

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT9  
10 EASTERN DISTRICT OF CALIFORNIA  
11  
12

13 L.M. DANIELS, II,

CASE NO. 1:09-cv-02033-MJS (PC)

14 Plaintiff,

ORDER DISMISSING PLAINTIFF'S  
COMPLAINT WITH LEAVE TO AMEND

15 v.

(ECF No. 1)

16 DAVID WATSON,

AMENDED COMPLAINT DUE AUGUST 15,  
201117 Defendant.  
18 \_\_\_\_\_/19  
20 **SCREENING ORDER**  
2122 **I. PROCEDURAL HISTORY**23 On November 19, 2009, Plaintiff L.M. Daniels, II, a former state prisoner proceeding  
24 pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983.  
25 (ECF No. 1). Plaintiff has consented to Magistrate Judge jurisdiction. (ECF No. 5).  
26 Plaintiff's Complaint is before the Court for screening.27 **II. SCREENING REQUIREMENT**

28 The Court is required to screen complaints brought by prisoners seeking relief

1 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
2 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has  
3 raised claims that are legally “frivolous, malicious,” or that fail to state a claim upon which  
4 relief may be granted, or that seek monetary relief from a defendant who is immune from  
5 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion  
6 thereof, that may have been paid, the court shall dismiss the case at any time if the court  
7 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be  
8 granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

9 Section 1983 “provides a cause of action for the ‘deprivation of any rights, privileges,  
10 or immunities secured by the Constitution and laws’ of the United States.” Wilder v.  
11 Virginia Hosp. Ass’n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983  
12 is not itself a source of substantive rights, but merely provides a method for vindicating  
13 federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

14 To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that  
15 a right secured by the Constitution or laws of the United States was violated and (2) that  
16 the alleged violation was committed by a person acting under the color of state law. See  
17 West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243, 1245  
18 (9th Cir. 1987).

19 A complaint must contain “a short and plain statement of the claim showing that the  
20 pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
21 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by  
22 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949  
23 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set  
24 forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its  
25 face.’” Id. Facial plausibility demands more than the mere possibility that a defendant  
26 committed misconduct and, while factual allegations are accepted as true, legal  
27 conclusions are not. Id. at 1949-50.

28 ///

1 **III. PLAINTIFF'S CLAIMS**

2 Plaintiff alleges the following:

3 Defendant Watson is Plaintiff's parole officer and has designated Plaintiff a "High  
4 Control, High Risk, sexual predator, child molestor [sic]." (Compl. at 3). Plaintiff is in fact  
5 a low risk sex offender. (Id.) Defendant refuses to correct the error and, as a result, the  
6 conditions of Plaintiff's parole were more stringent than they would be if he had been  
7 properly categorized as a low risk offender. (Id.) Plaintiff is now in custody because  
8 "[Defendant] has with malice violated [the Plaintiff] on a false pretense." (Id.)

9 The Plaintiff does not specifically identify which of his federal rights have been  
10 violated by the Defendant. The Court perceived potential Eighth and Fourteenth  
11 Amendment claims, but finds that this Complaint does not state a cognizable claim.

12 **A. Eighth Amendment**

13 1. Fabricated Parole Violation

14 Plaintiff alleges that the Defendant intentionally recorded that Plaintiff violated the  
15 conditions of his parole based on false pretenses. (Id.) Plaintiff also alleges that he is  
16 currently in custody.<sup>1</sup> (Id.) While the facts are not clear, the Court is proceeding with the  
17 understanding that when Plaintiff alleges he is "in custody" and has been "violated", he is  
18 asserting that the Defendant reported that Plaintiff had violated a condition of his parole,  
19 that parole subsequently was revoked, and, as a result, Plaintiff was re-incarcerated. On  
20 these facts, Plaintiff has not stated a cognizable claim.

