

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 10 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THOMAS T. ALFORD,
Plaintiff - Appellant,
v.
STEPHEN S. CARLTON, Elected
Official and DANIEL FLYNN,
Defendants - Appellees.

No. 18-15857

D.C. No. 2:18-cv-00463-JAM-AC
U.S. District Court for Eastern
California, Sacramento

MANDATE

The judgment of this Court, entered May 22, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

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THOMAS T. ALFORD,

Plaintiff-Appellant,

v.

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and DANIEL FLYNN,

Defendants-Appellees.

No. 18-15857

D.C. No.

2:18-cv-00463-JAM-AC

Eastern District of California,
Sacramento

ORDER

Before: THOMAS, Chief Judge, W. FLETCHER and CALLAHAN, Circuit
Judges.

The motion for reconsideration en banc (Docket Entry No. 3) is denied on
behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

The motion for appointment of counsel (Docket Entry No. 4) is denied as
moot.

No further filings will be entertained in this closed case.

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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Plaintiff-Appellant,

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2:18-cv-00463-JAM-AC
Eastern District of California,
Sacramento

ORDER

Before: THOMAS, Chief Judge, W. FLETCHER and CALLAHAN, Circuit
Judges.

A review of the record demonstrates that this court lacks jurisdiction over
this appeal because the order challenged in the appeal is not final or appealable.

See Serine v. Peterson, 989 F.2d 371, 372-73 (9th Cir. 1993) (magistrate judge's
findings and recommendations not appealable; premature appeal not cured by
subsequent entry of final judgment by district court). Consequently, this appeal is
dismissed for lack of jurisdiction.

DISMISSED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS TEMPLE ALFORD,
Plaintiff,
v.
STEPHEN CARLTON, et al.,
Defendants.

No. 2:18-cv-0463 JAM AC P

ORDER and **FINDINGS AND RECOMMENDATIONS**

I. Introduction

Plaintiff is a state prisoner at Pelican Bay State Prison, under the authority of the California Department of Corrections and Rehabilitation. Plaintiff proceeds pro se with a civil rights complaint filed pursuant to 42 U.S.C. § 1983. He has also filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 and a motion to obtain DNA testing.

This action is referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302(c). For the reasons that follow, plaintiff's motion for leave to proceed in forma pauperis is granted; however, the undersigned recommends that this action be dismissed without leave to amend, and plaintiff's motion for DNA testing be denied as moot.

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1 II. In Forma Pauperis Application

2 Plaintiff's application to proceed in forma pauperis and prison trust account statements
3 make the showing required by 28 U.S.C. § 1915(a). See ECF Nos. 2, 7, 12. Accordingly,
4 plaintiff's request to proceed in forma pauperis, ECF No. 2, will be granted.

5 Plaintiff must nevertheless pay the statutory filing fee of \$350.00 for this action. See 28
6 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee
7 in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will
8 direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account
9 and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly
10 payments of twenty percent of the preceding month's income credited to plaintiff's trust account.
11 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time
12 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. §
13 1915(b)(2).

14 III. Legal Standards for Screening Prisoner Civil Rights Complaint

15 The court is required to screen complaints brought by prisoners seeking relief against a
16 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
17 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
18 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
19 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
20 A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v.
21 Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir.
22 1984).

23 Rule 8 of the Federal Rules of Civil Procedure "requires only 'a short and plain statement
24 of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair
25 notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v.
26 Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
27 "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it
28 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v.

1 Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly at 555). To survive dismissal for failure to
2 state a claim, “a complaint must contain sufficient factual matter, accepted as true, to “state a
3 claim to relief that is plausible on its face.”” Iqbal at 678 (quoting Twombly at 570). “A claim
4 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
5 reasonable inference that the defendant is liable for the misconduct alleged. The plausibility
6 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility
7 that a defendant has acted unlawfully.” Id. (citing Twombly at 556). “Where a complaint pleads
8 facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between
9 possibility and plausibility of “entitlement to relief.”’” Id. (quoting Twombly at 557).

