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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael Dean Davis,)	No. CV 09-0820-PHX-DGC (MEA)
Plaintiff,)	ORDER
vs.)	
Charles L. Ryan, et al.,)	
Defendants.)	

Plaintiff Michael Dean Davis, who is confined in the Arizona State Prison Complex, Browning Unit, in Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. (Doc.# 1, 3.)¹ The Court will dismiss the action.

I. Application to Proceed *In Forma Pauperis* and Filing Fee

Plaintiff’s Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The statutory fee will be collected monthly in payments of 20% of the previous month’s income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

¹ “Doc.#” refers to the docket number of filings in this case.

1 **II. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief against
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.
7 28 U.S.C. § 1915A(b)(1), (2). If the Court determines that a pleading could be cured by the
8 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint
9 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)
10 (*en banc*). Plaintiff's Complaint will be dismissed without leave to amend because the
11 defects cannot be corrected.

12 **III. Complaint**

13 Plaintiff alleges one count for violation of his due process rights in connection with
14 disciplinary proceedings. He sues the following employees of the Arizona Department of
15 Corrections (ADC): Director Charles L. Ryan; Captains Sigona, Russman, Carroll, Shitter,
16 and Doe; Sergeants Holms, Ving, and Does I and II; and ADC. Plaintiff seeks injunctive,
17 compensatory, and punitive relief.

18 **IV. Heck v. Humphrey Bar**

19 Plaintiff filed this action using the court-approved form to seek relief for violations
20 of his constitutional rights by officials acting under color of state law pursuant to 42 U.S.C.
21 § 1983. In his Complaint, Plaintiff seeks relief for the alleged denial of due process in
22 connection with disciplinary proceedings that resulted in the loss of early release credits, and
23 hence, affecting the duration of his sentence. Plaintiff's claim has not yet accrued.

24 A civil rights claim brought pursuant to § 1983 that, if successful, would necessarily
25 undermine the validity of a conviction or the duration of a sentence may not be brought
26 before the prisoner has obtained a "favorable termination" of the underlying conviction; a
27 prisoner's sole federal remedy to challenge the validity or duration of his confinement is a
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1 petition for a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973); Docken
2 v. Chase, 393 F.3d 1024, 1031 (9th Cir. 2004). That is, a civil rights claim under § 1983
3 does not accrue unless or until the prisoner has obtained a “favorable termination” of the
4 underlying conviction, parole, or disciplinary action. See Heck v. Humphrey, 512 U.S. 477,
5 489 (1994); Docken, 393 F.3d at 1031. Under the “favorable termination” rule:

6 In order to recover damages for allegedly unconstitutional conviction or
7 imprisonment, or for other harm caused by action whose unlawfulness would
8 render a conviction of sentence invalid, a § 1983 plaintiff must prove that the
9 conviction or sentence has been reversed on direct appeal, expunged by
executive order, declared invalid by a state tribunal . . . or called into question
by a federal court’s issuance of a writ of habeas corpus . . .

10 Heck, 512 U.S. at 486-87. The “favorable termination” rule extends to prisoner challenges
11 to state disciplinary and parole procedures for damages where success thereon would
12 “necessarily demonstrate the invalidity of confinement or its duration.” Osborne v. District
13 Attorney’s Office for 3d Jud. Dist., 423 F.3d 1050, 1053 (9th Cir. 2005) (citing Wilkinson
14 v. Dotson, 544 U.S. 74 (2005)); see Edwards v. Balisok, 520 U.S. 641, 646 (1997)
15 (calculation of good time credits); Butterfield v. Bail, 120 F.3d 1023 (9th Cir. 1997) (parole
16 revocation proceedings). Thus, success on any claim for damages pursuant to § 1983 that
17 would necessarily imply the invalidity of confinement, or its duration, does not accrue “and
18 may not be brought” unless and until the underlying conviction, sentence, or disciplinary
19 proceeding affecting the duration of the sentence is reversed. Only then may a plaintiff
20 properly seek damages pursuant to 42 U.S.C. § 1983.

