No. 20-6884

United States Court of Appeals
FOR THE FOURTH CIRCUIT

DAVID NIGHTHORSE FIREWALKER-FIELDS,
Plaintiff-Appellant,

v.

BRUCE ALBERTSON, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Virginia

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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Plaintiff David Nighthorse Firewalker-Fields alleges a First Amendment violation pursuant to 42 U.S.C. § 1983.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. On June 3, 2020, the district court entered final judgment when it dismissed the complaint without prejudice as barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and for failure to state a claim. When a district court dismisses without prejudice a § 1983 action as barred under *Heck*, the dismissal is unrelated to the content of the pleadings. *Young v. Nickols*, 413 F.3d 416, 418 (4th Cir. 2005). Mr. Firewalker-Fields cannot cure the defect the district court perceived because he cannot show that his conviction or sentence has been reversed or expunged. *See id.* And a dismissal without prejudice for failure to state a claim is a final appealable order where, as here, nothing in the record indicates that there are relevant facts missing from the operative complaint. *See Bing v. Brivo Sys., LLC*, 959 F.3d 605, 611 (4th Cir. 2020).

Mr. Firewalker-Fields filed a timely notice of appeal by depositing in the prison mail system a notice of appeal postmarked on June 12, 2020. Fed R. App. P. 4(a)(1)(A), (c)(1); JA14–16.

STATEMENT OF THE ISSUES

1. Whether *Heck v. Humphrey* bars Mr. Firewalker-Fields' 42 U.S.C. § 1983 challenge to a probation condition that prohibits him from attending religious services.
2. Whether Mr. Firewalker-Fields, a practicing Muslim, stated a Free Exercise claim under § 1983 when he alleged that his probation officer prohibited him from attending religious services.

STATEMENT OF THE CASE

This appeal asks whether the district court properly dismissed Mr. Firewalker-Fields' pro se complaint alleging that his First Amendment right to freely exercise his religious beliefs was violated when his probation officer prohibited him from attending any religious services under penalty of imprisonment.

On March 14, 2007, Mr. Firewalker-Fields pleaded guilty to two counts of "internet communication with child – solicitation of sexual intercourse" in violation of Virginia Code Section 18.2-374.3(E) and was sentenced to two consecutive terms of ten years, with seven years of each term suspended. JA20, 22–23, 25, 31. The suspension of the sentences was conditioned upon, among other things, "obeying the usual rules and regulations of supervised probation" and refraining from using the internet for five years after his release from incarceration. JA22.[1] He was released to the probated sentence on February 28, 2014. JA59. On August 6, 2014, Mr. Firewalker-Fields' probation was revoked based on unauthorized use of the internet. JA60, 63–64.

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[1] The district court took judicial notice of relevant state court records pursuant to Fed. R. Evid. 201(b)(2). JA9.

Mr. Firewalker-Fields was again released to probation on December 2, 2016. JA45. The plan of supervision included "[a]ll standard conditions of probation supervision," and he remained subject to the ban on internet access. JA7, 45. One of his probation officers, Travis Hopkins, also imposed a new condition of probation, notifying Mr. Firewalker-Fields that he "was not allowed to attend any religious services or [his] probation would be violated."[2] JA7.

On September 12, 2017, Mr. Firewalker-Fields' probation was again revoked for, among other things, unauthorized internet access. *See* JA38, 53–54. The court revoked fourteen years of Mr. Firewalker-Fields' suspended sentences, but immediately suspended seven of those years, subject to the same terms and conditions as previously ordered by the court at his original sentencing in 2007. JA53–54. The suspended sentence was further conditioned upon the successful completion of a

[2] Although the district court concluded that it "seem[ed] most likely" that Mr. Firewalker-Fields was incarcerated on December 2, 2016—the date the complaint alleges that Probation Officer Hopkins imposed this new condition, JA9—the state court records show that Mr. Firewalker-Fields left prison and entered probation supervision on that date. JA45.

four-year probationary period with the "terms and conditions previously ordered." JA54.

On November 5, 2019, Mr. Firewalker-Fields filed a pro se complaint in the U.S. District Court for the Western District of Virginia alleging two First Amendment claims under 42 U.S.C. § 1983: (1) Mr. Firewalker-Fields could not access the internet or use a smartphone while on probation;[3] and (2) his probation officer, Travis Hopkins, prohibited him from attending any religious services.[4] JA6–7. Mr. Firewalker-Fields named as defendants probation officers Travis Hopkins and Joseph Smith, Page County Circuit Court Judge Bruce Albertson, and Commonwealth Attorney Kenneth Alger. JA6. He sought injunctive relief from the condition restricting the "practice [of his] Salafi Sunni Islamic beliefs," and $20,000 in damages. JA7.

Pursuant to 28 U.S.C. § 1915A(b)(1), the district court dismissed the case sua sponte before any of the defendants had been served. JA13. It provided two alternative grounds for dismissal: (1) the claims were

[3] Mr. Firewalker-Fields does not pursue this claim on appeal.

[4] Unlike the internet and smartphone bans, the religious services ban does not appear anywhere in the state court records.

barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because "any relief granted on Firewalker-Fields' claim would necessarily demonstrate the invalidity of at least a portion of the criminal judgment against him"; and (2) the complaint failed to state a claim under the First Amendment because it was not clear "how the challenged terms of his probation render him unable to adequately practice his religion."[5] JA10–12. Mr. Firewalker-Fields timely appealed. JA14–16.

This Court appointed undersigned counsel to represent Mr. Firewalker-Fields for this appeal. Dkt. No. 9-1. It specified that "[t]he issue of particular interest to the Court" is "[w]hether *Heck v. Humphrey*, 512 U.S. 477 (1994), bars challenge to conditions of state probation or parole." Dkt. No. 8.

[5] The district court also determined that Judge Albertson and Commonwealth Attorney Alger may be entitled to immunity. JA10.

SUMMARY OF THE ARGUMENT

Heck v. Humphrey does not bar Mr. Firewalker-Fields' § 1983 challenge to his probation officer's order prohibiting him from attending religious services. *Heck* bars § 1983 relief where such relief would necessarily imply the invalidity of a conviction or sentence. Mr. Firewalker-Fields' § 1983 action does not trigger that bar. As with any condition of confinement claim cognizable under § 1983, his complaint challenges an unconstitutional exercise of supervisory authority—not the fact of his conviction, sentence, or probation. And his claim's success would not result in immediate or speedier release from probation. Therefore, a successful challenge to the condition will not implicate the invalidity of any court judgment, and the *Heck* bar does not apply.

The district court also incorrectly dismissed Mr. Firewalker-Fields' Free Exercise claim on the merits. There is no more obvious a burden on free exercise than when a government official prohibits, under threat of incarceration, an adherent from practicing his religion. Mr. Firewalker-Fields' representation that he is a practicing Muslim, and that his probation officer told him he could not attend religious services, sufficiently states a claim.

This Court therefore should reverse the order dismissing that claim and remand for further proceedings.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint under 28 U.S.C. § 1915A, applying the same standards as those for reviewing a dismissal under Federal Rule of Civil Procedure 12(b)(6). *See De'Lonta v. Johnson*, 708 F.3d 520, 524 (4th Cir. 2013); *Young v. Nickols*, 413 F.3d 416, 418 (4th Cir. 2005). To meet this standard, a complaint must contain sufficient facts, accepted as true, to state a claim for relief "that is plausible on its face." *De'Lonta*, 708 F.3d at 524 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). When evaluating the complaint, this Court must construe all factual allegations in the light most favorable to the plaintiff. *See Wilcox v. Brown*, 877 F.3d 161, 166–67 (4th Cir. 2017). Liberal construction is particularly appropriate where, as here, a pro se plaintiff has raised civil rights issues. *Id.* (citing *Smith v. Smith*, 589 F.3d 736, 738 (4th Cir. 2009)).

ARGUMENT

I. MR. FIREWALKER-FIELDS' CHALLENGE TO A DISCRETE PROBATIONARY CONDITION IMPOSED BY HIS PROBATION OFFICER IS A COGNIZABLE § 1983 CLAIM.

Mr. Firewalker-Fields' Free Exercise claim is not barred by *Heck v. Humphrey* because it challenges a discrete condition of probation and not the fact or duration of his probation. Beginning with the applicable legal principles: In *Preiser v. Rodriguez*, the Supreme Court held that a challenge to the "fact or duration" of a prisoner's confinement was within the "core of habeas corpus[,]" and so habeas—not § 1983—was the exclusive remedy. 411 U.S. 475, 489–90 (1973). Later, in *Heck*, the Court recognized that a § 1983 action "should be allowed to proceed" where—if successful—the action would "not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (emphasis omitted); *see also Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring) (reasoning that "relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody" falls far outside of the "core of habeas"). The question whether a § 1983 action demonstrates the invalidity of a criminal judgment, in turn, depends on whether the claim

constitutes a challenge to the fact or duration of a conviction or sentence, or merely challenges a condition of confinement.[6] *See Preiser*, 411 U.S. at 499–500; *Heck*, 512 U.S. at 486–87. A successful challenge to a condition of confinement would not result in immediate or speedier release, so it falls outside the core of habeas and is cognizable under § 1983. *See Preiser*, 411 U.S. at 499–500; *Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (citing *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam)). In light of these principles, it is well-established that challenges to restrictions on prisoners' religious practice imposed by corrections officials are cognizable under § 1983. *See Cooper v. Pate,* 378 U.S. 546, 546 (1964) (per curiam) (prisoner challenge to denial of permission to buy religious publications under the First Amendment was cognizable § 1983 action); *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006).

The same principles apply to challenges to conditions of parole and probation. The Ninth Circuit's decision in *Thornton v. Brown*, 757 F.3d

[6] Mr. Firewalker-Fields' complaint does not challenge the validity of his underlying conviction because he in no way challenges his guilt. *See Muhammad v. Close*, 540 U.S. 749, 754–55 (2004) (per curiam). He also does not challenge the validity of his probation revocation because his probation was not revoked for violating the challenged condition. *See* JA45–49.

834 (9th Cir. 2013), is instructive. The *Thornton* court concluded that a challenge to a particular condition of parole was not a challenge to the fact of parole, so it was cognizable under § 1983: parolee status is "legally and factually distinct" from parole conditions. 757 F.3d at 842, 845–46. A parolee, it reasoned, is confined because he "is subject at all times to the jurisdiction of the Department [of Corrections] . . . The conditions . . . are simply an *exercise* of that jurisdiction." *Id.* at 842; *see also Yahweh v. U.S. Parole Comm'n*, 158 F. Supp. 2d 1332, 1338–39 (S.D. Fla. 2001) ("[P]arole conditions cases are indistinguishable from prison conditions cases for the purposes of determining which causes of action are available.").

The *Thornton* court was correct. Non-physical confinement, such as probation or parole, deprives a probationer or parolee of liberty. *See Yahweh*, 158 F. Supp. 2d at 1339 ("Fundamentally, parole is not freedom, and should not be construed as such."). A probationer—like a prisoner—is subject to the jurisdiction of the state supervisory authority, regardless of the particular conditions that authority chooses to impose. *See Samson v. California*, 547 U.S. 843, 848–49 (2006) ("[B]y virtue of their status alone, probationers 'do not enjoy the absolute liberty to which every

citizen is entitled[.]'" (quoting *United States v. Knights*, 532 U.S. 112, 119 (2001))); *Jones v. Cunningham*, 371 U.S. 236, 242 n.17 (1963) ("While [parole] is an amelioration of punishment, it is in legal effect imprisonment[.]" (quoting *Anderson v. Corall,* 263 U.S. 193, 196 (1923))).

And, for the purposes of determining whether an action is barred by *Heck*, there is no principled distinction to be drawn between a prison guard denying a prisoner the opportunity to practice his religion and a probation officer doing the same. *See Yahweh*, 158 F. Supp. 2d at 1339 ("[T]he custodian of the parolee simply becomes the parole board instead of the prison warden. And, instead of the rules . . . of prison life, he is subject to the conditions imposed on him by his new custodian, the parole board."). Neither challenge invalidates the fact or duration of imprisonment or probation because neither challenges the Department of Corrections' jurisdiction over the prisoner or probationer—so both are actionable under § 1983.

A challenge to a condition of probation also falls outside the "core of habeas" because, even if it were successful, it would not result in "immediate or speedier" release from probation. *See Dotson*, 544 U.S. at 81. Section 1983 is an available remedy where "success in the action

would not necessarily spell immediate or speedier release." *Id.* That is true even where a plaintiff challenges a condition that "might be considered part of the 'sentence'": such challenges are cognizable under § 1983 as long as they do not challenge the "substantive determinations as to the length of confinement" imposed in the original judgment. *Id.* at 82–84. Thus, the relevant inquiry is whether a § 1983 plaintiff seeks release from his overall probationary sentence. Here, Mr. Firewalker-Fields seeks not release from probation but rather "to practice [his] Salafi Sunni Islamic beliefs." JA9.

Similarly, challenges to particular conditions of probation do not implicate *Heck*'s rationale that "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." 512 U.S. at 486. Even a successful challenge to a discrete condition of probation would not call into question an individual's probationary status—and therefore "would not 'necessarily imply' the invalidity of any state-court judgment" that imposed that status. *See Thornton*, 757 F.3d at 844; *see also Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1074 n.5 (2d Cir. 1996) (determining that *Heck* does not bar a challenge

to a probationary condition in part because the claim was "in no way incompatible" with the probationer's guilt).

Here, for example, success for Mr. Firewalker-Fields on his free exercise claim would leave unmodified his status as a probationer, and would not cast doubt upon the validity of any state court judgment. He would still be on probation, and subject to his probation officers' authority, for just as long. And he does not challenge "the usual rules and regulations of supervised probation" that allow his probation officer to visit his home or workplace, mandate regular and invasive check-in reports, and impose any additional instructions that require adherence under threat of reincarceration. *See* JA4; *Virginia Sentencing Guidelines: Sentencing Revocation Report and Probation Violation Guidelines*, Appendix 1 – Conditions of Probation/Post-Release Supervision, 57 (July 2021), https://tinyurl.com/3ey7r9zs. He merely challenges an unconstitutional exercise of supervisory authority. Indeed, it is even clearer here than in *Dotson* that the claim is not *Heck*-barred. There, the Court held that challenges to state parole procedures were cognizable under § 1983 because, even though success would have meant new parole eligibility review with the possibility of a shorter prison term,

it would not *necessarily* result in earlier release: there was still the possibility that the Parole Board could decline to grant parole. *Dotson*, 544 U.S. at 76–77, 82. But here, even if Mr. Firewalker-Fields prevails on his Free Exercise claim, there is absolutely no possibility that he will be released from probation.

The district court erred in relying on the Seventh Circuit's decision in *Drollinger v. Milligan*, which held that a probationer may only challenge a probationary condition under habeas because the elimination of any single probationary condition "would free [the probationer] substantially from . . . confinement." 552 F.2d 1220, 1225 (7th Cir. 1977). *Drollinger* is inconsistent with the Supreme Court's admonition in *Dotson* that claims that do not "*necessarily* spell speedier release" fall outside the core of habeas. *Dotson*, 544 U.S. at 82 (emphasis added).

And even if *Drollinger* retained its vitality after *Dotson*, its logic would not govern in this case because Mr. Firewalker-Fields challenges a condition imposed by a probation officer—not a condition that was part of the sentence imposed by the state court. *See Thornton*, 757 F.3d at 843–44 (observing that *Drollinger*'s holding is limited to conditions imposed as part of a court judgment). The ban on attending religious

services is a condition that no court has ever considered, let alone endorsed. *Heck*'s underlying rationale—that tort is not an appropriate avenue for a collateral attack on an "outstanding criminal judgment[]"—therefore does not apply. *See Heck*, 512 U.S. at 486.

Further, accepting the district court's rationale would create an inexplicable inconsistency in the remedies available to prisoners and probationers. Prisoners challenging unlawful conditions of confinement would be able to seek relief under § 1983, but probationers and parolees would be limited to habeas. *See Thornton*, 757 F.3d at 842 n.8 ("Prisoners would have two potential [remedies], whereas parolees would have only one."). This result would be even more curious given that habeas is traditionally a remedy reserved for those in physical confinement. *See Jones v. Cunningham*, 371 U.S. 236, 238 (1963).[7]

In short, Mr. Firewalker-Fields' challenge to his probation officer's directive that he not attend any religious services is actionable under § 1983 because it falls outside the core of habeas. He does not seek

[7] Foreclosing § 1983 relief might also imperil the availability of *any* remedy for unconstitutional conditions of parole or probation because it is an open question in this Circuit whether a challenge to a condition of confinement is cognizable in habeas. *See Farabee v. Clarke*, 967 F.3d 380, 395 (4th Cir. 2020).

immediate or speedier release from either his original criminal judgment or from his probation. He seeks only relief from one unconstitutional condition of probation.

II. MR. FIREWALKER-FIELDS STATED A PLAUSIBLE § 1983 CLAIM BECAUSE A COMPLETE BAR ON ATTENDING RELIGIOUS SERVICES IS A SUBSTANTIAL BURDEN ON HIS FREE EXERCISE.

The district court also erred in dismissing Mr. Firewalker-Fields' complaint for failure to state a claim under the Free Exercise Clause. The court appears to have conflated the Free Exercise claim with the challenge to the internet ban, reasoning that although the complaint "arguably state[d] a First Amendment claim," it failed to explain how the internet ban "interfered with his ability to practice his religion." *See* JA12. In doing so, the district court essentially excised from the complaint Mr. Firewalker-Fields' distinct well-pled religious freedom claim.

In his complaint, Mr. Firewalker-Fields alleged that he was advised by his probation officer "that [he] was not allowed to attend any religious services or [his] probation would be violated." JA7. And Mr. Firewalker-Fields sought "to be allowed to practice [his] Salafi Sunni Islamic beliefs." JA7. He therefore stated a plausible Free Exercise claim because he has

alleged facts demonstrating that (1) he holds a sincere religious belief; and (2) that state action substantially burdened his religious exercise. *See Wilcox v. Brown*, 877 F.3d 161, 168 (4th Cir. 2017).

Mr. Firewalker-Fields satisfies the first prong by stating that he holds "Salafi Sunni Islamic beliefs." JA7; *see also Wilcox*, 877 F.3d at 168 (determining that a prisoner stated a Free Exercise claim by alleging the deprivation of a reasonable opportunity to worship according "to [his] Rastafarian . . . beliefs"). And he satisfies the second prong because a total bar on attending religious services, under pain of reincarceration, puts Mr. Firewalker-Fields under "substantial pressure . . . to modify his behavior and to violate his beliefs." *See Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)); *see also Janny v. Gamez*, 8 F.4th 883, 912 (10th Cir. 2021) (compelling parolee to participate in Christian-based counseling program "indisputably burdened" free exercise). Indeed, this Court has held that a policy that even *temporarily* deprives an adherent of the ability to participate in congregational religious services substantially burdens free exercise. *Lovelace*, 472 F.3d at 188. Here, the ban is total and would last for the duration of his probation.

Mr. Firewalker-Fields therefore met the threshold requirement of alleging facts demonstrating that Probation Officer Hopkins substantially burdened his exercise of religion, and remand is required.

CONCLUSION

This Court should reverse the district court's order dismissing Mr. Firewalker-Fields' Free Exercise claim and remand for further proceedings including service of the Defendants.

Respectfully Submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Firewalker-Fields respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a). Oral argument would greatly aid this Court in addressing an important issue that will repeatedly arise—namely, whether a challenge to a condition of parole or probation is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,451 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Lauren Bateman, certify that on November 29, 2021, a copy of Appellant's Brief and Joint Appendix was served on counsel for Appellees via the Court's ECF system.

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