

1 See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and
2 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may
3 be granted or seek monetary relief from a defendant who is immune from such relief. See id.
4 § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v.
5 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C.
6 § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the
7 Constitution or laws of the United States was violated, and (2) that the alleged violation was
8 committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42,
9 48 (1988).

10 Plaintiff alleges his constitutional rights were violated in December 2007 when the
11 Board declined to discharge him from parole, resulting in his subsequent incarceration for a
12 parole violation and his continuing status as a parolee.² Any claim by a prisoner attacking
13 the fact or duration of his custody pursuant to a criminal conviction or sentence must be
14 brought by way of a petition for a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475,
15 500 (1973); see Jones v. Cunningham, 371 U.S. 236, 241-43 (1963) (holding petitioner on
16 parole is in custody for purposes of habeas corpus review). Consequently, where a prisoner
17 raises a claim challenging the legality or duration of his parole status, such claim must be
18 brought in a petition for a writ of habeas corpus. See Butterfield v. Bail, 120 F.3d 1023,
19 1024 (9th Cir. 1997) (holding claim challenging decision finding prisoner ineligible for
20 parole must be brought in habeas corpus). Here, plaintiff claims he is entitled to immediate
21 release from parole. Consequently, he is seeking habeas relief. A civil rights complaint
22 seeking habeas relief is subject to dismissal without prejudice to the prisoner's bringing his
23 claim in a petition for a writ of habeas corpus. See Trimble v. City of Santa Rosa, 49 F.3d
24 583, 586 (9th Cir. 1995).

25 Accordingly, the instant complaint is hereby DISMISSED, without prejudice to

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27 ²Plaintiff does not seek money damages, but rather injunctive relief. If plaintiff did
28 seek damages, however, such claim would be barred as premature, because plaintiff does not
allege that the parole board's decision has been reversed, expunged, set aside or called into
question. See Littles v. Bd. of Pardons and Paroles Div., 68 F.3d 122, 123 (5th Cir. 1995).

1 plaintiff's refiling his claims in a petition for a writ of habeas corpus after he has exhausted
2 those claims in the state courts.

3 In light of plaintiff's showing as to his lack of funds, the application to proceed IFP is
4 hereby GRANTED.

5 This order terminates Docket No. 2.

6 The Clerk shall close the file.

7 IT IS SO ORDERED.

8 DATED: January 22, 2009


MAXINE M. CHESNEY
United States District Judge

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