

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

GREGORY McCLELLAN,  
Plaintiff,  
v.  
KERN COUNTY SERRIFF'S OFFICE, et  
al.,  
Defendant(s).

Case No. 1:10-cv-00386-LJO-MJS (PC)  
**ORDER DENYING RECONSIDERATION  
OF ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS  
(ECF Nos. 24, 28, 29)**  
**ORDER DENYING AS MOOT REQUEST  
THAT CLERK FILE OBJECTIONS TO  
FINDINGS AND RECOMMENDATIONS  
(ECF No. 30)**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. On June 2, 2014, the Magistrate Judge assigned to this matter issued Findings and Recommendations that Plaintiff's Fourth Amended Complaint stated a Fourth Amendment unreasonable seizure claim against Defendants Lozano, Wood, and Perkins arising out of their actions at the time of Plaintiff's arrest, and that all other claims and Defendants be dismissed. Objections to the Findings and Recommendations were due not later than June 19, 2014. Plaintiff filed Objections on June 23, 2014.<sup>1</sup> Entry of the untimely Objections into the docket was delayed because Plaintiff used an incorrect case number. On June 25, 2014, the Findings and Recommendations were adopted in full without review of Plaintiff's Objections.

Plaintiff now asserts his untimely Objections, requesting they be filed and that the

<sup>1</sup> Accordingly, Plaintiff's request for judicial notice that his Objections were timely filed, (ECF No. 27) is denied. See Fed. R. Evid. 201.

1 undersigned grant reconsideration of the June 25th Order Adopting Findings and  
2 Recommendations.<sup>2</sup>

3 **I. LEGAL STANDARDS**

4 Rule 60(b)(2) allows the Court to relieve a party from judgment on the basis of newly  
5 discovered evidence. The moving party must demonstrate that it exercised due diligence in  
6 obtaining information and that evidence is material and controlling and clearly would have  
7 produced different result if presented before original judgment. *New Hampshire Ins. Co. v.*  
8 *Martech USA, Inc.*, 993 F.2d 1195, 1201 (5th Cir. 1993). The court may rule upon a motion  
9 to vacate based upon newly discovered evidence in its sound discretion. *Dugan v. U.S.*,  
10 521 F.2d 231, 233 (5th Cir. 1975). The motion must be brought within one year of entry of  
11 judgment. Fed. R. Civ. P. 60(c)(1).

12 Rule 60(b)(6) allows the Court to relieve a party from an order for any reason that  
13 justifies relief. Rule 60(b)(6) is to be used sparingly as an equitable remedy to prevent  
14 manifest injustice and is to be utilized only where extraordinary circumstances exist.  
15 *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008). The motion must be brought within a  
16 reasonable time. Fed. R. Civ. P. 60(c)(1).

17 Local Rule 230(j) requires, in relevant part, that Plaintiff show “what new or different  
18 facts or circumstances are claimed to exist which did not exist or were not shown upon [the]  
19 prior motion, or what other grounds exist for the motion,” and “why the facts or  
20 circumstances were not shown at the time of the prior motion.”

21 **II. DISCUSSION**

22 Plaintiff re-argues previously dismissed claims for malicious prosecution, abuse of  
23 process, intentional infliction of emotional distress (IIED) and due process violations arising  
24 out of his claimed illegal arrest for failure to register as a sex offender.<sup>3</sup> His essential  
25 contention is that Defendants intentionally provided false probable cause for the arrest and  
26

---

27 <sup>2</sup> On July 24 2014, Plaintiff filed with the Ninth Circuit Court of Appeals a Notice of Appeal (see ECF No. 32;  
28 Appeal No. 14-16426) from the Order Adopting Findings and Recommendations. This Court rules on the  
motion for reconsideration of the Order, pending appeal, pursuant to Federal Rule of Appellate Procedure  
4(a)(4).

<sup>3</sup> Plaintiff does not otherwise object to the Findings and Recommendations or argue for reconsideration of the  
Order Adopting Findings and Recommendations.

1 subsequent prosecution which terminated in his favor. These claims are discussed below.  
2 For the reasons stated, Plaintiff has not shown legal or factual error in the Court's June 25,  
3 2014 Order Adopting Findings and Recommendations.

4 **A. Malicious Prosecution**

5 Malicious prosecution with the intent to deprive a person of equal protection of the  
6 law or otherwise to subject a person to a denial of constitutional rights is cognizable under  
7 § 1983." *Poppell v. City of San Diego*, 149 F.3d 951, 961 (9th Cir. 1998); *Ayala v. KC*  
8 *Environmental Health*, 426 F.Supp.2d 1070, 1083 (E.D. Cal. 2006).

9 Under California law, a malicious prosecution plaintiff must plead and prove that the  
10 prior proceeding commenced by or at direction of the malicious prosecution defendant was:  
11 (1) pursued to legal termination favorable to plaintiff; (2) brought without probable cause;  
12 and (3) initiated with malice. *Ayala*, 426 F.Supp .2d at 1083. The malice element is  
13 established when the former prosecution was commenced in bad faith to vex, annoy or  
14 wrong the adverse party and may, but need not necessarily be inferred from want of  
15 probable cause. *Id.*

16 1. False Probable Cause Declaration

17 Plaintiff objects that his malicious prosecution claim against Defendant Kern County  
18 Sheriff employees Youngblood, Hakker, and Smallwood was wrongly dismissed. He  
19 alleges these Defendants conducted the initial investigation and intentionally provided a  
20 false probable cause declaration to the prosecution and suppressed evidence of Plaintiff's  
21 innocence. These actions, Plaintiff maintains, caused charges to be wrongfully filed.  
22 Charges on which Plaintiff was arraigned and held over to answer.

23 Plaintiff attaches to his motion the November 17, 2009 arrest report which shows he  
24 was charged with failing to register at his current address and making a false statement of  
25 address on his registration form. The arrest report includes as probable cause Plaintiff's  
26 failure to register within five days of a July 11, 2009 change in residence, and his July 24  
27 2009 registration at an address not his residence. (See ECF No. 24 at 19.) He also  
28 attaches the underlying registration forms that, according to Plaintiff, show he did correctly

1 register in both these instances. (Id. at 20-30.)

2 Under California law, a charging document itself creates a prima facie presumption  
3 that probable cause existed for the underlying prosecution. *Roberts v. McAfee, Inc.*, 660  
4 F.3d 1156, 1166 (9th Cir. 2011). This presumption may be rebutted if the charge was  
5 based on false evidence. *Id.*, citing *Williams v. Hartford Ins. Co.*, 147 Cal.App.3d 893, 900  
6 (1983).

7 Here, Plaintiff has not made a showing that the criminal prosecution was terminated  
8 in his favor for lack of probable cause. Even if Plaintiff had shown a lack of probable cause,  
9 nothing in the instant motion for reconsideration suggests any probable cause error was  
10 attributable to Defendants' intentional and malicious desire to violate Plaintiff's rights.  
11 Likewise allegations in the Fourth Amended Complaint. *Cf. Galbraith v. County of Santa*  
12 *Clara*, 307 F.3d 1119, 1126-27 (9th Cir. 2002) (holding that coroner's knowing or reckless  
13 false statements that led to plaintiff's arrest and prosecution were sufficient to state a §  
14 1983 claim).

15 Plaintiff's cited case law is not authority otherwise. See *Marsh v. San Diego County*,  
16 432 F.Supp.2d 1035, 1051 (S.D. Cal. 2006) (malicious prosecution stated where  
17 defendants prosecuted plaintiff fraudulently and with malice and in order to violate his  
18 rights); *Pierce v. Gilchrist*, 359, F.3d 1279, 1995-96 (10th Cir. 2004) (malicious prosecution  
19 stated where knowingly false evidence becomes basis for state to prosecute the offense).

20 Plaintiff's assertion that malice is implicit because probable cause was ultimately  
21 found lacking is not supported in fact or law. No facts suggest his criminal proceeding was  
22 dismissed on grounds of lack of probable cause. Moreover, his contention that a lack of  
23 probable cause is malice per se, is unsupported by legal authority. "A lack of probable  
24 cause can support an inference of malice, but it is insufficient evidence by itself." *Hampton-*  
25 *Stein v. Aviation Finance Group, LLC*, 472 Fed.Appx. 455, 457 (9th Cir. 2012), citing  
26 *Drummond v. Desmarais*, 176 Cal.App.4th 439, 449-51 (2009); accord, *McCellan v. Coale*,  
27 842 F.2d 1291, (4th Cir. 1988), citing *Hooke Kennedy v. Crouch*, 191 Md. 580 (1948)  
28 (malice may not be inferred from a lack of probable cause alone).

