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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY DOWNS,
Plaintiff,
v.
LORI BALLS, et al.,
Defendants.

No. 2:15-cv-0507 KJN P

ORDER

Plaintiff is a state prisoner, proceeding pro se, in an action brought under 42 U.S.C. § 1983. On August 3, 2015, plaintiff filed a 117 page document in which he seeks appointment of counsel to prepare an amended complaint, claims he is “exercising res judicata and collateral estoppel against the defendants,” references preliminary injunctive relief or a protective order, and claims he is entitled to a stay of this action pending resolution of unidentified criminal issues. As set forth below, plaintiff’s requests are denied, but plaintiff is granted an extension of time to file an amended complaint.

First, in an effort to ascertain the nature of plaintiff’s claims, the court reviewed plaintiff’s original complaint. In the original complaint, plaintiff alleged that certain individuals were denying him the forms necessary to obtain counsel at his upcoming parole hearing, and to confirm that his rights under the Americans with Disabilities Act (“ADA”) would be protected at such a hearing. With the pending request, plaintiff provided a partial copy of the transcript from

1 his April 1, 2015 parole hearing, which confirms that plaintiff had benefit of counsel at the parole
2 hearing, and the Board had benefit of plaintiff's 1073 Form, as well as information in the
3 computer concerning plaintiff's disabilities under the ADA. (ECF No. 14 at 15-17.) Thus, absent
4 additional factual allegations provided by plaintiff, the court is unable to discern, absent his
5 amended complaint, the current nature of plaintiff's allegations.

6 Second, plaintiff references a preliminary injunction and discusses the elements a litigant
7 must prove in order to obtain one. (ECF No. 14 at 3-4.) However, plaintiff provides no factual
8 allegations to support such elements; indeed, it is unclear what plaintiff would like the court to
9 enjoin. To the extent plaintiff seeks injunctive relief, his request is wholly without factual support
10 and is denied.

11 Third, district courts lack authority to require counsel to represent indigent prisoners in
12 section 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In
13 exceptional circumstances, the court may request an attorney to voluntarily represent such a
14 plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);
15 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether
16 "exceptional circumstances" exist, the court must consider plaintiff's likelihood of success on the
17 merits as well as the ability of the plaintiff to articulate his claims pro se in light of the complexity
18 of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court
19 did not abuse discretion in declining to appoint counsel). The burden of demonstrating
20 exceptional circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such
21 as lack of legal education and limited law library access, do not establish exceptional
22 circumstances that warrant a request for voluntary assistance of counsel.

23 Having considered the factors under Palmer, the court finds that plaintiff has failed to
24 meet his burden of demonstrating exceptional circumstances warranting the appointment of
25 counsel at this time.

26 Fourth, plaintiff discusses the duty to disclose evidence favorable to the criminally
27 accused under Brady v. Maryland, 373 U.S. 83, 87 (1963), and states that on April 1, 2015, the
28 Sacramento Deputy District Attorney conceded that procedural due process was violated "since

1 November 15, 1993,” and that plaintiff’s “Brady violation was ongoing.” (ECF No. 14 at 7.)
2 However, the undersigned has reviewed the partial transcript from the April 1, 2015 parole
3 hearing, and found no such comment by the deputy district attorney. (ECF No. 14 at 15-22.) To
4 the extent plaintiff seeks to challenge his underlying conviction, plaintiff must raise such
5 challenge through a petition for writ of habeas corpus under 28 U.S.C. § 2254.¹

6 Fifth, because plaintiff has not yet filed an amended complaint, the court cannot determine
7 whether a stay of this action is appropriate. Plaintiff fails to identify what criminal issues would
8 require a stay of any such claims in this court. Plaintiff’s 1994 conviction has long been final,
9 and plaintiff identifies no new criminal charges pending against him. Indeed, the instant motion
10 is devoid of factual allegations identifying what claims plaintiff seeks to pursue in this court.
11 Rather, plaintiff provides numerous citations to statutes and cases. Plaintiff is advised that he
12 need not cite legal authority in his amended complaint. Rather, plaintiff must set forth facts
13 demonstrating his rights under the Constitution have been violated. In addition, plaintiff must
14 have first exhausted his administrative remedies as to any such claims. Exhaustion in prisoner
15 cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002).

16 Good cause appearing, plaintiff is granted one final extension of time in which to file an
17 amended complaint. Failure to timely file an amended complaint will result in the dismissal of
18 this action. The Clerk of the Court is directed to send plaintiff the form for filing a civil rights
19 action.

20
21 ¹ Plaintiff previously challenged his 1994 conviction in Case No. CIV S-97-0922 FCD PAN P.
22 Thus, before he can proceed with another habeas petition challenging the same conviction,
23 plaintiff must file a motion in the United States Court of Appeals for the Ninth Circuit asking for
24 an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3).

25 If plaintiff wishes to challenge a specific parole decision, a § 1983 action is not the proper
26 vehicle to challenge the Board’s procedures and/or decision. Under Swarthout v. Cooke, 562
27 U.S. 216, 218-19 (2011) (per curiam), the only federal due process to which plaintiff is entitled in
28 connection with a parole decision by the Board of Parole Hearings is the minimal procedural due
process protections set forth in Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442
U.S. 1, 16 (1979) (i.e., an opportunity to be heard, and a statement of reasons for the denial). If
plaintiff wishes to challenge the Board’s denial of parole by arguing that the basic requirements
of due process under Swarthout were not met, the proper vehicle for such a challenge is a petition
for writ of habeas corpus.

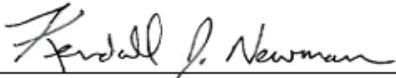
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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's August 3, 2015 motion (ECF No. 14) is denied in its entirety without prejudice;
2. Plaintiff is granted thirty days in which to file an amended complaint; and
3. The Clerk of the Court is directed to send plaintiff the form for filing a civil rights complaint under 42 U.S.C. § 1983 by a state prisoner.

Dated: August 10, 2015

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE