IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT MORRIS,

Plaintiff, No. CIV S-06-1211 LKK GGH P

vs.

EDWARD ALAMEIDA, et al.,

Defendants. FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. Plaintiff initially filed this action as one pursuant to 28 U.S.C. § 2254, alleging that his due process rights under both the federal and state constitutions and his liberty interest in parole were violated because a California Department of Corrections and Rehabilitation (CDCR) counselor is unauthorized to assess or predict the degree of threat an inmate may pose to the general public if released and contending that there is no statutory or regulatory authority which allows for such assessments. Plaintiff, as petitioner, did not challenge any particular parole denial. As relief, he asked that the CDCR, and Board of Prison Terms (now Board of Parole Hearings-BPH) be ordered to desist from mandating that a correctional counselor predict the level of threat or danger to the public an inmate would pose if released. He asked that the statements of Correctional Counselor Macias-Gram (concerning threat level) be

excised from her evaluation report, or she be directed to retract the statements, and that the BPH be ordered to delete that evaluation report from petitioner's prison files and that a new BPH hearing be held within 30 days under the guidelines he sets forth. By order filed September 27, 2006, plaintiff's purported habeas petition, pursuant to 28 U.S.C. § 2254, was dismissed with leave to file an amended complaint, pursuant to 42 U.S.C. § 1983.

Plaintiff's amended complaint, filed on January 5, 2007,[1] was dismissed with leave to amend, setting forth, inter alia, the following:

> Plaintiff names the following as defendants: H . Macias, P. Buch, O. F. Acuna, D.K. Butler, N. Grannis, E. Alameida. He alleges that CDCR correction counselors [] act without authority when they assess the degree of threat an inmate may pose to the general public upon release from prison.
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> The "minimum requirements of due process" in the parole context have long been established by the United States Supreme Court and include notice to the inmate of the hearing, an opportunity to be heard, hearing by a 'neutral and detached' hearing body, and a written statement by the factfinders as to the evidence relied in rendering a decision. Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604 (1972). While Morrissey specifically addressed parole revocation hearings, the process applies to any hearings arising in the parole context and the Supreme Court emphasized that the requirements for such a hearing in no equate to the process due in a criminal prosecution but rather recognized it "is a narrow inquiry" which "should be flexible enough to consider evidence including letters, affidavits and other material that would not be admissible in an adversary criminal trial." Id.
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> Finding that California inmates have a protected liberty interest in parole eligibility matters, the Ninth Circuit has stated that due process in the context of parole suitability hearings affords prisoners entitlement "to be present at the hearing, speak and offer evidence on their own behalf," and if serving a life sentence, to counsel at the hearing. Biggs v. Terhune, 334 F.3d 910, 915 (9th Cir. 2003). A Board's decision to deny parole must rest on some evidence. Id., at 916-17. In his claim that correctional counselors are not authorized to predict the level of dangerousness of an inmate upon release on parole, plaintiff does not set forth a

[1] Plaintiff's amended complaint had been filed as a new case because plaintiff had failed to include the case number on the filing. The court's December 20, 2006, findings and recommendations recommending dismissal of the action for failure to respond to the September 27, 2006, order, were vacated. See Order, filed on February 14, 2007.

> constitutional deprivation because he has not thereby made a showing that he has been deprived of the process that is due at a parole hearing. The amended complaint will be dismissed but plaintiff will be granted leave to amend.

Order, filed on April 12, 2007, pp. 2-3.

Plaintiff has filed a second amended complaint wherein he seeks to reinstate this action as a petition pursuant to 28 U.S.C. § 2254. However, he continues to challenge the authority of BPH and CDCR to include risk assessments by CDCR caseworkers as part of the parole consideration process and does not challenge any particular parole decision. Plaintiff has been previously informed, inter alia, that:

> In Wilkinson v. Dotson, 544 U.S. 74, 82, 125 S. Ct. 1242, 1248 (2005), the Supreme Court found that where petitioners sought relief that would "render invalid the state procedures used to deny parole eligibility ... and parole suitability....," their claims did "not fall within the implicit habeas exception." Here, petitioner's challenge is to the constitutionality of an alleged policy whereby the CDCR and/or BPT [BPH] requires that a correctional counselor assess or predict the threat level of an inmate should he be released from confinement. He does not challenge a particular parole decision or seek immediate release from custody. Should petitioner be granted the relief he seeks, at most, as in Wilkinson, supra, a parole application by petitioner would receive a speedier consideration. Therefore, the petition will be dismissed and petitioner will be granted leave to file an amended complaint, pursuant to 42 U.S.C. § 1983.

Order, filed on September 27, 2007, pp. 2-3.

Further, as noted above, plaintiff had been informed that he did not set forth a constitutional deprivation because he not made a showing in his first amended complaint that he had been deprived of the process that is due at a parole hearing.[2] By his second amended filing, plaintiff has made it evident that he is unable to cure the defects of his complaint. The court will now recommend dismissal of this action. Thornton v. McClatchy Newspapers, Inc., 261 F.3d

[2] Plaintiff's reference in his second amended complaint to two unpublished and unreported decisions by a Los Angeles County Superior Court does not frame a federal due process claim.

789, 799 (9th Cir. 2001), quoting Bowles v. Reade, 198 F.3d 752, 757 (9th Cir.1999) (Liberality in granting a plaintiff leave to amend "is subject to the qualification that the amendment not cause undue prejudice to the defendant, is not sought in bad faith, and is not futile.") "Under Ninth Circuit case law, district courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint lacks merit entirely." Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000). See also, Smith v. Pacific Properties and Development Corp., 358 F.3d 1097, 1106 (9th Cir. 2004), citing Doe v. United States, 58 F.3d 494, 497(9th Cir.1995) ("a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not be cured by the allegation of other facts.")

Accordingly, IT IS RECOMMENDED that this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, plaintiff may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: 10/23/07

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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