No. 20-6884

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID NIGHTHORSE FIREWALKER-FIELDS,

Plaintiff-Appellant,

v.

BRUCE ALBERTSON, ET AL.,

Defendants-Appellees.

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

BRIEF OF DEFENDANTS-APPELLEES

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JURISDICTIONAL STATEMENT

Because this is an action under 42 U.S.C. § 1983, the district court had jurisdiction under 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment on June 3, 2020, JA 13, and Plaintiff filed a timely notice of appeal on June 15, 2020, JA 14. See Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

I. Whether the district court properly dismissed the complaint upon concluding that *Heck v. Humphrey* barred Firewalker-Fields's § 1983 action challenging the conditions of his state probation.

II. Alternatively, even if Firewalker-Fields's § 1983 action is not barred under *Heck Humphrey*, whether the district court properly dismissed the complaint where: (1) the entire § 1983 action was time barred under the applicable statute of limitations, and (2) the complaint failed to articulate a cognizable constitutional violation against any individual defendant.

STATEMENT

A. Factual Background

1. On March 14, 2007, Firewalker-Fields plead guilty to two counts of using the internet to solicit sexual intercourse with a child in

violation of Virginia Code § 18.374(E). JA 22, 26, 31. The state circuit court sentenced Firewalker-Fields to two consecutive terms of ten years, with seven years of each term suspended for a period of five years. JA 27. The court ordered that upon his release from incarceration, Firewalker-Fields be placed on supervised probation for a period of five years, and in addition to the usual conditions of probation the conditions of his supervision included conditions that he "having no contact with minor children under the age of 18, completing a sex offender treatment program," and "shall not use or have access to the internet during the period of his probation." JA 27. The suspension of fourteen years of active incarceration was conditioned upon compliance with the conditions of probations. In addition to the court's sentencing order, the terms in which his sentence was suspended, and he was subject to supervision probation were listed in the plea agreement that Firewalker-Fields voluntarily agreed to and signed acknowledging his consent. JA 27.

2. On February 28, 2014, Firewalker-Fields was release from incarceration to supervision probation. JA 59. At that time his probation officer reviewed all his conditions of probation. Shortly

thereafter, in May 2014, it was determined during a home visit that Firewalker-Fields had accessed the internet using a smart phone. JA 59. Consequently, his probation officer filed a Major Violation Report on the basis that he had "violated a court ordered special condition," that he shall not use or have access to the internet during his probation. JA 60.

On August 28, 2014, the circuit court conducted a revocation hearing. JA 63. On August 6, 2014, the circuit court entered a revocation order after finding that Firewalker-Fields was "in violation of the terms and conditions of [his] suspended sentences and supervised probation." JA 63. The circuit court revoked the suspended seven years for one of his convictions, and resuspended four years, resulting in an active period of incarceration of three years. The circuit court revoked the suspended seven years for the other conviction and resuspended all seven years of that sentence. JA 64. The court ordered that upon his release from incarceration, Firewalker-Fields be placed on supervised probation for a period of five years, and each suspended sentence shall be "subject to the same terms and conditions as previously ordered by the Court by order entered 03/21/07," and "further conditioned upon

[Firewalker-Fields]'s successful completion of supervised probation upon his previous terms and conditions previously ordered." The court also included in its revocation ordered "that additional special conditions of his probation shall include . . . not to access internet or smart phone." JA 64.

3. On December 2, 2016, Firewalker-Fields was again released from incarceration to supervision probation. JA 34. On that same day, Firewalker-Fields and his probation officer reviewed and signed "his conditions of probation, special instructions for sex offenders, . . . and Court ordered special instructions (including his no contact with minors, no internet use, and no smartphone special instructions)." JA 34. Firewalker-Fields's plan of supervision included "[a]ll standard conditions of probation supervision," and "Sex Offender Special Instructions of Probation."[1] JA 34. According to Firewalker-Fields's

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[1] On Appeal, Firewalker-Fields concedes that "he does not challenge "the usual rules and regulations of supervised probation," and refers to Appendix 1 of the Virginia Sentencing Guidelines: Sentencing Revocation Report and Probation Violation Guidelines, which contains both the "Conditions of Probation Supervision" and the "Sex Offender Special Instructions" which pursuant to Condition #6 of the standard Conditions of Probation Supervision he was instructed to comply with. Appellant's Br. 15. Condition #6 requires that he "follow the Probation and Parole Officer's instructions and will be truthful, cooperative, and report as in-

allegations in the complaint, on that same day, December 2, 2016, he "was told by Travis Hopkins [his] probation officer that [he] was not allowed to attend any religious services or [his] probation would be violated." JA 7, Appellants' Br. 5, n.2.

Over the following months, Firewalker-Fields began to engage in conduct in violated of his conditions of probation until he eventually absconded from supervision on June 1, 2017. JA 33–38. Consequently, his Probation and Parole Officer filed a Major Violation Report on the basis that he had violated the special conditions the court included in it prior sentencing order restricting his contact with minors and the requirement he have not access or use the internet or smart phone during his probation period. The Major Violation Report also noted that Firewalker-Fields had violated a number of the standard "Conditions of Probation Supervision." JA 34–38. The Major Violation Report indicates he violated Condition #10 by leaving a designated geographic area without the permission of his Probation and Parole Officer, and Condition #11 by absconding from supervision, as such that his

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structed." *See* Virginia Sentencing Guidelines: Sentencing Revocation Report and Probation Violation Guidelines, Appendix 1 – Conditions of Probation/Post-Release Supervision, 57–60 (July 2021), https://tinyurl.com/3ey7r9zs.

whereabouts were unknown his Probation and Parole Officer, and Condition #6 which requires that he "follow the Probation and Parole Officer's instructions and will be truthful, cooperative, and report as instructed." JA 36. Pursuant to Condition #6 he was instructed to follow the "Sex Offender Special Instructions," and violated several of those instructions, mostly related to his internet usage and contact with minors. JA 36–38.

After a revocation hearing held August 28, 2017, the circuit court entered a revocation order on September 12, 2017, after finding that Firewalker-Fields was "in violation of the terms and conditions of [his] suspended sentences and supervised probation." JA 53. The circuit court revoked and resuspended the remaining four years on his previously suspended sentence for one of his convictions.[2] The circuit court revoked the seven years of his previously suspended sentence for the second conviction. JA 56.

[2] The original order stated that the court imposed a total of 14 years with 7 years suspended, however the court later entered and amended order on June 27, 2018 imposing a total of 11 years with 4 years suspended. The amended order correctly reflects that because Firewalker-Fields had already served three years of the seven years initially suspended on the first conviction, there were only 4 years remaining on that suspended sentence. JA 55–56.

Once again, the circuit court ordered that upon his release from incarceration, Firewalker-Fields will be placed on supervised probation for a period of four years, and the remaining suspended sentence shall be "subject to the same terms and conditions as previously ordered by the Court by order entered 03/21/07," and "further conditioned upon [Firewalker-Fields]'s successful completion of supervised probation upon his previous terms and conditions previously ordered." JA 56. Firewalker-Fields presently remains incarcerated for that probation violation with a projected good time release date of September 5, 2023.[3]

B. Procedural Background

1. On November 5, 2019, Firewalker-Fields filed a pro se complaint in the U.S. District Court for the Western District of Virginia pursuant to 42 U.S.C. § 1983. JA 6. Firewalker-Fields named as defendants: Probation and Parole Officers, Travis Hopkins and Joseph Smith, Page County Circuit Court Judge Bruce Albertson, and Commonwealth Attorney Kenneth Alger. JA 6. As the district court noted, the complaint contained limited allegations; in their entirety, the

[3] Projected release dates of VDOC inmates' that are currently incarcerated are publicly available at https://vadoc.virginia.gov/general-public/offender-locator/.

allegations were: "On December 2, 2016 I was advised by Travis Hopkins and Joseph Smith that I had a no access/no use internet ban issued by Bruce Albertson along with a no smartphone ban," and "I was told by Travis Hopkins my probation officer that I was not allowed to attend any religious services or my probation would be violated." JA 7, 9. He sought the following relief: "[t]o have the internet ban replaced with monitored access and to be allowed to practice" his religious beliefs, to be allowed a smart phone, [and] $20,000." JA 7.

2. On June 2, 2020, before any defendants were served, the district court dismissed the complaint without prejudice pursuant to 28 U.S.C. § 1915A(b)(1). In its Memorandum Opinion, the district court found that "Firewalker-Fields's complaint is subject to dismissal on several grounds." JA 9.

As an initial matter, the district court held that "the complaint directly challenges terms of the probation imposed as part of his criminal judgment, and he asks that this court modify several of those conditions . . . [t]his claim falls squarely within the bar of *Heck v. Humphrey*, 512 U.S. 477 (1994). JA 9–10. The district court held that "[b]ecause any relief granted on Firewalker-Fields's claim would

necessarily demonstrate the invalidity of at least a portion of the criminal judgment against him—the challenged terms of probation—he may not bring that claim in an action pursuant to 42 U.S.C. § 1983, but must file a habeas petition instead." JA 10.

The district court further noted that even if his claims were not barred by *Heck*, "plaintiff wholly fails to state sufficient factual matter to state a constitutional claim." JA 10. Based on the limited allegations contained in the complaint, the district court explained that it was unclear whether Firewalker-Fields is asserting more than one claim, "but it appears to this court that he is raising only a First Amendment challenge to the terms of his probation." JA 12. However, because he has provided no information as to how the challenged terms of his probation render him unable to adequately practice his religion, "the complaint failed to give the defendants fair notice of what the claim is and the grounds upon which it rests." JA 12. The district court explained that although Firewalker-Fields "claims there is an interference with his religion, which could arguably state a First Amendment claim, he does not explain in any way how a condition that

he not have internet or phone access interferes with his ability to practice his religion." JA 12.

Accordingly, on June 2, 2020, the district court dismissed the complaint without prejudice pursuant to 28 U.S.C. § 1915A(b)(1). JA 12, 13.

3. Firewalker-Fields filed a timely notice of appeal. JA 14–16. This Court appointed counsel to represent Firewalker-Fields for this appeal, and Dkt. No. 9-1, specifying 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.

SUMMARY OF ARGUMENT

The district court's dismissal of Firewalker-Fields's complaint, without prejudice, pursuant to 28 U.S.C. § 1915A(b)(1) was properly and should be affirmed.

1. *Heck v. Humphrey*, 512 U.S. 477 (1994), requires that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Moskos v. Hardee*,

No. 19-7611, ___ F.4th ____, 2022 WL 175659, at *3 (4th Cir. Jan. 20, 2022). "If so, 'the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence already has been invalidated,' whether on direct appeal, by executive order, by a state tribunal, or by a federal court's issuance of a writ of habeas corpus." *Id.* (quoting *Heck*, 512 U.S. at 487).

Thus, the determinative inquiry is whether Firewalker-Fields's § 1983 claims challenging his conditions of probation, if successful, would necessarily imply the invalidity of his sentence and therefore cannot first be collaterally attacked through a § 1983 action. *Heck*, 512 U.S. at 487; *see Griffin v. Baltimore Police Dep't*, 804 F.3d 692, 695–96 (4th Cir. 2015). Under Virginia law, the conditions of probation are part of a sentence imposed by the state circuit court, and habeas relief is the exclusive remedy available for those challenges. Thus, despite his arguments to the contrary, Firewalker-Fields's challenge to the conditions of his probation *is* an attack on the sentence imposed by the state circuit court and thus, a successful challenge to a condition necessarily implies the invalidity of his sentence. Consequently, Firewalker-Fields may not "end-run" the traditional remedy for

challenging his sentence, habeas corpus, by bringing his challenges under § 1983. Therefore, the district court properly dismissed his § 1983 action as barred by *Heck*.

2. Even if Firewalker-Fields's § 1983 action is not barred under *Heck*, the district court properly dismissed the complaint because: (1) the entire § 1983 action was time barred under the applicable statute of limitations, and (2) the complaint failed to articulate a cognizable constitutional violation against any individual defendant.

Because no explicit statute of limitations for 42 U.S.C. § 1983 actions exists, federal courts borrow the personal injury statute of limitations from the relevant state. *Battle v. Ledford*, 912 F.3d 708, 713 (4th Cir. 2019); *Nasim*, 64 F.3d at 955 (citing *Wilson v. Garcia*, 471 U.S. 261, 266-69 (1985)). Virginia applies a two-year statute of limitations to personal injury claims. *See* Va. Code Ann. § 8.01-243(A).

The statute of limitations for any possible claim contained in the complaint began to accrue on December 2, 2016. Therefore, Firewalker-Fields had two years from December 2, 2016—until December 2, 2018—to file a complaint under 42 U.S.C. § 1983. However, Firewalker-Fields waited until November 5, 2019 to file a pro se complaint in the U.S.

District Court for the Western District of Virginia under 42 U.S.C. § 1983—almost a year past the expiration of the statute of limitations deadline. It is plain on the face of Firewalker-Fields's complaint that this action is barred by the two-year statute of limitations.

Even accepting Firewalker-Fields's factual allegations as true, the limited allegations contained in the complaint fail to state any cognizable constitutional claim under 42 U.S.C. § 1983 against any of the four individual defendants.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a complaint under 28 U.S.C. § 1915A. *Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015) (citing *Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 248 (4th Cir. 2005)). Dismissal is proper only if the plaintiff has failed to "present factual allegations that 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014). 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 v. Johnson*, 708 F.3d 520, 524 (4th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (and stating

that the same standard applies in reviewing § 1915A dismissal as reviewing a dismissal under Federal Rule of Civil Procedure 12(b)(6)).

A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and if there is "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); *see also* Fed. R. Civ. P. (8)(a)(2). Also, although a court must consider all of the factual allegations of the complaint as true, a court is not bound to accept a legal conclusion couched as a factual assertion, *Iqbal*, 556 U.S. at 663-64, nor should it accept a plaintiff's "unwarranted deductions," "rootless conclusions of law" or "sweeping legal conclusions cast in the form of factual allegations." *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996).

Although it is true that as a pro se litigant, Firewalker-Fields's pleadings are accorded liberal construction, however, this does not mean that the district court can ignore a clear failure in the pleading to allege facts which set forth a cognizable claim. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

ARGUMENT

I. The district court did not error in concluding *Heck v. Humphrey* barred Firewalker-Fields's § 1983 action challenging the conditions of his state probation.

The Supreme Court has long held that "habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement" and that this "specific determination must override the general terms of § 1983." *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973). "It would wholly frustrate explicit congressional intent" if petitioners could avoid the requirements for habeas relief "by the simple expedient of putting a different label on their pleadings." *Moskos v. Hardee*, No. 19-7611, ___ F.4th ____, 2022 WL 175659, at *3 (4th Cir. Jan. 20, 2022) (quoting *Preiser*, 411 U.S. at 489–90).

In accordance with the Supreme Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994), "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Moskos*, 2022 WL 175659, at *3. "If so, 'the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence already has been invalidated,' whether on

direct appeal, by executive order, by a state tribunal, or by a federal court's issuance of a writ of habeas corpus." *Id.* (quoting *Heck*, 512 U.S. at 487). "[A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005).

The determinative inquiry is whether Firewalker-Fields's § 1983 claims challenging his conditions of probation, if successful, would necessarily imply the invalidity of his sentence and therefore cannot first be collaterally attacked through a § 1983 action. *Heck*, 512 U.S. at 487; *Griffin v. Baltimore Police Dep't*, 804 F.3d 692, 695–96 (4th Cir. 2015). Despite his arguments on appeal to the contrary, Firewalker-Fields's challenge to the conditions of his probation *is* an attack on the sentence imposed by the state circuit court and thus, a successful challenge to a condition necessarily implies the invalidity of his sentence.

1. Firewalker-Fields suggests that whether a § 1983 claim "demonstrates the invalidity of a criminal judgment," and therefore determinative of whether the action is barred under *Heck*, depends on whether the claim is a challenge to a fact or duration of sentence "or merely challenges a condition of confinement." Appellant's Br. 11. Firewalker-Fields universally equates a challenge to conditions of confinement of incarcerated to a challenge to conditions of probation. His reliance on the Ninth Circuit's opinion in *Thornton v. Brown*, 757 F.3d 834, 841 (9th Cir. 2013), to reach the conclusion that a successful challenge to a condition of probation would not, or could not, necessarily imply the invalidity of any state court judgment is misplaced.[4] Rather the *Thornton* court's holding was limited to the facts of that case and the application of California law—the court affirmatively refrained from holding that challenges to parole or probation conditions categorically

[4] As explained in detail *infra*, Firewalker-Fields inaccurately concludes that the allegations contained in the complaint fall outside the core of habeas because he "in no way challenges his guilt," nor does he "challenge the validity of his probation revocation because probation was not revoked for violating the challenged condition." Appellant's Br. 11, n.6. The "relevant inquiry" is not, as Firewalker-Fields suggests, "whether he seeks release from his overall probationary sentence." Appellant's Br. 11.

do not fall within the "core of habeas" and therefore are always actionable under § 1983 without running afoul to *Heck*.

a. In *Thornton*, the Ninth Circuit concluded that a state parolee "may challenge parole conditions imposed by a state correctional department through a habeas petition," however it acknowledged that "the Supreme Court has addressed previously whether, or under what circumstances, *Heck* 's implicit exception to § 1983 applies to such a claim." *Thornton*, 757 F.3d at 841. The *Thornton* court held that "a state parolee may challenge a condition of parole under § 1983 if his or her claim, if successful, would neither result in speedier release from parole nor imply, either directly or indirectly, the invalidity of the criminal judgments underlying that parole term." *Id.* Because under the facts of that case, the plaintiff' challenged two parole conditions that if enjoined would neither affect the "fact or duration" of his parole nor "necessarily imply" the invalidity of his state-court conviction or sentence under California law. However, the *Thornton* court did not reject the Seventh Circuit's holding in *Drollinger v. Milligan*, 552 F.2d 1220, 1225 (7th Cir. 1977), but rather

found the case factually distinguishable, and its holding consistent with the Ninth Circuit's precedent following *Heck*.

b. In *Drollinger*, the Seventh Circuit held that the Indiana statutes authorizing the granting of probation demonstrate that the plaintiff was challenging the sentence of the trial court—"clearly the proper subject matter for a habeas corpus action." Under Indiana law, "the granting of probation is a discretionary act," and in effect is an alternative to imprisonment. *Drollinger*, 552 F.2d at 1225 (citing *Sutton v. State of Indiana*, 191 N.E.2d 104 (1963)). Under Indiana's applicable statute, "placing a defendant on probation the trial court is required to impose conditions concerning the manner in which the defendant must conduct himself," and the trial court "may revoke the defendant's probation if any of these conditions are violated, thereby ordering the execution of the previous judgment and causing the confinement of the defendant according to the original sentence." *Id.* (citing *Sutton*, 191 N.E.2d 104). Accordingly, the *Drollinger* court held that because habeas "is the appropriate remedy for a defendant seeking release from custody or expansion of the perimeters of his confinement," the defendant's "constitutional challenge to the conditions and terms of

probation is an attempt to obtain such relief, and therefore, must be brought as a petition for habeas corpus." *Id.*

c. The *Thornton* court, recognizing that, unlike the conditions of probation in *Drollinger*, the parole conditions that the plaintiff challenged were not imposed as part of a court judgment, but were rather the result of discretionary decisions of an administrative body. *Thornton*, 757 F.3d at 843–44. Consequently, a judgment in plaintiff's favor would neither shorten nor alter any sentence or judgment of a state court, and therefore could not "necessarily imply" the invalidity of any state-court judgment under California law. *Id.* (citing *Osborne v. Dist. Attorney's Off. for Third Jud. Dist.*, 423 F.3d 1050, 1055 (9th Cir. 2005)). Consequently, the *Thornton* court, found that the Seventh Circuit's holding in *Drollinger*—that habeas relief was the exclusive relief available to challenge a probation condition because under Indiana state law the probation condition was part of the sentence imposed by the state court—was "consistent with *Heck*" and Ninth Circuit's precedent as it was "limited to probation conditions that,

under state law, were part of the sentencing court's judgment." *Thornton*, 757 F.3d at 843, & n.10.[5]

In this Court were to adopt the logical conclusion of Firewalker-Fields's analysis, it would require this court to hold that challenges to probations conditions are categorically outside the scope of habeas and therefore under no circumstances could such a challenge be brought under § 1983 without running afoul to *Heck*. However, the existing caselaw from our sister circuits, at minimum, supports the conclusion that such determinations must be made on a case by case basis, in consideration of the specific state's governing sentencing statutes.

2. Under Virginia law, the conditions of probation are part of a sentence imposed by the state circuit court, and habeas relief is the exclusive remedy available for those challenges.

Under Virginia's relevant sentencing statutes, the grant of probation is a discretionary act and serves as an alternative to

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[5] Because unlike the Indiana probation conditions considered in *Drollinger*, the parole conditions in *Thornton* "were not imposed as part of a court judgment," but instead were imposed as the result of discretionary decisions of an administrative body, the *Thornton* court concluded that it "need not and do not decide whether we would reach a different result had the Department merely implemented a parole condition that was required by statute as a direct consequence of a court's judgment of conviction or sentence." *Thornton*, 757 F.3d at 844.

incarceration. *See Fazili v. Commonwealth*, 835 S.E.2d 87, 93–94 (2019). After a conviction resulting in a sentence of incarceration, "the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine." Va. Code Ann. § 19.2-303. "Pursuant to this section, a circuit court may "impose such reasonable terms and conditions of probation as it deems appropriate." *Fazili*, 835 S.E.2d at 94–95. Furthermore, the "court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation." Va. Code Ann. § 19.2-304. And if the circuit court, after hearing, finds good cause to believe that the defendant has violated the terms of suspension, then the court may revoke the suspension and impose a sentence." Va. Code Ann. § 19.2-306.

Under Virginia Code § 19.2-303, "it is only the province of the circuit court to determine the conditions of probation." However, unless a statute specifically imposes on the circuit court the duty to set the parameters of the condition at issue, the circuit court may set the bounds of the condition and delegate to the probation office the duty to set the parameters of those conditions." *Fazili*, 835 S.E.2d at 94–95

(citing *Miller v. Commonwealth*, 492 S.E.2d 482 (1997) (explaining probation officers are "statutorily required to supervise, assist, and provide a probationer with a statement of the conditions of his release from confinement," and are "charged by law with defining a probationer's permissible or impermissible conduct"). Virginia law does not require a trial court to memorialize each rule of probation with which a defendant must comply. If the probation believes that a condition or rule imposed by the probation office is "unreasonable" or unlawful, then he may timely raise his concerns in state court.

Thus, under Virginia's statutory scheme, when a court conditions a suspended sentence on probation, the conditions of probation are part of the sentence imposed by the circuit court, and habeas relief is the exclusive remedy available for those challenges.

3. As discussed above, *Heck* applies in the context of a person challenging a condition of probation in Virginia. Thus, to bring a claim under § 1983, Firewalker-Fields must demonstrate that his conviction or sentence has been invalidated. Because the remedy of habeas corpus is available for Firewalker-Fields to challenge the conditions of his probation in state court, his § 1983 claims are therefore subject to

dismissal pursuant to the bar imposed by *Heck*. Therefore, the district court properly dismissed his § 1983 action as barred by Heck.

II. Even if this Court were to conclude that the complaint was not barred under *Heck*, the district did not error in dismissing the complaint.

Even if this Court determines that Firewalker-Fields's § 1983 action is not barred ender *Heck*, the district court did not error in dismissing the complaint in its entirety because: (1) the entire complaint is time barred under the applicable statute of limitations; and (2) even ignoring the fact that his § 1983 was filed more than a year past the statute of limitations, the remainder of the complaint fails to state a claim on which relief can be granted as it does not articulate any cognizable constitutional violation against any individual defendant.

A. On the face of the complaint, Firewalker-Fields's § 1983 action was filed more than a year after the expiration of the applicable statute of limitations and is therefore time-barred.

1. Sua sponte consideration of the statute of limitations is permissible and appropriate when such a defense plainly appears on the face of the complaint filed in forma pauperis under 28 U.S.C. §

1915A.[6] *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 655–57 (4th Cir. 2006); *see also Howard v. Sharrett*, 540 F. Supp. 3d 549, 553 (E.D. Va. 2021) (citing N*asim v. Warden, Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995)). This deviation from the general rule—that a statute of limitations defense is waived if not timely raised by the defendant—is justified for two reasons. *Eriline*, 440 F.3d 648, 655–56. "First, in forma pauperis proceedings, like failure to prosecute, abuse of process, and res judicata, implicate important judicial and public concerns not present in the circumstances of ordinary civil litigation." *Id.* at 656. Second, in the context of in forma pauperis proceedings, "the district courts are charged with the unusual duty of independently screening initial filings and dismissing those actions that plainly lack merit." *Id.*

2. Because no explicit statute of limitations for 42 U.S.C. § 1983 actions exists, federal courts borrow the personal injury statute of limitations from the relevant state. *Battle v. Ledford*, 912 F.3d 708, 713

[6] While generally this Court does not consider arguments that were not advanced below, because this case was dismissed under 28 U.S.C. § 1915A(b)(1), none of the defendants were ever served with the complaint, nor had an opportunity to present the argument to the district court. JA 13. However, this Court is not bound by the district court's reasoning and "may affirm on any basis fairly supported by the record." *Lawson v. Union Cty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016).

(4th Cir. 2019); *Nasim*, 64 F.3d at 955 (citing *Wilson v. Garcia*, 471 U.S. 261, 266-69 (1985)). Virginia applies a two-year statute of limitations to personal injury claims. *See* Va. Code Ann. § 8.01-243(A). Thus, Firewalker-Fields was required to file his complaint within two years from when the underlying claims accrued. The accrual of a cause of action under § 1983 for statute of limitations purposes is based on federal law. *See Nasim*, 64 F.3d at 955. "This court has held that the cause of action under § 1983 accrues 'when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action.'" *Smith v. McCarthy*, 349 F. App'x 851, 857 (4th Cir. 2009) (quoting Nasim, 64 F.3d at 955); *see also United States v. Kubrick*, 444 U.S. 111, 123 (1979) (holding that a claim accrues when the plaintiff becomes aware of his or her injury," or when he or she "is put on notice to make reasonable inquiry as to whether a claim exists").

3. Here, it is plain on the face of the complaint that this action is barred by the statute of limitations. Regardless if this Court construes the complaint to contain one claim as the district court does, or two separate claims as Firewalker-Fields now alleges on appeal, the entire § 1983 action is barred by the statute of limitations because it

was filed well after two years from the date of any alleged conduct. Firewalker-Fields acknowledges that the complaint alleges it was on December 2, 2016 that he was advised of both the no internet access and smart phone ban, and when was allegedly told by Probation and Parole Officer Hopkins that he was not allowed to attend any religious services or his probation would be violated. JA 7; Appellant's Br. 5, n.2. The statute of limitations for any possible claim contained in the complaint began to accrue on December 2, 2016. Therefore, Firewalker-Fields had two years from December 2, 2016—until December 2, 2018—to file a complaint under 42 U.S.C. § 1983. However, Firewalker-Fields waited until November 5, 2019 to file a pro se complaint in the U.S. District Court for the Western District of Virginia under 42 U.S.C. § 1983—almost a year past the expiration of the statute of limitations deadline. It is plain on the face of Firewalker-Fields's complaint that this action is barred by the statute of limitations.

B. Even if this Court excused the untimeliness of the complaint, Firewalker-Fields's assertions fail to state any cognizable § 1983 claim against an any individual defendant.

Even accepting Firewalker-Fields's factual allegations as true, the complaint fails to state a cognizable constitutional claim under 42 U.S.C. § 1983.

Any claims against Defendants Albertson, Alger, and Smith necessarily fail because Firewalker-Fields fails to identify a constitutional right that has been infringed upon by these three defendants' individual conduct—or even identify which constitutional provision he claims these three defendants have violated. With respect to Defendant Alger, the complaint fails to identify any conduct, never mind unconstitutional conduct; in fact, the only reference to Defendant Alger is in the caption of the complaint. The only possible conceivable claim involving Defendants Albertson and Smith relate to Firewalker-Fields's dissatisfaction with the condition that he is not allowed access to the internet or a smart phone. JA 7. Standing alone, the challenge to the internet/smartphone ban is insufficient to state a plausible constitutional claim because it fails to identify a constitutional right that has been infringed upon. JA 7. Moreover, Firewalker-Fields

expressly abandoned any challenge to the internet/smart phone ban on appeal. Appellant's Br. 6, n.3.

If the allegations in the complaint are construed together, Firewalker-Fields's still fails to state a cognizable claim against *any* defendant for the reasons state by the district court: "he does not explain in any way how a condition that he not have internet or phone access interferes with his ability to practice his religion." JA 12.

If Firewalker-Fields's allegations that he "was told by Travis Hopkins . . . that [he] was not allowed to attend any religious services or [his] probation would be violated," JA 7, is construed as alleging an independent claim, as Firewalker-Fields now suggests on appeal, that is insufficient to state a plausible constitutional claim against Defendants Albertson, or Smith because Firewalker-Fields has not alleged either defendant engaged in any conduct that violated any constitutionally protected right. Furthermore, his allegations with respect to Defendant Hopkins fail to allege that Defendant Hopkins's individual conduct violated Firewalker-Fields's constitutional rights—rather he merely alleges that Defendant Hopkins told him that attending religious services would violate his probation, not that Defendant Hopkins

imposed a "new" condition or that such restriction was not merely an explanation of the application of his existing conditions of probation, such as his restriction on contacts with minors or restriction from going to places where children might congregate.

Therefore, because the allegations in the complaint do not contain sufficient facts from which the court could "draw the reasonable inference that the defendant is liable for the misconduct alleged," Firewalker-Fields has not stated a plausible claim against *any* of the named defendants and thus the district court properly dismissed the complaint in its entirety. *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998) ("[N]otice pleading requires generosity in interpreting a plaintiff's complaint. But generosity is not fantasy.").

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees agree that oral argument will aid in the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with Fed. R. App. P. 32(a)(7)(B), because it contains 6,674 words, excluding the parts exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ *Laura H. Cahill*

Laura H. Cahill

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2022 I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Laura H. Cahill*

Laura H. Cahill

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-6884 Caption: Firewalker-Fields v. Albertson, et al.,

Pursuant to FRAP 26.1 and Local Rule 26.1,

All Defendants-Appellees
(name of party/amicus)

who is Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Laura H. Cahill Date: 1/28/2022

Counsel for: Defendants-Appellees

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