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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY McCARARY,
Plaintiff,
v.
SCOTT KERNAN, et al.,
Defendants.

No. 2: 17-cv-1944 KJN P

ORDER

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. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
2 § 1915(b)(2).

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

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14 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.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

18 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
19 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
20 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
21 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
22 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
23 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
24 sufficient "to raise a right to relief above the speculative level." Id. at 555. However, "[s]pecific
25 facts are not necessary; the statement [of facts] need only 'give the defendant fair notice of what
26 the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93
27 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).
28 In reviewing a complaint under this standard, the court must accept as true the allegations of the

1 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most
2 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other
3 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

4 Named as defendants are Secretary of the California Department of Corrections and
5 Rehabilitation (“CDCR”) Kernan, CDCR Associate Director Lockwood and High Desert State
6 Prison (“HDSP”) Warden Spearman. Plaintiff alleges that following the passage of Proposition
7 57, defendants enacted regulations that were inconsistent with this proposition. Plaintiff alleges
8 that he is entitled to parole consideration under Proposition 57, but not under the regulations
9 enacted by defendants. Plaintiff alleges that his failure to receive a parole suitability hearing
10 under Proposition 57 violates his right to due process. Plaintiff seeks money damages and
11 injunctive relief.

12 At the outset, the undersigned finds that plaintiff’s claims are properly brought in this civil
13 rights action rather than in a petition for writ of habeas corpus. A finding in plaintiff’s favor, i.e.,
14 that he was wrongly found ineligible for parole consideration, would not necessarily impact the
15 duration of his confinement. See Nettles v. Grounds, 830 F.3d 922, 934-35 (9th Cir. 2016) (en
16 banc).

17 The background to plaintiff’s claim follows herein.

18 Proposition 57 changed California parole eligibility rules by adding section 32 to article I
19 of the California Constitution, which provides:

20 (a) The following provisions are hereby enacted to enhance public
21 safety, improve rehabilitation, and avoid the release of prisoners by
22 federal court order, notwithstanding anything in this article or any
other provision of law:

23 (1) Parole Consideration: Any person convicted of a nonviolent
24 felony offense and sentenced to state prison shall be eligible for
parole consideration after completing the full term for his or her
primary offense.

25 (A) For purposes of this section only, the full term for the primary
26 offense means the longest term of imprisonment imposed by the
27 court for any offense, excluding the imposition of an enhancement,
consecutive sentence, or alternative sentence.

28 (2) Credit Earning: The Department of Corrections and
Rehabilitation shall have authority to award credits earned for good

1 behavior and approved rehabilitative or educational achievements.

2 (b) The Department of Corrections and Rehabilitation shall adopt
3 regulations in furtherance of these provisions, and the Secretary of
4 the Department of Corrections and Rehabilitation shall certify that
5 these regulations protect and enhance public safety.

6 Cal. Const., art. I, § 32.

7 Plaintiff alleges that Proposition 57 does not permit the consideration of enhancements in
8 determining whether a person has been convicted of a nonviolent felony. Plaintiff argues that
9 defendants enacted regulations to implement Proposition 57 which wrongly permit the
10 consideration of enhancements in determining whether a person has been convicted of a
11 nonviolent felony.

12 Plaintiff alleges that he was convicted of violating California Penal Code § 245, i.e.,
13 assault with a deadly weapon, which is a nonviolent offense under Proposition 57. Plaintiff
14 argues that defendants found him ineligible for parole consideration, based on the regulations
15 they enacted, by wrongly considering one of his enhancements. Attached to plaintiff's complaint
16 are exhibits indicating that plaintiff has two enhancements for violating California Penal Code
17 sections 12022.5(a) (use of a firearm) and 12022.7(a) (personal infliction of great bodily injury).
(ECF No. 1 at 13.)

