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

STEPHEN LIEBB,  
Plaintiff,  
v.  
C. DALY, BPT COMMISSIONER,  
Defendant.

No. C 04-00950 CW  
ORDER DENYING  
DEFENDANT'S MOTION  
FOR JUDGMENT ON THE  
PLEADINGS  
(Docket # 25)

Plaintiff Stephen Liebb, an inmate incarcerated at San Quentin State Prison (SQSP) for the crime of first degree murder, brings this civil rights complaint under 42 U.S.C. § 1983 seeking injunctive and declaratory relief for violation of his due process rights at his July 17, 2003 hearing before the Board of Prison Terms (Board).<sup>1</sup> Defendant moves for judgment on the pleadings on the ground that Plaintiff's due process claim is barred by the doctrine of res judicata. Plaintiff filed pro se a partial opposition (docket # 28) and a partial response to Defendant's reply (docket # 31) and, represented by counsel, Plaintiff filed another opposition to Defendants' motion (docket # 36). Defendant filed a reply (docket # 30) and a sur-reply (docket # 42). The matter was taken under submission. Having considered the papers filed by the parties, the Court DENIES the motion for judgment on the pleadings.

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<sup>1</sup>The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

BACKGROUND

1  
2 Plaintiff filed this action on March 9, 2004, alleging that  
3 the Board violated his due process rights at his July 17, 2003  
4 parole hearing. Plaintiff claims that the Board acted in an  
5 arbitrary and capricious manner in that it characterizes virtually  
6 every murder as heinous and cruel in order to justify a finding of  
7 parole unsuitability.<sup>2</sup> On October 5, 2004, Plaintiff filed a  
8 habeas petition alleging that the Board violated his due process  
9 rights at his July 17, 2003 hearing by finding, inter alia, that  
10 his commitment offense was carried out in an especially cruel  
11 manner, which the Board finds "in virtually every instance in which  
12 it denies parole suitability." Habeas Petition at 16. On November  
13 10, 2004, citing Heck v. Humphrey, 512 U.S. 477, 481 (1994), the  
14 Court dismissed this § 1983 action without prejudice so that  
15 Plaintiff could pursue his claim through his habeas petition.

16 On February 16, 2006, the Court granted Plaintiff leave to  
17 file an amended complaint in this action and directed the Clerk to  
18 reopen the file. This order was issued in light of the Supreme  
19 Court's March 7, 2005 opinion in Wilkinson v. Dotson, 544 U.S. 74  
20 (2005), which held that prisoners could challenge the  
21 constitutionality of parole procedures in a § 1983 action seeking

22 \_\_\_\_\_  
23 <sup>2</sup>Circumstances tending to show unsuitability for parole  
24 include the nature of the commitment offense and whether "[t]he  
25 prisoner committed the offense in an especially heinous, atrocious  
26 or cruel manner." Cal. Code Regs. tit. 15, § 2402(c). This  
27 includes consideration of the number of victims, whether "[t]he  
28 offense was carried out in a dispassionate and calculated manner,"  
whether the victim was "abused, defiled or mutilated during or  
after the offense," whether "[t]he offense was carried out in a  
manner which demonstrates an exceptionally callous disregard for  
human suffering," and whether "[t]he motive for the crime is  
inexplicable or very trivial in relation to the offense." Id.

1 declaratory and injunctive relief and were not required to seek  
2 habeas relief exclusively. The amended complaint was filed on  
3 February 16, 2006.

4 On June 11, 2007, Defendant filed a motion for judgment on the  
5 pleadings in the § 1983 case. On March 31, 2008, the Court denied  
6 the motion, stating that "it is clear in his amended complaint that  
7 Plaintiff is seeking relief for the 'violation of his due process  
8 rights at his July 17, 2003 parole suitability hearing'" and, thus,  
9 "the Court cannot decide this case on the pleadings because it must  
10 consider matters outside the pleadings, such as how long Plaintiff  
11 had been incarcerated prior to his parole hearing and the factors  
12 the Board considered before finding Plaintiff unsuitable for  
13 parole, including whether Plaintiff's commitment offense weighed  
14 heavily in the Board's determination." March 31, 2008 Order at 4.  
15 On May 12, 2008, the Court denied the habeas petition. On June 30,  
16 2008, Defendant filed this second motion for judgment on the  
17 pleadings arguing that res judicata bars Plaintiff's civil rights  
18 action because the due process cause of action alleged herein was  
19 litigated and adjudicated in Plaintiff's petition for writ of  
20 habeas corpus.

