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

EDWARD TERRELL

Plaintiff,

No. 2:12-cv-1405 CKD P

vs.

KEVIN GUEST, et al.,

Defendants.

ORDER

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Plaintiff, a state prisoner proceeding pro se and in forma pauperis, seeks relief pursuant to 42 U.S.C. § 1983. This proceeding was referred to the undersigned by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). Plaintiff has consented to jurisdiction by a United States Magistrate Judge.

On September 20, 2012, plaintiff’s original complaint was dismissed with leave to amend as his claims alleged therein against his parole officer, defense attorney, and the sheriff were found to be barred by the rule of Heck v. Humphrey, 512 U.S. 477 (1994).

Plaintiff has filed a first amended complaint. (Dkt. No. 13.) The court will screen the first amended complaint for claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 In order to avoid dismissal for failure to state a claim a complaint must contain  
9 more than “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements  
10 of a cause of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other  
11 words, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
12 statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a  
13 claim upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570.  
14 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
15 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129  
16 S. Ct. at 1949. When considering whether a complaint states a claim upon which relief can be  
17 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200  
18 (2007), and construe the complaint in the light most favorable to the plaintiff, see Scheuer v.  
19 Rhodes, 416 U.S. 232, 236 (1974).

20 Plaintiff’s first amended complaint contains allegations only against Tim  
21 Garrigan, his defense attorney. Plaintiff alleges in a single ground for relief that he was denied  
22 his fundamental right to present a defense based on his trial counsel’s deficient performance, and  
23 in particular by counsel’s failure to investigate and failure to correctly advise plaintiff regarding  
24 his decision whether to testify at trial. (Dkt. No. 13 at 3.<sup>1</sup>) Plaintiff requests that damages be  
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26 <sup>1</sup> The court references the page numbers assigned by the court’s CM/ECF system.

1 awarded. (Id. at 4.)

2 Plaintiff's claim against his defense attorney is barred by the rule of Heck v.  
3 Humphrey, 512 U.S. 477 (1994). In Heck, the United States Supreme Court held:

4 [I]n order to recover damages for an allegedly unconstitutional  
5 conviction or imprisonment, or for other harm caused by actions  
6 whose unlawfulness would render a conviction or sentence invalid,  
7 a § 1983 plaintiff must prove that the conviction or sentence has  
8 been reversed on direct appeal, expunged by executive order,  
9 declared invalid by a state tribunal authorized to make such  
determination, or called into question by a federal court's issuance  
of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages  
bearing that relationship to a conviction or sentence that has *not*  
been so invalidated is not cognizable under § 1983.

10 Heck, 512 U.S. at 486-87.

11 Here, were plaintiff to succeed in his claim, an award of damages would  
12 “necessarily imply the invalidity” of his sentence. Id. at 487. Thus his claim is barred by Heck  
13 unless and until plaintiff's conviction and/or sentence has been invalidated. The United States  
14 Supreme Court has explained:

15 Federal law opens two main avenues to relief on complaints related  
16 to imprisonment: a petition for habeas corpus, 28 U.S.C. 2254, and  
17 a complaint under the Civil Rights Act of 1871, Rev. Stat. 1979, as  
18 amended, 42 U.S.C. 1983. Challenges to the validity of any  
19 confinement or to particulars affecting its duration are the province  
of habeas corpus, Preiser v. Rodriguez, 411 U.S. 475, 500, 93 S.Ct.  
1827, 36 L.Ed.2d 439 (1973); requests for relief turning on  
circumstances of confinement may be presented in a § 1983 action.

20 Muhammad v. Close, 540 U.S. 749, 750 (2004 (per curiam)).

21 In other words, plaintiff, as a petitioner, “may challenge the validity of his arrest,  
22 prosecution, and conviction only by writ of habeas corpus.” Muhammad, 540 U.S. at 750.  
23 Plaintiff may proceed in an action for money damages only if he can demonstrate that the  
24 underlying state court judgment against him has been expunged, dismissed, or otherwise  
25 invalidated, which he cannot do at this time.

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Accordingly, the first amended complaint must be dismissed. Moreover, it appears that further leave to amend would be futile. However, the dismissal will be without prejudice to plaintiff reasserting his claim for damages in a new action if and when a civil rights cause of action accrues based on plaintiff's underlying conviction being expunged, dismissed, or otherwise invalidated. See Edwards v. Balisok, 520 U.S. 641, 649 (1997).

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

- 1. Plaintiff's first amended complaint (Dkt. No. 13) is dismissed without prejudice pursuant to 28 U.S.C. § 1915A for failure to state a claim upon which relief can be granted.
- 2. The Clerk is directed to close this case.

Dated: January 25, 2013

  
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 CAROLYN K. DELANEY  
 UNITED STATES MAGISTRATE JUDGE

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