

1 § 1915(g) provides that the dismissal of an action will count as a
2 dismissal for purposes of § 1915(g) "if the prisoner has, on 3 or
3 more prior occasions, while incarcerated or detained in any
4 facility, brought an action or appeal in a court of the United
5 States that was dismissed on the grounds that it is frivolous,
6 malicious, or fails to state a claim upon which relief may be
7 granted." (Emphasis added.)

8 Heck makes it clear that a § 1983 "cause of action for damages
9 attributable to an unconstitutional conviction or sentence does not
10 accrue until the conviction or sentence has been invalidated."
11 Heck, 512 U.S. at 489-90 (footnote omitted). Consequently, any
12 such claim is not cognizable and therefore should be dismissed.
13 See Edwards v. Balisok, 520 U.S. 641, 649 (1997); Butterfield v.
14 Bail, 120 F.3d 1023, 1025 (9th Cir. 1997) (claim barred by Heck may
15 be dismissed under Rule 12(b)(6)); Trimble v. City of Santa Rosa,
16 49 F.3d 583, 585 (9th Cir. 1995) (claim barred by Heck may be
17 dismissed sua sponte without prejudice under 28 U.S.C. §1915).
18 Accordingly, a dismissal under Heck counts as a dismissal for
19 failure to state a claim under § 1915(g).

20 Additionally, Plaintiff argues that he should be allowed to
21 proceed IFP under the portion of § 1915(g) that provides an
22 exception for a prisoner who "is under imminent danger of serious
23 physical injury." § 1915(g). Specifically, Plaintiff argues that
24 this exception applies to him because every incarcerated prisoner
25 is under imminent danger of serious physical injury on a daily
26 basis. Plaintiff's conclusory assertion does not amount to a
27 plausible allegation that he is in imminent danger of serious
28 physical injury.

1 Accordingly, based on the above, Plaintiff's request to
2 proceed IFP is DENIED.

3 Further, the case is subject to dismissal because Plaintiff's
4 request for relief is without merit. Plaintiff asks this Court to
5 issue to the Ninth Circuit a "recommendation" that the Court is
6 willing to consider the merits of Plaintiff's second or successive
7 petition even though the Ninth Circuit has refused to grant
8 Plaintiff's request to proceed with such a petition under 28 U.S.C.
9 § 2244. Compl. at 8. Additionally, Plaintiff asks the Court to
10 find that the Ninth Circuit's determination is a violation of
11 Plaintiff's civil rights under 42 U.S.C. §§ 1981 and 1983.

12 Plaintiff has no statutory or constitutional right to proceed
13 with a second or successive habeas petition in federal court, and
14 this Court is without the authority to rule on such a petition
15 absent permission from the Ninth Circuit.¹ Further, as no
16 constitutional right is implicated by the Ninth Circuit's denial of
17 permission to proceed with a second or successive petition,
18 Plaintiff cannot state a claim for relief under § 1981 or § 1983.
19 See Felker v. Turpin, 518 U.S. 651, 664 (1996) (restrictions on
20 second or successive petitions are well within limits Congress may
21 place on scope of writ of habeas corpus).

22

23 ¹Before a second or successive petition may be filed in the
24 district court, the petitioner must first obtain an order from the
25 court of appeals authorizing the district court to consider the
26 petition. See 28 U.S.C. § 2244(b)(3)(A). This gatekeeping function
27 performed by a court of appeals applies only to a petition filed in
28 the district court. See Felker v. Turpin, 518 U.S. 651, 662 (1996).
The petitioner still may file an original successive habeas petition
in the United States Supreme Court, in which case the court of
appeals' permission to file is not needed. See id. at 660-61.

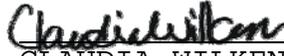
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Accordingly, this action is DISMISSED with prejudice.

The Clerk of the Court shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: 10/7/2011



CLAUDIA WILKEN
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5
6 JAMES DEAN TAYLOR et al,
7 Plaintiff,

Case Number: CV09-05999 CW

CERTIFICATE OF SERVICE

8 v.

9 US COURT OF APPEALS et al,
10 Defendant.
11 _____/

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on October 7, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
16 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
17 located in the Clerk's office.

18 James Dean Taylor K05216
19 California State Prison - Soledad
20 P.O. Box 689, C-W 333
21 Soledad, CA 93960

22 Dated: October 7, 2011

23 Richard W. Wieking, Clerk
24 By: Nikki Riley, Deputy Clerk
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United States District Court
For the Northern District of California