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

WILLIE WEAVER,

Plaintiff,

No. 2:12-cv-1091 DAD P

vs.

ATTORNEY HILARY DAVISSON,

Defendant.

ORDER

_____/

Plaintiff, a county jail inmate proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has not, however, filed an in forma pauperis affidavit or paid the required filing fee. See 28 U.S.C. §§ 1914(a), 1915(a). Plaintiff will be provided the opportunity either to submit the appropriate affidavit in support of a request to proceed in forma pauperis or to submit the appropriate filing fee.

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 immune from such relief. 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 A complaint, or portion thereof, should only be dismissed for failure to state a
9 claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set
10 of facts in support of the claim or claims that would entitle him to relief. Hishon v. King &
11 Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer
12 v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a
13 complaint under this standard, the court must accept as true the allegations of the complaint in
14 question, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the
15 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor,
16 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

17 Plaintiff has named his criminal defense attorney as the sole defendant in this civil
18 action. He alleges that he has asked his attorney to move to dismiss the criminal charges pending
19 against him due to the insufficiency of the evidence, but she won't do so. Plaintiff further alleges
20 that his criminal attorney has "never interviewed" two alibi witnesses. (Compl. at 3.) Plaintiff
21 seeks monetary damages, including punitive damages. Id.

22 It is unclear whether plaintiff has been convicted of the criminal charges referred
23 to in his complaint. In Younger v. Harris, 401 U.S. 37 (1971), the United States Supreme Court
24 established "a 'circumscribed exception to mandatory federal jurisdiction.'" Baffert v. California
25 Horse Racing Bd., 332 F.3d 613, 617 (9th Cir. 2003) (internal citation omitted). Under Younger,
26 a federal court is required to abstain from exercising federal jurisdiction over claims which

1 would interfere with state judicial proceedings ““if the state proceedings (1) are ongoing, (2)
2 implicate important state interests, and (3) provide the plaintiff an adequate opportunity to
3 litigate federal claims.”” Canatella v. California, 404 F.3d 1106, 1109-10 (9th Cir. 2005)(quoting
4 Hirsh v. Justices of Supreme Court of Cal., 67 F.3d 708, 712 (9th Cir. 1995)). In such
5 circumstances, the federal court must dismiss the action. Baffert, at 617. Younger arose from
6 state criminal proceedings. If plaintiff’s criminal proceedings are ongoing, it is likely this court
7 will be required to dismiss the action under Younger, because California law provides an
8 adequate opportunity to litigate plaintiff’s claims of ineffective assistance of counsel.

9 If plaintiff has been convicted, it is likely this action is barred by Heck v.
10 Humphrey, 512 U.S. 477 (1994). In Heck, the United States Supreme Court held that a suit for
11 damages on a civil rights claim concerning an allegedly unconstitutional conviction or
12 imprisonment cannot be maintained absent proof “that the conviction or sentence has been
13 reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal
14 authorized to make such determination, or called into question by a federal court’s issuance of a
15 writ of habeas corpus, 28 U.S.C. § 2254.” Heck, 512 U.S. at 486.

16 Under Heck, the court is required to determine whether a judgment in plaintiff’s
17 favor in this case would necessarily invalidate his conviction or sentence. Id. If it would, the
18 complaint must be dismissed unless the plaintiff can show that the conviction or sentence has
19 been invalidated. If plaintiff has been convicted, his claims would implicate the validity of that
20 conviction and there is no suggestion that any conviction has been invalidated.

21 For the foregoing reasons, this court finds this action may be subject to dismissal
22 without prejudice. Plaintiff will be granted a period of thirty days in which to voluntarily dismiss
23 the action if he wishes to do so in light of the applicable legal standards addressed above. See
24 Fed. R. Civ. P. 41(a).

25 In accordance with the above, IT IS HEREBY ORDERED that:

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1. Plaintiff shall submit, within thirty days from the date of this order, an affidavit in support of his request to proceed in forma pauperis on the form provided by the Clerk of Court, or the appropriate filing fee and failure to comply with this order may result in a recommendation that this action be dismissed pursuant to Local Rule 110 and Fed. R. Civ. P. 41(b);

2. The Clerk of the Court is directed to send plaintiff a new Application to Proceed In Forma Pauperis By a Prisoner; and

3. Plaintiff is granted thirty days from the date of this order in which to voluntarily dismiss this action pursuant to Fed. R. Civ. P. 41(a) if he wishes to do so.

DATED: June 1, 2012.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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