18 For purposes of Proposition 57, violent felonies are defined in California Penal Code
19 § 667.5(c). See People v. Harris, 2017 WL 423084 at *2 (Cal. App. 2017). Plaintiff is correct
20 that a conviction for assault with a deadly weapon in violation of California Penal Section 245 is
21 not listed as a violent felony in § 667.5(c). However, § 667.5(c)(8) classifies as a violent felony,
22 “any felony in which the defendant inflicts great bodily injury on any person other than an
23 accomplice which has been charged and proved as provided in Section 12202.7...” Thus,
24 plaintiff's conviction for violating § 12022.7 renders him ineligible for parole consideration under
25 Proposition 57.

26 Plaintiff's claim appears to be based on a misinterpretation of Proposition 57. Plaintiff
27 argues that Proposition 57 only allows consideration of whether a person's “primary offense” is a
28 violent felony, and prohibits consideration of enhancements in determining whether an offense is

1 violent. Section 32(a)(1), quoted above, states that person convicted of a *nonviolent felony* is
2 eligible for parole consideration after completing the *full term for their primary offense*. Section
3 32(a)(2) states that the *full term of the primary offense* means the longest term of imprisonment
4 imposed by the court for any offense, excluding the imposition of an enhancement, consecutive
5 sentence or alternative sentence. Thus, consideration of enhancements is not permitted when
6 determining the *full term of a primary offense*. Section 32 does not state that enhancements may
7 not be considered when determining whether a felony is violent or nonviolent.

8 Plaintiff's due process claim is based on an alleged violation of state law, which did not
9 occur. For these reasons, the undersigned finds that plaintiff has not stated a potentially colorable
10 due process claim. While it is unlikely that plaintiff can cure the pleading defects discussed
11 above, plaintiff is granted one opportunity to file an amended complaint.

12 If plaintiff chooses to amend the complaint, plaintiff is informed that the court cannot
13 refer to a prior pleading in order to make plaintiff's amended complaint complete. Local Rule
14 220 requires that an amended complaint be complete in itself without reference to any prior
15 pleading. This requirement exists because, as a general rule, an amended complaint supersedes
16 the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an
17 amended complaint, the original pleading no longer serves any function in the case. Therefore, in
18 an amended complaint, as in an original complaint, each claim and the involvement of each
19 defendant must be sufficiently alleged.

20 Plaintiff also requests that the court appoint counsel. District courts lack authority to
21 require counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States
22 Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an
23 attorney to voluntarily represent such a plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer,
24 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir.
25 1990). When determining whether "exceptional circumstances" exist, the court must consider
26 plaintiff's likelihood of success on the merits as well as the ability of the plaintiff to articulate his
27 claims pro se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d
28 965, 970 (9th Cir. 2009) (district court did not abuse discretion in declining to appoint counsel).

1 The burden of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances
2 common to most prisoners, such as lack of legal education and limited law library access, do not
3 establish exceptional circumstances that warrant a request for voluntary assistance of counsel.

4 Having considered the factors under Palmer, the court finds that plaintiff has failed to
5 meet his burden of demonstrating exceptional circumstances warranting the appointment of
6 counsel at this time.

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

8 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

9 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
10 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
11 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
12 Director of the California Department of Corrections and Rehabilitation filed concurrently
13 herewith.

14 3. Plaintiff's complaint is dismissed.

15 4. Within thirty days from the date of this order, plaintiff shall complete the attached
16 Notice of Amendment and submit the following documents to the court:

17 a. The completed Notice of Amendment; and


18 b. An original and one copy of the Amended Complaint.

19 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the
20 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must
21 also bear the docket number assigned to this case and must be labeled "Amended Complaint."

22 Failure to file an amended complaint in accordance with this order may result in the
23 dismissal of this action.

24 5. Plaintiff's motion for appointment of counsel (ECF No. 6) is denied.

25 Dated: October 11, 2017

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28 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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NOTICE OF AMENDMENT

Plaintiff hereby submits the following document in compliance with the court's order
filed _____.

DATED: _____ Amended Complaint

Plaintiff