



1 A complaint must contain “a short and plain statement of the claim showing that the pleader is  
2 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but  
3 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
4 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,  
5 550 U.S. 544, 555 (2007)). Plaintiff must demonstrate that each named defendant personally  
6 participated in the deprivation of his rights. Iqbal, 556 U.S. at 676-677; Simmons v. Navajo County,  
7 Ariz., 609 F.3d 1011, 1020-1021 (9th Cir. 2010).

8 Prisoners proceeding pro se in civil rights actions are still entitled to have their pleadings  
9 liberally construed and to have any doubt resolved in their favor, but the pleading standard is now  
10 higher, Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted), and to survive  
11 screening, Plaintiff’s claims must be facially plausible, which requires sufficient factual detail to allow  
12 the Court to reasonably infer that each named defendant is liable for the misconduct alleged. Iqbal,  
13 556 U.S. at 678-79; Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). The “sheer  
14 possibility that a defendant has acted unlawfully” is not sufficient, and “facts that are ‘merely  
15 consistent with’ a defendant’s liability” falls short of satisfying the plausibility standard. Iqbal, 556  
16 U.S. at 678; Moss, 572 F.3d at 969.

## 17 II.

### 18 COMPLAINT ALLEGATIONS

19 On April 18, 2002, Plaintiff was prosecuted in the Kern County Superior Court, for violation of  
20 California Penal Code 245(a). District Attorney, Ronald Shumaker, pursued a criminal conviction  
21 based on false testimony by a police officer. The District Attorney had no physical evidence.  
22 Plaintiff’s public defender, Howard Levich, never objected on the record as to the lack of evidence and  
23 did not advise Plaintiff of the lack of evidence. Plaintiff agreed to a three year plea agreement, which  
24 was based on improper testimony. Plaintiff seeks \$3,000,000 in punitive damages and requests that  
25 his conviction be expunged.

26 ///

27 ///

28 ///

1 III.

2 DISCUSSION

3 A habeas corpus petition is the correct method for a prisoner to challenge the “legality or  
4 duration” of his confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991), quoting, Preiser v.  
5 Rodriguez, 411 U.S. 475, 485 (1973); Advisory Committee Notes to Rule 1 of the Rules Governing  
6 Section 2254 Cases. In contrast, a civil rights action pursuant to 42 U.S.C. § 1983 is the proper  
7 method for a prisoner to challenge the conditions of that confinement. McCarthy v. Bronson, 500  
8 U.S. 136, 141-42 (1991); Preiser, 411 U.S. at 499; Badea, 931 F.2d at 574; Advisory Committee Notes  
9 to Rule 1 of the Rules Governing Section 2254 Cases. “[R]elief is available to a prisoner under the  
10 federal habeas statute . . . if success on the claim would ‘necessarily spell speedier release’ from  
11 custody, which . . . include termination of custody, acceleration of the future date of release from  
12 custody, or reduction of the level of custody.” Nettles v. Grounds, 788 F.3d 992, 1001 (9th Cir. 2015)  
13 (quoting Skinner v. Switzer, 562 U.S. 521, 534 (2011)).

14 Plaintiff is seeking to challenge the constitutionality of his conviction and/or his custody rather  
15 than the conditions of his confinement. In order for Plaintiff’s conviction to be expunged from his  
16 record, it would have to be determined Plaintiff’s conviction is invalid. Thus, Plaintiff’s claims  
17 challenge his criminal conviction which cannot be raised by way of a section 1983 complaint.  
18 Plaintiff must file a habeas corpus petition pursuant to 28 U.S.C. § 2254.<sup>1</sup> Plaintiff’s claim is not  
19 cognizable unless and until he can show that the criminal conviction has been set aside by the grant of  
20 writ of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 487 (1994). Accordingly, Plaintiff’s  
21 complaint must be dismissed, without prejudice. Although the Court would generally grant Plaintiff  
22 leave to amend in light of his pro se status, amendment is futile in this instance because the  
23 deficiencies cannot be cured by amendment. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.  
24 2000); Schmier v. U.S. Court of Appeals for the Ninth Circuit, 279 F.3d 817, 824 (9th Cir. 2002)  
25 (recognizing “[f]utility of amendment” as a proper basis for dismissal without leave to amend); see

26  
27  
28 <sup>1</sup> Pursuant to 28 U.S.C. § 2241(d), venue for a habeas action challenging the validity of the conviction and/or sentence is proper in the district of conviction.

1 also Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th Cir. 1995) (a civil rights complaint seeking  
2 habeas relief should be dismissed without prejudice to filing as a petition for writ of habeas corpus).

3 **IV.**

4 **ORDER**

5 Based on the foregoing, it is HEREBY ORDERED that:

- 6 1. Plaintiff's complaint is dismissed, without prejudice,<sup>2</sup> for failure to state a cognizable  
7 claim for relief; and  
8 2. The Clerk of Court is directed to terminate this action.

9  
10 IT IS SO ORDERED.

11 Dated: April 19, 2017



12 UNITED STATES MAGISTRATE JUDGE

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28 \_\_\_\_\_  
<sup>2</sup> Heck barred civil rights claim must be dismissed without prejudice so Plaintiff may reassert the claims if the conviction or sentence is later invalidated. Trimble v. City of Santa Rosa, 49 F.3d 583, 585 (9th Cir. 1995).