1                   2.       Favorable Termination

2                   A prosecution ends favorably when it “tends to indicate the innocence of the  
3 accused.” *Hobbs v. City of Long Beach*, 534 Fed.Appx. 648, 650 (2013), citing *Jaffe v.*  
4 *Stone*, 18 Cal.2d 146, 114 P.2d 335, 338 (1941). “When the proceeding terminates other  
5 than on the merits, the court must examine the reasons for termination to see if the  
6 disposition reflects the opinion of the court or the prosecuting party that the action would  
7 not succeed.” *Sierra Club Found. v. Graham*, 72 Cal.App.4th 1135, 85 Cal.Rptr.2d 726, 734  
8 (1999).

9                   Here, Plaintiff asserts the criminal charges were terminated in his favor. He attaches  
10 to his Objections the Reporter’s Transcript of his preliminary hearing. The Reporter’s  
11 Transcript indicates the criminal proceeding was dismissed on the State’s motion and with  
12 the State’s expressed intent to refile. (See ECF No. 24 at 14-16.) This does not  
13 demonstrate the opinion of the prosecutor or trial court that the criminal action lacked merit  
14 or would have resulted in a decision in Plaintiff’s favor, *Minasian v. Sapse*, 80 Cal.App.3d  
15 823, 145 Cal.Rptr. 829, 831-32 (1978), or that the criminal action was dismissed because  
16 Plaintiff was innocent of the charges, *Pitt v. District of Columbia*, 491 F.3d 494, 501  
17 (C.A.D.C. 2007); *Marsh*, 432 F.Supp.2d at 1052. Plaintiff does support a favorable  
18 termination for purposes of malicious prosecution.

19                   **B.       Abuse of Process, IIED, and Due Process Claims**

20                   Plaintiff objects that, because the malicious prosecution claim is cognizable, then so  
21 too are claims for IIED, abuse of process and denial of due process. These arguments fail  
22 because reconsideration of dismissal of the malicious prosecution claim is denied for  
23 reasons stated above.

24                   **C.       Injunctive Relief**

25                   Plaintiff argues that he needs and is entitled to injunctive relief because he will be  
26 paroled to Bakersfield and fears Defendants will again attempt to harm him. The Magistrate  
27 Judge recommended denying injunctive relief because nothing in the Fourth Amended  
28 Complaint suggested immediate threat of injury and impending harm. Nothing in the

1 reconsideration motion before the Court suggests legal or factual error in this  
2 determination, or that Plaintiff is otherwise under threat of harm from Defendants. See *City*  
3 *of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (plaintiff must show “real and  
4 immediate” threat of injury). Plaintiff’s assertion of a post-parole threat from Defendants is  
5 based solely on speculation and thus insufficient to support relief.

6 **D. Denial of Leave to Amend**

7 Plaintiff argues he was wrongly denied leave to amend the above claims. However,  
8 as noted by the Magistrate Judge, Plaintiff having been advised of deficiencies in his claims  
9 and offered the opportunity to correct them, failed to so do. The Magistrate Judge  
10 reasonably concluded further amendment was futile.

11 **E. Request Clerk File Objections**

12 Plaintiff’s request that the Clerk file the Objections is moot. The Objections were filed  
13 on June 23, 2014. (See ECF No. 24.).

14 **III. CONCLUSIONS AND ORDER**

15 Plaintiff’s untimely Objections to the Findings and Recommendations lack merit and  
16 his motion for reconsideration based thereon fails to demonstrate any error of fact or law in  
17 the undersigned’s adoption of the Findings and Recommendations. The Objections have  
18 been filed and the motion that the Clerk do so is moot.

19 Accordingly, for the reasons stated, it is HEREBY ORDERED that:

- 20 1. Plaintiff’s motion for reconsideration of the Order Adopting Findings and  
21 Recommendations (ECF Nos., 24, 28, 29) is DENIED on the merits, and  
22 2. Plaintiff’s motion that his Objections to Findings and Recommendations be  
23 filed (ECF No. 30) is DENIED as moot.

24 IT IS SO ORDERED.

25 Dated: August 6, 2014

/s/ Lawrence J. O’Neill  
UNITED STATES DISTRICT JUDGE