21 In his Complaint, Plaintiff alleges violation of his due process rights in connection
22 with disciplinary proceedings that resulted in the loss of early release credits. Success on
23 Plaintiff’s due process claim in this action would necessarily undermine the validity of the
24 disciplinary proceedings and affect the duration of his sentence. Before Plaintiff may seek
25 relief pursuant to § 1983, Plaintiff must first obtain a “favorable termination” of the
26 disciplinary action.

27 To challenge disciplinary proceedings, a prisoner may seek federal habeas relief
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1 pursuant to 28 U.S.C. § 2254, which is the “exclusive vehicle” for a state prisoner to seek
2 relief from an administrative decision in federal court. See White v. Lambert, 370 F.3d 1002,
3 1009-10 (9th Cir. 2004). Before a federal court may grant habeas relief, however, a prisoner
4 must first have exhausted remedies available in the state courts. See 28 U.S.C. § 2254(b)(1);
5 O’Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). The federal court will not entertain a
6 petition for writ of habeas corpus unless each and every issue has been exhausted. Rose v.
7 Lundy, 455 U.S. 509, 521-22 (1982); Olvera v. Guirbino, 371 F.3d 569, 572 (9th Cir. 2004)
8 (district court may not consider a claim until petitioner has properly exhausted all available
9 remedies). When seeking habeas relief, the burden is on the habeas petitioner to show that
10 he has properly exhausted each claim. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir.
11 1981) (*per curiam*).

12 To exhaust claims, a prisoner must give the state courts a “fair opportunity” to act on
13 his claims. Castillo v. McFadden, 399 F.3d 993, 998 (9th Cir. 2005). He must describe both
14 the operative facts and the federal legal theory so that the state courts have a “‘fair
15 opportunity’ to apply controlling legal principles to the facts bearing upon his constitutional
16 claim.” Anderson v. Harless, 459 U.S. 4, 6 (1982). Further, a prisoner seeking to exhaust
17 claims in state court before filing a federal habeas action should diligently pursue his
18 available state remedies to avoid application of the one-year limitation period. See Shelby
19 v. Bartlett, 391 F.3d 1061, 1066 (9th Cir. 2004) (applying § 2244(d) to a habeas petition
20 challenging a disciplinary order).

21 Plaintiff appears to have an available remedy in state court to exhaust his claim
22 challenging the disciplinary proceedings prior to filing a federal habeas corpus petition.
23 Although Arizona’s Administrative Review Act does not authorize state judicial review of
24 prison disciplinary proceedings, an inmate may seek such review by bringing a special action
25 in superior court. Rose v. Arizona Dep’t of Corr., 804 P.2d 845, 847-50 (Ariz. Ct. App.
26 1991). If unsuccessful, the inmate must then appeal the superior court’s ruling to the Arizona
27 Court of Appeals to exhaust his claims before seeking federal habeas relief. See Swoopes

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1 v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999).

2 **CONCLUSION**

3 Plaintiff seeks damages for violation of his constitutional rights in connection with
4 disciplinary proceedings that resulted in the loss of early release credits. Success on
5 Plaintiff's claim would necessarily undermine the duration of his sentence; therefore, he must
6 first obtain a "favorable termination" of the underlying disciplinary charges before he may
7 seek relief pursuant to 42 U.S.C. § 1983. Because Plaintiff has not done so, this action will
8 be dismissed without prejudice to filing a new action when and if he obtains a favorable
9 termination of the disciplinary charges.

10 **IT IS ORDERED:**

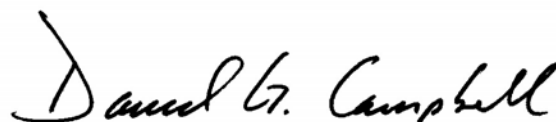
11 (1) Plaintiff's Application to Proceed *In Forma Pauperis*, filed with the Complaint,
12 is **granted**. (Doc.# 3.)

13 (2) As required by the accompanying Order to the appropriate government agency,
14 Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.

15 (3) The Complaint (doc.# 1) is **dismissed** for failure to state a claim pursuant to 28
16 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment accordingly.

17 (4) The Clerk of Court must make an entry on the docket stating that the dismissal
18 for failure to state a claim counts as a "strike" under 28 U.S.C. § 1915(g).

19 DATED this 29th day of April, 2009.

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David G. Campbell
24 United States District Judge