

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

DEC 15 2023

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

JOSE G. CASTILLO,

Plaintiff - Appellant,

v.

JEAN HARPER, Case Records Analyst, et  
al.,

Defendants - Appellees.

No. 23-2586

D.C. No.

1:21-cv-01181-ADA-CDB

Eastern District of California,  
Fresno

ORDER

Before: RAWLINSON, BYBEE, and HURWITZ, Circuit Judges.

A review of the record and the opening brief filed on November 16, 2023 demonstrates that this court lacks jurisdiction over this appeal because the notice of appeal, served on September 25, 2023, and filed in the district court on September 29, 2023, was not filed or delivered to prison officials within 30 days after the district court's judgment entered on August 23, 2023. *See* 28 U.S.C. § 2107(a); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

**DISMISSED.**

CLERK, U.S. COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
P.O. BOX 193939  
SAN FRANCISCO, CA 94119-3939

OFFICIAL BUSINESS  
PENALTY FOR PRIVATE USE

**LEGAL MAIL**



quadrant

FIRST-CLASS MAIL

IMI

**\$000.63<sup>0</sup>**

12/15/2023 ZIP 94103  
043M31241397

**US POSTAGE**

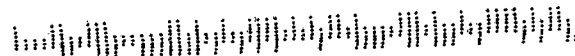
12-20-2023

450

**SPECIAL MAIL**

OPEN ONLY IN THE PRESENCE OF THE ADDRESS

9320480804 B900



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSE G. CASTILLO,

Plaintiff,

v.

JEAN HARPER, et al.,

Defendants.

No. 1:21-cv-01181-ADA-CDB (PC)

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS AND DISMISSING  
COMPLAINT FOR FAILURE TO STATE A  
CLAIM

(ECF No. 16)

Plaintiff Jose G. Castillo is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On May 18, 2023, the Magistrate Judge issued findings and recommendations, finding that Plaintiff's complaint challenges the length of, rather than the conditions of, his confinement. (ECF No. 16.) After determining that Plaintiff's claim for damages is barred by *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), the Magistrate Judge recommended that the Court dismiss the complaint with prejudice for failure to state a cognizable claim. (*Id.* at 4–5.)

Plaintiff filed objections to the findings and recommendations on June 14, 2023. (ECF No. 17.) None of the cases Plaintiff cites, however, demonstrate that his challenge to an “unauthorized, illegal sentence” is properly before this Court.

///

1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a  
2 de novo review of this case. After carefully reviewing the entire file, including Plaintiff's  
3 objections, the Court concludes that the findings and recommendations are supported by the  
4 record and proper analysis.

5 Accordingly,

- 6 1. The findings and recommendations issued on May 18, 2023, (ECF No. 16), are  
7 adopted in full;
- 8 2. This action is dismissed with prejudice for failure to state a cognizable claim; and
- 9 3. The Clerk of Court is directed to close this case.

10  
11  
12 IT IS SO ORDERED.

13 Dated: August 22, 2023

14   
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JOSE G. CASTILLO,

Plaintiff,

v.

JEAN HARPER, *et al.*,

Defendants.

Case No. 1:21-cv-01181-ADA-CDB (PC)

FINDINGS AND RECOMMENDATIONS  
TO DISMISS FOR FAILURE TO STATE A  
CLAIM

(Docs. 1, 12)

**FOURTEEN (14) DAY DEADLINE**

Plaintiff Jose G. Castillo is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action filed under 42 U.S.C. § 1983. On August 5, 2021, Plaintiff filed a complaint alleging he received an unauthorized, illegal sentence, as indicated by correspondence from a correctional case records analyst at the California Department of Corrections and Rehabilitation (“CDCR”) to the sentencing court. (Doc. 4.) The Court has screened the complaint and finds that it fails to state a claim upon which relief may be granted; therefore, the complaint must be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(i)–(ii) and 28 U.S.C. § 1915A(b)(1). The Court further finds that amendment would be futile and recommends dismissal of this action with prejudice.

**I. SCREENING REQUIREMENT**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).

1 The Court must dismiss a complaint or portion thereof if the prisoner raises claims that are  
2 frivolous or malicious, fail to state a claim on which relief may be granted, or seeks monetary  
3 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)–(iii); 28  
4 U.S.C. § 1915A(b). These provisions authorize the court to dismiss a frivolous *in forma pauperis*  
5 complaint *sua sponte*. *Neitzke v. Williams*, 490 U.S. 319, 322 (1989). Dismissal based on  
6 frivolousness is appropriate “only if the petitioner cannot make any rational argument in law or  
7 fact which would entitle him or her to relief.” *Id.* at 322–23. The Court must dismiss a complaint  
8 if it lacks a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal  
9 theory. *O’Neal v. Price*, 531 F.3d 1146, 1151 (9th Cir. 2008) (citing *Vaden v. Summerhill*, 449  
10 F.3d 1047, 1050 (9th Cir.2006)).

## 11 II. PLEADING REQUIREMENTS

12 A complaint must contain “a short and plain statement of the claim showing that the  
13 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The statement must give the defendant fair  
14 notice of the plaintiff’s claims and the grounds supporting the claims. *Swierkiewicz v. Sorema*  
15 *N.A.*, 534 U.S. 506, 512 (2002). Detailed factual allegations are not required, but “[t]hreadbare  
16 recitals of the elements of a cause of action, supported by mere conclusory statements, do not  
17 suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S.  
18 544, 555 (2007)). Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a  
19 claim that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). Factual allegations  
20 are accepted as true, but legal conclusions are not. *Id.* (citing *Twombly*, 550 U.S. at 555).

