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

MARIO GUTIERREZ,

Plaintiff,

No. CIV S-11-1062 DAD P

vs.

FIFTH APPEAL COURT,

Defendant.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. This proceeding was referred to the undersigned magistrate judge in accordance with Local Rule 302 and 28 U.S.C. § 636(b)(1).

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

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

8 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and  
9 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
10 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic  
11 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47  
12 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must  
13 contain more than “a formulaic recitation of the elements of a cause of action;” it must contain  
14 factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic,  
15 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the  
16 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
17 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all  
18 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

19 The Civil Rights Act under which this action was filed provides as follows:

20 Every person who, under color of [state law] . . . subjects, or causes  
21 to be subjected, any citizen of the United States . . . to the  
22 deprivation of any rights, privileges, or immunities secured by the  
23 Constitution . . . shall be liable to the party injured in an action at  
24 law, suit in equity, or other proper proceeding for redress.

25 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
26 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
(1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the



1 **DISCUSSION**

2 A civil rights action is the proper mechanism for a prisoner seeking to challenge  
3 the conditions of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991). In contrast,  
4 habeas corpus proceedings are the proper mechanism for a prisoner seeking to challenge the fact  
5 or duration of his confinement. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973). Here, plaintiff  
6 claims that the state appellate court’s conduct resulted in him being sentenced to twenty-five  
7 years to life in state prison. However, even if the state appellate court was a proper defendant in  
8 this civil rights action, which it is not, plaintiff has not alleged that his current conviction or  
9 sentence has been overturned or otherwise invalidated.

10 Under these circumstances, the court cannot allow plaintiff to proceed in this civil  
11 rights action. See Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005) (“a state prisoner’s § 1983  
12 action is barred (absent prior invalidation) - no matter the relief sought (damages or equitable  
13 relief), no matter the target of the prisoner’s suit (state conduct leading to conviction or internal  
14 prison proceedings) - *if* success in that action would necessarily demonstrate the invalidity of  
15 confinement or its duration.”) (emphasis in original); Heck v. Humphrey, 512 U.S. 477 (1994) (a  
16 state prisoner may not recover damages under § 1983 for allegedly unconstitutional  
17 imprisonment, or for any other harm caused by “actions whose unlawfulness would render the  
18 imprisonment invalid,” unless he can prove that the conviction or other basis for confinement has  
19 been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal  
20 authorized to make such a determination, or called into question by a federal court’s issuance of a  
21 writ of habeas corpus). Although the allegations of plaintiff’s complaint are vague and  
22 conclusory, the court finds that those allegations necessarily implicate the validity of plaintiff’s  
23 current confinement. Plaintiff is advised that a writ of habeas corpus is his sole remedy by which  
24 to attack in federal court his state court criminal conviction and sentence, and that remedy may be  
25 pursued only after he has properly exhausted all of his constitutional claims by properly  
26 presenting them to the highest state court.

1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Clerk of the Court is directed to randomly  
3 assign a United States District Judge to this action.

4 For the reasons set forth above, IT IS HEREBY RECOMMENDED that:

- 5 1. Plaintiff's motion to proceed in forma pauperis (Doc. No. 17) be denied;  
6 2. Plaintiff's motion for a thirty-day extension of time to file an in forma pauperis  
7 application (Doc. No. 18) be denied as moot; and  
8 3. This action be dismissed without prejudice.

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

16 DATED: October 3, 2011.

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20 DALE A. DROZD  
21 UNITED STATES MAGISTRATE JUDGE

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