

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 (9th
3 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 A complaint must contain more than a “formulaic recitation of the elements of a cause of
9 action;” it must contain factual allegations sufficient to “raise a right to relief above the
10 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “The pleading
11 must contain something more. . . than . . . a statement of facts that merely creates a suspicion [of]
12 a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal Practice and
13 Procedure § 1216, pp. 235-35 (3d ed. 2004). “[A] complaint must contain sufficient factual
14 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,
15 566 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570). “A claim has
16 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
17 reasonable inference that the defendant is liable for the misconduct alleged.” Id.

18 In reviewing a complaint under this standard, the court must accept as true the allegations
19 of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740
20 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in
21 the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421(1969).

22 Plaintiff names as the sole defendant Rebecca Jones, his state appellate counsel.¹ Plaintiff
23 alleges that the defendant, while acting in her capacity as his appointed appellate attorney,
24 revealed a client confidence. Specifically, Ms. Jones allegedly revealed that plaintiff had shot the
25 fatal bullet. Because the evidence was unclear as to the identity of the shooter, and four
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27 ¹ The complaint alleges that defendant Jones was employed by the Central California Appellate
28 Program (“CCAP”). CCAP administers the appellate panel for the Third and Fifth District Courts
of Appeal.

1 defendants were charged, plaintiff alleges that Ms. Jones' actions have impaired his current and
2 future chances for relief. Plaintiff seeks punitive damages. ECF No. 1.

3 In order to state a claim under section 1983, a plaintiff must allege that: (1) defendant was
4 acting under color of state law at the time the act complained of was committed; and (2)
5 defendant's conduct deprived plaintiff of rights, privileges or immunities secured by the
6 Constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 27, 535 (1981), overruled
7 on other grounds, Daniels v. Williams, 474 U.S. 327 (1986). "Once a lawyer has undertaken the
8 representation of an accused, the duties and obligations are the same whether the lawyer is
9 privately retained, appointed, or serving in a legal aid or defender program." Polk County v.
10 Dodson, 454 U.S. 312, 449-51 (1981). Thus, even public defenders, who are paid by the state, do
11 not act under color of state law for purposes of § 1983. Id., 454 U.S. at 321; Dyer v. Rosenberg,
12 434 F.2d 648 (9th Cir. 1970) (retained defense counsel who failed to file opening brief on appeal
13 was not acting under color of state law).

14 "Under Ninth Circuit case law, district courts are only required to grant leave to amend if
15 a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint
16 lacks merit entirely." Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000). See also, Smith v.
17 Pacific Properties and Development Corp., 358 F.3d 1097, 1106 (9th Cir. 2004), citing Doe v.
18 United States, 58 F.3d 494, 497(9th Cir.1995) ("a district court should grant leave to amend even
19 if no request to amend the pleading was made, unless it determines that the pleading could not be
20 cured by the allegation of other facts.").

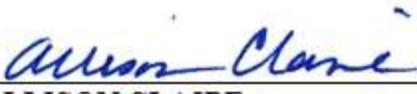
21 This court finds that plaintiff has failed to state a claim under § 1983 because the only
22 named defendant was not acting under color of state law. Accordingly, IT IS ORDERED that the
23 Clerk of the Court make a random assignment of a district judge to this case.

24 IT IS HEREBY RECOMMENDED that this action be dismissed. See Fed. R. Civ. P.
25 41(b).

26 These findings and recommendations are submitted to the United States District Judge
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
28 after being served with these findings and recommendations, plaintiff may file written objections

1 with the court. The document should be captioned “Objections to Magistrate Judge’s Findings
2 and Recommendations.” Plaintiff is advised that failure to file objections within the specified
3 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153
4 (9th Cir. 1991).

5 DATED: January 13, 2014

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7 ALLISON CLAIRE
8 UNITED STATES MAGISTRATE JUDGE
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