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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN B. TURNER,
Plaintiff,

No. C 11-05176 CRB

ORDER DENYING RULE 60 MOTION

v.

MELODY SMITH, ET AL.,
Defendants.

I. BACKGROUND

Plaintiff Stephen Turner sued his parole officer and other government officials and entities alleging, among other things, that various of Turner's parole conditions and the Defendants' enforcement of those conditions violated his constitutional rights. See generally Second Am. Compl., dkt. 64. This Court granted a motion to dismiss all forty-seven of Turner's causes of action. See Order, dkt. 75. He now seeks narrow relief from this Court's order, asking that the Court revisit its dismissal of his forty-seventh cause of action, which alleged "retaliatory harassment in violation of the First and Fourteenth Amendments." Second Am. Compl. ¶ 354.

The forty-seventh cause of action actually included two distinct theories. Turner first alleged that Defendant Sims, a parole agent, "made a statement to Turner indicating that 'bad things would happen to him if he didn't drop his pendent lawsuits against him and the California Parole department.'" Id. ¶ 357; see also id. ¶ 115 (alleging that Sims said "if you

1 don't [stop your lawsuits] things are going to be very unpleasant for you!"). He separately
2 alleged that Defendant Smith, another parole officer, "singled Turner out by repeatedly
3 rearresting Turner for minor technical violations, when other parolees would not get arrested
4 by her for similar violations." Id.

5 The Court dismissed the forty-seventh cause of action as barred by Heck v.
6 Humphrey, 512 U.S. 477 (1994). See Order at 6.

7 **II. LEGAL STANDARD**

8 Rule 60(b) provides relief from judgment where one or more of the following is
9 shown: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered
10 evidence which by due diligence could not have been discovered before the court's decision;
11 (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied;
12 (6) any other reason justifying relief. Fed. R. Civ. P. 60(b). U.S. Bank cites subdivisions (1)
13 and (6) in support of its motion.

14 Rule 60(b)(1) permits relief from judgment because of "mistake, inadvertence,
15 surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Though motions under this
16 subsection usually concern mistakes made by the party seeking relief, the Ninth Circuit
17 permits 60(b)(1) relief premised on an error by the court. Kingvision Pay-Per-View Ltd. v.
18 Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999); Liberty Mut. Ins. Co. v. E.E.O.C., 691
19 F.2d 438, 440-41 (9th Cir. 1982); see also 11 Wright et al., Federal Practice & Procedure §
20 2858.1 (2d ed. 2008) (noting circuit split).

21 **III. DISCUSSION**

22 Turner argues that this Court erred in including his forty-seventh cause of action in the
23 list of claims barred by Heck. The Court agrees that only one of Turner's two theories in
24 claim 47—the "singling out" theory—was barred by Heck, and that Turner's alternative theory
25 that Sims unlawfully threatened him should have been separately addressed in the portion of
26 the order analyzing whether he stated a cognizable claim for relief.

27 Turning to that theory, Turner failed to state a claim, because the vague "threats"
28 alleged—however inappropriate—do not rise to the level of a constitutional violation. Whether

1 any threat unaccompanied by follow-through can state a § 1983 retaliation claim is doubtful.
2 See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987); cf. Corales v. Bennett, 567 F.3d 554,
3 564-65 (9th Cir. 2009).

4 However, assuming *arguendo* that some category of mere threats could constitute
5 “adverse action” sufficient state a retaliation claim, the vague threats here involving
6 unspecified harms of “bad” or “unpleasant” experiences would not qualify. Indeed, is not
7 even clear that Sims was “threatening” to do anything unlawful or improper; Turner’s
8 complaint describes Sims as repeatedly urging Turner to comply with his sex-offender
9 registration requirements in the same conversation where he supposedly threatened Turner.
10 See Second Am. Compl. ¶ 115. Accordingly, Turner has not plausibly pled that the “threats”
11 were anything other than Sims’ opinion that Turner’s litigation campaign would distract him
12 from staying in compliance with his various registration requirements.

13 **IV. CONCLUSION**

14 One of the Turner’s two theories in his forty-seventh cause of action was barred by
15 Heck, and the other failed to state a claim. Accordingly, Turner’s motion for Rule 60 relief
16 is DENIED.

17 **IT IS SO ORDERED.**

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20 Dated: January 8, 2013



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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