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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

MICHAEL J. JONES,  
  
Plaintiff,  
  
vs.

CASE No. 1:09-cv-02004-LJO-JLT  
  
FINDINGS AND RECOMMENDATION TO  
DISMISS THIRD AMENDED COMPLAINT  
WITH PREJUDICE FOR FAILURE TO STATE  
A CLAIM

BAKERSFIELD POLICE OFFICER  
THEODORE KING and BAKERSFIELD  
POLICE OFFICER SCOTT DREWRY,  
sued in their individual and in their  
official capacities and the Bakersfield  
Police Department,  
  
Defendants.

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Plaintiff, proceeding pro se and *in forma pauperis*, filed an action pursuant to 28 U.S.C. § 1983. This proceeding was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1).

**I. Procedural History**

Plaintiff filed his initial complaint on November 16, 2009, along with a motion and application to proceed *in forma pauperis*. (Docs. 1, 2). The Court granted *in forma pauperis* status, (Doc. 3), but dismissed the complaint with leave to amend on January 19, 2010. (Doc. 4). On February 22, 2010, the Magistrate Judge recommended that the action be dismissed because Plaintiff had not filed an amended complaint as the Court had ordered on January 19, 2010. Plaintiff filed objections to the recommendation and a first amended complaint on March 24, 2010. On March 30,

1 2010, the Court vacated its earlier findings and recommendation to dismiss for failure to comply  
2 with the Court's order. However, the Court dismissed the first amended complaint because the  
3 Court concluded it was vague as to claims against Defendant Police Officers King and Drewry and  
4 failed to state a claim against Defendant Bakersfield Police Department. (Doc. 9 at 5-7). Plaintiff  
5 filed a second amended complaint on April 7, 2010.

6 On April 14, 2010, the Court dismissed Plaintiff's second amended complaint again finding  
7 that his claims were vague and/or otherwise failed to state a claim, and because he had failed to  
8 explain whether he still had pending criminal or parole revocation proceedings or relate if such  
9 proceedings had terminated in his favor. (See Doc. 13 at 4-9). Nevertheless, the Court again granted  
10 Plaintiff an opportunity to file a Third Amended Complaint to state cognizable claims. (Id. at 9-10).  
11 On May 21, 2010, Plaintiff filed a Third Amended Complaint. (Doc. 14).

## 12 **II. Failure to State a Claim**

### 13 **A. Screening**

14 The Court is required to review a case filed *in forma pauperis*. 28 U.S.C. §1915A(a); 28  
15 U.S.C. 1915(e). The Court must review the complaint and dismiss the action if it is frivolous or  
16 malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a  
17 defendant who is immune from such relief. 28 U.S.C. § 1915 (e)(2)(B); see Noll v. Carlson, 809 F.  
18 2d 1446, 1448 (9th Cir. 1987 (citing Franklin v. Murphy, 745 F. 2d 1221, 1228 (9th Cir. 1984)). If  
19 the Court determines that the complaint fails to state a claim, leave to amend may be granted to the  
20 extent that the deficiencies of the complaint can be cured by amendment. Lopez v. Smith, 203 F.3d  
21 1122, 1127-1128 (9th Cir. 2000) (en banc).

#### 22 1. Section 1983 complaint

23 Plaintiff's complaint seeks damages under 42 U.S.C. § 1983, which provides in pertinent part  
24 that:

25 Every person who, under color of any statute, ordinance, regulation, custom, or usage,  
26 of any State or Territory or the District of Columbia, subjects, or causes to be  
27 subjected, any citizen of the United States or other person within the jurisdiction  
28 thereof to the deprivation of any rights, privileges, or immunities secured by the  
Constitution and laws, shall be liable to the party injured in an action at law, suit in  
equity, or other proper proceeding for redress. . .

1 42 U.S.C. § 1983.

2 To plead a § 1983 violation, the plaintiff must allege facts from which it may be inferred that  
3 (1) plaintiff was deprived of a federal right, and (2) the person who deprived plaintiff of that right  
4 acted under color of state law. West v. Atkins, 487 U.S. 42, 48 (1988); Collins v. Womancare, 878  
5 F. 2d 1145, 1147 (9th Cir. 1989). To warrant relief under § 1983, the plaintiff must allege and show  
6 that the defendants' acts or omissions caused the deprivation of the plaintiff's constitutionally  
7 protected rights. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1993). "A person deprives another of  
8 a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates  
9 in another's affirmative acts, or omits to perform an act which he is legally required to do that causes  
10 the deprivation of which [the plaintiff complains]." Id. There must be an actual causal connection  
11 or link between the actions of each defendant and the deprivation alleged to have been suffered by  
12 the plaintiff. See Monell v. Department of Social Services, 436 U.S. 658, 691-692 (1978)(citing  
13 Rizzo v. Goode, 432 U.S. 362, 370-371, 96 S. Ct. 598 (1976)).