21 LEGAL STANDARD

22 I. Judgment on the Pleadings

23 A motion for judgment on the pleadings, like a motion to  
24 dismiss for failure to state a claim, addresses the sufficiency of  
25 a pleading. Judgment on the pleadings may be granted when the  
26 moving party clearly establishes on the face of the pleadings that  
27 no material issue of fact remains to be resolved and that the  
28 moving party is entitled to judgment as a matter of law. Hal Roach

1 Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th  
2 Cir. 1989). The court may consider, in addition to the face of the  
3 pleadings, exhibits attached to the pleadings, Durning v. First  
4 Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987), and facts which  
5 may be judicially noticed, Mullis v. United States Bankr. Court,  
6 828 F.2d 1385, 1388 (9th Cir. 1987). In testing the sufficiency of  
7 a pleading, the well-plead allegations of the non-moving party are  
8 accepted as true, while any allegations of the moving party which  
9 have been denied are assumed to be false. Hal Roach Studios, 896  
10 F.2d at 1550.

11 DISCUSSION

12 I. Res Judicata

13 Under the doctrine of res judicata, a final judgment on the  
14 merits bars further claims by parties or their privies based on the  
15 same cause of action. Montana v. United States, 440 U.S. 147, 153  
16 (1979). "Res judicata bars all grounds of recovery that could have  
17 been asserted, whether they were or not, in a prior suit between  
18 the same parties on the same cause of action." Siegel v. Federal  
19 Home Loan Mortgage Corp., 143 F.3d 525, 528-29 (9th Cir. 1998)  
20 (emphasis in the original). For res judicata to bar a later suit,  
21 the previous adjudication must have involved the same claim as the  
22 later suit, have reached a final judgment on the merits and have  
23 involved the same parties or privities. Nordhorn v. Ladish Co.,  
24 Inc., 9 F.3d 1402, 1404 (9th Cir. 1993).

25 Four criteria are used to determine whether successive  
26 lawsuits involve the same cause of action: (1) whether rights or  
27 interests established in the prior judgment would be destroyed or  
28 impaired by prosecution of the second action; (2) whether

1 substantially the same evidence is presented in the two actions;  
2 (3) whether the two suits involve infringement of the same right;  
3 and (4) whether the two suits arise out of the same transactional  
4 nucleus of facts. International Ambassador Programs, Inc. v.  
5 Archexpo, 68 F.3d 337, 340-41 (9th Cir. 1995) (citing C.D. Anderson  
6 & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987)). The  
7 last of these criteria has been deemed "the most important." Id.  
8 Accordingly, res judicata can be applied without reaching all four  
9 factors if two claims arose out of the same transaction. Id.

10 Plaintiff does not dispute that Defendant has shown that she  
11 is in privity with the respondent in the habeas petition. Rather,  
12 Plaintiff primarily argues that the causes of action in the two  
13 suits are not identical. He also implies that the judgment  
14 rendered in the habeas petition does not constitute a judgment on  
15 the merits because a different standard of review applies to civil  
16 rights claims.

17 I. Causes of Action

18 A. Infringement of the Same Right

19 Plaintiff argues that he asserted infringement of different  
20 rights in his two cases. He contends that, in the habeas  
21 proceeding, he discussed the specific facts of his case and  
22 asserted there was no evidence to support the Board's denial of  
23 parole suitability as it applied to him, but that his § 1983 case  
24 challenges the overall procedures of the Board.

25 As Respondent correctly points out, a comparison of the habeas  
26 petition with Plaintiff's First Amended Complaint (FAC) in this  
27 case shows that both cases allege infringement of the same right.  
28 In his habeas petition, Plaintiff alleged that the Board violated

1 his Due Process rights in denying him parole based, in part, on the  
2 fact that the Board uses the finding that the offense was carried  
3 out in an especially cruel manner "in virtually every instance in  
4 which it denies suitability." Habeas Petition at 15-16. In his  
5 petition, Plaintiff noted that the Board denies parole to over  
6 ninety-eight percent of parole applicants, and argued that "to find  
7 that about 98 percent of murders in California are particularly  
8 cruel or egregious violates law and logic." Id. at 7-8, 16.

9 In his FAC, Plaintiff seeks relief "for violation of his Due  
10 Process rights at his July 17, 2003 parole suitability hearing  
11 before the Board of Prison Terms . . . . Petitioner maintains that  
12 the Board's finding that his crime was 'particularly cruel and  
13 callous' was arbitrary and capricious and was a pro forma finding  
14 that the Board makes in virtually every life prisoner hearing."  
15 FAC at 1, 3. Petitioner also alleges, "The Board's finding that  
16 virtually every murder in California is of the particularly  
17 egregious sort violates law and logic." FAC at 3.

