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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA DAVIS BLAND,  
Plaintiff,  
v.  
JON A. MESSINGER, et al.,  
Defendants.

No. 2:20-cv-0051 DAD DB P  
ORDER

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims defendants used excessive force against him in violation of his rights under the Eighth Amendment during an incident that occurred on January 21, 2018. On August 8, 2023, the undersigned recommended that this action proceed to trial. (ECF No. 55.) For the reasons set forth below, the undersigned will vacate the August 8, 2023 findings and recommendations and direct the parties to file supplemental briefing.

**I. Background**

**A. Allegations in the Operative Complaint**

Plaintiff alleges that on January 21, 2018, correctional officer Mossinger kicked his cell door and yelled for him to wake up to take his medication. (ECF No. 14 at 5.) Plaintiff told Mossinger he did not need the medication because it was only Tylenol. Plaintiff further alleges that Mossinger snuck into the cell, when plaintiff realized Mossinger was in the cell he began to panic and blacked out. (Id.) When plaintiff woke up he had been pulled from his bed, dragged to

1 the door, and officers Gill and Savage were on top of him strangling him with their radio cords.  
2 (Id.) He further states that officers Mossinger and Goforth were kicking him in the ribs, officers  
3 Lewis was hitting him on the side of his head with a metal baton, and officers Andjuo was  
4 standing on his ankles. (Id.)

### 5 **B. Procedural History**

6 Plaintiff initiated this action by filing the original complaint which was docketed on  
7 January 6, 2020. (ECF No. 1.) The undersigned screened and dismissed the original complaint  
8 for failure to state a claim. (ECF No. 11.) Plaintiff filed a first amended complaint. (ECF No.  
9 14.) Upon screening, the undersigned determined the amended complaint stated a cognizable  
10 excessive force claim against defendants Mossinger, Gill, Savage, Goforth, Lewis, and Andujo.  
11 (ECF No. 15 at 5.) The undersigned further determined that the complaint did not contain any  
12 additional cognizable claims. (Id. at 4-5.) Plaintiff was given the option to proceed immediately  
13 with his excessive force claim or file an amended complaint. (Id. at 5, 7.) Plaintiff elected to  
14 proceed immediately, voluntarily dismissing all other claims. (ECF No. 16.)

15 Defendants were served (ECF No. 22), and this action was referred to the court's post-  
16 screening ADR (Alternative Dispute Resolution) Project (ECF No. 23). Defendants moved to opt  
17 out of the ADR Project. (ECF No. 24.) The motion was granted, and defendants were directed to  
18 file an answer. (ECF No. 25.) Defendants filed an answer (ECF No. 27), and the undersigned  
19 issued a discovery and scheduling order ("DSO") (ECF No. 28). Pursuant to the deadlines set  
20 forth in the DSO, discovery was to be completed by July 30, 2021, and dispositive motions were  
21 to be filed on or before October 22, 2021. (ECF No. 28 at 6.)

22 Neither party filed a motion for summary judgment nor requested additional time to file a  
23 motion for summary judgment before October 22, 2021. Several months after expiration of the  
24 dispositive motion deadline, the undersigned issued a show cause order directing the parties to  
25 show cause why this action should not be set for trial. (ECF No. 39.) Defendants filed a response  
26 requesting additional time to file a motion for judgment on the pleadings because plaintiff's claim  
27 is barred by Heck. (ECF No. 39.) Plaintiff filed an objection to the response indicating he was  
28 opposed to allowing defendants another opportunity to request dismissal. (ECF No. 41.)

1           The undersigned denied defendants’ request for additional time to file a motion for  
2 judgment on the pleadings because they failed to show good cause sufficient to warrant  
3 modification of the dispositive motion deadline. (ECF No. 42.) However, in light of the issue  
4 raised in defendants’ response to the show cause order, the undersigned directed the parties to file  
5 briefing on whether Heck is a jurisdictional bar to adjudication of the merits of plaintiff’s claim.  
6 (ECF No. 44.) Defendants filed a response addressing the issue. (ECF No. 46.) Plaintiff filed a  
7 motion for stay, which was denied. (ECF Nos. 50, 54.)

8           On August 8, 2023, the undersigned issued findings and recommendations recommending  
9 that this action proceed to trial because it determined Heck did not serve as a jurisdictional bar  
10 and did not necessarily bar plaintiff’s claim in this action. (ECF No. 55.) Defendants filed timely  
11 objections to the findings and recommendations. (ECF No. 56.)

## 12           **II.       Recent Ninth Circuit Holding**

13           In the August 8, 2023, findings and recommendations (“F&Rs”), the undersigned noted  
14 that the Ninth Circuit had not indicated whether Heck is a jurisdictional barrier to adjudication of  
15 the merits of plaintiff’s claims. (ECF No. 55 at 5.) The F&Rs further noted that while the First  
16 and Eleventh Circuits had described Heck as jurisdictional and the Seventh Circuit characterized  
17 it as an affirmative defense subject to waiver, the Ninth Circuit had not squarely addressed the  
18 issue. (Id.) Rather, the Ninth Circuit had stated that “compliance with Heck most closely  
19 resembles the mandatory administrative exhaustion of PLRA claims, which constitutes an  
20 affirmative defense and not a pleading requirement.” (Id.)

21           On January 11, 2024, the Ninth Circuit issued an opinion in Hebrard v. Nofziger, 90 F.4th  
22 1000 (2024). Therein, the Court held that Heck is an affirmative defense that can be waived or  
23 forfeited. Id. at 1006. In Hebrard, the defendant did not raise Heck as a defense. Rather, the  
24 district court raise Heck sua sponte following oral argument on defendant’s motion for summary  
25 judgment. Id. at 1005. On appeal, plaintiff argued that defendants “failure to raise Heck and the  
26 ‘sheer passage of time’ were sufficient to constitute waiver.” Id. at 1006. The Ninth Circuit  
27 rejected plaintiff’s argument and determined that defendant’s failure to raise the argument in a  
28 timely fashion constituted a forfeiture and not a waiver. Id.

1 The undersigned previously determined that in light of defendants' failure to timely raise  
2 the defense, the Court was not required to dismiss plaintiff's claim. (ECF No. 55.) However, in  
3 light of the Ninth Circuit's decision in Hebrard and specifically its statement that delay in  
4 asserting the defense did not constitute waiver, the undersigned will vacate the August 8, 2023,  
5 F&Rs. The parties will be directed to file supplemental briefs on whether this action is barred by  
6 Heck.

7 **III. Conclusion**

8 For the reasons set forth above, IT IS HEREBY ORDERED that:

- 9 1. The August 8, 2023 F&Rs (ECF No. 55) are vacated;
- 10 2. Within thirty days of the date of this order defendants shall file supplemental briefing  
11 on whether this action is Heck barred.
- 12 3. Plaintiff's response if any shall be filed within thirty days of the date of service of  
13 defendants' brief.

14 Dated: March 27, 2024

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17 DEBORAH BARNES  
18 UNITED STATES MAGISTRATE JUDGE  
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