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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALEX LEONARD AZEVEDO,  
Plaintiff,  
v.  
COLUSA COUNTY JAIL, et al.,  
Defendants.

No. 2:17-cv-0472 AC P

ORDER and  
FINDINGS AND RECOMMENDATIONS

I. Introduction

Plaintiff is a county detainee incarcerated at the Colusa County Jail. Plaintiff proceeds pro se with a civil rights complaint filed pursuant to 42 U.S.C. § 1983; a motion to proceed in forma pauperis pursuant to 28 U.S.C. § 1915; a motion for appointment of counsel; and a motion for issuance of summonses.

Plaintiff has consented to the jurisdiction of the undersigned Magistrate Judge for all purposes pursuant to 28 U.S.C. § 636(c) and Local Rule 305(a). See ECF No. 4. For the reasons that follow, this court recommends the dismissal of this action without leave to amend and denial of plaintiff’s motions as moot.a

II. In Forma Pauperis Application

Plaintiff has submitted an affidavit and jail trust account statement that make the showing required by 28 U.S.C. § 1915(a). See ECF No. 5. Nevertheless, because this court recommends

1 dismissal of this action without leave to amend, the court further recommends that plaintiff's  
2 request to proceed in forma pauperis be denied as moot.

3 III. Legal Standards for Screening Prisoner Civil Rights Complaint

4 The court is required to screen complaints brought by prisoners seeking relief against a  
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a); see  
6 also 41 U.S.C. § 1983. The court must dismiss a complaint or portion thereof if the prisoner has  
7 raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief  
8 may be granted, or that seek monetary relief from a defendant who is immune from such relief.  
9 28 U.S.C. § 1915A(b)(1),(2). A claim is legally frivolous when it lacks an arguable basis either  
10 in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d  
11 1221, 1227-28 (9th Cir. 1984).

12 A pro se litigant is entitled to notice of the deficiencies in the complaint and an  
13 opportunity to amend, unless the complaint's deficiencies cannot be cured by amendment. See  
14 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

15 IV. Screening of Plaintiff's Complaint

16 Plaintiff makes the following three claims, see ECF No. 1: (1) that Colusa County Jail  
17 Officer Keri King denied plaintiff breakfast on August 30, 2016, the morning plaintiff was  
18 admitted to the jail; plaintiff states that he was arrested at 3:10 a.m., but King refused to give him  
19 breakfast at 6:15 a.m., leaving him hungry and embarrassed; (2) that Colusa County Superior  
20 Court Judge Jeffrey Thompson improperly denied plaintiff's Marsden motion on November 23,  
21 2016, denying plaintiff's Sixth Amendment right to counsel and resulting in plaintiff receiving a  
22 longer sentence than he should have received; and (3) that jail officials improperly recorded  
23 plaintiff's November 2016 telephone conversation with his attorney, in violation of state  
24 regulations.

25 Plaintiff's first claim is premised on the alleged denial of basic necessities. However,  
26 denying plaintiff breakfast one morning more than a year ago does not state a cognizable Eighth  
27 Amendment claim because it was not, objectively, “sufficiently serious” to violate constitutional  
28 requirements and did not exhibit a “sufficiently culpable state of mind” on the part of Officer

1 King to support liability. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). Plaintiff's exhibits  
2 to the complaint confirm this assessment. As set forth in the response of an officer to plaintiff's  
3 grievance on the matter: "Spoke [with] Azevedo and explained reason on why he was not fed  
4 while in sobering. Explained his combative and verbal abuse makes the situation unsafe." ECF  
5 No. 1 at 14.

6 Plaintiff's second claim, against Judge Thompson, is barred because judges acting within  
7 the course and scope of their judicial duties are absolutely immune from liability for damages  
8 under Section 1983. Pierson v. Ray, 386 U.S. 547, 553-55 (1967). "A judge will . . . be subject  
9 to liability only when he has acted in the 'clear absence of all jurisdiction.'" Stump v.  
10 Sparkman, 435 U.S. 349, 356-57 (1978) (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351  
11 (1871)). The scope of a judge's jurisdiction is determined by the two-part test articulated in  
12 Stump: whether the challenged act is "a function normally performed by a judge," and whether  
13 the parties "dealt with the judge in his judicial capacity." Id. at 362. In the instant case, Judge  
14 Thompson's ruling on plaintiff's Marsden motion was squarely within the scope of his judicial  
15 authority, rendering him absolutely immune from liability under Section 1983.

16 In his third claim, plaintiff alleges a violation of state law when jail officials recorded  
17 plaintiff's November 2016 telephone conversation with his attorney. Plaintiff cites Cal. Code  
18 Regs. tit. 15, § 3282, applicable to state prisons, which sets forth the procedures for designating  
19 and implementing a confidential telephone call. See id., § 3282(g) ("If a call is determined to be  
20 an attorney/inmate confidential phone call, in order for the inmate to place or receive the call it  
21 must have already received approval/clearance in accordance with subsections (g)(1), (g)(2) and  
22 (g)(4)."). Plaintiff's exhibits demonstrate that he did not obtain prior approval for the subject  
23 telephone call. As the Jail Commander responded in part to plaintiff's subject grievance, ECF  
24 No. 1 at 12: "You did not inform this facility of your new attorney # and therefore we were not  
25 aware of it. The attorney's number is now blocked from recording and any recordings have been  
26 deleted by the phone provider. It is your responsibility to notify jail staff you have hired a new  
27 attorney and they will make every effort to ensure your attorney client privilege is protected."  
28 Moreover, even if county jail officials were in violation of state law, such violation would not

1 state a federal civil rights claim. “To state a claim under § 1983, a plaintiff must allege the  
2 violation of a right secured by the Constitution and laws of the United States[.]” West v. Atkins,  
3 487 U.S. 42, 48 (1988).

4 The undersigned finds none of plaintiff’s putative claims cognizable under Section 1983,  
5 and therefore concludes that amendment of the complaint would be futile. The court is persuaded  
6 that plaintiff is unable to allege any facts, based upon the circumstances he challenges, that would  
7 state a cognizable claim. “A district court may deny leave to amend when amendment would be  
8 futile.” Hartmann v. CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013); accord Lopez v. Smith, 203  
9 F.3d 1122, 1129 (9th Cir. 2000) (“Courts are not required to grant leave to amend if a complaint  
10 lacks merit entirely.”).

11 Accordingly, the undersigned recommends that this action be dismissed without leave to  
12 amend.

13 V. Request for Issuance of Summonses

14 Plaintiff requests that the court issue his proposed summonses on defendants. See ECF  
15 No. 7. The request should be denied as moot. Plaintiff is informed that even if his complaint  
16 stated a cognizable claim against a specific defendant, and he qualified for in forma pauperis  
17 status, plaintiff would be required to complete and submit a summons provided by the court  
18 which would, in turn, be served by U.S. Marshal.

19 VI. Motion for Appointment of Counsel

20 Plaintiff requests appointment of counsel due to his poverty, imprisonment, limited  
21 knowledge of the law, need for assistance at trial, and dismissal of his prior cases. See ECF No.  
22 6. This request should also be denied as moot.

23 Plaintiff is informed that district courts lack authority to require counsel to represent  
24 indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298  
25 (1989). In certain exceptional circumstances, the district court may request the voluntary  
26 assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017  
27 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When  
28 determining whether “exceptional circumstances” exist, the court must consider plaintiff’s

1 likelihood of success on the merits as his ability to articulate his claims pro se in light of the  
2 complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009).  
3 Plaintiff bears the burden of demonstrating exceptional circumstances. Id. However,  
4 circumstances common to most prisoners, such as lack of legal education and limited law library  
5 access, do not establish the requisite exceptional circumstances. Id.

6 VII. Conclusion

7 For the foregoing reasons, IT IS HEREBY ORDERED that the Clerk of Court shall  
8 randomly assign a district judge to this action.

9 Further, IT IS HEREBY RECOMMENDED that:


10 1. The complaint, ECF No. 1, be dismissed without leave to amend for failure to state a  
11 potentially cognizable claim.

12 2. Plaintiff's motions to proceed in forma pauperis, ECF No. 5, for appointment of  
13 counsel, ECF No. 6, and for issuance of summonses, ECF No. 7, be denied as moot.

14 3. The Clerk of Court be directed to close this case.

15 These findings and recommendations are submitted to the United States District Judge  
16 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty one days  
17 after being served with these findings and recommendations, plaintiff may file written objections  
18 with the court. Such document should be captioned "Objections to Magistrate Judge's Findings  
19 and Recommendations." Plaintiff is advised that failure to file objections within the specified  
20 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
21 (9th Cir. 1991).

22 DATED: December 27, 2017

23   
24 ALLISON CLAIRE  
25 UNITED STATES MAGISTRATE JUDGE  
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