

1 filing fee, or any portion thereof, that may have been paid, the court shall dismiss the
2 case at any time if the court determines that . . . the action or appeal . . . fails to state a
3 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

4 A complaint must contain “a short and plain statement of the claim showing that
5 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
6 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
7 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
8 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
9 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is
10 plausible on its face.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555).
11 Facial plausibility demands more than the mere possibility that a defendant committed
12 misconduct and, while factual allegations are accepted as true, legal conclusions are
13 not. Iqbal, 556 U.S. at 678.

14 **II. PLAINTIFF’S CLAIMS**

15 Plaintiff is currently housed at Wasco State Prison (“WSP”), where the events at
16 issue in his Complaint occurred. Plaintiff names the following individuals as defendants
17 in their official and individual capacities: 1) Kamala Harris, Attorney General of
18 California; 2) the Grand Jury of Kern County; and 3) Lisa Green, District Attorney of
19 Kern County.

20 Plaintiff’s allegations may be summarized as follows:

21 Plaintiff was falsely accused of battery on a peace officer and filed a grievance to
22 correct the mistake. (Compl. at 4.) In response, on January 27, 2014, Correctional
23 Officers Bienvenides and Reyes gave Plaintiff an apple which Plaintiff believed was
24 laced with cyanide because he saw a “syringe imprint” on it. (Id.) These officers acted
25 on orders of the California Department of Corrections and Rehabilitation (“CDCR”),
26 Warden Katavich, Correctional Officer Hieto, and Correctional Officer Ayala. (Id. at 5.)
27 Prison staff came to Plaintiff’s cell and stared at him for thirty-minutes to see if he
28 reacted to the cyanide. (Id. at 4.)

1 Plaintiff had his food, especially his apples, tampered with from September 25,
2 2013, to February 2, 2014. (Compl. at 5-6.) Plaintiff's apples were tampered with
3 because certain correctional officers were racist. (Id. at 6.) He also was provided
4 spoiled food. (Id. at 5.)

5 Plaintiff informed Defendant Harris of the problems with his food, but she refused
6 to intervene. (Compl. at 6.) He informed a Kern County Grand Jury of his problems but
7 they also failed to help. (Id. at 7.)

8 Plaintiff asks for monetary damages and an injunction directing that he be
9 immediately transferred to another prison.

10 **III. ANALYSIS**

11 **A. 42 U.S.C. § 1983 Claims**

12 42 U.S.C. § 1983 "provides a cause of action for the 'deprivation of any rights,
13 privileges, or immunities secured by the Constitution and laws' of the United States."
14 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). §
15 1983 is not itself a source of substantive rights, but merely provides a method for
16 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-
17 94 (1989).

18 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)
19 that a right secured by the Constitution or laws of the United States was violated, and
20 (2) that the alleged violation was committed by a person acting under the color of state
21 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d
22 1243, 1245 (9th Cir. 1987).

23 **B. Analysis**

24 Plaintiff's Complaint is frivolous.

25 A complaint is frivolous if it lacks an arguable basis either in law or in fact.
26 Neitzke v. Williams, 490 U.S. 319, 325 (1989) (quotation marks omitted); Martin v. Sias,
27 88 F.3d 774, 775 (9th Cir. 1996); Cato v. U.S., 70 F.3d 1103, 1106 (9th Cir. 1995).

1 Plaintiff alleges a vast conspiracy among the CDCR and its employees to poison
2 Plaintiff with poisoned apples and spoiled food. Plaintiff sues not the employees, but
3 the California Attorney General, a district attorney and a grand jury because they did not
4 come to his aid and protect him from being poisoned.

5 The Court finds that Plaintiff's Complaint is frivolous and devoid of factual support
6 or arguable question of law. See Neitzke, 490 U.S. at 327–328. No useful purpose
7 would be served by giving Plaintiff leave to amend to try again to assert the poison
8 apple conspiracy.

9 **IV. CONCLUSION AND RECOMMENDATION**

10 Plaintiff's Complaint fails to state any claims upon which relief may be granted
11 and the deficiencies at issue are not capable of being cured through amendment.
12 Akhtar v. Mesa, 698 F.3d 1202, 1212-13 (9th Cir. 2012); Lopez v. Smith, 203 F.3d
13 1122, 1130-31 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).
14 Additionally, the Court finds that Plaintiff's complaint is frivolous. Neitzke v. Williams,
15 490 U.S. 319, 325 (1989) (quotation marks omitted); Martin v. Sias, 88 F.3d 774, 775
16 (9th Cir. 1996); Cato v. U.S., 70 F.3d 1103, 1106 (9th Cir. 1995).

17 Accordingly, the Court HEREBY RECOMMENDS that this action be
18 DISMISSED, with prejudice, for failure to state a claim upon which relief may be granted
19 and as frivolous. The Court also recommends that the dismissal of this action qualifies
20 as a strike under 28 U.S.C. § 1915(g). Silva v. Di Vittorio, 658 F.3d 1090, 1098-99 (9th
21 Cir. 2011).

22 These Findings and Recommendations will be submitted to the United States
23 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
24 636(b)(l). Within thirty (30) days after being served with these Findings and
25 Recommendations, Plaintiff may file written objections with the Court. The document
26 should be captioned "Objections to Magistrate Judge's Findings and
27 Recommendations." Plaintiff is advised that failure to file objections within the specified
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1 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
2 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

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Dated: April 28, 2014

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/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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