douglas County District Attorney/Minden \ Mark B. Jackson, District Attorney
Bobbie W. Williams, Douglas County Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

11/15/2021 Appeal Filing Fee waived. Criminal. (SC)
11/15/2021 Filed Notice of Appeal/Proper Person. Appeal docketed in the Supreme Court this day. (18-CR-00084) (SC)
11/15/2021 Filed Notice of Appeal/Proper Person. (18-CR-00116) (SC)

DATE: November 15, 2021

Elizabeth A. Brown, Clerk of Court
lh

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

MICHAEL LUIS COTA,
Petitioner,
vs.
THE NINTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA, IN AND FOR THE
COUNTY OF DOUGLAS,
Respondent.

Supreme Court No. 83663
District Court Case No. NONE

RECEIPT FOR DOCUMENTS

TO: Michael Luis Cota
Douglas County District Attorney/Minden \ Mark B. Jackson, District Attorney
Bobbie W. Williams, Douglas County Clerk

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

10/22/2021 Petition Filing Fee waived. Criminal. (SC)
10/22/2021 Filed Proper Person Petition for Writ of Mandamus. (Exhibits attached) (SC)

DATE: October 22, 2021

Elizabeth A. Brown, Clerk of Court
lh