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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SCOTT C. SMITH,

Plaintiff,

v.

KAREN BRUNSON *et al.*,

Defendants.

Case No. C06-5712FDB

ORDER TO SHOW CAUSE

This civil rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Plaintiff was given leave to proceed *in forma pauperis*. Review of plaintiff's proposed complaint discloses plaintiff is challenging the fact that he is in custody (Dkt. # 1). The court now **ORDERS PLAINTIFF TO SHOW CAUSE** why this action should not be dismissed prior to service.

When a person is challenging the very fact or duration of his physical imprisonment, and the relief he seeks will determine that he is or was entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). In June 1994, the United States Supreme Court held that "[e]ven a

ORDER

1 prisoner who has fully exhausted available state remedies **has no cause of action under § 1983**  
2 **unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by**  
3 **the grant of a writ of habeas corpus."** Heck v. Humphrey, 512 U.S. 477, 487 (1994)(emphasis  
4 added). The court added:

5 Under our analysis the statute of limitations poses no difficulty while the state  
6 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]  
7 § 1983 cause of action for damages attributable to an unconstitutional conviction or  
8 sentence does not accrue until the conviction or sentence has been invalidated.

9 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be  
10 made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily to  
11 imply the invalidity of the judgment.' *Id.* If the court concludes that the challenge would necessarily  
12 imply the invalidity of the judgment or continuing confinement, then the challenge must be brought  
13 as a petition for a writ of habeas corpus, not under § 1983." Butterfield v. Bail, 120 F.3d 1023,  
14 1024 (9th Cir.1997) (*quoting Edwards v. Balisok*, 520 U.S. 641 (1997)).

15 Plaintiff has not indicated he has received relief in habeas corpus. At the current time he fails  
16 to state a claim. Plaintiff should show cause why this action should not be dismissed for failure to  
17 state a claim on or before **January 19, 2007**. The Clerk is directed to send plaintiff a copy of this to  
18 plaintiff and note the **January 19, 2007** due date on the court's calendar.

19 DATED this 22, day of December, 2006.

20 /s/ J. Kelley Arnold  
21 J. Kelley Arnold  
22 United States Magistrate Judge  
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28 ORDER