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9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

11 TOBY J. MASSE,

12 Plaintiff,

13 v.

14 PAT GLEBE *et al.*,

15 Defendants.  
16

CASE NO. C10-5165RBL/JRC

ORDER TO SHOW CAUSE

Noted for April 30, 2010

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18 This Civil Rights Action has been referred to United States Magistrate Judge J. Richard  
19 Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and 636(b)(1)(B), and Local Magistrate Judge's  
20 Rule MJR3 and MJR4. The Court, having reviewed plaintiff's complaint and the balance of the  
21 record contained herein, does hereby find as follows:

22 Plaintiff's allegations call into question the validity of a sentence he has served (Dkt. # 1  
23 proposed complaint). Specifically, plaintiff alleges defendants retaliated against him and part of  
24 the retaliation was an improper infraction that he was found guilty of committing. The sanctions  
25 imposed included 15 days loss of good time credits (Dkt. # 1, proposed complaint, page 4).  
26

1 Plaintiff seeks monetary damages and expungement of the records from his prison file (Dkt. # 1,  
2 proposed complaint page 5).

3 In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully  
4 exhausted available state remedies has no cause of action under §1983 unless and until the  
5 conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of  
6 habeas corpus." Heck v. Humphrey, 512 U.S. 477, 489 (1994). The court added:

8 [A] §1983 cause of action for damages attributable to an unconstitutional conviction  
9 or sentence does not accrue until the conviction or sentence has been invalidated.

10 Id.

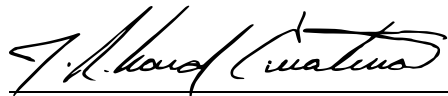
11 Plaintiff's claims call into question the legality of the length of his served sentence.  
12 Plaintiff must have first raised these claims in the state court action, or, possibly, in a petition for  
13 writ of habeas corpus --not a §1983 civil rights claim for money damages. Plaintiff is no longer  
14 incarcerated and may not be able to file a habeas petition because he is not in custody. See 28  
15 U.S.C. § 2254. The district court may entertain an application for a writ of habeas corpus only  
16 from a person in custody pursuant to the judgment of a state court. The custody requirement of  
17 the habeas corpus statute is designed to preserve the writ as a remedy for severe restraints on  
18 individual liberty. Hensley v. Municipal Court, San Jose Milpitas Judicial District, 411 U.S.  
19 345, 351 (1973). The person must be in custody pursuant to the conviction or sentence under  
20 attack at the time the petition is filed. Maleng v. Cook, 490 U.S. 488, 490-91 (1989); Carafas v.  
21 LaVallee, 391 U.S. 234, 238 (1968).

23 The requirement that a plaintiff first obtain relief in habeas is not automatically waived  
24 when a person is no longer in custody. Guerrero v. Gates, 442 F.2d 697 (9th Cir. 2006).  
25 However, a former inmate may be allowed to proceed if he did not have an opportunity while  
26 incarcerated to challenge the infraction through a state action or habeas petition. Guerrero v.

1 Gates, 442 F.2d, at 704, n. 16 (9th Cir. 2006). Mr. Masse should be allowed the opportunity to  
2 argue why he could not pursue a habeas action on the 2008 disciplinary hearing in question.

3 Based on the forgoing findings, it is hereby ORDERED that **by no later than April 30,**  
4 **2010**, plaintiff shall show cause why this matter should not be summarily dismissed. In that  
5 argument, he should inform the court when he was released from prison and the reason, if any,  
6 that he could not pursue a habeas action before he was released. If plaintiff fails to adequately  
7 respond, the Court will recommend dismissal of this action for failure to state a claim.  
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9 The Clerk is directed to send plaintiff a copy of this Order and the General Order  
10 DATED this 31<sup>st</sup> day of March, 2010.

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13 J. Richard Creatura  
14 United States Magistrate Judge  
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