

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MICHAEL SCHAFER,

Plaintiff,

vs.

STATE OF ALASKA, JEFFERY  
O'BRYANT, former District  
Attorney, and JANELL DOMKE,  
Assistant District Attorney,

Defendants.

Case No. 4:08-cv-0030-RRB

**ORDER REGARDING**  
**PENDING MOTIONS**

**I. MOTION PRESENTED**

Two motions are pending before the Court: Defendants' Motion for Judgment on the Pleadings at Docket 8, and Plaintiff's Motion to Amend the Complaint at Docket Docket 16. The Court now enters the following Order.

**II. BACKGROUND**

Plaintiff was arrested in September 2005 and criminally charged with multiple counts of assault; he later entered a plea of no contest to one count of reckless endangerment. Docket 1. In August 2008, Plaintiff commenced this civil rights action under

42 U.S.C. § 1983 against Assistant District Attorney Jenel Domke, former Assistant District Attorney Jeffery O'Bryant, and the State of Alaska, alleging malicious prosecution and seeking damages of over 15 million dollars. *Id.*

The Defendants seek judgment on the pleadings for three reasons. (1) Plaintiff's claims against the State and the State official Defendants are barred by the Eleventh Amendment of the United States Constitution; (2) The Complaint fails to allege a viable cause of action under 42 U.S.C. § 1983 or State tort law; and (3) Plaintiff's claims against the State official Defendants pertain directly to their prosecution of Plaintiff's underlying criminal case in State court, his claims are barred by prosecutorial immunity. The Defendants, therefore, request judgment on the pleadings on all claims.

Plaintiff concedes that the Eleventh Amendment grants states immunity from suits brought by a citizen in Federal District Court. Docket 15. Accordingly, Plaintiff concedes that damages against the State are not available. However, Plaintiff maintains that his claims for damages against State employees, acting under color of state law, are permissible. Docket 15. He moves to amend his Complaint accordingly. Docket 16. The proposed First Amended Complaint modifies his single cause of action to "Prosecutorial Violation of Civil Rights," alleging that

"Defendants knowingly violated his constitutional rights of due process, and right to legal representation, and followed a pattern of behavior, including following a pattern of discrimination based wholly on gender in violation of the federal Civil Rights Act." Docket 17.

Defendants oppose amendment of the Complaint on the grounds of "futility," and request that the Court enter judgment on the pleadings based on the original Complaint. "Even assuming that Mr. Schafer's amendments were permitted, the defendants would be entitled to judgment on the pleadings for the primary reason stated in their motion for judgment on the pleadings. More specifically, all of plaintiff's claims against the state official defendants necessarily question the legitimacy of his underlying criminal conviction." Docket 19, citing *Heck v. Humphrey*, 512 U.S. 477, 483-484 (1994).

### **III. STANDARD OF REVIEW**

Judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, there are no issues of material fact, and the moving party is entitled to judgment as a matter of law.<sup>1</sup> Under Federal Rule of Civil

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<sup>1</sup> *Heliotrope General, Inc. v. Ford Motor Co.*, 189 F.3d 971, 979 (9 Cir. 1999); *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991).

Procedure 12(c), "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Where Fed. R. Civ. Procedure 12(c) is used to raise the defense of failure to state a claim, the motion for judgment on the pleadings faces the same test as a motion under Rule 12(b)(6); that is the court dismiss Plaintiff's claim "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations."<sup>2</sup> In deciding this motion, not only must the court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the Plaintiff.<sup>3</sup>

A Motion to Amend a Complaint is governed by Fed. R. Civ. P. 15(a). Leave to amend should be freely given by the court "when justice so requires." Rule 15(a)(2).

#### **IV. DISCUSSION**

Although the Defendants request that the Court enter judgment on the pleadings based on the original Complaint, Plaintiff has clearly abandoned his claims against the State and

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<sup>2</sup> See *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); see also, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Newman v. Universal Pictures*, 813 F.2d 1519, 1521-22 (9th Cir. 1987).

<sup>3</sup> *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 834-45 (9th Cir. 1980).

has proposed to modify his Complaint to proceed only against the two individuals who prosecuted him. Accordingly, the Court considers Defendants' Motion for Judgment on the Pleadings with respect to the Proposed First Amended Complaint. Docket 17.

The Proposed First Amended Complaint seeks to bring a civil action under 42 U.S.C. § 1983, on the grounds that Defendants Domke and O'Bryant engaged in a pattern of intentionally discriminatory activities against Plaintiff, motivated by Plaintiff's gender. Specifically, Plaintiff claims that Defendant Domke advised and directed a State Trooper to question Plaintiff without the presence of counsel, or even notice to counsel. Docket 17, ¶ 7. The State court subsequently suppressed the results of that interview. Plaintiff also alleges that in December 2005, he was "charged with a crime that didn't happen, because it alleged he violated a condition of the DV protective order which in fact did not exist." Docket 17, ¶ 8. However, Plaintiff does not dispute that he agreed to a plea agreement dismissing three of four felony counts and reducing the fourth charge to a misdemeanor charge of reckless endangerment under AS 11.41.250, with a suspended imposition of sentence. Docket 17, ¶ 11.

The Court finds that *Heck v. Humphrey*<sup>4</sup> is dispositive in this matter. In *Heck*, the Supreme Court of the United States addressed whether a State prisoner may challenge the constitutionality of his conviction in a suit for damages under 42 U.S.C. § 1983. The Court compared a § 1983 action to the common-law cause of action for malicious prosecution, because it permits damages for confinement imposed pursuant to legal process. "One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused."<sup>5</sup> Otherwise, the Court noted, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit."<sup>6</sup> The Court noted that such a collateral attack is generally discouraged. "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 reversed on direct appeal, expunged by executive order,

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<sup>4</sup> 512 U.S. 477 (1994).

<sup>5</sup> *Id.* at 484.

<sup>6</sup> *Id.* (citations omitted).

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."<sup>7</sup>

Plaintiff argues that his "no contest" plea to a single misdemeanor with a suspended imposition of sentence, successfully completed, resulted in his conviction being set aside. He argues that this scenario results in a termination in his favor adequate to allow a § 1983 action to go forward. Docket 15. The Court disagrees. A suspended imposition of sentence is not the equivalent of having a sentence expunged from a criminal record. The Alaska Supreme Court has observed that although a conviction may be set aside after the successful completion of probation under a suspended imposition of sentence, the failure to establish factual innocence or to formally challenge the validity of the conviction or the legitimacy of the underlying arrest prevents expungement.<sup>8</sup> Records are expunged only in exceptional circumstances.<sup>9</sup> Plaintiff's successful completion of a suspended

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<sup>7</sup> *Id.* at 486-87 (emphasis added).

<sup>8</sup> *Journey v. State of Alaska* , 850 P.2d 663, 666 (Alaska 1993).

<sup>9</sup> *Id.*

imposition of sentence is not adequate under *Heck* to allow him to bring a § 1983 action against the prosecutors.

**V. CONCLUSION**

In light of the foregoing, Plaintiff cannot pursue a § 1983 action because his conviction or sentence has not been reversed on direct appeal, expunged by executive order, declared invalid, or called into question by the issuance of a writ of habeas corpus. The Motion for Judgment on the Pleadings at **Docket 8** is **GRANTED**. The Motion to Amend the Complaint at **Docket 16** is **DENIED AS MOOT**. This matter is **DISMISSED** with prejudice.

**IT IS SO ORDERED.**

ENTERED this 31st day of March, 2009.

S/RALPH R. BEISTLINE  
UNITED STATES DISTRICT JUDGE