21 The Court construes pleadings of *pro se* prisoners liberally and affords them the benefit  
22 of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (citation omitted). This liberal  
23 pleading standard applies to a plaintiff’s factual allegations but not to his legal theories. *Neitzke*,  
24 490 U.S. at 330 n.9. Moreover, a liberal construction of the complaint may not supply essential  
25 elements of a claim not pleaded by the plaintiff. *Bruns v. Nat’l Credit Union Admin.*, 122 F.3d  
26 1251, 1257 (9th Cir. 1997). The mere possibility of misconduct and facts merely consistent with  
27 liability is insufficient to state a cognizable claim. *Iqbal*, 556 U.S. at 678; *Moss v. U.S. Secret*  
28 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

Dismissal of a *pro se* complaint without leave to amend is proper only if it is “absolutely clear that no amendment can cure the defect.” *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212–13 (9th Cir. 2012)); see *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (“Although leave to amend should be given freely, a district court may dismiss without leave where a plaintiff’s proposed amendments would fail to cure the pleading deficiencies and amendment would be futile.”).

### III. DISCUSSION

#### A. Plaintiff’s Allegations and Claims

In the Superior Court for the County of Santa Clara, Plaintiff was convicted of two counts of lewd/lascivious act on a child by use of force committed on or about January 1, 2007, and March 2–3, 2013. On September 26, 2014, the Superior Court sentenced Plaintiff to a middle term of six years (based on a sentencing triad of three, six, or eight years) on each of two counts. (Doc. 1 at 3, 12.)

Plaintiff asserts he received an unauthorized and illegal sentence and the Superior Court will not correct the sentencing error. Arguing that he was denied his First Amendment right to pursue grievances and access the courts, Plaintiff submits a letter from the Office of Grievances at Avenal (“OOG”) rejecting his grievance regarding sentencing errors as being outside of the OOG’s jurisdiction. (*Id.* at 8.) As proof that his sentence is illegal, Plaintiff submits a June 12, 2020, letter from an analyst employed by the California Department of Corrections and Rehabilitation to the Superior Court Judge, advising Plaintiff’s September 26, 2014, sentencing was inconsistent with an increase in the sentencing triad to five, eight, or ten years, effective September 9, 2010. (*Id.* at 12.) Plaintiff also relies on a letter dated January 28, 1987, from the California Attorney General to the Director of Corrections requesting that cases challenging sentences as illegal be directed to local district attorneys’ offices rather than to the Offices of the Attorney General. (*Id.* at 14.)

Plaintiff brings this section 1983 action against Defendants Jean Harper, Correctional Case Records Analyst, in Sacramento; the case records supervisor at Avenal State Prison; California Attorney General Robert Bonta; and Martin Gamboa, Warden at Avenal State Prison.

1 (Doc. 1 at 2.) Plaintiff seeks damages in the amount of \$7 million and injunctive relief in the  
2 form enforcement of the “order” of the California Attorney General dated January 28, 1987. (*Id.*  
3 at 6.)

4 **B. 42 U.S.C. § 1983**

5 Prisoners may bring claims under 42 U.S.C. § 1983 for violations of constitutional or  
6 other federal rights by persons acting “under color of state law.” A civil rights action under 42  
7 U.S.C. § 1983 is the proper remedy for a constitutional challenge to the conditions of  
8 imprisonment. *Ziglar v. Abbasi*, 582 U.S. 120, 137 S. Ct. 1843, 1848 (2017) (“In 42 U.S.C. §  
9 1983, Congress provided a specific damages remedy for plaintiffs whose constitutional rights  
10 were violated by state officials.”); *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973) (“[A] § 1983  
11 action is a proper remedy for a state prisoner who is making a constitutional challenge to the  
12 conditions of his prison life, but not to the fact or length of his custody.”).

13 Here, Plaintiff has failed to allege any facts that would support a constitutional claim  
14 against any of the defendants. Plaintiff does not complain about the conditions of confinement,  
15 but instead he challenges the length of his custody. Accordingly, he has failed to state a claim  
16 under 42 U.S.C. § 1983.

17 **1. Writ of Habeas Corpus**

18 In his request for relief, Plaintiff seeks enforcement of the January 28, 1987, “order” from  
19 the California Attorney General. To give Plaintiff the benefit of any doubt, the Court construes  
20 this demand for relief as a request for correction of his sentence. However, when a prisoner  
21 challenges the legality or duration of his custody, or raises a constitutional challenge that could  
22 entitle him to an earlier release, his sole federal remedy is a writ of habeas corpus. *See Preiser*,  
23 411 U.S. at 487 (where relief sought is immediate release or shortening length of actual  
24 confinement in prison, habeas corpus is the appropriate remedy, “and that specific determination  
25 must override the general terms of § 1983.”). Thus, because Plaintiff’s exclusive recourse to  
26 obtaining the relief he seeks is through habeas corpus, his complaint must be dismissed.

27 **2. *Heck v. Humphrey***

28 Plaintiff also makes a demand for \$7 million in damages for his illegal sentence. When a

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Jose B. Castillo — PETITIONER  
(Your Name)

VS.

Martin Gambo — RESPONDENT(S)

**PROOF OF SERVICE**

I, Jose B. Castillo, do swear or declare that on this date, February 28, 2024, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Office of the Clerk - Supreme Court of the United States  
Washington, D.C.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 28, 2024

Jose B. Castillo  
(Signature)

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