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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARDSON, Donn,
CDCR #AC-9306,

Plaintiff,

vs.

W.L. MONTGOMERY; M. POLLARD;
L. HATFIELD; E. NUNEZ; A.
BARRIOS; D. POLLARD; P.
SAUCEDO; D. WHITE; J. SPAICH;
H. LIU,

Defendants.

Case No.: 3:20-cv-0356-WQH-RBM

**ORDER DISMISSING SECOND
AMENDED COMPLAINTOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
& 28 U.S.C. § 1915A(b)**

I. Procedural History

On February 24, 2020, Donn Richardson (“Plaintiff”), currently incarcerated at Pelican Bay State Prison (“PBSP”) located in Crescent City, California and proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. (*See* Compl., ECF No. 1). In his original Complaint, Plaintiff claimed prison officials at Calipatria State Prison (“CAL”), along with California Department of Corrections and Rehabilitation (“CDCR”)

1 officials in Sacramento violated his right to due process when they refused to consider
2 him for early parole consideration. (*Id.* at 10-18.)

3 Plaintiff initially filed this action in the Eastern District of California. However,
4 United States Magistrate Judge Barbara McAuliffe determined that venue was proper in
5 the Southern District of California and transferred the matter on February 26, 2020. (*See*
6 ECF No. 3.)

7 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when
8 he filed his Complaint; instead, he filed a certified copy of his inmate trust account
9 statement and prison certificate which the Court liberally construed as a Motion to
10 Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

11 On April 27, 2020, the Court GRANTED Plaintiff’s Motion to Proceed IFP ad
12 DISMISSED his Complaint for failing to state a claim pursuant to 28 U.S.C. § 1915(e)
13 and § 1915A. (ECF No. 6.) Plaintiff was granted leave to file an amended complaint and
14 after receiving extensions of time, Plaintiff filed his First Amended Complaint (“FAC”)
15 on November 4, 2020. (ECF No. 12.) On November 23, 2020, the Court, once again,
16 found Plaintiff failed to state a claim pursuant to 28 U.S.C. § 1915(e) and § 1915A and
17 DISMISSED his FAC. (ECF No. 13.) On January 5, 2021, Plaintiff filed his Second
18 Amended Complaint (“SAC”). (ECF No. 14.)

19 **II. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

20 **A. Standard of Review**

21 As the Court previously informed Plaintiff, because he is a prisoner and is
22 proceeding IFP, his SAC also requires a pre-answer screening pursuant to 28 U.S.C.
23 § 1915(e)(2) and § 1915A(b). Under these statutes, the Court must sua sponte dismiss a
24 prisoner’s IFP complaint, or any portion of it, which is frivolous, malicious, fails to state
25 a claim, or seeks damages from defendants who are immune. *See Lopez v. Smith*, 203
26 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2));
27 *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C.
28 § 1915A(b)). “The purpose of [screening] is ‘to ensure that the targets of frivolous or

1 malicious suits need not bear the expense of responding.” *Nordstrom v. Ryan*, 762 F.3d
2 903, 920 n.1 (9th Cir. 2014) (citation omitted).

3 “The standard for determining whether a plaintiff has failed to state a claim upon
4 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
5 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
6 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
7 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
8 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
9 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
10 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
11 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

12 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
13 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
14 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
15 relief [is] ... a context-specific task that requires the reviewing court to draw on its
16 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
17 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
18 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
19 (9th Cir. 2009).

20 B. Plaintiff’s Factual Allegations

21 Plaintiff alleges that prison officials at Calipatria State Prison (“CAL”) improperly
22 categorized his criminal convictions as “violent.” SAC at 2. Plaintiff alleges he was
23 convicted of [California Penal Code] 246, 245(a), 667(a), [and] 12022.5 for a total of 22
24 years [and] 4 months as a non-violent (2) striker.” *Id.* Because of this alleged
25 misclassification, Plaintiff alleges he was prevented from being “included/allowed to take
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1 part in [Proposition] 57¹” which would have “allowed [Plaintiff] to go in front of a Prop
2 57 Board which would have decided Plaintiff’s release from prison.” *Id.* at 4-5.

3 Plaintiff seeks declaratory relief, along with compensatory and punitive damages.
4 *Id.* at 8.

5 C. 42 U.S.C. § 1983

6 “Section 1983 creates a private right of action against individuals who, acting
7 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*
8 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
9 substantive rights, but merely provides a method for vindicating federal rights elsewhere
10 conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks
11 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)
12 deprivation of a right secured by the Constitution and laws of the United States, and (2)
13 that the deprivation was committed by a person acting under color of state law.” *Tsao v.*
14 *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

15 D. Violent Felonies

16 As an initial matter Plaintiff claims he was convicted of non-violent felonies and
17 thus, should have been given early parole consideration under Proposition 57. However,
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21 ¹ On November 8, 2016, the California voters approved The Public Safety and
22 Rehabilitation Act of 2016—Proposition (“Prop”) 57—and it took effect the next day.
23 *People v. Marquez*, 11 Cal. App. 5th 816, 821, 217 Cal.Rptr.3d 814 (Cal. App. 2017); Cal.
24 Const., Art. II, § 10(a). Proposition 57 added Article 1, section 32 to the California
25 Constitution. That section provides, in relevant part, “Parole consideration: Any person
26 convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for
27 parole consideration after completing the full term of his or her primary offense,” defined
28 for these purposes as “the longest term of imprisonment imposed by the court for any
offense, excluding the imposition of an enhancement, consecutive sentence, or alternative
sentence.” (Cal. Const., art. I, § 32, subds. (a)(1), (a)(1)(A).). Proposition 57 provides an
inmate who has completed his base term with a hearing before the Board of Parole Hearings
(Cal. Const. Art. I, Sec. 32(a)).

