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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

NICHOLAS ROY OESTREICH,
Plaintiff,
v.
ALBERT SMITH, et al.,
Defendants.

No. 2:16-cv-2921 DB

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding pro se with an action filed pursuant to 42 U.S.C. § 1983, alleging that he is being denied “two-for-one credits” on his prison term by the State of California. (ECF No. 1.) Plaintiff’s complaint is before the court for screening.

While the complaint is filed pursuant to Section 1983, the actual claims made sound in habeas corpus, as plaintiff challenges the duration of his sentence. As this case does not and cannot state a cognizable claim for relief in the Section 1983 context, the court orders that a district judge be assigned to this case and that this matter be dismissed without leave to amend.

I. Screening

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

1 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
2 U.S.C. § 1915A(b)(1) & (2).

3 **A. Legal Standard**

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

11 In considering whether a complaint states a claim upon which relief can be granted, the
12 court must accept the allegations as true, Erickson v. Pardus, 551 U.S. 89, 94 (2007), and construe
13 the complaint in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232,
14 236 (1974). Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
15 See Haines v. Kerner, 404 U.S. 519, 520 (1972). Still, to survive dismissal for failure to state a
16 claim, a pro se complaint must contain more than “naked assertions,” “labels and conclusions” or
17 “a formulaic recitation of the elements of a cause of action.” Bell Atlantic Corp. v. Twombly,
18 550 U.S. 544, 555-57 (2007). In other words, “[t]hreadbare recitals of the elements of a cause of
19 action, supported by mere conclusory statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662,
20 678 (2009). Furthermore, a claim upon which the court can grant relief must have facial
21 plausibility. Twombly, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads
22 factual content that allows the court to draw the reasonable inference that the defendant is liable
23 for the misconduct alleged.” Iqbal, 556 U.S. at 678. Attachments to a complaint are considered
24 to be part of the complaint for purposes of a motion to dismiss for failure to state a claim. Hal
25 Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

26 **B. Discussion**

27 Plaintiff generally alleges that his sentence is not being calculated properly and that he is
28 being held for a longer period of time than his sentence necessitates.

1 Plaintiff's claims are not appropriate under Section 1983, as it appears he is challenging
2 the duration of his sentence. (ECF No. 1.) "[W]hen a state prisoner is challenging the very fact
3 or duration of his physical imprisonment, and the relief he seeks is a determination that he is
4 entitled to immediate or a speedier release from that imprisonment, his sole federal remedy is a
5 writ of habeas corpus." Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). If plaintiff seeks to make
6 a collateral attack on his trial and imprisonment, the action should be filed pursuant to 28 U.S.C.
7 § 2254.

8 However, a petition for a writ of habeas corpus is not a substitute for pursuing state
9 judicial remedies. See 28 U.S.C. § 2254(b). Therefore, a petition for writ of habeas corpus
10 should not be entertained unless the petitioner has first exhausted his state remedies. Baldwin v.
11 Reese, 541 U.S. 27, 29 (2004); Castille v. Peoples, 489 U.S. 346, 349 (1989). Concerns of
12 comity dictate that the State must first be afforded a full and fair opportunity to pass upon and
13 correct the alleged violation of its prisoners' federal rights. See Duncan v. Henry, 513 U.S. 364,
14 365 (1995). The exhaustion of state court remedies is a prerequisite to the granting of a petition
15 for writ of habeas corpus. 28 U.S.C. § 2254(b)(1).

16 A petitioner satisfies the exhaustion requirement by providing the highest state court with
17 a full and fair opportunity to consider all claims before presenting them to the federal court.
18 Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir.
19 1986). In order for this court to address a petitioner's habeas claims, he must first be convicted
20 and sentenced by the state trial court. Thereafter, the petitioner must pursue his claims in the state
21 courts of appeal until the claims have been exhausted before the California Supreme Court.
22 Accordingly, if this court were to interpret the complaint as a petition for habeas corpus, it would
23 be premature and require dismissal until such time as when plaintiff exhausted his state court
24 remedies.

25 In its present form, plaintiff's claims sound in habeas law and do not present cognizable
26 claims for relief pursuant to Section 1983. For these reasons, the complaint must be dismissed
27 without prejudice. The court will not grant leave to amend the complaint because amendment

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1 would be futile, as it appears no set of facts can rectify that this case is, in its essence, a habeas
2 matter.

3 **II. Conclusion**

4 In accordance with the above, IT IS HEREBY ORDERED that Clerk of Court randomly
5 assign a district judge to this action, and IT IS HEREBY RECOMMENDED that this action be
6 dismissed without leave to amend for failure to state a cognizable claim.

7 These findings and recommendations are submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
9 after being served with these findings and recommendations, plaintiff may file written objections
10 with the court and serve a copy on all parties. Such a document should be captioned “Objections
11 to Magistrate Judge's Findings and Recommendations.” Plaintiff is advised that failure to file
12 objections within the specified time may waive the right to appeal the District Court's order.

13 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 Dated: September 30, 2017

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17 DEBORAH BARNES
18 UNITED STATES MAGISTRATE JUDGE
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