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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD WRIGHT,

Plaintiff,

vs.

NO. CIV S-10-0334 LKK GGH P

FINDINGS AND RECOMMENDATIONS

ATTORNEY GENERAL OF THE  
STATE OF CALIFORNIA,

Defendant.

\_\_\_\_\_/

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. By order filed April 1, 2010, plaintiff’s complaint was dismissed with leave to file an amended complaint. (Doc. #13). Plaintiff has now filed an amended complaint (Doc. #14); however, plaintiff has failed to cure the defects of the original complaint.

As plaintiff was previously informed, 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 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is

1 immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

2 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
3 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
4 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
5 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
6 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
7 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
8 Cir. 1989); Franklin, 745 F.2d at 1227.

9 A complaint must contain more than a “formulaic recitation of the elements of a  
10 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the  
11 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).  
12 “The pleading must contain something more...than...a statement of facts that merely creates a  
13 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal  
14 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient  
15 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft  
16 v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct.  
17 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
18 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
19 Id.

20 In reviewing a complaint under this standard, the court must accept as true the  
21 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
22 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,  
23 and resolve all doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.  
24 1843 (1969).

25 As in the original complaint (Doc. #1), plaintiff alleges that officials at the High  
26 Desert State Prison in Susanville repeatedly denied him access to the law library, where he

1 sought to research and prepare a federal habeas petition before the running of the one-year  
2 statutory limitations period under the Antiterrorism and Effective Death Penalty Act (AEDPA).  
3 (Doc. #14 at 4.) Whereas in the original complaint, plaintiff alleged that he had two months left  
4 to file his federal habeas petition before the AEDPA deadline, by plaintiff’s own calculations the  
5 AEDPA deadline has since passed (see Doc. #13 at 3, fn. 1), and plaintiff now states that he “had  
6 no other choice but to file [my] state habeas without real reasonable research.” (Doc. #14 at 4.)  
7 This suggests not that plaintiff failed to file a habeas claim at all, but opted to file a state habeas  
8 petition; alternatively, plaintiff may mean that he was forced to file his federal habeas petition  
9 without adequate research.<sup>1</sup>

10           Either way, plaintiff seeks relief including “an injunction that allows equitable  
11 time to file” a federal petition for a writ of habeas corpus; an injunction requiring the California  
12 Department of Corrections and Rehabilitation to “put into effect a system for law library use”  
13 that recognizes prisoners’ need to file a federal habeas petition within the one-year AEDPA  
14 limitations period; and various damages. (Doc. #14 at 3.)

15           While the amended complaint is an improvement over the original complaint  
16 insofar as it names defendants, plaintiff has not met the requisite “actual injury” necessary to  
17 support a claim for denial of access to the courts under the First Amendment. Lewis v. Casey,  
18 518 U.S. 343, 351-53, 355, 116 S. Ct. 2174 (1996) (prisoner must allege actual injury). The  
19 court held that before a denial of access to the courts claim can go forward, an inmate must  
20 “demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded.” Id.  
21 Accordingly, before a claim of denial of access to the courts can proceed, an inmate must  
22 demonstrate that he was precluded or thwarted in his efforts to present a legally or factually  
23 arguable claim to the courts. Plaintiff has failed to do so in this instance, and his own opinion on  
24 the merits of any filing he made does not establish the actual injury. He has also not alleged that

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25           <sup>1</sup> Court records do not reflect that plaintiff has any currently pending habeas corpus  
26 petition in this district, at least under the name of Richard Wright.

1 he was unable to timely file a federal habeas petition after allegedly spending one or two hours in  
2 the prison law library on twelve separate occasions during the AEDPA limitations period (Doc.  
3 #14 at 4), nor does he allege that any such petition was denied, either for untimeliness or any  
4 other reason. Without allegations of actual injury, plaintiff's First Amendment claim must fail.

5           Moreover, plaintiff is mistaken in his apparent belief that this court can grant  
6 relief on the amended complaint that affects in any way the timeliness of any federal habeas  
7 petition he has filed or may file. Any such habeas proceeding is entirely separate from the instant  
8 § 1983 action. Plaintiff's assertion that he should be given "equitable time to file [a] federal  
9 habeas petition" (Doc. #14 at 3) is really an argument for equitable tolling of the AEDPA  
10 limitations period, which should be made in the course of his federal habeas litigation.

11           Finally, as plaintiff's complaint now stands, the court would be compelled to  
12 adjudicate the adequacy of plaintiff's habeas claim, if the inadequacy of such is the "harm"  
13 plaintiff suffered. It would be perverse for this court to be adjudicating the adequacy of the  
14 habeas petition at the same time as the habeas court.

15           Because the gravamen of plaintiff's complaint concerns his ability to timely file  
16 an unrelated federal petition for writ of habeas corpus, the undersigned concludes that little  
17 would be served by giving plaintiff another chance to amend his complaint. "Liberality in  
18 granting a plaintiff leave to amend 'is subject to the qualification that the amendment not cause  
19 undue prejudice to the defendant, is not sought in bad faith, and is not futile.'" Thornton v.  
20 McClatchy Newspapers, Inc., 261 F.3d 789, 799 (9<sup>th</sup> Cir. 2001), quoting Bowles v. Reade, 198  
21 F.3d 752, 757 (9<sup>th</sup> Cir.1999). "Under Ninth Circuit case law, district courts are only required to  
22 grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave  
23 to amend if a complaint lacks merit entirely." Lopez v. Smith, 203 F.3d 1122, 1129 (9<sup>th</sup> Cir.  
24 2000). See also, Smith v. Pacific Properties and Development Corp., 358 F.3d 1097, 1106 (9<sup>th</sup>  
25 Cir. 2004), citing Doe v. United States, 58 F.3d 494, 497 (9<sup>th</sup> Cir.1995) ("a district court should  
26 grant leave to amend even if no request to amend the pleading was made, unless it determines

1 that the pleading could not be cured by the allegation of other facts.”). “[A] district court retains  
2 its discretion over the terms of a dismissal for failure to state a claim, including whether to make  
3 the dismissal with or without leave to amend.” Lopez v. Smith, 203 F.3d at 1124. “The district  
4 court’s discretion to deny leave to amend is particularly broad where plaintiff has previously  
5 amended the complaint.” Metzler Inv. GMBH v. Corinthian Colleges, Inc. 540 F.3d 1049, 1072  
6 (9<sup>th</sup> Cir. 2008), quoting In re Read-Rite Corp., 335 F.3d 843, 845 (9<sup>th</sup> Cir. 2003).

7 This court has previously granted plaintiff leave to amend and plaintiff has once  
8 again altogether failed to set forth a colorable claim. It appears to the undersigned that to grant  
9 further leave to amend would be patently futile.

10 Accordingly, IT IS HEREBY RECOMMENDED that this case be dismissed for  
11 plaintiff’s repeated failure to state a claim upon which relief can be granted.

12 These findings and recommendations are submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
14 days after being served with these findings and recommendations, plaintiff may file written  
15 objections with the court. Such a document should be captioned “Objections to Magistrate  
16 Judge's Findings and Recommendations.” Plaintiff is advised that failure to file objections  
17 within the specified time may waive the right to appeal the District Court's order. Martinez v.  
18 Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

19 DATED: September 17, 2010

/s/ Gregory G. Hollows

20 \_\_\_\_\_  
GREGORY G. HOLLOWS  
21 UNITED STATES MAGISTRATE JUDGE

22 GGH:014  
23 wrig0334.ord  
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