10 A pro se litigant is entitled to notice of the deficiencies in the complaint and an
11 opportunity to amend, unless the complaint’s deficiencies cannot be cured by amendment. See
12 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

13 **IV. Screening of Plaintiff’s First Amended Complaint**

14 **A. Plaintiff’s Allegations**

15 Plaintiff is incarcerated for a 1996 conviction based on his guilty plea to second degree
16 murder with use of a firearm. Plaintiff first challenged his conviction in this court in a petition for
17 writ of habeas corpus pursuant to 28 U.S.C. § 2254. See Alford v. Clay, Case No. 2:07-cv-01035
18 GEB DAD P (E.D. Cal.). The petition was dismissed on January 4, 2008, because filed after
19 expiration of the statute of limitations. See id. (ECF Nos. 16, 18). Petitioner’s subsequent
20 request to the Ninth Circuit Court of Appeals for a certificate of appealability was denied. Id.
21 (ECF No. 25).

22 In 2010, plaintiff again attempted to challenge his conviction in a petition for writ of
23 habeas corpus under 28 U.S.C. § 2254. See Alford v. Dickinson, Case No. 2:10-cv-0383 JAM
24 DAD P (E.D. Cal.). The petition was dismissed without prejudice as second or successive. See
25 id. (ECF Nos. 18, 20).

26 The following year, in an action filed pursuant to 42 U.S.C. § 1983, plaintiff attempted to
27 obtain DNA testing of the evidence submitted in support of his 1996 conviction. See Alford v.
28 Shasta County Superior Court, Case No. 2:11-cv-2583 WBS GGH P (E.D. Cal.). The First

1 Amended Complaint in that action named as defendants Shasta County District Attorney Dennis
2 Sheehy, Shasta County Superior Court Judge Anthony Anderson, and Shasta County Public
3 Defender James, each of whom were principals in plaintiff's criminal proceeding.¹ The court
4 dismissed the action for failure to state a claim, construing the effort as a challenge to plaintiff's
5 confinement under 28 U.S.C. § 2254. See id. (ECF Nos. 12, 15).

6 In the present case, plaintiff again names two "elected" Shasta County defendants:
7 Stephen Carlton (a former District Attorney), and Daniel Flynn (a current Superior Court judge).
8 Plaintiff contends these defendants "failed to uphold their sworn oaths, and comply with the long
9 established Congressional Innocence Protection Act of 2004, 18 U.S.C. § 3600(a), for the testing
10 of the untested DNA evidence hi-lited [sic] in the forensic report (attached)." ECF No. 1 at 4
11 (citing id. at 11-2 (Cal. Dept. Justice, Bureau of Forensic Services, Feb. 23, 1996 "Physical
12 Evidence Examination Report")). Plaintiff asserts that defendants' failure to comply with the Act
13 – by advocating for and ordering DNA testing of the evidence used in obtaining plaintiff's state
14 criminal conviction – violates the Eighth Amendment's proscription against cruel and unusual
15 punishment. With this action, plaintiff seeks injunctive relief as "authorized by 28 U.S.C. [§§]
16 2283 and 2284, and Rule 65 of the Federal Rules of Civil Procedure."² Id.

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18 ¹ As set forth in Alford v. Shasta County Superior Court, Case No. 2:11-cv-2583 WBS GGH P
19 (E.D. Cal.) (ECF No. 12 at 3-4) (internal citations omitted):

20 In the amended complaint, plaintiff alleges that defendant Sheehy
21 failed to properly oversee his employees in the prosecution of
22 plaintiff's case in violation of his due process rights. Plaintiff
23 contends that defendant Richardson, who was assigned to
24 investigate and determine whether a motion brought pursuant to
25 Cal. Pen. Code §1405 for DNA on plaintiff's behalf would be
26 appropriate, violated his due process rights and provided ineffective
assistance of counsel by declining to bring such a motion. Finally,
plaintiff maintains that defendant Judge Anderson violated his due
process rights as well as Cal. Penal Code § 14051 and Cal. Evid.
Code § 11532 by denying plaintiff's motion for DNA testing on the
ground that plaintiff had voluntarily entered a guilty plea on the
relevant charges. Plaintiff presents evidence that his request for
DNA testing has been rejected up through the state Supreme Court.

