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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

OSHAY JOHNSON,
Plaintiff,
v.
ANTHONY KANE, et al.,
Defendants.

No. 2:17-cv-0026 KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly payments of twenty percent of the preceding month's income credited to plaintiff's trust account.

1 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
2 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
3 § 1915(b)(2).

4 For the reasons discussed below, plaintiff's complaint should be dismissed, and leave to
5 amend should not be granted.

6 II. Screening Standards

7 The court is required to screen complaints brought by prisoners seeking relief against a
8 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
9 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
10 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
11 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

12 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
13 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
14 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an
15 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
16 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
17 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
18 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
19 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
20 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
21 1227.

22 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
23 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
24 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
25 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
26 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
27 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
28 sufficient "to raise a right to relief above the speculative level." Id. at 555. However, "[s]pecific

1 facts are not necessary; the statement [of facts] need only ‘give the defendant fair notice of what
2 the . . . claim is and the grounds upon which it rests.’” Erickson v. Pardus, 551 U.S. 89, 93
3 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).
4 In reviewing a complaint under this standard, the court must accept as true the allegations of the
5 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most
6 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other
7 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

8 III. Discussion

9 A. Due Process Right to Be Heard

10 First, plaintiff alleges that he was denied the right to be heard at the 2009 Board of Prison
11 Hearings (“Board”) parole consideration hearing because he was denied the opportunity to
12 present a rebuttal after the Board gave their reasons for the denial. Plaintiff names as defendants
13 Governor Brown, Board Chairman Kane, Board Member Moezsinger, and two Secretaries of the
14 CDCR.

15 The doctrine of res judicata bars the re-litigation of claims previously decided on their
16 merits. Headwaters, Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1051 (9th Cir. 2005). “The
17 elements necessary to establish res judicata are: ‘(1) an identity of claims, (2) a final judgment on
18 the merits, and (3) privity between parties.’” Headwaters, Inc., 399 F.3d at 1052 (quoting Tahoe-
19 Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003)).
20 “As a general matter, a court may, *sua sponte*, dismiss a case on preclusion grounds ‘where the
21 records of that court show that a previous action covering the same subject matter and parties had
22 been dismissed.’” Headwaters, Inc., 399 F.3d at 1055 (quoting Evarts v. W. Metal Finishing Co.,
23 253 F.2d 637, 639 n.1 (9th Cir. 1958)). The doctrine “‘relieve[s] parties of the costs and vexation
24 of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions,
25 encourage[s] reliance on adjudication.’” Dodd v. Hood River Cnty., 59 F.3d 852, 863 (9th Cir.
26 1995) (quoting Allen, 449 U.S. at 94).

27 Court records confirm that plaintiff raised this due process claim in his prior habeas
28 petition. Oshay Johnson v. Board of Parole Hearings, No. 2:11-cv-2748 GGH (E.D. Cal. Jan. 4,

1 2012). The district court addressed the claim on its merits, finding that during the June 3, 2009
2 parole hearing, plaintiff “was present, represented by counsel, and both counsel and [plaintiff]
3 presented many, many arguments to the Board and responded to the Board’s questions.” Id.
4 (ECF No. 6 at 1.) The court found that plaintiff did not have a right to be heard once the Board
5 stated its decision,¹ received all the process due under Swarthout v. Cooke, 562 U.S. 216 (2011),
6 and dismissed the case. Board of Parole Hearings, No. 2:11-cv-2748 GGH, at 2. Moreover, in
7 that action, plaintiff sued the Board of Parole Hearings and the State of California, who are in
8 privity with the defendants named herein: Board members, State of California officials and
9 corrections officials. Because “there is privity between officers of the same government,” a
10 judgment in one suit between a party and a representative of the United States precludes
11 relitigation of the same issue between that party and a different government officer in a later suit.”
12 Sunshine Anthracite Coal, Inc., 310 U.S. 381, 402-03 (1940); see also Nordhorn v. Ladish Co., 9
13 F.3d 1402, 1405 (9th Cir. 1993) (“[W]hen two parties are so closely aligned in interest that one is
14 the virtual representative of the other, a claim by or against one will serve to bar the same claim
15 by or against the other.”) (citation omitted); see also Nelson v. Brown, 2014 WL 1096189 at *7
16 (S.D. Cal. 2014) (warden named in habeas petition and correctional officers named in civil rights
17 action in privity). Here, there is sufficient commonality of interests to apply res judicata against
18 all defendants in this case. All defendants have interests closely aligned with the Board in the
19 prior case.

20 Therefore, because there is an identity of claims, a final judgment on the merits, and
21 privity among the parties, res judicata bars relitigation of plaintiff’s due process claim alleging he
22 was denied the right to be heard at the 2009 parole hearing.

23 Second, as a sub-part of his first claim, plaintiff alleges he was denied the right to be heard
24 for seven years because the Board failed to schedule a hearing for seven years. (ECF No. 1 at
25 11.) Plaintiff claims that the Board acknowledged and agreed that his 2009 hearing was late, and

26 ¹ The court further noted that “the Ninth Circuit has held that a petitioner does not have
27 the right to be heard after he is granted parole by the Board, and then the grant is reversed by the
28 governor. Styre v. Adams, 645 F.3d 1106, 1108-09 (9th Cir. 2011).” Board of Parole Hearings,
No. 2:11-cv-2748 GGH, at 2.

1 that plaintiff had missed approximately three hearings. Plaintiff states he should have had his
2 initial hearing in 2002.

3 However, court records reflect that plaintiff first presented his claim concerning the seven
4 year delay in Johnson v. Yates, No. 1:09-cv-1355 OWW SMS (E.D. Cal.). Warden Yates was a
5 named respondent. In that action, plaintiff claimed the Board violated his due process and equal
6 protection rights when it delayed his initial parole consideration hearing by seven years. Id. The
7 court dismissed the challenge as barred by the statute of limitations, and as failing to state a
8 cognizable constitutional claim. Id. (May 14, 2010 Order). The district court's dismissal of the
9 earlier filed petition constitutes a decision on the merits. McNabb v. Yates, 576 F.3d 1028, 1029
10 (9th Cir. 2009) (“[D]ismissal of a habeas petition as untimely constitutes a disposition on the
11 merits.”) Plaintiff raised the seven year delay again in Johnson v. Dickinson, No. 2:10-cv-1841
12 MCE EFB, but the petition was dismissed on the grounds that the claim was successive. Id.
13 (Aug. 31, 2011 Findings & Rec.; Ord. adopting Sept. 30, 2011).

14 Thus, there is an identity of claims, a final judgment on the merits, and privity among the
15 parties, as discussed above, res judicata bars relitigation of plaintiff's due process claim alleging
16 he was denied a Board hearing for seven years.

17 B. Calculation of Minimum Eligible Parole Date (“MEPD”)

18 In his second claim, plaintiff alleges that the Ex Post Facto Clause was violated by the
19 application of a new CDCR policy being applied in 2011 to calculate plaintiff's MEPD (sub-
20 argument B). (ECF No. 1 at 15.) Plaintiff concedes that his sub-argument B was addressed in a
21 later habeas petition filed in Johnson v. Duffy, No. 2:13-cv-1962 DAD (E.D. Cal. Aug. 13, 2014).
22 Warden Duffy was the named respondent. In Duffy, the court stated:

23 “there is no Ex Post Facto Clause violation when prison procedures
24 change, to the prisoner's detriment, in response to an authoritative
25 state court decision correcting an administrative body's previously
26 erroneous application of state law.” See Madrid v. Trimble, No.
27 ED CV 12-0962 PSG (SS), 2013 WL 5951971 at *6-*7 (C.D. Cal.
28 Nov. 6, 2013) (rejecting petitioner's claim that CDCR violated the
Ex Post Facto Clause when it changed its method for calculating an
MEPD because CDCR's changes were dictated by California court
decisions) (citing Mileham v. Simmons, 588 F.2d 1279 (9th Cir.
1979)); Holguin v. Raines, 695 F.2d 372 (9th Cir. 1982)).

1 Duffy, No. 2:13-cv-1962 DAD at 4. The court dismissed the petition for failure to state a
2 cognizable claim for federal habeas corpus relief. Because there is an identity of claims, a final
3 judgment on the merits, and privity among the parties, as discussed above, res judicata bars
4 relitigation of plaintiff's sub-argument B.²

5 C. Marsy's Law/Ex Post Facto Claim

6 In his second claim, plaintiff alleges the Ex Post Facto Clause was violated by the
7 application of Marsy's Law at his 2009 hearing (sub-argument A). Plaintiff concedes that this
8 sub-argument A was raised in No. 2:11-cv-2748 GGH, but claims that the court dismissed the
9 claim without prejudice finding that plaintiff was part of the class action Gilman v. Fisher, No.
10 2:05-cv-0830 LKK GGH (E.D. Cal.). (ECF No. 1 at 16.) Court records confirm that plaintiff's
11 ex post facto claim was dismissed without prejudice on December 2, 2011. See No. 2:11-cv-2748
12 GGH (ECF No. 4 at 3.) Plaintiff argues that he "never consented to be part of the [Gilman] class
13 action," and contends that because he is not a life term inmate convicted of murder he should not
14 be part of the class. In any event, plaintiff argues that this claim was never heard on the merits.³
15 (ECF No. 1 at 17.)

16 In Gilman v. Brown, 110 F. Supp. 3d 989 (E.D. Cal. 2014) ("Gilman I"), rev'd and
17 remanded, 814 F.3d 1007 (9th Cir. Feb. 22, 2016), which held that the application of Marsy's
18 Law⁴ (Proposition 9) to California State prisoners who have been sentenced to a life term with the

19 ² Plaintiff appealed the district court's decision, and the district court declined to issue a
20 certificate of appealability. Johnson v. Duffy, No. 15-15900 (9th Cir.). The Ninth Circuit stayed
21 the appeal pending Gilman. On October 28, 2016, the Ninth Circuit lifted the stay and denied the
22 request for a certificate of appealability because the petition failed to state any cognizable habeas
23 claims debatable among jurists of reason. The Ninth Circuit also stated that the denial of the
24 certificate of appealability did not preclude plaintiff from pursuing conditions of confinement
25 claims in a properly filed civil action under 42 U.S.C. § 1983. Here, however, plaintiff's MEPD
26 claim is barred by res judicata, rendering the claim legally frivolous. When claims are barred by
27 res judicata, or claim preclusion, a complaint is frivolous and fails to state a claim. See Franklin,
28 745 F.2d at 1230 (affirming dismissal of plaintiff's claims as "frivolous or malicious" where the
request for damages was barred "under the doctrine of res judicata").

³ Plaintiff filed an appeal of the decision in No. 2:11-cv-2748 GGH, but the Ninth Circuit
declined to issue a certificate of appealability. Id.

⁴ Under Marsy's Law, the minimum deferral period between parole hearings was increased from

1 possibility of parole for an offense that occurred before November 4, 2008, violated the Ex Post
2 Facto Clause. Gilman I, 110 F. Supp. 3d at 1012. Plaintiff contends that application of Marsy’s
3 Law to his parole hearing violated the Ex Post Facto Clause.⁵

4 Plaintiff falls within the Gilman class. See Gilman I, 110 F. Supp. 3d at 990 (the plaintiff
5 class in Gilman is comprised of “all California State prisoners who have been sentenced to a life
6 term with possibility of parole for an offense that occurred before November 4, 2008.”). Before
7 2008, plaintiff was convicted of attempted premeditated murder, and sentenced to life with the
8 possibility of parole. (ECF No. 1 at 5.) Although he claims he did not consent to be a Gilman
9 class member, he did not allege that he opted out of the Gilman class. Assuming he did not opt
10 out of the class, plaintiff cannot maintain an independent ex post facto challenge. See Acinelli v.
11 Holland, 2016 WL 5662048, at *5 (C.D. Cal. July 22, 2016) (Adopted in full Sept. 28, 2016); see
12 also Gilman v. Fisher, 2:05-cv-0830 LKK CKD P, ECF No. 296 at 2, 2010 U.S. Dist. LEXIS
13 143678, at *3 (Order filed Dec. 10, 2010).

14 Nevertheless, even if plaintiff could maintain an independent ex post facto challenge after
15 Nettles, any such challenge is foreclosed by the Ninth Circuit’s decision in Gilman v. Brown, 814
16 F.3d 1007 (9th Cir. 2016) (“Gilman II”), which reversed Gilman I and held that Proposition 9’s
17 deferral provisions do not violate the Ex Post Facto Clause. Gilman II, 814 F.3d at 1016-17. See
18 Montalvo v. California Dep’t of Corr., 2016 WL 4096407, at *5 (E.D. Cal. Aug. 2, 2016)
19 (adopted in full Aug. 30, 2016). In other words, the Ninth Circuit has foreclosed any claim that
20 plaintiff seeks to raise that the Board’s application of Proposition 9 to his parole hearing violates
21 the Ex Post Facto Clause.

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23 one to three years, and the maximum deferral period from five to fifteen years. Gilman v.
24 Schwarzenegger, 638 F.3d 1101, 1104 (9th Cir. 2011).

25 ⁵ The Ninth Circuit has held that unless a state prisoner’s claim lies at the core of habeas corpus,
26 it may not be brought in habeas corpus but must be brought, “‘if at all,’ under § 1983.” Nettles v.
27 Grounds, 830 F.3d 922, 925, 930-31 (9th Cir. 2016) (en banc). Claims that lie in the “core of
28 habeas corpus” are those that, if successful, would “necessarily lead to . . . immediate or earlier
release from confinement.” Id. at 935.

1 D. Statute of Limitations

2 Because plaintiff was aware of his alleged injuries on or before his parole hearing on June
3 3, 2009, his claims are barred by the statute of limitations. Federal law determines when a claim
4 accrues, and “[u]nder federal law, a claim accrues when the plaintiff knows or should know of the
5 injury that is the basis of the cause of action.” Douglas v. Noelle, 567 F.3d 1103, 1109 (9th Cir.
6 2009) (citation omitted); Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004). Because
7 section 1983 contains no specific statute of limitations, federal courts should apply the forum
8 state’s statute of limitations for personal injury actions. Jones v. Blanas, 393 F.3d 918, 927 (9th
9 Cir. 2004); Maldonado, 370 F.3d at 954. California’s statute of limitations for personal injury
10 actions was extended to two years effective January 1, 2003. Cal. Civ. Proc. Code § 335.1; Jones,
11 393 F.3d at 927; Maldonado, 370 F.3d at 954-55. However, the new statute of limitations period
12 does not apply retroactively. Maldonado, 370 F.3d at 955. California law also tolls for two years
13 the limitations period for inmates “imprisoned on a criminal charge, or in execution under the
14 sentence of a criminal court for a term less than for life.” Cal. Civ. Proc. Code § 352.1.

15 Liberally construed, plaintiff had four years from the 2009 parole hearing to file suit.
16 Plaintiff’s complaint was signed on January 1, 2017, over three and a half years too late.
17 Therefore, plaintiff’s claims are barred by the statute of limitations.

18 IV. Leave to Amend?

19 As set forth above, federal courts are instructed to “freely give leave [to amend] when
20 justice so requires.” Fed. R. Civ. P. 15(a)(2). Although the court would generally grant plaintiff
21 leave to amend in light of his pro se status, amendment is futile in this instance because the
22 deficiencies cannot be cured by amendment. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.
23 2000); Schmier v. U.S. Court of Appeals for the Ninth Circuit, 279 F.3d 817, 824 (9th Cir. 2002)
24 (recognizing “[f]utility of amendment” as a proper basis for dismissal without leave to amend);
25 see also Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995) (a civil rights complaint
26 seeking habeas relief should be dismissed without prejudice to filing as a petition for writ of
27 habeas corpus).

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

1. Plaintiff's request for leave to proceed in forma pauperis is granted.
2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the Director of the California Department of Corrections and Rehabilitation filed concurrently herewith.
3. The Clerk of the Court is directed to assign a district judge to this case; and

IT IS HEREBY RECOMMENDED that plaintiff's complaint be dismissed.

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

Dated: March 20, 2017


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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