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

TIMOTHY THOMPSON,

Plaintiff,

No. CIV S-10-0279 GEB KJM P

vs.

RUSSELL W. MILLER, JR.,

Defendant.

ORDER AND

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$54.67 will be assessed by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the

1 preceding month's income credited to plaintiff's prison trust account. These payments will be
2 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's
3 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief
5 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
6 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
7 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may
8 be granted, or that seek monetary relief from a defendant who is immune from such relief. 28
9 U.S.C. § 1915A(b)(1),(2).

10 In order to avoid dismissal for failure to state a claim a complaint must contain
11 more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements
12 of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other
13 words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
14 statements do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a
15 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.
16 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
17 draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129
18 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be
19 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200
20 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.
21 Rhodes, 416 U.S. 232, 236 (1974).

22 Plaintiff asserts that an attorney representing him during criminal proceedings
23 rendered ineffective assistance of counsel in violation of the Sixth Amendment. However,
24 plaintiff's claim is barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), because plaintiff
25 fails to show that the conviction at issue has been invalidated. Therefore, this case must be
26 dismissed.

1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

3 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

4 Plaintiff is assessed an initial partial filing fee of \$54.67. All fees shall be collected and paid in
5 accordance with this court's order to the Director of the California Department of Corrections
6 and Rehabilitation filed concurrently herewith.

7 IT IS HEREBY RECOMMENDED that this action be dismissed with prejudice.

8 These findings and recommendations are submitted to the United States District
9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
10 one days after being served with these findings and recommendations, plaintiff may file written
11 objections with the court. The document should be captioned "Objections to Magistrate Judge's
12 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
13 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
14 F.2d 1153 (9th Cir. 1991).

15 DATED: May 7, 2010.

16 
17 U.S. MAGISTRATE JUDGE

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