21 When a state prisoner seeks monetary or declaratory relief alleging constitutional  
22 violations that would necessarily imply the invalidity of his or her conviction or sentence,  
23 and cannot establish that the underlying conviction or sentence has been invalidated, the  
24 sole federal remedy is a writ of habeas corpus, not a civil rights action. See Preiser v.

---

25  
26 <sup>1</sup> The Complaint alleged that Plaintiff was in custody. (Compl. at 3). The most recent notice of  
27 address change filed by Plaintiff indicates he is no longer a state prisoner. (ECF No. 7). The Court has  
28 therefore presumed that Plaintiff is a former state prisoner. Irrespective of Plaintiff's custody status,  
section 1983 remains an improper vehicle for Plaintiff's claims for the reasons explained in the legal  
analysis which follows.

1 Rodriguez, 411 U.S. 475, 500 (1973) (“[W]hen a state prisoner is challenging the very fact  
2 or duration of his physical imprisonment, . . . his sole federal remedy is a writ of habeas  
3 corpus.”); Edwards v. Balisok, 520 U.S. 641, 646 (1997); 28 U.S.C. § 2254.

4 To recover damages under 42 U.S.C. § 1983, based on an allegedly  
5 unconstitutional imprisonment, a plaintiff must show that the legality of the imprisonment  
6 has been reversed on direct appeal, expunged by executive order, declared invalid by a  
7 state tribunal authorized to make such a determination, or called into question by a federal  
8 court's issuance of a writ of habeas corpus. See Heck v. Humphrey, 512 U.S. 477, 486-87  
9 (1994). A claim for damages based upon an allegedly illegal term of imprisonment that has  
10 not been so invalidated is not cognizable under § 1983. Id.; see also Butterfield v. Bail,  
11 120 F.3d 1023, 1025 (9th Cir. 1997) (Heck barred a prisoner's claim for money damages  
12 based upon prison officials' alleged denial of constitutional rights in denying release on  
13 parole).

14 As the Supreme Court recently stated, “a state prisoner's § 1983 action is barred  
15 (absent prior invalidation) - no matter the relief sought (damages or equitable relief), no  
16 matter the target of the prisoner's suit (state conduct leading to conviction or internal prison  
17 proceedings) - if success in that action would necessarily demonstrate the invalidity of  
18 confinement or its duration.” Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005) (emphasis  
19 in original).

20 The question before this court is whether Plaintiff's claims in this § 1983 action  
21 necessarily demonstrate the invalidity of the decision to revoke his parole. See Williams  
22 v. Consovoy, 453 F.3d 173, 177 (3rd Cir. 2006) (holding that prisoner may not attack the  
23 revocation of his parole via a § 1983 action because that revocation had not been rendered  
24 invalid); White v. Gittens, 121 F.3d 803, 807 (1st Cir. 1997) (concluding that a § 1983 claim  
25 based on revocation of parole was barred by Heck). Plaintiff is alleging that his parole  
26 officer intentionally made false allegations against him that resulted in the revocation of his  
27 parole. Were the fact-finder to agree with Plaintiff, such decision would necessarily call  
28 into question the validity of his parole revocation and reincarceration. Therefore, Plaintiff's

1 claim is barred by Heck. Before Plaintiff can pursue a § 1983 claim for his parole  
2 revocation, he must show that the revocation has been reversed, expunged, declared  
3 invalid, or called into question by the granting of a habeas petition.

4 The Court will grant Plaintiff leave to amend. Before Plaintiff can proceed with a  
5 claim for damages for the wrongful actions that caused his conviction and/or revocation of  
6 parole, he must allege true facts demonstrating that his conviction and sentence and/or  
7 revocation of parole have been invalidated. See Johnson v. Schriro, 2008 WL 4137990,  
8 \*1 (D. Ariz. Sept. 4, 2008).

