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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JUAN M. TIDWELL,
Plaintiff,
v.
C. VESTITO,
Defendant.

No. 2:16-cv-2529 DB

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis who filed a civil rights claim herein under 42 U.S.C. § 1983. On October 19, 2017, the undersigned issued an order dismissing plaintiff’s complaint without leave to amend for failure to state a claim.¹ (ECF No. 6). The judgment was issued the same day as well (ECF No. 9), and the case was closed. On November 13, 2017, plaintiff filed a motion for reconsideration. (ECF No. 10).

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¹ The court determined that plaintiff’s claim that his due process rights had been violated when defendant, a court reporter, failed to include key testimony of the victim in the transcription process was inappropriately filed under Section 1983 because the claim challenged the fact and/or duration of his physical imprisonment and required a determination that he was entitled to either an immediate or speedier release. As such, the undersigned opined, plaintiff’s sole federal remedy lay in a writ of habeas corpus. (See ECF No. 6 at 3).

1 Pursuant to jurisdictional requirements recently reiterated by the Ninth Circuit in Williams
2 v. King, 875 F.3d 500 (9th Cir. 2017),² the undersigned will vacate its October 2017 order (ECF
3 No. 6) in part to the extent that it dismisses plaintiff’s complaint without leave to amend.³ As a
4 result, it will also vacate the resulting judgment (ECF No. 9) in its entirety. It will then order that
5 a district judge be appointed to this case to review it. These actions will render plaintiff’s motion
6 for reconsideration (ECF No. 10) moot and enable plaintiff’s complaint to be reviewed de novo
7 by a district court judge. See 28 U.S.C. § 636(b)(1); see also Webb v. Califano, 468 F. Supp.
8 825, 828 (E.D. Cal. 1979) (stating district judge mandated to review de novo findings and
9 recommendations of magistrate judge). Thereafter, for the reasons listed below, the undersigned
10 will recommend that the court dismiss plaintiff’s complaint without leave to amend for failure to
11 state a claim.

12 **I. Screening Requirement**

13 The in forma pauperis statute provides, “Notwithstanding any filing fee, or any portion
14 thereof, that may have been paid, the court shall dismiss the case at any time if the court
15 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be
16 granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

17 **II. Pleading Standard**

18 Section 1983 “provides a cause of action for the deprivation of any rights, privileges, or
19 immunities secured by the Constitution and laws of the United States.” Wilder v. Virginia Hosp.
20 Ass’n., 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source

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22 ² In Williams, the Ninth Circuit reiterated the 28 U.S.C. § 636(c)(1) need for all-party consent to a
23 magistrate judge presiding over a matter prior to the magistrate being able to issue dispositive
24 motions in it. Williams, 875 F.3d at 504 (stating that plaintiff’s consent alone is insufficient to
25 satisfy Section 636(c)(1) jurisdictional requirement); see also Tripati v. Rison, 847 F.2d 548
26 (1988) (finding pursuant to 28 U.S.C. § 636(c)(1) magistrate has no authority to issue final
judgment on motion unless matter has been referred to him or her by court and parties consent to
have magistrate decide motion and enter judgment).

27 ³ Specifically, the parts of the October 2017 order that grant plaintiff in forma pauperis status and
28 obligate him to pay the statutory filing fee (see ECF No. 6 at 5) will not be vacated and will
remain in full force and effect.

1 of substantive rights, but merely provides a method for vindicating federal rights conferred
2 elsewhere. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

3 To state a claim under Section 1983, a plaintiff must allege two essential elements: (1)
4 that a right secured by the Constitution or laws of the United States was violated and (2) that the
5 alleged violation was committed by a person acting under the color of state law. See West v.
6 Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243, 1245 (9th Cir. 1987).

7 A complaint must contain “a short and plain statement of the claim showing that the
8 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
9 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
10 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
11 v. Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient
12 factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft,
13 556 U.S. at 678 (internal quotation marks omitted). Facial plausibility demands more than the
14 mere possibility that a defendant committed misconduct and, while factual allegations are
15 accepted as true, legal conclusions are not. Id. at 677-78.

16 **III. Plaintiff’s Allegations**

17 Plaintiff is a state inmate housed at the Correctional Training Facility in Soledad,
18 California. In the complaint, he names a single defendant, Casey Vestito, the court reporter
19 during plaintiff’s 2006 criminal trial. (See ECF No. 1 at 1). Plaintiff’s allegations are fairly
20 summarized as follows:

21 The victim’s testimony, transcribed by defendant Vestito in Sacramento Superior Court
22 Case No. 05-F8989, was incomplete, resulting in plaintiff’s 2006 conviction and sentence.
23 Through appeals of his state conviction via direct and collateral review, plaintiff has sought
24 defendant’s shorthand notes of the proceedings. These efforts have proven unsuccessful.
25 Plaintiff alleges that defendant’s failure to release specific shorthand transcription notes to him
26 from his trial violated his due process rights under the Fifth and Fourteenth Amendments and led
27 to an “unjust verdict.” (See id. at 2-9). Consequently, in the instant complaint, plaintiff asks the

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1 court to order the defendant “to release a full and complete set of short hand [sic] notes,” and he
2 also asks for “the release of any and all audio and/or video in the case in question.” (Id. at 9).

3 **IV. Discussion**

4 Plaintiff’s claim is inappropriate under Section 1983 because it appears he is challenging
5 the fact of his incarceration. “[W]hen a state prisoner is challenging the very fact or duration of
6 his physical imprisonment, and the relief he seeks is a determination that he is entitled to
7 immediate or a speedier release from that imprisonment, his sole federal remedy is a writ of
8 habeas corpus.” Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). If plaintiff seeks to make a
9 collateral attack on his trial and imprisonment, the action should be filed pursuant to 28 U.S.C. §
10 2254.