14 2. Rule 8(a)

15 Section 1983 complaints are governed by the notice pleading standard in Federal Rule of  
16 Civil Procedure 8(a), which provides in relevant part that:

17 A pleading that states a claim for relief must contain:

18 (1) a short and plain statement of the grounds for the court's  
19 jurisdiction, unless the court already has jurisdiction and the claim  
needs no new jurisdictional support;

20 (2) a short and plain statement of the claim showing that the pleader  
21 is entitled to relief; and

22 (3) a demand for the relief sought, which may include relief in the  
alternative or different types of relief.

23 The Federal Rules of Civil Procedure adopt a flexible pleading policy. Nevertheless, a  
24 complaint must give fair notice and state the elements of the plaintiff's claim plainly and succinctly.  
25 Jones v. Community Redevelopment Agency, 733 F.2d 646, 649 (9th Cir. 1984). In other words,  
26 the plaintiff is required to give the defendants fair notice of what constitutes the plaintiff's claim and  
27 the grounds upon which it rests. Although a complaint need not outline all of the elements of a claim,  
28 it must be possible to infer from the allegations that all of the elements exist and that the plaintiff is

1 entitled to relief under a viable legal theory. Walker v. South Cent. Bell Telephone Co., 904 F.2d  
2 275, 277 (5th Cir. 1990). Conclusory allegations that are unsupported by facts are insufficient to state  
3 a claim under § 1983. Sherman v. Yakahi, 549 F.2d 1287, 1290 (9th Cir. 1977).

4 **B. Analysis**

5 1. Summary of Allegations in Complaint

6 In his Third Amended Complaint, Plaintiff again recounts the circumstances concerning his  
7 arrest on January 16, 2009. He asserts that on that day, he and another man, Kenneth Lee Charles,  
8 were standing near the street when defendants Bakersfield Police Officers King and Drewry drove by  
9 in their marked patrol car. (Doc 14 at 2) Plaintiff shouted and gestured at the officers as if he was  
10 going to jump into the lanes of traffic. Id. The officers completed a u-turn and stopped near the men.

11 Id.

12 King and Drewry contacted Plaintiff and found that he displayed “blood shot/watery eyes,  
13 slow thick speech and a strong odor of marijuana on his person.” (Doc. 14 at 2). Officer Drewry  
14 recognized Charles as a gang member from previous contacts, because he wore a baseball cap that  
15 depicted the gang logo and because his cell phone’s screen saver read, “Westside Crip.” Id. During  
16 the contact, the officers learned that Plaintiff was on parole a condition of which restricted him from  
17 associating with known gang members.<sup>1</sup> Id. As a result of this stop, Plaintiff was booked into the  
18 county jail on charges of “being under the influence of marijuana and in violation of [a] State  
19 imposed ‘anti-street gang’ association clause of his condition of parole.” (Id. at 2). Plaintiff  
20 unabashedly admits that he was under the influence of marijuana at the time of his arrest. (Doc. 14 at  
21 3.)

22 In the Third Amended Complaint, Plaintiff continues to name as defendants Officers King and  
23 Drewry in their individual and official capacities. (Doc. 14 at 1, 2). He articulates two causes of  
24 action. First he asserts that “Defendants enforcement of California’s State Parole anti-street gang  
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26 <sup>1</sup>The Third Amended Complaint admits that Charles was a member of the “West Side Crips,”  
27 but then, somewhat confusingly, indicates that Plaintiff “denied and disavowed that . . . [Charles] is an  
28 active ‘street gang member.’” (See id. at 2, 3). This inconsistency was pointed out by the Court in its  
order dismissing the Second Amended Complaint but Plaintiff has failed to clarify this point.

1 regulations violated plaintiff's rights secured by the First Amendment under the U.S. Constitution."  
2 (Id. at 4). Second, he asserts that "Defendants interpretation and enforcement of State Parole Special  
3 Anti-Gang Association [conditions] violated plaintiff's rights under the Due Process Clause to the  
4 United States Constitution." (Id.)

5 In the body of the Third Amended Complaint, Plaintiff elaborates on his claims. He asserts  
6 that "the anti gang regulation as interpreted by defendants . . . is unconstitutional[ly] vague [sic] or  
7 overbroad in that, 'a[n] ordinary person would not [know] when he would be reasonably . . . in  
8 violation of the regulation.'" (Doc. 14 at 3). As a result, he contends that "defendants actions of  
9 arresting and charging him for violating California State Parole anti-street gang association  
10 regulation[s] as interpreted by defendant [were] carried out without probable cause, . . ." (Id.) He  
11 further contends that as a result of Defendants' actions he "has suffered [a] loss of freedom, resulting  
12 from the California State Parole authorities making a criminal finding of guilt at the parole revocation  
13 hearing as to the state parole imposed 'anti-street gang' statute." (Id.)

#### 14 2. The Third Amended Complaint Fails to State a Cognizable Claim under § 1983

15 Based on the statements made by Plaintiff in the Third Amended Complaint, he alleges that  
16 the act of associating with a known gang member resulted in revocation of his parole and  
17 incarceration. (See Doc. 14 at 3).

