



issuance of process, so as to spare prospective defendants the inconvenience and expense of answering such complaints.” *Neitzke v. Williams*, 490 U.S. 319, 324 (1989) (citing *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir.1984)); accord *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

Flood also has pending in this court a 28 U.S.C. § 2254 petition challenging the constitutionality of the same proceeding. See *Flood v. Barnhart*, 1:11-cv-32-DBH. I have issued a recommended decision on that case today, indicating that Flood’s § 2254 petition should be dismissed because his tardy efforts to bring a challenge in the state courts were rejected by the state courts, and, as a consequence, for purposes of federal habeas review, this is an independent and adequate state law ground barring 28 U.S.C. § 2254 merits review. As things currently stand Flood is still in custody under that revocation judgment.

In this 28 U.S.C. § 1983 action, Flood reintroduces his same discontents with the revocation, now in the guise of a civil rights action. He wants to be released, and he seeks damages. However, Flood’s claims in this civil rights action run squarely into the *Heck v. Humphrey*, 512 U.S. 477 (1994), bar on dispositions in civil rights suits that undermine the underlying validity of the challenged criminal judgment for which the defendants is still in custody.<sup>2</sup> See *Jackson v. Vannoy*, 49 F.3d 175, 177 (5th Cir. 1995) (“A judgment in favor of

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<sup>2</sup> The *Heck* majority held, 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, 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. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Jackson on his illegal seizure claim would necessarily imply the invalidity of the revocation of his probation and parole. It logically follows that *Heck* applies to Jackson's probation and parole revocation proceedings. Jackson has not demonstrated that his current sentence has already been invalidated. He does not allege that any revocation proceeding has been reversed, expunged, set aside by a state court, or called into question by a federal court's issuance of a writ of *habeas corpus*. Thus, Jackson's action is not cognizable under § 1983 at this time[.]” (footnote omitted).

Very much on point with regards to this § 1915(e)(2) screening is the following discussion in *Widvey v. Mink*:

Since Mr. Widvey's conviction for probation violation has not been invalidated or called into question in any way by any entity with the authority to call that conviction into question, all of the allegations made by Mr. Widvey which arise out of his probation revocation case fall[] squarely within the prohibition in *Heck*. None of Mr. Widvey's claims for damages could be entertained without concomitantly calling into question the validity or constitutionality of his underlying state court criminal conviction or his current incarceration.

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... A district court is allowed to dismiss a complaint any time, *sua sponte*, after *in forma pauperis* status has been granted if the court becomes convinced that the complaint is frivolous or fails to state a claim upon which relief may be granted....

A complaint is “frivolous” where the claim is based upon “an indisputably meritless legal theory.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Here, it is impossible for Mr. Widvey to prove that his probation revocation sentence has been reversed or called into question by habeas proceedings on that judgment. Because of the conclusive inability of Mr. Widvey to prove that element of his claim, he cannot state a claim for which relief can be granted. Accordingly, the court finds his claim frivolous and recommends dismissal under *Heck*.

No. CIV. 09-5044-JLV, 2010 WL 276185, at \*11 (D.S.D. Jan 15, 2010) (some internal citations omitted).

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*Id.* at 486-87 (footnote omitted). Justice Souter wrote a lengthy decision concurring in the judgment, joined by Justices Blackmun, Stevens, and O'Connor, that addressed, among other points, the viability of a § 1983 claim that implicated a conviction or sentence that was not overturned prior to release from state custody. *Id.* 501-502.

There is little more to be said. I conclude that this 42 U.S.C. § 1983 complaint should be dismissed as frivolous given the clear applicability of the *Heck* bar.

## II. Conclusion

I now **GRANT** Flood's motion to proceed without prepayment of fees, I **DENY** his motion for appointment of counsel, and I **RECOMMEND** that the case be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

### NOTICE

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within fourteen (14) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 31<sup>st</sup> day of May, 2011.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

### Plaintiff

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