## 9 2. Harassment

10 Plaintiff alludes to the fact that the Defendant treated him harshly, describing the  
11 Defendant's actions as "extreme irrational and unfair behavior . . . ." (Compl. at 3). The  
12 Complaint does not allege that the Defendant was physically abusive. Verbal harassment  
13 or abuse alone is not sufficient to state a constitutional deprivation under 42 U.S.C. § 1983,  
14 Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987), and threats do not rise to the  
15 level of a constitutional violation. Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987).  
16 Therefore, plaintiff fails to state a claim for harassment under section 1983.

17 Plaintiff will be granted leave to amend his Eighth Amendment claim. In order to  
18 state a cognizable harassment claim, Plaintiff must allege truthful facts showing that  
19 physical contact was a part of the harassment attributable to the Defendant.

## 20 **B. Fourteenth Amendment Procedural Due Process**

21 For the same reasons that Heck precludes Plaintiff from challenging his custody on  
22 the basis of an Eighth Amendment violation, any Due Process claim the Complaint may  
23 have been advancing is also foreclosed. See Vincent v. Borges, 2003 WL 22519412, \*1  
24 (N.D. Cal. Oct. 30, 2003). The Court will grant Plaintiff leave to amend. If Plaintiff chooses  
25 to amend his Due Process claim, he must demonstrate that the decision regarding  
26 incarceration (here, the decision to revoke his parole and send him back to prison) has  
27 already been invalidated.

## 28 **IV. CONCLUSION AND ORDER**

1 Plaintiff's Complaint does not state a claim for relief under section 1983. The Court  
2 will grant Plaintiff an opportunity to file an amended complaint. Noll v. Carlson, 809 F.2d  
3 1446, 1448-49 (9th Cir. 1987). If Plaintiff opts to amend, he must demonstrate that the  
4 alleged acts resulted in a deprivation of his constitutional rights. Iqbal, 129 S.Ct. at 1948-  
5 49. Plaintiff must set forth "sufficient factual matter . . . to 'state a claim that is plausible  
6 on its face.'" Id. at 1949 (quoting Twombly, 550 U.S. at 555 (2007)). Plaintiff must also  
7 demonstrate that each named Defendant personally participated in a deprivation of his  
8 rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

9 Plaintiff should note that although he has been given the opportunity to amend, it  
10 is not for the purposes of adding new claims. George v. Smith, 507 F.3d 605, 607 (7th Cir.  
11 2007). Plaintiff should carefully read this Screening Order and focus his efforts on curing  
12 the deficiencies set forth above.

13 Finally, Plaintiff is advised that Local Rule 220 requires that an amended complaint  
14 be complete in itself without reference to any prior pleading. As a general rule, an  
15 amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55,  
16 57 (9th Cir. 1967). Once an amended complaint is filed, the original complaint no longer  
17 serves any function in the case. Therefore, in an amended complaint, as in an original  
18 complaint, each claim and the involvement of each defendant must be sufficiently alleged.  
19 The amended complaint should be clearly and boldly titled "First Amended Complaint,"  
20 refer to the appropriate case number, and be an original signed under penalty of perjury.  
21 Plaintiff's amended complaint should be brief. Fed. R. Civ. P. 8(a). Although accepted as  
22 true, the "[f]actual allegations must be [sufficient] to raise a right to relief above the  
23 speculative level . . . ." Twombly, 550 U.S. at 555 (citations omitted).

24 Accordingly, it is HEREBY RECOMMENDED that:

25 1. The Clerk's Office shall send Plaintiff (1) a blank civil rights complaint form  
26 and (2) a copy of his Complaint, filed November 19, 2009;

27 2. Plaintiff's complaint is dismissed for failure to state a claim upon which relief  
28 may be granted;

1           3.       Plaintiff shall file an amended complaint by **August 15, 2011**; and

2           4.       If Plaintiff fails to file an amended complaint in compliance with this order, this  
3 action will be dismissed, with prejudice, for failure to state a claim and failure to prosecute.

4  
5 IT IS SO ORDERED.

6 Dated: July 12, 2011  
7 ci4d6

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE