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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTHONY B. TILLMAN,

Plaintiff,

v.

BOARD OF PRISON TERMS,

Defendant.

CASE NO. 1:11-cv-00138-LJO-SMS PC

ORDER VACATING FINDINGS AND RECOMMENDATIONS AND DISMISSING COMPLAINT, WITHOUT PREJUDICE, FOR FAILURE TO STATE A CLAIM

(ECF Nos. 9, 10)

ORDER COUNTING DISMISSAL AS A STRIKE UNDER 28 U.S.C. § 1915(G)

I. Screening Requirement

Plaintiff Anthony B. Tillman (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. A complaint and application to proceed in forma pauperis were filed on January 26, 2011, however the documents were not signed. Fed. R. Civ. P. 11(a). On order was issued on January 28, 2011, directing Plaintiff to file a signed complaint and application to proceed in forma pauperis within twenty one days. (ECF No. 3.) Plaintiff failed to file a signed complaint and on April 7, 2011, findings and recommendations issued recommending that the action be dismissed for failure to comply with a court order. (ECF No. 9.) On April 19, 2011, Plaintiff filed a signed document entitled objections to findings and recommendations which the Court construes as Plaintiff’s first amended complaint. (ECF No. 10.)

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally

1 “frivolous or malicious,” that “fails to state a claim on which relief may be granted,” or that “seeks
2 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).

3 In determining whether a complaint states a claim, the Court looks to the pleading standard
4 under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must contain “a short and
5 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
6 “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it
7 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v.
8 Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555
9 (2007)).

10 **II. Complaint Allegations**

11 Plaintiff is in the custody of the California Department of Corrections and Rehabilitation and
12 is incarcerated at Old Folsom State Prison. In 1985, Plaintiff was convicted of multiple offenses,
13 including kidnaping and robbery with a firearm enhancement, and sentenced to nineteen years to life
14 in prison. (Obj. 1, ECF No. 10.) Plaintiff alleges that he should have been released in 2004, and has
15 exceeded his sentence by seven years in violation of the Eighth Amendment. (Id. at 1-2.) The Parole
16 Board failed to consider the circumstances of his commitment offenses and set forth some evidence
17 of current danger to the public at his parole hearing on November 22, 2010. Plaintiff argues that he
18 is suitable for probation and seeks seven million dollars. (Id. at 3.)

19 **III. Discussion**

20 When a prisoner is challenging the legality or duration of his custody and the relief he seeks
21 is immediate or speedier release, his sole federal remedy is habeas corpus. Preiser v. Rodriguez, 411
22 U.S. 475, 500 (1973). A “prisoner’s § 1983 action is barred (absent prior invalidation)-no matter
23 the relief sought (damages or equitable relief), no matter the target of the prisoner’s suit (state
24 conduct leading to conviction or internal prison proceedings)-*if* success in that action would
25 necessarily demonstrate the invalidity of confinement or its duration.” Wilkinson v. Dotson, 544
26 U.S. 74, 81-82 (2005).

27 Plaintiff is clearly challenging the legality or duration of his custody. Plaintiff alleges that
28 the Parole Board denied his probation and he should have been released in 2004. Since the success

1 in this action would necessarily demonstrate the invalidity of his confinement or its duration, the sole
2 remedy available to Plaintiff is a writ of habeas corpus. Therefore Plaintiff has failed to state a
3 cognizable claim under section 1983 and the action shall be dismissed without prejudice.

4 **IV. Conclusion and Order**

5 Plaintiff's complaint fails to state a claim upon which relief may be granted under section
6 1983. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend 'shall be freely
7 given when justice so requires,'" Fed. R. Civ. P. 15(a), and "[l]eave to amend should be granted if
8 it appears at all possible that the plaintiff can correct the defect," Lopez v. Smith, 203 F.3d 1122,
9 1130 (9th Cir. 2000) (internal citations omitted). However, the Court finds that the deficiencies
10 outlined above are not capable of being cured by amendment, and therefore leave to amend should
11 not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Noll v. Carlson, 809 F. 2d 1446, 1448-49 (9th Cir.
12 1987).

13 It is HEREBY ORDERED that:

- 14 1. The findings and recommendations issued April 7, 2011, is VACATED;
- 15 2. This action is dismissed, without prejudice, for failure to state a claim under section
16 1983,
- 17 3. The Clerk's Office shall enter judgment;
- 18 4. All pending motions are terminated; and
- 19 5. This dismissal counts as a strike under 28 U.S.C. § 1915(g).

20
21 IT IS SO ORDERED.

22 **Dated: April 21, 2011**

23 /s/ Lawrence J. O'Neill
24 UNITED STATES DISTRICT JUDGE
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