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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TANH HUU LAM,  
Plaintiff,  
v.  
NINTH CIRCUIT COURT OF APPEALS,  
Defendant.

No. 2:18-cv-0117-EFB P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff, a federal prisoner proceeding without counsel, seeks leave to proceed in forma pauperis (“IFP”).<sup>1</sup> He also requests appointment of counsel. ECF Nos. 2, 5.

**I. Application to Proceed In Forma Pauperis**

The court has reviewed plaintiff’s application and trust fund account statement and finds that it makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

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<sup>1</sup> Plaintiff commenced this action in the United States District Court for the Northern District of California. ECF No. 1. On January 17, 2018, that court transferred the action to this court, citing lack of jurisdiction. ECF No. 6.

1           **II. Request for Appointment of Counsel**

2           District courts lack authority to require counsel to represent indigent prisoners in section  
3 1983 cases. *Mallard v. United States Dist. Court*, 490 U.S. 296, 298 (1989). In exceptional  
4 circumstances, the court may request an attorney to voluntarily to represent such a plaintiff. *See*  
5 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wood v.*  
6 *Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether “exceptional  
7 circumstances” exist, the court must consider the likelihood of success on the merits as well as the  
8 ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues  
9 involved. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Having considered those factors,  
10 the court finds there are no exceptional circumstances in this case.

11           **III. Screening Requirements**

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

17           A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”  
18 *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th  
19 Cir. 1984). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
20 meritless legal theories or whose factual contentions are clearly baseless.” *Jackson v. Arizona*,  
21 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), superseded by statute  
22 on other grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000); *Neitzke*, 490  
23 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,  
24 has an arguable legal and factual basis. *Id.*

25           “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the  
26 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
27 what the . . . claim is and the grounds upon which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S.  
28 544, 555 (2007) (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

1 However, in order to survive dismissal for failure to state a claim, a complaint must contain more  
2 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
3 allegations sufficient “to raise a right to relief above the speculative level.” *Id.* (citations  
4 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that  
5 merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (alteration in original)  
6 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d  
7 ed. 2004)).

8 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
9 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
10 *Corp.*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content  
11 that allows the court to draw the reasonable inference that the defendant is liable for the  
12 misconduct alleged.” *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556). In reviewing a complaint  
13 under this standard, the court must accept as true the allegations of the complaint in question,  
14 *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), as well as construe the pleading  
15 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, *Jenkins v.*  
16 *McKeithen*, 395 U.S. 411, 421 (1969).

#### 17 **IV. Screening Order**

18 Plaintiff purports to sue the Ninth Circuit Court of Appeals “to vindicate his own  
19 constitutional interests and legal rights.” ECF No. 1 at 2. He alleges that the appellate court  
20 erred in affirming his conviction. *See id.* at 2 (referencing *United States v. Lam*, No. 2:97-cr-  
21 0054-WBS-KJN). As relief, he asks this court to “find that the Ninth Circuit [ ] committed  
22 manifest errors of fact and law in [plaintiff’s] case.” *Id.* at 15. But a federal prisoner who wishes  
23 to challenge the validity or constitutionality of his conviction or sentence must do so by way of a  
24 motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. *Tripati v.*  
25 *Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). In a civil rights action, as plaintiff attempts to  
26 assert here, the court is not authorized to review the validity of plaintiff’s conviction. Rather, his  
27 claims challenging the validity of his conviction must be brought in a motion pursuant to 28

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1 U.S.C. § 2255, in the court which imposed the sentence. Accordingly, plaintiff's complaint must  
2 be dismissed without leave to amend,

3 **V. Conclusion**

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. Plaintiff's application to proceed in forma pauperis (ECF No. 2) is GRANTED;
- 6 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected  
7 in accordance with the notice to the Bureau of Prisons filed concurrently herewith;
- 8 3. Plaintiff's request for the appointment of counsel (ECF No. 5) is DENIED.
- 9 4. The Clerk is directed to randomly assign a United States District Judge to this  
10 case.

11 Further, IT IS HEREBY RECOMMENDED that plaintiff's complaint (ECF No. 1) be  
12 DISMISSED without leave to amend and the Clerk be directed to close the case.

13 These findings and recommendations are submitted to the United States District Judge  
14 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
15 after being served with these findings and recommendations, plaintiff may file written objections  
16 with the court. Such document should be captioned "Objections to Magistrate Judge's Findings  
17 and Recommendations." Local Rule 304(d). Plaintiff is advised that failure to file objections  
18 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*  
19 *Ylst*, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: May 17, 2018.

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22 EDMUND F. BRENNAN  
23 UNITED STATES MAGISTRATE JUDGE  
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