

**\*\*E-filed 07/23/2010\*\***

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JOHN E. DANNENBERG

No. C 09-0832 RS

Plaintiff,

**ORDER GRANTING MOTION TO  
DISMISS**

v.

WARDEN ROBERT L. AYERS, JR., et al.,

Defendants

## I. INTRODUCTION

After serving approximately 19 years in prison for manslaughter, plaintiff John E. Dannenberg was granted parole by the Board of Parole Hearings (“the Board”). Governor Arnold Schwarzenegger then exercised his review power under the California Penal Code and reversed the Board’s decision. In December of 2007, California’s Sixth District Court of Appeal issued a final decision granting Dannenberg’s petition for habeas corpus and reinstating the determination made by the Board. Dannenberg, however, was not released on parole for another 14 months, while further review of his habeas petition was pending, first in the California Supreme Court and then again in the Sixth District after the matter was re-transferred to that court for further consideration in light of intervening decisions in similar cases.

1 In this action, Dannenberg presents a compelling argument that under a better interpretation  
2 of California law, he was entitled to immediate release upon the Sixth District's initial decision, the  
3 Attorney General not having obtained a stay from either the Sixth District itself, or from the  
4 California Supreme Court. As explained in this Court's order granting defendants' initial motion to  
5 dismiss, however, when the California Supreme Court denied the Attorney General's stay  
6 application as "unnecessary," it effectively ruled that the Sixth District's initial decision did *not* give  
7 rise to an immediate right to release, and under *Rooker-Feldman* doctrine<sup>1</sup> that determination is not  
8 reviewable here.

9 As a result, this Court previously dismissed Dannenberg's claims based on alleged unlawful  
10 imprisonment, without leave to amend. Because defendants conceded that the California Supreme  
11 Court's ruling did not categorically preclude Dannenberg's claim based on denial of equal  
12 protection, the Court granted Dannenberg leave to amend with respect to that claim, advising him  
13 that he needed to allege (1) sufficient non-conclusory facts to support his equal protection claim, and  
14 (2) sufficient facts to show how each named defendant "personally participated in the decision to  
15 treat him differently than other similarly situated persons, or . . . had both the personal authority and  
16 responsibility under state law to ensure his equal treatment, but failed to act."

17 Dannenberg's Second Amended Complaint includes additional factual averments explaining  
18 both how he believes he received unequal treatment under the law, and why he contends each of the  
19 named defendants is responsible. Nevertheless, the facts alleged, together with matters subject to  
20 judicial notice, reveal that Dannenberg's supposed differential treatment arose from the decision of  
21 the California Supreme Court that left his case in a different procedural posture than those of the  
22 other prisoners who he contends were "similarly situated," and not from the actions or inactions of  
23 defendants.

24 If Dannenberg is correct that the California Supreme Court misinterpreted California law,  
25 then his incarceration for an additional fourteen months beyond the time he should have been  
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27 <sup>1</sup> See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *D.C. Court of Appeals v. Feldman*,  
28 460 U.S. 462, 482-86 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

1 released was an injustice. It is not, however, a matter subject to a remedy in this Court. The  
2 complaint will be dismissed without leave to amend.

## 3 4 5 II. BACKGROUND

6 The general background of this action has been set forth in prior orders and will not be  
7 repeated here. The factual averments of the Second Amended Complaint differs from its  
8 predecessor in the following respects: (1) as to each individual defendant, Dannenberg has  
9 described, with citations to statutes in some instances, the defendant's legal responsibilities in the  
10 parole process, and that each defendant was put on written notice by Dannenberg's counsel of his  
11 contention that he was being held unlawfully, (2) Dannenberg has now identified four other  
12 prisoners who he contends were similarly situated to him in that appellate courts granted their  
13 *habeas* petitions after the Governor had overturned the Board's grant of parole—Sarah Lawrence,  
14 Peter Cooper, Bradford Titone, and Edward Gozy. Dannenberg asserts, and court records subject to  
15 judicial notice reveal, that each of those prisoners were released on parole after the appellate courts  
16 had ruled, and while further challenges to the appellate decisions were still pending in the California  
17 Supreme Court.