18 Thus, the allegations in the petition and the FAC are  
19 practically identical; both allege that, at Plaintiff's 2003  
20 hearing before the Board, it violated his due process rights by  
21 determining that he was unsuitable for parole based on the  
22 predetermined finding that his commitment offense was particularly  
23 egregious.

24 Plaintiff's argument that he presents a different claim in the  
25 FAC because it seeks to invalidate the Board's overall procedure in  
26 determining the egregiousness of a crime is unpersuasive. Although  
27 the remedy Plaintiff seeks in his FAC is different, the claim in  
28 both cases, that the Board's procedure is unconstitutional,

1 involves the infringement of the same right.

2 Plaintiff relies on Wilkinson to argue that the causes of  
3 action are different because, in a habeas proceeding, the  
4 petitioner challenges the specific facts surrounding his or her  
5 incarceration, whereas in a civil rights action, the plaintiff  
6 challenges the overall parole procedures. However, Wilkinson does  
7 not support this distinction. In Wilkinson, the Supreme Court  
8 addressed its previous decision in Heck, which held that a state  
9 inmate could not sue for damages in a § 1983 action that would, in  
10 effect, challenge the fact or duration of his confinement. Heck,  
11 512 U.S. at 481; Wilkinson, 544 U.S. at 80-81. The Wilkinson Court  
12 held that an inmate may bring a civil rights claim seeking  
13 prospective injunctive relief challenging a parole board's  
14 procedures because that would not invalidate the inmate's  
15 confinement or the duration of his sentence. Id. at 81-82. It did  
16 not hold that a petitioner could not challenge a parole board's  
17 procedures in a habeas petition. See id.

18 Therefore, the Court concludes that Plaintiff's two cases  
19 assert infringement of the same due process right.

20 B. Transactional Nucleus of Facts

21 Plaintiff argues that the two claims do not arise out of the  
22 same transactional nucleus of facts because Wilkinson precludes  
23 bringing a constitutional claim in a habeas proceeding. However,  
24 as discussed above, Wilkinson did not preclude Plaintiff from  
25 bringing his constitutional claim in his habeas proceeding.

26 Moreover, the allegations in the § 1983 case arose out of the  
27 same nucleus of facts alleged in the habeas petition, that is,  
28 whether the Board inappropriately denied Plaintiff parole by

1 unconstitutionally relying on a finding that his commitment offense  
2 was particularly egregious and callous.

3 Plaintiff argues that the constitutional claim in the § 1983  
4 action would not require an analysis of the particular facts of his  
5 case, whereas the habeas petition only focused on his case.  
6 However, Plaintiff is incorrect. To establish standing to bring a  
7 lawsuit, a plaintiff must establish that he has suffered an injury  
8 in fact. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61  
9 (1992) (standing is present only when (1) a plaintiff suffers a  
10 concrete, particularized injury; (2) there is a causal connection  
11 between the injury and the conduct complained of; and (3) the  
12 injury will likely be redressed by a favorable decision). To  
13 establish a concrete injury in his § 1983 cause of action,  
14 Plaintiff would have to prove that the Board's actions directly  
15 injured him. Therefore, even though the remedy Plaintiff seeks in  
16 his civil rights case may be different from the remedy sought in  
17 his habeas case, the claims arise out of the same set of facts.

18 C. Evidence Presented in Both Actions

19 A review of the evidence proffered in both actions shows that  
20 it is substantially the same. As explained previously, Plaintiff's  
21 argument that the civil rights action requires only an analysis of  
22 the Board's behavior generally and not its specific behavior toward  
23 him is incorrect. The determination that Plaintiff was injured by  
24 the Board's procedure would necessarily require an analysis of the  
25 specific facts of his case. Furthermore, in the habeas case,  
26 Plaintiff submitted the evidence that he says is particular to his  
27 civil rights case, that is, prior denials by the Board in other  
28 inmates' parole suitability hearings to show the Board has a

1 predisposition to deny parole. See Def.'s Request for Judicial  
2 Notice, Ex. B, Liebb v. Brown, C 04-4213 CW, Order Denying Petition  
3 for Writ of Habeas Corpus at 14. The Court denied this claim in  
4 the habeas case because Plaintiff had not proved that the alleged  
5 predisposition played any role in the Board's finding him  
6 unsuitable for parole. Id. Plaintiff would have to make the same  
7 showing in this civil rights case.

