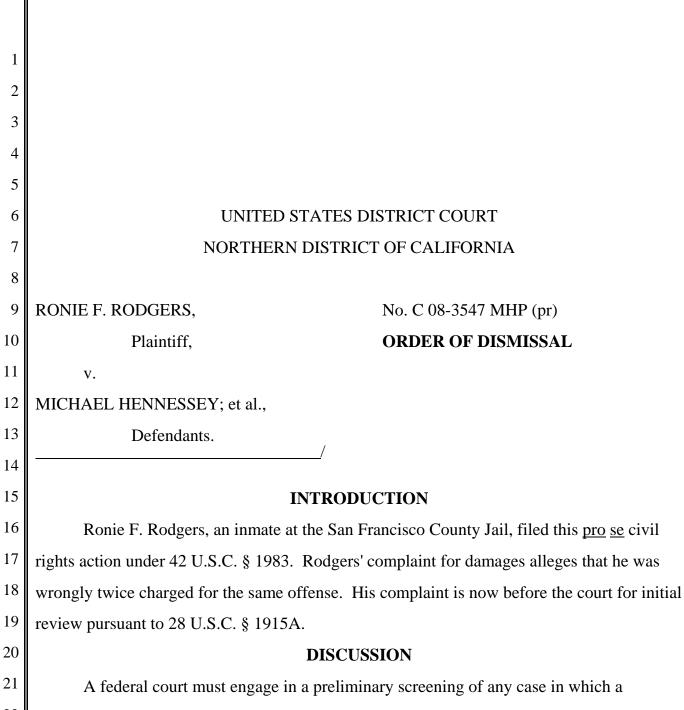
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prisoner seeks redress from a governmental entity or officer or employee of a governmental
entity. See 28 U.S.C. §1915A(a). The court must identify any cognizable claims, and
dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may
be granted, or seek monetary relief from a defendant who is immune from such relief. See
28 U.S.C. §1915A(b)(1),(2).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the United States District Court For the Northern District of California violation was committed by a person acting under the color of state law. <u>See West v. Atkins</u>,
 487 U.S. 42, 48 (1988).

3 Rodgers alleges in his complaint that he was twice charged with robbery under 4 California Penal Code § 211. He alleges that he was arrested on February 4, 2008 for 5 robbery, but that the charge was dismissed on April 18, 2008. He alleges that he was 6 recharged on that same day with robbery, which he contends is "clearly Double Jeopardy, 7 and cruel and unusual punishment, and violation of due process." Complaint, p. 3. (He also alleges that he has HIV and was charged with attempted murder based on him biting 8 9 someone, but that charge was dropped because he has no teeth. The connection between the 10 attempted murder charge and the robbery charge is not explained.)

The complaint fails to state a claim upon which relief may be granted. The Double Jeopardy Clause is not implicated by the facts alleged. Specifically, the dismissal of charges ten weeks after an arrest does not prevent a defendant from being charged again because there is no indication that jeopardy had attached. Jeopardy attaches when the jury is empaneled and sworn. <u>See Crist v. Bretz</u>, 437 U.S. 28 (1978). The pretrial dismissal and refiling of charges did not violate Rodgers' right not to be placed twice in jeopardy.

The Eighth Amendment's ban on cruel and unusual punishment also is not implicated
by the facts alleged in the complaint because that provision only applies to those who have
been convicted, which the complaint suggests has not occurred to jail inmate Rodgers. See
<u>Bell v. Wolfish</u>, 441 U.S. 520, 535 & n.16 (1979). The Due Process Clause provides
protections similar to the Eighth Amendment for those persons who are pretrial detainees, as
Rodgers apparently is. However, the Due Process Clause does not bar a state from
dismissing and refiling charges against an arrestee.

The dismissal and refiling of charges against Rodgers does not state a claim upon
which relief may be granted under § 1983. If Rodgers ever suffers a conviction on the refiled
robbery charges and wants to challenge that conviction, he may file a petition for writ of
habeas corpus, <u>Preiser v. Rodriguez</u>, 411 U.S. 475, 500 (1973), but not until after he exhausts
state judicial remedies, <u>Granberry v. Greer</u>, 481 U.S. 129, 134 (1987).

1		CONCLUSION	
1	CONCLUSION		
2	The complaint fails to state a claim upon which relief may be granted. The action is		
3	DISMISSED with prejudice. The clerk shall close the file.		
4	IT IS SO ORDERED.	11 Peter	1
5	Dated: February 27, 2009	Marilyn Hall Patel	
6		United States District Judge	
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