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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NEAL O'NEILL,  
Plaintiff,  
v.  
STATE OF CALIFORNIA, et al.,  
Defendants.

No. 2:17-cv-0212 JAM AC P

FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, has filed a complaint and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. He has also filed a motion to compel discovery. ECF No. 8. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

I. Application to Proceed In Forma Pauperis

Plaintiff has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. ECF Nos. 2. Plaintiff's declaration makes the showing required by 28 U.S.C. § 1915(a). However, the court will not assess a filing fee at this time. Instead, the undersigned will recommend that the complaint be summarily dismissed.

II. Complaint

Plaintiff alleges various violations of his due process rights by Judges Wagner, Melikian, and Lassarow; district attorney Pizzuti; and defense attorney Dain Wiener in connection with a

1 state court criminal case. ECF No. 1. Specifically, he alleges that Judge Wagner, Melikian, and  
2 Lassarow refused to dismiss his case based on a violation of the Interstate Agreement on  
3 Detainers, denied his motion to dismiss defense counsel, would not let him speak except through  
4 counsel, and denied him presentence credits. Id. at 5-6, 8. Pizutti allegedly ignored requests for a  
5 speedy trial and obtained a governor’s warrant by falsely stating that there were no other requests  
6 for extradition. Id. at 7. Finally, plaintiff asserts that Wiener did not provide a fair and impartial  
7 defense because he had a conflict of interest and he refused to file a file a petition for habeas  
8 review or appeal the denial of his motion to dismiss. Id. at 10. Plaintiff seeks monetary damages  
9 and to have his conviction overturned. Id. at 11.

10 III. Failure to State a Claim

11 A. Defendants Wagner, Melikian, and Lassarow

12 The Supreme Court has held that judges acting within the course and scope of their  
13 judicial duties are absolutely immune from liability for damages under § 1983. Pierson v. Ray,  
14 386 U.S. 547, 553-55 (1967). “A judge will not be deprived of immunity because the action he  
15 took was in error, was done maliciously, or was in excess of his authority; rather, he will be  
16 subject to liability only when he has acted in the ‘clear absence of all jurisdiction.’” Stump v.  
17 Sparkman, 435 U.S. 349, 356-57 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351  
18 (1871)). A judge’s jurisdiction is quite broad and its scope is determined by the two-part test  
19 articulated in Stump:

20 The relevant cases demonstrate that the factors determining whether  
21 an act by a judge is a “judicial” one relate to [(1)] the nature of the  
22 act itself, *i.e.*, whether it is a function normally performed by a  
23 judge, and [(2)] to the expectations of the parties, *i.e.*, whether they  
24 dealt with the judge in his judicial capacity.

25 Id. at 362.

26 The alleged actions of defendants Wagner, Melikian, and Lassarow fall squarely within  
27 the scope of functions “normally performed by a judge” and were done while the defendants were  
28 acting as superior court judges. Defendants Wagner, Melikian, and Lassarow are therefore  
absolutely immune from liability under § 1983, and the claims against them must be dismissed  
without leave to amend.

1           B.     Defendant Pizzuti

2           Prosecutors are absolutely immune from civil suits for damages under § 1983 which  
3 challenge the initiation and presentation of criminal prosecutions. Imbler v. Pachtman, 424 U.S.  
4 409, 431 (1976). Determining whether a prosecutor’s actions are immunized requires a  
5 functional analysis. The classification of the challenged acts, not the motivation underlying them,  
6 determines whether absolute immunity applies. Ashelman v. Pope, 793 F.2d 1072, 1076 (9th Cir.  
7 1986) (en banc). The prosecutor’s quasi-judicial functions, rather than administrative or  
8 investigative functions, are absolutely immune. Id. Thus, even charges of malicious prosecution,  
9 falsification of evidence, coercion of perjured testimony, and concealment of exculpatory  
10 evidence will be dismissed on grounds of prosecutorial immunity. See Stevens v. Rifkin, 608 F.  
11 Supp. 710, 728 (N.D. Cal. 1984).

12           Since the alleged actions taken by Pizzuti were related to the initiation and presentation of  
13 the state’s case, Pizzuti is immune from suit and the claims must be dismissed.

14           C.     Defendant Wiener

15           It is not clear whether Wiener was a public defender or privately retained counsel when he  
16 represented plaintiff. However, it is immaterial because in either case he is an improper  
17 defendant under 42 U.S.C. § 1983.

18           “To state a claim under § 1983, a plaintiff must allege the violation of a right secured by  
19 the Constitution and laws of the United States, and must show that the alleged deprivation was  
20 committed by a person acting under color of state law.” West v. Atkins, 487 U.S. 42, 48 (1988)  
21 (citations omitted). “[A] public defender does not act under color of state law when performing a  
22 lawyer’s traditional functions as counsel to a defendant in a criminal proceeding.” Polk County v.  
23 Dodson, 454 U.S. 312, 325 (1981).

24           In this case, plaintiff’s allegations against Wiener are based on his claims that Wiener was  
25 deficient in carrying out his duties as counsel. Because plaintiff’s allegations are about Wiener’s  
26 actions in representing him in a criminal case, if Wiener was a public defender he was not acting  
27 under color of state law. Similarly, if Wiener was privately retained counsel, he was also not  
28 acting under color of state law. This means that plaintiff cannot bring a claim against defendant

1 Wiener under § 1983. Furthermore, any potential claims for legal malpractice do not come within  
2 the jurisdiction of the federal courts. Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).  
3 For these reasons, the claims against defendant Wiener should be dismissed without leave to  
4 amend.

5 D. Jurisdiction

6 To the extent plaintiff may be trying to challenge his conviction and sentence, he may not  
7 do so in a § 1983 action and “habeas corpus is the appropriate remedy” for such claims. Preiser  
8 v. Rodriguez, 411 U.S. 475, 490 (1973); Nettles v. Grounds, 830 F.3d 922, 930 (9th Cir. 2016)  
9 (holding that habeas corpus is “available only for state prisoner claims that lie at the core of  
10 habeas (and is the exclusive remedy for such claims), while § 1983 is the exclusive remedy for  
11 state prisoner claims that do not lie at the core of habeas”). Accordingly, if plaintiff wants to  
12 challenge his conviction and sentence, he will need to do so in a petition for writ of habeas corpus  
13 after he has exhausted his state court remedies.

14 IV. No Leave to Amend

15 Leave to amend should be granted if it appears possible that the defects in the complaint  
16 could be corrected, especially if a plaintiff is pro se. Lopez v. Smith, 203 F.3d 1122, 1130-31  
17 (9th Cir. 2000) (en banc); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) (“A pro se  
18 litigant must be given leave to amend his or her complaint, and some notice of its deficiencies,  
19 unless it is absolutely clear that the deficiencies of the complaint could not be cured by  
20 amendment.” (citing Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987))). However, if, after  
21 careful consideration, it is clear that a complaint cannot be cured by amendment, the court may  
22 dismiss without leave to amend. Cato, 70 F.3d at 1005-06.

23 The undersigned finds that, as set forth above, the complaint fails to state a claim upon  
24 which relief may be granted and that amendment would be futile. The complaint should therefore  
25 be dismissed without leave to amend.

26 V. Plain Language Summary of this Order for a Pro Se Litigant

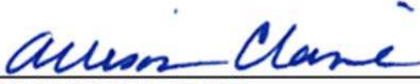
27 Your claims should be dismissed because even if they are true, the judges and prosecutor  
28 are immune from a civil suit and your defense attorney is not a proper defendant under § 1983. If

1 you want to challenge your conviction, you will need to file a habeas petition after you have  
2 exhausted your state court remedies.

3 In accordance with the above, IT IS HEREBY RECOMMENDED that the complaint be  
4 dismissed without leave to amend for failure to state a claim.

5 These findings and recommendations are submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
7 after being served with these findings and recommendations, plaintiff may file written objections  
8 with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
9 and Recommendations." Plaintiff is advised that failure to file objections within the specified  
10 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
11 (9th Cir. 1991).

12 DATED: October 2, 2017

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14 ALLISON CLAIRE  
15 UNITED STATES MAGISTRATE JUDGE  
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