8 D. Final Judgment in Habeas Petition

9 Plaintiff correctly argues that the final judgment in the  
10 habeas petition will not be affected by the outcome of this suit.  
11 Because Plaintiff only seeks prospective injunctive relief in this  
12 case, the past habeas judgment would remain intact. See Wilkinson,  
13 544 U.S. at 82 (explaining that success on claim for prospective  
14 injunctive relief would not invalidate previous decisions denying  
15 parole, but would mean new eligibility review, not necessarily  
16 speedier release).

17 However, the most important factor in analyzing whether a res  
18 judicata bar applies to a subsequent action is whether it arises  
19 from the same transactional nucleus of facts as the original suit.  
20 Because this factor weighs in favor of the application of res  
21 judicata, as do the findings that there is substantially the same  
22 evidence and the infringement of the same right in both cases, the  
23 Court concludes that there is an identity of claims in both  
24 actions.

25 II. Adjudication on the Merits

26 In his pro se partial opposition, Plaintiff argues that the  
27 habeas judgment cannot be used to bar litigation of this civil  
28 rights action because, in federal habeas proceedings, a district

1 court is limited to reviewing the underlying state court proceeding  
2 by the standard set forth in the Antiterrorism and Death Penalty  
3 Act (AEDPA). Under AEDPA, a district court may grant a petition  
4 challenging a state conviction or sentence on the basis of a claim  
5 that was "adjudicated on the merits" in state court only if the  
6 state court's adjudication of the claim: "(1) resulted in a  
7 decision that was contrary to, or involved an unreasonable  
8 application of, clearly established Federal law, as determined by  
9 the Supreme Court of the United States; or (2) resulted in a  
10 decision that was based on an unreasonable determination of the  
11 facts in light of the evidence presented in the State court  
12 proceeding." 28 U.S.C. § 2254(d). Plaintiff is correct that this  
13 deferential standard of review is different from that which the  
14 Court would use in a § 1983 case to determine whether a Board  
15 procedure violated Plaintiff's due process rights.

16 Before the passage of AEDPA, the Ninth Circuit had held that  
17 res judicata may bar a § 1983 action based on the adjudication of a  
18 prior federal habeas decision. Hawkins v. Risley, 984 F.2d 321,  
19 323 (9th Cir. 1993). At least three district courts have relied  
20 upon Hawkins post-AEDPA to dismiss a civil rights action based upon  
21 the res judicata effect of a previous federal habeas petition. See  
22 Escamilla v. Giurbino, 2008 WL 4493035, \*5 (S.D. Cal.); Boston v.  
23 Stobbe, 586 F. Supp. 2d 574, 578-79 (D. S.C. 2008); Morke v.  
24 Merritt, 2000 WL 33949739, \*8 (E.D. Vir.). However, none of the  
25 cases addressed or acknowledged the fact that a very different  
26 threshold for relief is required by AEDPA, relative to that in a  
27 § 1983 suit. As noted previously, AEDPA requires deference to the  
28 state court adjudication of any habeas claim. The determination of

1 a constitutional due process claim involves no such deference;  
2 constitutional claims are reviewed de novo. Therefore, the Court  
3 concludes that a judgment applying the AEDPA standard on a habeas  
4 petition does not preclude, on res judicata grounds, the litigation  
5 of a subsequent civil rights claim.

6 Accordingly, Defendant's motion for judgment on the pleadings  
7 based on res judicata is denied and Plaintiff's civil rights claim  
8 may proceed. Plaintiff may pursue his claim that the Board's  
9 procedures were unconstitutional as applied to him; Plaintiff has  
10 no standing to make this claim on behalf of all prisoners who have  
11 had a hearing before the Board.

12 Because Plaintiff's claim is for equitable relief, it must be  
13 adjudicated in a trial to the Court, Danjaq LLC v. Sony Corp., 263  
14 F.3d 942, 962 (9th Cir. 2001) (Seventh Amendment preserves right to  
15 jury for all legal claims, but no such right for equitable claims),  
16 if not on summary judgment. The remedy would be a new hearing  
17 before the Board. Defendant shall file a motion for summary  
18 judgment no later than sixty days from the date of this order.  
19 Plaintiff may have thirty days thereafter to file an opposition.  
20 Defendant's reply is due fifteen days thereafter.

21 CONCLUSION

22 For the foregoing reasons, the Court denies Defendant's motion  
23 for judgment on the pleadings.

24  
25 IT IS SO ORDERED.

26  
27 Dated: 3/17/09

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CLAUDIA WILKEN  
United States District Judge