11 It appears, however, that plaintiff has already filed a habeas petition related to defendant’s
12 alleged omission of critical information concerning the victim’s testimony. In July 2006, plaintiff
13 was convicted of a number of crimes, one of which was “forcible rape” pursuant to California
14 Penal Code § 261(a)(2). (See Tidwell v. Knipp, No. 2:11-cv-0489 JKS (“Tidwell 2011”) ECF
15 No. 11 at 1). He received a sentence of 151 years to life. (Id.). In a petition for writ of habeas
16 corpus filed in this court in 2011, plaintiff, as a petitioner, asserted a number of claims, including
17 an ineffective assistance of counsel claim premised on the purportedly omitted portion of the
18 victim’s testimony.⁴ (See Tidwell 2011, ECF No. 11 at 10, 29-34). In that case, plaintiff also
19 filed a motion to compel discovery seeking, inter alia, a copy of the court reporter’s shorthand
20 notes. (See Tidwell 2011, ECF No. 37 at 3). Plaintiff’s motion to compel was denied. (Tidwell
21 2011, ECF No. 45). Thereafter, his petition for writ of habeas corpus was denied after it was
22 determined: (1) that the lower court had found that no transcript pages had been omitted – the

23 ⁴ Specifically, on federal habeas appeal in 2011, plaintiff argued in relevant part: (1) that a
24 portion of the trial transcript was missing, and (2) that the statement from the transcript pages that
25 were missing was the victim stating that she had only consented to having sex with plaintiff
because she was scared. (See Tidwell 2011, ECF No. 11 at 29-30).

26 Plaintiff went on to further assert that because California Penal Code § 261(a)(2) “[did]
27 not weigh the issue of verbal consent induced by fear, but rather a[n] implied, non-verbal form of
consent,” and because the definition of “against [one’s] will” in Black’s Law Dictionary was
28 defined as “without consent,” given that the victim consented non-verbally to having sex with
plaintiff, the act was not against the victim’s will. (See Tidwell 2011, ECF No. 11 at 30).

1 defendant court reporter had clearly noted in the transcript that the page gap had been created “for
2 block numbering purposes only,” and (2) that even if the portion of the victim’s testimony alleged
3 to have been omitted had actually been included at trial, that portion would only have supported
4 plaintiff’s guilty verdicts. (See Tidwell 2011, ECF No. 49 at 27-28). Plaintiff was subsequently
5 denied certificates of appealability by both the district court and the Ninth Circuit Court of
6 Appeal. (See Tidwell 2011, ECF Nos. 49, 58, 59).

7 If plaintiff were to refile his complaint as a habeas petition, it is evident that the claim
8 related to alleged missing transcript pages is duplicative of that asserted and denied in Tidwell
9 2011. (Compare ECF No. 1 at 2-9, with Tidwell 2011, ECF No. 11 at 10, 29-34). As a result, a
10 newly filed habeas petition would constitute a second or successive petition.

11 The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)
12 apply to any petition filed after April 24, 1996. Lindh v. Murphy, 521 U.S. 320, 327 (1997).
13 When AEDPA applies, a federal court must dismiss a second or successive petition that raises the
14 same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or
15 successive petition raising a new ground unless the petitioner can show that: (1) the claim rests
16 on a new retroactive constitutional right, or (2) the factual basis of the claim was not previously
17 discoverable through due diligence, and the new facts establish, by clear and convincing
18 evidence, that but for the constitutional error, no reasonable factfinder would have found the
19 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

20 The circuit court of appeals, not the district court, must decide whether a second or
21 successive petition satisfies the statutory requirements to proceed. 28 U.S.C. § 2244(b)(3)(A)
22 (“Before a second or successive petition permitted by this section is filed in the district court, the
23 applicant shall move in the appropriate court of appeals for an order authorizing the district court
24 to consider the application.”). This means that a petitioner may not file a second or successive
25 petition in district court until he has obtained leave from the court of appeals. Felker v. Turpin,
26 518 U.S. 651, 657 (1996). In the absence of an order from the appropriate circuit court, a district
27 court lacks jurisdiction over the petition and must dismiss the second or successive petition.
28 Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997). For these reasons, the undersigned

1 recommends that plaintiff's complaint be dismissed without leave to amend for failure to state a
2 claim.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. The court's October 19, 2017 order (ECF No. 6) is VACATED in part as follows:

5 a. The dismissal of plaintiff's complaint therein without leave to amend is
6 VACATED, and

7 b. The grant of plaintiff's request to proceed in forma pauperis as well as
8 plaintiff's resulting obligation to pay the statutory filing fee as directed therein are to remain in
9 full force and effect;

10 2. The court's October 19, 2017 judgment (ECF No. 9) is VACATED in its entirety;

11 3. Plaintiff's motion for reconsideration filed November 13, 2017 (ECF No. 10) is
12 DENIED as moot, and

13 4. The Clerk of Court is to randomly appoint a district court judge to preside over this
14 matter.

15 IT IS FURTHER RECOMMENDED that plaintiff's complaint be dismissed without leave
16 to amend for failure to state a cognizable claim.

17 These findings and recommendations will be submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
19 after being served with these findings and recommendations, plaintiff may file written objections
20 with the court. The document should be captioned "Objections to Magistrate Judge's Findings
21 and Recommendations." Failure to file objections within the specified time may result in waiver
22 of the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir.
23 1991).

24 Dated: February 7, 2018

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27 DEBORAH BARNES
28 UNITED STATES MAGISTRATE JUDGE

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