## 18 19 III. DISCUSSION

### 20 21 A. Dannenberg did not receive unequal treatment from defendants and/or there was a rational basis 22 to treat him differently

23 The Equal Protection Clause, “guarantees equal laws, not equal results.” *McQueary v.*  
24 *Blodgett*, 942 F.2d 829, 835 (9th Cir. 1991) (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273  
25 (1979)). Here, the facts alleged and those subject to judicial notice show that:

- 26 1. Dannenberg and the four other prisoners were all serving indeterminate life sentences.
- 27 2. In all five instances, the Board granted parole.
- 28 3. In all five instances, the Governor overruled the Board's decisions.

- 1           4. In all five instances, the appellate courts granted *habeas* relief (or upheld trial court  
2           *habeas* grants).
- 3           5. In all five instances, the state officials sought to have the appellate decisions stayed,  
4           pending further review.
- 5           6. In the cases of Lawrence, Cooper, and Titone, both the appellate courts and the California  
6           Supreme Court promptly denied the various stay requests. See Defendants’ Request  
7           for Judicial Notice Exhibits 5-9; Second Amended Complaint ¶¶ 27, 29.<sup>2</sup> In the case  
8           of Gozy, the appellate court promptly denied a request to stay the effect of the trial  
9           court’s grant of habeas; the matter apparently did not reach the California Supreme  
10          Court. See Defendants’ Request for Judicial Notice Exhibit 4; Second Amended  
11          Complaint ¶¶ 32.
- 12          7. In Dannenberg’s case, unlike the others, the California Supreme Court did *not* act  
13          expeditiously either to grant or to deny the stay request. Instead, some six weeks  
14          after the request was filed, the court denied it as “unnecessary,” stating that the matter  
15          would not become final until the remittitur issued.

16

17          Under these circumstances, Dannenberg has failed to plead facts showing he was subjected  
18          to improper unequal treatment by defendants. Rather, it is manifestly apparent that his continued  
19          incarceration during further review of his habeas petition resulted from the California Supreme  
20          Court’s decision to treat his case differently than it did those of Lawrence, Cooper, and Titone. As  
21          set out in the prior order, even assuming that the California Supreme Court committed legal error, it  
22          is beyond the purview of this Court to revisit that issue in this proceeding.<sup>3</sup>

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24          <sup>2</sup> The complaint does not expressly allege that Cooper’s request for a stay was denied by the  
25          Supreme Court, but Dannenberg does not dispute that fact.

26          <sup>3</sup> Dannenberg makes much of the fact that the Attorney General “invited” the supposed legal error  
27          by submitting a brief stating that the stay could be denied as unnecessary. Dannenberg offers no  
28          authority, however, and the Court is aware of none, that would support imposing personal liability  
on state officials on the grounds that their counsel offered erroneous legal argument that a court  
accepted.

1 To the extent it is possible to characterize defendants, as opposed to the California Supreme  
2 Court, as having elected to treat Dannenberg differently, his equal protection claim still fails because  
3 the judicial decision provided defendants a rational basis for the determination to keep him  
4 incarcerated. Accordingly, Dannenberg's complaint must be dismissed, without leave to amend.

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6 B. Other defense arguments

7 Defendants offer several other grounds for dismissal, none of which are persuasive.

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9 1. *Immunity of Governor and Parole Board Members*

10 Defendants argue that Governor Schwarzenegger and the Board members named as  
11 defendants enjoy absolute quasi-judicial immunity for their decisions to grant or to deny parole.  
12 While that may be so, Dannenberg is not seeking to hold defendants liable for denying him parole,  
13 but instead for failing to release him when the Sixth District Court of Appeal reinstated the Board  
14 decision to *grant* him parole. Were his claim otherwise viable, quasi-judicial immunity would not  
15 be a bar.