27 ² These authorities generally authorize the issuance of injunctive relief by federal courts under
28 appropriate circumstances.

B. Analysis

2 Plaintiff's allegations fail to state a cognizable claim for the following reasons. First,
3 plaintiff's allegations fail to demonstrate application of 18 U.S.C. § 3600. Upon written motion
4 of an individual sentenced pursuant to a conviction for a *federal* offense, 18 U.S.C. § 3600(a) sets
5 forth the threshold requirements for a federal court to order DNA testing. Although the statute
6 authorizes DNA testing of evidence related to a state offense, it is necessary that the "evidence of
7 such offense was admitted during a *Federal* sentencing hearing and exoneration of such offense
8 would entitle the applicant to a reduced sentence or new sentencing hearing." 18 U.S.C. §
9 3600(a)(1) (B)(i) (emphasis added). Here plaintiff challenges only his state conviction and
10 sentence and therefore his request for DNA testing does not come within the parameters of 18
11 U.S.C. § 3600(a).

12 Second, for the same reasons identified by the court in Alford v. Shasta County Superior
13 Court, Case No. 2:11-cv-2583 WBS GGH P (E.D. Cal.), both named defendants in the instant
14 case are immune from suit. See id. (ECF No. 12 at 5-7). See also Ashelman v. Pope, 793 F.2d
15 1072, 1075-78 (9th Cir. 1986) (prosecutors and judges are immune from suit when their
16 challenged conduct, even if in error, was within the normal scope of their respective prosecutorial
17 and judicial responsibilities).

18 Third, although the instant action is framed as a civil rights action under 42 U.S.C. § 1983,
19 it clearly constitutes yet another attempt by plaintiff to challenge his current confinement based
20 on his 1996 conviction and sentence. Such a challenge may be pursued only as a habeas action
21 under 28 U.S.C. § 2254. However, in light of plaintiff's prior habeas petitions, any new petition
22 would be successive. This court must dismiss a successive habeas petition unless it has been
23 authorized by the Ninth Circuit Court of Appeals. See 28 U.S.C. § 2244(b). Because petitioner
24 has not obtained such authorization, this court is precluded from construing the instant complaint
25 as a putative habeas petition.

26 "Leave to amend should be granted unless the pleading 'could not possibly be cured by
27 the allegation of other facts,' and should be granted more liberally to pro se plaintiffs." Ramirez
28 v. Galaza, 334 F.3d 850, 861 (9th Cir. 2003) (citing Lopez v. Smith, 203 F.3d 1122, 1129 (9th

1 Cir. 2000) (en banc), cert. denied, 541 U.S. 1063 (2004). “It is not an abuse of discretion to deny
2 leave to amend when any proposed amendment would be futile.” Reddy v. Litton Industries, Inc.,
3 912 F.2d 291, 296 (9th Cir. 1990); accord, Lopez, 203 F.3d at 1129 (“Courts are not required to
4 grant leave to amend if a complaint lacks merit entirely.”); Hartmann v. CDCR, 707 F.3d 1114,
5 1130 (9th Cir. 2013).

6 For the reasons set forth above, the undersigned is persuaded that the deficiencies in
7 plaintiff’s complaint cannot be cured by amendment. Therefore, this court will recommend the
8 dismissal of this civil rights action without leave to amend, for failure to state a cognizable claim,
9 and recommend that plaintiff’s motion for DNA testing be denied as moot.

10 V. Conclusion

11 Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED that:

12 1. Plaintiff’s application to proceed in forma pauperis, ECF No. 2, is granted.
13 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
14 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. §1915(b)(1).
15 All fees shall be collected and paid in accordance with this court’s order filed concurrently
16 herewith.

17 Additionally, IT IS HEREBY RECOMMENDED that:

18 1. This action be dismissed without leave to amend for failure to state a cognizable claim;
19 and
20 2. Plaintiff’s motion for DNA testing, ECF No. 3, be denied as moot.

21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
23 days after being served with these findings and recommendations, plaintiff may file written
24 objections with the court and serve a copy on all parties. Such a document should be captioned
25 “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that

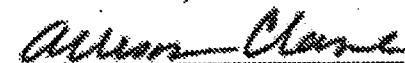
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1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: April 18, 2018

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE

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MIME-Version:1.0 From:caed_cmecl_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain
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U.S. District Court

Eastern District of California – Live System

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Case Name: (PC) Alford v. Carlton et al

Case Number: 2:18-cv-00463-JAM-AC

Filer:

Document Number: 15

Docket Text:

ORDER and FINDINGS and RECOMMENDATIONS signed by Magistrate Judge Allison Claire on 4/18/2018 GRANTING [2] Motion to Proceed IFP and RECOMMENDING this action be dismissed without leave to amend for failure to state a cognizable claim and [3] Motion for DNA Testing be denied as moot. Plaintiff to pay the statutory filing fee of \$350. All fees to be collected and paid in accordance with this court's order filed concurrently herewith. Referred to Judge John A. Mendez. Objections due within 14 days after being served with these findings and recommendations. (Henshaw, R)

2:18-cv-00463-JAM-AC Notice has been electronically mailed to:

2:18-cv-00463-JAM-AC Electronically filed documents must be served conventionally by the filer to:

Thomas Temple Alford
K-01015
PELICAN BAY STATE PRISON (7500)
P.O. BOX 7500
CRESCENT CITY, CA 95532-7500

The following document(s) are associated with this transaction:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS TEMPLE ALFORD,

No. 2:18-cv-0463 JAM AC P

Plaintiff,

V.

STEPHEN CARLTON, et al.,

Defendants.

ORDER

17 Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief
18 under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to
19 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20 On April 18, 2018, the magistrate judge filed findings and recommendations herein which
21 were served on plaintiff and which contained notice to plaintiff that any objections to the findings
22 and recommendations were to be filed within fourteen days. See ECF No. 15. Plaintiff has not
23 filed objections to the findings and recommendations.¹

24 The court has reviewed the file and finds the findings and recommendations to be
25 supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY
26 ORDERED that:

¹ However, plaintiff filed an interlocutory appeal on May 5, 2018, that was dismissed for lack of jurisdiction on May 23, 2018. See ECF No. 21.

1 1. The findings and recommendations filed April 18, 2018, are adopted in full.
2 2. This action is dismissed without leave to amend for failure to state a cognizable claim.
3 3. Plaintiff's motion for DNA testing, ECF No. 3, is denied as moot.

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5 DATED: May 30, 2018

6 /s/ John A. Mendez

7 UNITED STATES DISTRICT COURT JUDGE

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U.S. District Court

Eastern District of California – Live System

Notice of Electronic Filing

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Case Name: (PC) Alford v. Carlton et al

Case Number: 2:18-cv-00463-JAM-AC

Filer:

WARNING: CASE CLOSED on 05/31/2018

Document Number: 22

Docket Text:

ORDER signed by District Judge John A. Mendez on 5/30/2018 ADOPTING [15] Findings and Recommendations in full and DISMISSING Case without leave to amend for failure to state a cognizable claim. Plaintiff's [3] Motion for DNA testing is DENIED as moot. CASE CLOSED. (York, M)

2:18-cv-00463-JAM-AC Notice has been electronically mailed to:

2:18-cv-00463-JAM-AC Electronically filed documents must be served conventionally by the filer to:

Thomas Temple Alford
K-01015
PELICAN BAY STATE PRISON (7500)
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CRESCENT CITY, CA 95532-7500

The following document(s) are associated with this transaction:

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