

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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JEFFREY C. JACOBSON,

Plaintiff,

Case No. 1:12-cv-1415

v.

Honorable Robert Holmes Bell

JAMES DIMITRIOU et al.,

Defendants.

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**OPINION**

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. §§ 1983, 1985. The Court has granted Plaintiff leave to proceed *in forma pauperis*, and Plaintiff shall pay the initial partial filing fee when funds are available. Under the Prison Litigation Reform Act, PUB. L. NO. 104-134, 110 STAT. 1321 (1996), the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. 28 U.S.C. § 1915(e)(2). The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972), and accept Plaintiff's allegations as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). Applying these standards, Plaintiff's action will be dismissed for failure to state a claim.

### **Factual Allegations**

Plaintiff presently is incarcerated at the Michigan Reformatory. In his *pro se* complaint, he sues attorney James Dimitriou and Dr. Neil Colegrove. Attorney Dimitriou was retained by Plaintiff for his criminal trial in Kent County Circuit Court. Dr. Colegrove practices medicine in Kentwood, Michigan.

Following a jury trial, Plaintiff was convicted of four counts of first-degree criminal sexual conduct (CSC), one count of first-degree home invasion and one count of assault with a dangerous weapon. In 2011, the trial court sentenced Plaintiff to prison terms of fifteen to forty-five years for each CSC count, two to six years for the assault count and seven years and six months to thirty years for the home invasion count.<sup>1</sup>

In his complaint, Plaintiff argues that Defendant Dimitriou violated his Sixth Amendment right to the effective assistance of counsel and his Fourteenth Amendment right to the due process of law. Plaintiff also asserts that Defendant Dimitriou's actions constituted negligence and violated MICH. COMP. LAWS §767.5a(2). In support of his claims, Plaintiff alleges that Defendant Dimitriou: (1) failed to inform Plaintiff of a forensics lab report prior to a status conference, (2) failed to inform Plaintiff of an investigation by the Attorney Discipline Board of the State of Michigan so Plaintiff could find alternative representation, (3) conspired with the prosecutor to adjourn Plaintiff's trial until Dimitriou's disciplinary issues were resolved with the Attorney Discipline Board, (4) disclosed confidential communications to the prosecutor, (5) failed to prevent the prosecutor from illegally obtaining Plaintiff's medical records, (6) conspired with the prosecutor

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<sup>1</sup>The Court obtained information regarding Plaintiff's convictions and sentences from the MDOC Offender Tracking Information System website at <http://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=796135>.

so Plaintiff would be a witness against himself, (7) conspired with the prosecutor so Plaintiff would stipulate to having had a vasectomy when that information was protected by the physician-patient privilege, (8) was completely absent throughout the entire pre-trial period of Plaintiff's representation, (9) failed to obtain subpoenas for witnesses, withheld evidence from Plaintiff, and failed to investigate the complainant's story and alternative defenses, and (10) fraudulently informed Plaintiff that the prosecution had his medical records and had subpoenaed Plaintiff's doctor to testify so Plaintiff would stipulate that he had a vasectomy at trial.

As to Defendant Colegrove, Plaintiff argues that the disclosure of Plaintiff's medical records violated his rights under the Due Process Clause, his Fifth Amendment right against self incrimination and his Fourth Amendment right against illegal search and seizures. Plaintiff also alleges that Defendant Colegrove's actions violated MICH. COMP. LAWS §§ 600.2157 and 767.5a(2) and constituted negligence under state law.

After Plaintiff's jury trial, he was granted a *Ginther*<sup>2</sup> hearing. While testifying at the *Ginther* hearing, Plaintiff states that his appellate attorney deliberately interrupted him to avoid placing all of the information about his ineffective assistance of counsel claims on the record. Plaintiff claims that he was denied his due process right to a fair and impartial hearing, and his right to access the courts at his *Ginther* hearing.

Plaintiff requests declaratory and injunctive relief as well as compensatory and punitive damages.

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<sup>2</sup>*People v. Ginther*, 212 N.W.2d 922 (Mich. 1973) (establishing procedure for requesting evidentiary hearings for claims of ineffective assistance of counsel).

## Discussion

### I. Failure to state a claim

A complaint may be dismissed for failure to state a claim if “it fails to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff’s allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). The court must determine whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 679. Although the plausibility standard is not equivalent to a “probability requirement,’ . . . it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – that the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)); *see also Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010) (holding that the *Twombly/Iqbal* plausibility standard applies to dismissals of prisoner cases on initial review under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(i)).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the federal Constitution or laws and must show that the deprivation was committed by

a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009). Because § 1983 is a method for vindicating federal rights, not a source of substantive rights itself, the first step in an action under § 1983 is to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

A. ***Heck v. Humphrey***

Plaintiff's complaint fails because his allegations challenge his incarceration by the State of Michigan. A challenge to the fact or duration of confinement should be brought as a petition for habeas corpus and is not the proper subject of a civil rights action brought pursuant to § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (the essence of habeas corpus is an attack by a person in custody upon the legality of that custody and the traditional function of the writ is to secure release from illegal custody). Therefore, to the extent that Plaintiff's complaint challenges the fact or duration of his incarceration, it must be dismissed. *See Barnes v. Lewis*, No. 93-5698, 1993 WL 515483, at \*1 (6th Cir. Dec. 10, 1993) (dismissal is appropriate where § 1983 action seeks equitable relief and challenges fact or duration of confinement); *see also Moore v. Pemberton*, 110 F.3d 22, 23-24 (7th Cir. 1997) (reasons for not construing a § 1983 action as one seeking habeas relief include (1) potential application of *Heck v. Humphrey*, 512 U.S. 477 (1994), (2) differing defendants, (3) differing standards of § 1915(a)(3) and § 2253(c), (4) differing fee requirements, (5) potential application of second or successive petition doctrine or three-strikes rules of § 1915(g)).

To the extent Plaintiff seeks injunctive, declaratory and monetary relief for alleged violations of Constitutional rights, his claim is barred by *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), which held that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction

or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [overturned].” See *Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (emphasis in original). In *Heck*, the Supreme Court held that a state prisoner cannot make a cognizable claim under § 1983 for an allegedly unconstitutional conviction or for “harm caused by actions whose unlawfulness would render a conviction or sentence invalid” unless a prisoner shows that the conviction or sentence has been “reversed on direct appeal, expunged by executive order, 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.” 512 U.S. at 486-87 (footnote omitted). The holding in *Heck* has been extended to actions seeking injunctive or declaratory relief. See *Edwards*, 520 U.S. at 646-48 (declaratory relief); *Clarke v. Stalder*, 154 F.3d 186, 189-90 (5th Cir. 1998) (claim for injunctive relief intertwined with request for damages); *Wilson v. Kinkela*, No. 97-4035, 1998 WL 246401, at \*1 (6th Cir. May 5, 1998) (injunctive relief). Plaintiff’s allegations clearly call into question the validity of his convictions. Therefore, his action is barred under *Heck* until his criminal convictions have been invalidated.

#### **B. Supplemental Jurisdiction**

In his complaint, Plaintiff asserts violations of state law. Section 1983 does not provide redress for a violation of state law. *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Sweeton v. Brown*, 27 F.3d 1162, 1166 (6th Cir. 1994). Plaintiff’s assertion that Defendants violated state law therefore fails to state a claim under § 1983. Moreover, to the extent that Plaintiff seeks to invoke this Court’s supplemental jurisdiction over a state-law claim, the Court declines to exercise jurisdiction. In determining whether to retain supplemental jurisdiction, “[a] district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues.” *Landefeld v. Marion Gen. Hosp., Inc.*,

994 F.2d 1178, 1182 (6th Cir. 1993). Ordinarily, where a district court has exercised jurisdiction over a state-law claim solely by virtue of supplemental jurisdiction and the federal claims are dismissed prior to trial, the court will dismiss the remaining state-law claims. *Id.* Dismissal, however, remains “purely discretionary.” *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (citing 28 U.S.C. § 1367(c)); *Orton v. Johnny’s Lunch Franchise, LLC*, 668 F.3d 843, 850 (6th Cir. 2012). Here, the balance of the relevant considerations weighs against the continued exercise of supplemental jurisdiction. Accordingly, Plaintiff’s state-law claims will be dismissed without prejudice.

### Conclusion

Having conducted the review required by the Prison Litigation Reform Act, the Court determines that Plaintiff’s action will be dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2).

The Court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should Plaintiff appeal this decision, the Court will assess the \$455.00 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless Plaintiff is barred from proceeding *in forma pauperis*, e.g., by the “three-strikes” rule of § 1915(g). If he is barred, he will be required to pay the \$455.00 appellate filing fee in one lump sum.

This is a dismissal as described by 28 U.S.C. § 1915(g).

A Judgment consistent with this Opinion will be entered.

Dated: January 31, 2013

/s/ Robert Holmes Bell  
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ROBERT HOLMES BELL  
UNITED STATES DISTRICT JUDGE