16  
17 2. *The Wardens' Authority*

18 Defendants contend that Warden Ayers, and his successor Warden Wong, cannot be  
19 responsible for failing to release Dannenberg because wardens "lack independent authority to make  
20 prison release decisions, as that is the parole board's responsibility." Motion at 7:8-9 (quoting  
21 *Brown v. California Department of Corrections*, 554 F.3d 747 (9th Cir. 2009). This argument  
22 ignores the fact that the Board had already ordered Dannenberg's release, and the Sixth District had  
23 reinstated that order. Accordingly, this argument would not, standing alone, foreclose  
24 Dannenberg's claims against Wardens Ayers and Wong.

25  
26 3. *Class of one*

27 Defendants contend that a "class of one" equal protection claim does not lie where the  
28 challenged action involves "subjective and individualized" decisions to be made in the exercise of

1 official discretion. Again, defendants may be correct as a matter of general principle, but they  
2 continue to misconstrue the claim Dannenberg is making. Because Dannenberg's claim arises from  
3 defendants' failure to carry out a parole decision made in his favor and reinstated by the Sixth  
4 District, defendants' arguments regarding discretion in granting parole are misplaced.

5  
6 *4. Qualified Immunity*

7 Defendants make a qualified immunity argument that is largely built on their prior argument  
8 that no "class of one" equal protection claim lies in the context of discretionary decisions. In light  
9 of the conclusion that there is no viable claim of a constitutional violation committed by defendants,  
10 the qualified immunity argument is moot.

11  
12 C. Individual liability

13 As noted above, the prior order required Dannenberg to allege facts showing how each  
14 named defendant "personally participated in the decision to treat him differently than other similarly  
15 situated persons, or . . . had both the personal authority and responsibility under state law to ensure  
16 his equal treatment, but failed to act." February 10, 2010, Order at 11:3-6. A reasonable inference  
17 was, and remains, that all of the state officials involved in this matter were at all times acting on the  
18 advice of counsel; that is to say, the decisions regarding whether or not to release Dannenberg were  
19 almost certainly made as a matter of legal analysis in conjunction with the attorney general's office.  
20 Even to the extent any other state officials had input into the decisions, they almost certainly were  
21 consulting closely with the attorney general's office.

22 That said, Dannenberg has now adequately shown, for pleading purposes at least, that  
23 Warden Ayers and Wong had the power and authority to carry out the Board's order upon its  
24 reinstatement by the Sixth District, and therefore could be potentially held liable for failing to do so,  
25 had the California Supreme Court not effectively ruled that no immediate obligation to release arose  
26 when the Sixth District ruled. Dannenberg has also shown that pursuant to California Penal Code §  
27 5075(c), the Executive Officer of the Board is charged with exercising "all duties and functions  
28 necessary to insure that the responsibilities of the board are successfully discharged." As such, at

1 least at the pleading stage, there would also appear to be a basis to impose liability against  
2 defendants Hoshino and Monday, who were each the Board's Executive Officer during relevant  
3 time periods, were Dannenberg's claim otherwise viable.

4 As to Governor Schwarzenegger and Board Chairman James Davis, however, Dannenberg  
5 has shown nothing more than that they had some involvement in the process and that they did not  
6 respond to his counsel's written demands that he be released. While it is true that a failure to act can  
7 be wrongful *where there is a duty to act*, Dannenberg's counsel could not unilaterally create such a  
8 duty simply by sending letters. Accordingly, the claims against the Governor and Davis are subject  
9 to dismissal on this additional ground.

10 Finally, Dannenberg suggests that this motion does not address his claims against "Doe"  
11 defendants—unknown subordinate state employees who may have been involved in the decisions as  
12 to when and whether Dannenberg would be released. Dannenberg contends the case must proceed  
13 to discovery so that he can ascertain the identities of such persons and the roles they played. Given  
14 the conclusion above that Dannenberg has no viable claim against *any* state official, the discovery  
15 he seeks to determine whether individual liability might otherwise lie against specific individuals is  
16 moot.

#### 17 18 IV. CONCLUSION

19 The motion to dismiss the Second Amended Complaint is granted, without leave to amend.  
20 The Clerk shall close the file.

21  
22  
23 Dated: 07/23/2010

24   
25 RICHARD SEEBORG  
26 UNITED STATES DISTRICT JUDGE  
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