

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**

JERRY OWENS,

Plaintiff,

v.

FRESNO POLICE DEPARTMENT, *et al.*,

Defendants.

Case No. 1:18-cv-00153-LJO-EPG

**FINDINGS AND RECOMMENDATIONS  
THAT THIS ACTION BE DISMISSED AS  
BARRED BY THE FAVORABLE  
TERMINATION RULE**

(ECF No. 6)

**THIRTY (30) DAY DEADLINE**

Jerry Owens (“Plaintiff”), proceeding *pro se* and *in forma pauperis*, commenced this civil rights action pursuant to 42 U.S.C. § 1983 by the filing of a Complaint on January 29, 2018. (ECF No. 1). On February 23, 2018, Plaintiff filed a First Amended Complaint (“FAC”), alleging that the Fresno Police Department, Community Regional Medical Center, and the Fresno County District Attorney violated his constitutional rights by taking his blood, offering false testimony in open court, and presenting misleading information to a judge. (ECF No. 4). Plaintiff also alleged that his attorney, Wagner & Jones Law Office, breached his trust by failing to advise him that his constitutional rights had been violated. *Id.*

This Court screened the FAC, and concluded that Plaintiff’s claims were barred by the *Younger* abstention doctrine and the *Heck* favorable termination rule, or were otherwise not cognizable under § 1983. The Court provided Plaintiff leave to file an amended complaint. On May 31, 2018, Plaintiff filed a Second Amended Complaint (“SAC”). (ECF No. 6).

The SAC is now before the Court for screening. As discussed below, the Court finds that

1 Plaintiff again fails to state a claim upon which relief can be granted because his claims are barred  
2 by the favorable termination rule. Because Plaintiff lost his state court criminal case, he cannot go  
3 forward with a civil rights action that is inconsistent with his conviction in the criminal case. If  
4 Plaintiff wishes to challenge his conviction, he may file direct appeals and potentially a petition  
5 for habeas corpus. Only if he eventually succeeds in overturning that conviction can he file a civil  
6 rights action pursuant to § 1983. Thus, the Court will recommend dismissal of this action without  
7 further leave to amend.

### 8 **I. SCREENING REQUIREMENT**

9 The Court is required to screen complaints brought by prisoners or detainees seeking relief  
10 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
11 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner or detainee has  
12 raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief  
13 may be granted, or that seek monetary relief from a defendant who is immune from such relief.  
14 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee, or any portion thereof, that may  
15 have been paid, the court shall dismiss the case at any time if the court determines that the action  
16 or appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

17 A complaint is required to contain “a short and plain statement of the claim showing that  
18 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
19 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
20 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*  
21 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as  
22 true, courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*,  
23 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). Plaintiff must  
24 set forth “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on  
25 its face.” *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted). While factual  
26 allegations are accepted as true, legal conclusions are not. *Id.* The mere possibility of  
27 misconduct falls short of meeting this plausibility standard. *Id.* at 678-79; *Moss v. U.S. Secret*  
28 *Service*, 572 F.3d 962, 969 (9th Cir. 2009).

1 **II. PLAINTIFF’S ALLEGATIONS IN THE SECOND AMENDED COMPLAINT**

2 Plaintiff names as defendants Chris Perry, a Police Officer with the Fresno Police  
3 Department, an unnamed phlebotomist employed at Community Regional Medical Center, and  
4 Lisa A. Smittcamp, District Attorney for Fresno County. (ECF No. 6 at 2-3). Plaintiff alleges that  
5 his “freedom from deprivation of liberty, property and private property was violated without  
6 probable cause, warrant or due process of law, and without just compensation.” *Id.* at 3.

7 On March 3, 2017, Plaintiff was taken by Fresno Police to Community Regional Medical  
8 Center and forced to have his blood drawn by a female phlebotomist on the orders of Officer  
9 Perry. *Id.* He asked numerous times to have the procedure stopped because no warrant was issued  
10 to collect his blood. *Id.* Officer Petty responded that Plaintiff was to shut up, and that Plaintiff had  
11 no rights because he was on an active DUI probation. *Id.* at 3-4. Plaintiff informed Officer Perry  
12 that he had just been discharged from probation a few days prior. *Id.* at 3. Officer Perry said, well  
13 my computer says you are on probation. *Id.* Plaintiff again informed Officer Perry that he was  
14 wrong, and implored him to call and speak to a live person in the probation office. *Id.* Plaintiff  
15 also told the female phlebotomist that she needed a warrant to proceed with the procedure, and  
16 expressed that he would file a claim for violating his rights in federal district court. *Id.* But,  
17 Officer Perry and the phlebotomist simply laughed and said, good luck. *Id.*

18 The phlebotomist withdrew blood from Plaintiff’s upper right thigh. *Id.* at 5. Plaintiff was  
19 in and out of consciousness after being brought to the medical center by paramedics. *Id.* He was  
20 then placed under arrest and booked into Fresno County Jail on DUI and related charges. *Id.*  
21 Plaintiff was later convicted and sentenced to a prison term of sixteen months because of the  
22 unwarranted blood draw. *Id.*

23 Plaintiff made a 1538.5 motion to have the blood drawn evidence suppressed. *Id.* at 4. He  
24 appeared in Fresno Superior Court for a preliminary hearing on January 25, 2017. *Id.* The  
25 assistant district attorney coerced the officer on the stand—who Plaintiff believed to be Officer  
26 Chris Perry—to lie by stating that he spoke with a male phlebotomist about the procedures used  
27 to withdraw Plaintiff’s blood on March 3, 2017. *Id.* The testimony was inconsistent with Officer  
28 Perry’s report, the hospital report, and the complaint filed in Fresno County Superior Court. *Id.* at

1 6. The assistant district attorney knowingly led the Officer to make statements that were  
2 inconsistent with the reports and medical records. *Id.*

### 3 **III. FAVORABLE TERMINATION RULE**

4 In *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the United States Supreme Court held  
5 that to recover damages for “harm caused by actions whose unlawfulness would render a  
6 conviction or sentence invalid,” a § 1983 plaintiff must prove that the conviction or sentence was  
7 reversed, expunged, or otherwise invalidated. The favorable termination rule in *Heck* preserves  
8 the requirement that claims which, if successful, would necessarily imply the invalidity of a  
9 conviction or sentence, must be brought by way of a petition for writ of habeas corpus, after  
10 exhausting appropriate avenues for relief, including direct appeal. *Muhammad v. Close*, 540 U.S.  
11 749, 750-751 (2004).

12 “The applicability of the favorable termination rule turns solely on whether a successful §  
13 1983 action would necessarily render invalid a conviction, sentence, or administrative sanction  
14 that affected the length of the prisoner’s confinement.” *Ramirez v. Galaza*, 334 F.3d 850, 856  
15 (9th Cir. 2003). In *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996), the court held that, “if a  
16 criminal conviction arising out of the same facts and is fundamentally inconsistent with the  
17 unlawful behavior for which section 1983 damages are sought, the 1983 action must be  
18 dismissed.” But if the “action, even if successful, will not demonstrate the invalidity of any  
19 outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in  
20 the absence of some other bar to the suit.” *Heck*, 512 U.S. at 487.

21 It is clear from the allegations in the SAC that Plaintiff has been convicted of an offense  
22 and seeks to challenge the validity of his current confinement. Plaintiff alleges that his conviction  
23 and current sentence were procured using evidence that was obtained without a warrant and  
24 through false testimony extracted by an assistant district attorney. These allegations fall squarely  
25 within the scope of the favorable termination rule; a victory in this action would necessarily  
26 render invalid Plaintiff’s outstanding criminal conviction and sentence. Accordingly, this action  
27 should be dismissed as barred by the favorable termination rule articulated in *Heck*.

28 If Plaintiff seeks to challenge his criminal conviction, he must appeal that conviction

1 through the state court, and may file a petition for writ of habeas corpus in federal court only after  
2 exhausting appropriate avenues for relief.<sup>1</sup>

3 **IV. CONCLUSION AND RECOMMENDATION**

4 The Court finds that Plaintiff's claims are barred under *Heck*. Thus, this action should be  
5 dismissed for Plaintiff's failure to state a claim upon which relief may be granted. The Court does  
6 not recommend granting leave to amend. The legal issues presented in the SAC and analyzed in  
7 this order cannot be cured by additional facts, and thus, further amendment would be futile.

8 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 9 1. This case be DISMISSED for failure to state a claim; and  
10 2. The Clerk of the Court be directed to CLOSE this case.

11 These findings and recommendations are submitted to the United States District Judge  
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days**  
13 after being served with these findings and recommendations, Plaintiff may file written objections  
14 with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings  
15 and Recommendations."

16 Failure to file objections within the specified time may result in the waiver of rights on  
17 appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*,  
18 923 F.2d 1391, 1394 (9th Cir. 1991)).

19  
20 IT IS SO ORDERED.

21 Dated: August 14, 2018

22 /s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE

23  
24  
25  
26  
27  
28 <sup>1</sup> Note that there are rules regarding such petitions, including the requirement to exhaust state remedies and to abide by certain time requirements.