1 Plaintiff's own allegations appear to indicate that he was, in fact, convicted of a violent
2 felony. Specially, Plaintiff claims he was convicted under California Penal Code
3 Sections, 246, 245(a), 667(a), and 12022.5. *See* SAC at 2. Under Proposition 57, violent
4 felonies are defined in California Penal Code Section 667.5(c). *See* Cal. Code Regs. tit.
5 15, § 3490. Pursuant to § 667.5(c)(8) of the penal code, a violent felony is classified as
6 "any felony in which the defendant uses a firearm which use has been charged or proved
7 in ... Section 12022.5." Cal. Penal Code § 667.5(c)(8). As Plaintiff admits, he was
8 convicted under California Penal Code Section 12022.5 *See* SAC at 2. Thus, Plaintiff's
9 own factual allegations show that he is not eligible for early parole consideration under
10 Proposition 57.

11 E. Early release

12 To the extent that Plaintiff is seeking early release, he cannot bring this claim
13 pursuant to § 1983. Such a claim would challenge "the validity of [his] continued
14 incarceration [and therefore] lie within 'the heart of habeas corpus.'" *Ramirez v. Galaza*,
15 334 F.3d 850, 856 (9th Cir. 2003)(quoting *Preiser v. Rodriguez*, 411 U.S. 475, 98-99
16 (1973) (holding that a writ of habeas corpus is "explicitly and historically designed" to
17 provide a state prisoner with the "exclusive" means to "attack the validity of his
18 confinement" in federal court)).

19 F. Due Process

20 Plaintiff also claims that Defendants have failed to correctly classify his case factors
21 in violation of regulations promulgated by Proposition 57 which has resulted in the denial
22 of his due process rights. *See* SAC at 3.

23 The Fourteenth Amendment prohibits the deprivation of life, liberty or property
24 without due process of law. U.S. Const., amend. XIV. "Application of this prohibition
25 requires the familiar two-stage analysis: We must first ask whether the asserted individual
26 interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty
27 or property'; if protected interests are implicated, we then must decide what procedures
28 constitute 'due process of law.'" *Ingraham v. Wright*, 430 U.S. 651, 672 (1977). A liberty

1 interest may be created by the Constitution or by state law. *Meachum v. Fano*, 427 U.S.
2 215, 226 (1976).

3 Prisoners do not have a federal Constitutional right to be conditionally released
4 before the expiration of a valid sentence. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011);
5 *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).
6 California, however, has statutorily created a liberty interest in parole. *See Swarthout*,
7 562 U.S. at 220; *McQuillion v. Duncan*, 306 F.3d 895, 902 (9th Cir. 2002) (“California’s
8 parole scheme gives rise to a cognizable liberty interest in release on parole.”).
9 Accordingly, California authorities must provide some procedural protections when
10 determining parole eligibility. *Swarthout*, 562 U.S. at 219. The procedures required
11 however, are minimal—prisoners must be provided only an opportunity to be heard and a
12 statement of reasons why parole was denied. *Id.* at 220. “[M]ere error of state law’ is not
13 a denial of due process.” *Swarthout*, 562 U.S. at 222 (quoting *Engle v. Isaac*, 456 U.S.
14 107, 121, n.21 (1982)). “[T]he responsibility for ensuring that the constitutionally
15 adequate procedures governing California’s parole system are properly applied rests with
16 California courts, and is no part of the [federal court’s] business.” *Id.*

17 Plaintiff cannot “transform a state-law issue into a federal one merely by asserting
18 a violation of due process.” *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996).
19 Section 1983 provides a remedy only for Constitutional violations and violations of the
20 laws or treaties of the United States. *Swarthout*, 562 U.S. at 222. Accordingly, Plaintiff’s
21 Fourteenth Amendment procedural due process claim regarding Proposition 57 is
22 dismissed for failing to state a claim upon which relief may be granted.

23 G. Leave to Amend

24 Because Plaintiff has already been provided a short and plain statement of his
25 pleading deficiencies, as well as an opportunity to amend those claims to no avail, the
26 Court finds granting further leave to amend would be futile. *See Gonzalez v. Planned*
27 *Parenthood*, 759 F.3d 1112, 1116 (9th Cir. 2014) (“Futility of amendment can, by itself,
28 justify the denial of ... leave to amend.”) (quoting *Bonin v. Calderon*, 59 F.3d 815, 845

1 (9th Cir. 1995)); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir.
2 2009) (“[W]here the plaintiff has previously been granted leave to amend and has
3 subsequently failed to add the requisite particularity to its claims, [t]he district court’s
4 discretion to deny leave to amend is particularly broad.” (internal quotation marks
5 omitted) (second alteration in original)).

6 **III. Conclusion and Order**

7 For the reasons discussed, the Court:

8 1) **DISMISSES** this civil action without further leave to amend for failure to
9 state a claim upon which § 1983 relief can be granted pursuant to 28 U.S.C.

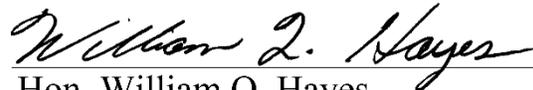
10 § 1915(e)(2)(B)(ii) and § 1915A(b)(1);

11 2) **CERTIFIES** that an IFP appeal would not be taken in good faith pursuant
12 to 28 U.S.C. § 1915(a)(3), and

13 3) **DIRECTS** the Clerk of Court to enter a final judgment of dismissal and
14 close the file.

15 **IT IS SO ORDERED.**

16 Dated: February 16, 2021

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18 Hon. William Q. Hayes
19 United States District Court
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