18 In Heck v. Humphrey, 512 U.S. 477 (1994), the U.S. Supreme Court precluded a prisoner  
19 from raising a § 1983 claim that, if successful, would render a conviction or sentence invalid where  
20 the conviction or sentence has not been reversed, expunged or called into question by issuance of a  
21 writ of habeas corpus. See id. at 486-87. Subsequently, in Crow v. Penry, 102 F.3d 1086, 1087 (10<sup>th</sup>  
22 Cir. 1996), the Tenth Circuit held that Heck applies to actions which implicate the validity of a  
23 decision to revoke parole. See also Butterfield v. Bail, 120 F.3d 1023, 1024 n. 1 (9<sup>th</sup> Cir. 1997)  
24 (citing Crow and stating that "a challenge to the procedures used in the denial of parole necessarily  
25 implicates the validity of the denial of parole and, therefore, the prisoner's continuing confinement").

26 In this action, Plaintiff challenges both the decision to revoke his parole based for his violation  
27 of the "anti-gang association" restriction as well as the probable cause determination to arrest him for  
28 this action. To the extent that he challenges the decision by the state parole board to revoke his

1 parole, Heck bars this action under § 1983. See Crow, 102 F.3d at 1087, see also Butterfield, 120  
2 F.3d at 1024.

3 Likewise, Heck bars Plaintiff's challenge to the probable cause determination that supported  
4 his arrest.<sup>2</sup> In Smithart v. Towery, 79 F.3d 951, 952 (9<sup>th</sup> Cir. 1996), the court held,

5 There is no question that Heck bars Smithart's claims that defendants *lacked probable*  
6 *cause to arrest him* and brought unfounded criminal charges against him. Smithart  
7 may challenge *the validity of his arrest*, prosecution and conviction only by writ of  
8 habeas corpus. To the extent that Smithart seeks to invalidate his assault conviction,  
9 whether expressly or by implication, we affirm the district court's dismissal. If  
10 Smithart wishes to challenge his *arrest*, prosecution or conviction, he should file a writ  
11 of habeas corpus.

12 (Citations omitted, emphasis added).

13 Plaintiff acknowledges that his arrest led directly to a parole revocation hearing wherein  
14 "California State Parole authorities [made] a criminal finding of guilt" resulting in his "loss of  
15 freedom." (Doc. 14 at 3). Moreover, he appears to contend that the facts upon which the officers  
16 relied to arrest him for associating with a gang member formed the bases for his parole revocation and  
17 his subsequent incarceration. Plaintiff does not contend that his parole revocation has been  
18 subsequently reversed, expunged or called into question by issuance of a writ of habeas corpus. Thus,  
19 as in Towery, any challenge to the probable cause determination for his arrest on this question would  
20 necessarily implicate the validity of the parole revocation proceedings and is, therefore, not  
21 cognizable via an action pursuant to 42 U.S.C. § 1983. Assuming Plaintiff can demonstrate the "in  
22 custody"<sup>3</sup> requirement for jurisdiction, any challenge to this determination must be brought via a  
23 petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Because the Court concludes Heck  
24 bars Plaintiff's claims, the Court finds that leave to amend would be futile and should be denied.

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26 <sup>2</sup>Notably, Plaintiff does *not* assert that the officers lacked probable cause to arrest him for being under the influence  
27 of marijuana. Moreover, he fails to provide any information about whether this action formed a basis for the decision to  
28 revoke his parole.

29 <sup>3</sup>"The essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the  
30 traditional function of the writ is to secure release from illegal custody." Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).  
31 Where, as here, a petitioner seeks to challenge the revocation of his parole, he must demonstrate that continuing collateral  
32 consequences exist if the underlying sentence has expired, see Spencerv. Kemna, 523 U.S. 1, 14-18 (1998), or if the  
33 additional term imposed for violating parole has been served. See Cox v. McCarthy, 829 F.2d 800, 803 (9th Cir. 1987).

1 **III. Recommendation**

2 Accordingly, it is RECOMMENDED that

- 3 1. The Third Amended Complaint be DISMISSED without leave to amend for failure to  
4 state a claim; and
- 5 2. The Clerk of Court enter judgment for Defendants because this dismissal with  
6 prejudice would terminate the action in its entirety.

7 These findings and recommendations are submitted to the United States District Court Judge  
8 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the  
9 Local Rules of Practice for the United States District Court, Eastern District of California. Within  
10 fourteen days after being served with a copy, any party may file written objections with the Court and  
11 serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s  
12 Findings and Recommendations.” Replies to the objections shall be served and filed within fourteen  
13 days after service of the objections. The Court will then review the Magistrate Judge’s ruling pursuant  
14 to 28 U.S.C. § 636 (b)(10)(C). The parties are advised that failure to file objections within the  
15 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d  
16 1153 (9th Cir. 1991).

17  
18 IT IS SO ORDERED.

19 Dated: June 2, 2010

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE