

Westlaw

16 Fed.Appx. 878

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16 Fed.Appx. 878, 2001 WL 874275 (C.A.10 (Colo.)), 2001 DJCAR 3934

(Not Selected for publication in the Federal Reporter)**(Cite as: 16 Fed.Appx. 878, 2001 WL 874275 (C.A.10 (Colo.)))**

This case was not selected for publication in the Federal Reporter.

***878** Before SEYMOUR, McKAY, Circuit Judges and BRORBY, Senior Circuit Judge.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,
Tenth Circuit.

James Joseph OWENS-EL, Petitioner-Appellant,
v.

Michael V. PUGH, Warden, Respondent-Appellee.
No. 00-1482.

Aug. 1, 2001.

Federal prisoner brought habeas corpus petition, challenging conditions of confinement. The United States District Court for the District of Colorado denied petition and appeal was taken. The Court of Appeals held that claim should have been brought as *Bivens* civil rights action.

Appeal dismissed.

West Headnotes

Habeas Corpus 197 **277**

197 Habeas Corpus

1971 In General

1971(C) Existence and Exhaustion of Other Remedies

197k275 Particular Issues and Problems

197k277 k. Prisons; Conditions, Discipline, Transfer, Etc. Most Cited Cases

Federal prisoner's claim concerning his conditions of confinement were improperly brought as habeas corpus petition, when they should have been raised in *Bivens* civil rights action. 28 U.S.C.A. § 2241.

ORDER AND JUDGMENT ^{FN*}

FN* After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a)(2) and 10th Cir.R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, or collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

SEYMOUR, Circuit Judge.

****1** James Joseph Owens-El, a pro se federal prisoner, brought this petition under ***87928** U.S.C. § 2241, alleging that his continuing incarceration is invalid because the sentence he is serving was terminated on the government's motion in 1992. He also alleges that he is being harassed and tortured through a mind-control device. The district court found Mr. Owens' claim that his sentence had been terminated was contradicted by information Mr. Owens submitted in support of his application, and dismissed this claim. Although the court construed Mr. Owens' allegations of harassment and torture as challenges to his conditions of confinement which should have been asserted in a civil rights complaint, the court addressed the merits and dismissed these claims as frivolous. Mr. Owens seeks leave to proceed on appeal in forma pauperis.

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The material attached to Mr. Owens' application contains a docket sheet from the federal district court in the Central District of California, which reflects that the proceedings in his underlying criminal prosecution for attempted murder were dismissed on the government's motion on March 23, 1992. However, the record also contains a notice of clerical error from the district court clerk stating that this docket entry was in error, as well as a docket entry of the notice of error. Accordingly, Mr. Owens' challenge to his continuing incarceration is factually baseless.

The district court dismissed Mr. Owens' claims concerning his conditions of confinement under 28 U.S.C. § 1915(e)(2)(B), concluding that they were factually frivolous. Subsequent to the district court's dismissal, we held that a petitioner may not raise challenges to conditions of confinement in a section 2241 petition. *See Boyce v. Ashcroft*, 251 F.3d 911, 918 (10th Cir.2001). Such a claim must be brought instead as a civil rights action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

For the reasons set out above, we conclude that Mr. Owens has failed to demonstrate the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal. Accordingly, we deny his request to proceed in forma pauperis and **DISMISS** his appeal.

C.A.10 (Colo.),2001.
Owens-El v. Pugh
16 Fed.Appx. 878, 2001 WL 874275 (C.A.10 (Colo.)), 2001 DJCAR 3934

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 Slip Copy, 2009 WL 88493 (N.D.Fla.)
 (Cite as: 2009 WL 88493 (N.D.Fla.))

Page 1

Only the Westlaw citation is currently available.

United States District Court, N.D. Florida,
 Pensacola Division.

Anthony J. FAILS, Plaintiff,

v.

ESCAMBIA COUNTY JAIL, et al., Defendants.

No. 3:08cv415/RV/EMT.

Jan. 12, 2009.

West KeySummary

Federal Civil Procedure 170A  2734

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2732 Deposit or Security

170Ak2734 k. Forma Pauperis Proceedings. Most Cited Cases

A state **prisoner's** allegations that a listening **device** was **implanted** into his mouth during a visit to the **prison** dentist, that other prisoners and **prison officials** could hear him think through these listening **devices**, that he could hear officers accusing him of other crimes, and that he could hear his own voice coming from officer's radios and other **devices**, were wholly incredible and factually **frivolous**, warranting **dismissal** of his § 1983 suit against the sheriff's department and local prosecutor under the statute governing proceedings in forma pauperis. U.S.C.A. Const.Amend. 8; 28 U.S.C.A. § 1915(e)(2)(B); 42 U.S.C.A. § 1983.

Anthony J. Fails, Raiford, FL, pro se.

ORDER

ROGER VINSON, Senior District Judge.

*1 This cause comes on for consideration upon the magistrate judge's report and recommendation

dated December 23, 2008 (Doc. 21). Plaintiff has been furnished a copy of the report and recommendation and has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b) (1). I have made a *de novo* determination of all timely filed objections.

Having considered the report and recommendation, and any timely filed objections thereto timely filed, I have determined that the report and recommendation should be adopted.

Accordingly, it is now **ORDERED** as follows:

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order.
2. This case is **DISMISSED WITH PREJUDICE** as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i);
3. The clerk is directed to close the file

DONE AND ORDERED.

REPORT AND RECOMMENDATION

ELIZABETH M. TIMOTHY, United States Magistrate Judge.

This cause is before the court on Plaintiff's civil rights complaint filed pursuant to 42 U.S.C. § 1983 (Doc. 1). Leave to proceed in forma pauperis has been granted (Doc. 18). Upon review of the complaint, the court concludes that **dismissal** of this case is warranted.

Because Plaintiff is proceeding in forma pauperis, the court may **dismiss** the case if satisfied that the action is "(i) **frivolous** or malicious; (ii) fails to state a **claim** on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. §

(e)(2)(B). A complaint is **frivolous** under section 1915(e)“where it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338 (1989). **Dismissals** on this ground should only be ordered when the legal theories are “indisputably meritless,” *id.*, 490 U.S. at 327. or when the **claims** rely on factual allegations that are “clearly baseless,” a category encompassing allegations that are “**fanciful**,” “**fantastic**,” and “**delusional**.” *Denton v. Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 1733, 118 L.Ed.2d 340 (1992) (quoting *Neitzke*, 490 U.S. at 325, 237). “[A] finding of factual **frivolousness** is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible .”*Id.* Upon review of the complaint, the court concludes that Plaintiff’s **claims** are **frivolous**.

Plaintiff, an **inmate** of the Florida State **Prison**, names two Defendants in this action, the Escambia County Sheriff’s Department (Sheriff’s Department) and Stephen Petri, a local prosecutor (Doc. 1 at 2). Plaintiff alleges doctors and officers of the Escambia County Jail, as well as “**prison** personel [sic] in the dental department,” secretly bugged him by **implanting** a listening **device** in his jaw (*id.* at 5). He states he had dental work done at various correctional facilities in 1992, 1994, and 1995 (*id.*). He states he strongly believes his dental fillings were bugged by the Sheriff’s Department, with the cooperation of **prison officials**, and officers and **inmates** can now hear him think through these listening **devices**(*id.*). Plaintiff states he can hear officers accusing him of other crimes, and he believes the listening **devices** are part of an illegal investigation (*id.*). He states that **prison officials** permit other **inmates** to participate in this investigation by showing him pictures of people who look like his family members, friends, and acquaintances (*id.*). Plaintiff states that every institution to which he is transferred participates in the bugging, and he can hear his own voice coming from officers’ radios and other **devices** that have been installed within the insti-

tutions (*id.* at 6). Plaintiff states he has been mentally **tortured** in this manner for several years (*id.*). He states this illegal monitoring occurs even when he is “on the streets” through police helicopters which shine lights on him for several minutes (*id.*). Plaintiff states this activity allows law enforcement to “set him up” by conspiring with others, including Plaintiff’s ex-girlfriend and the local prosecutor, and this led to his being wrongfully prosecuted for rape (*id.*).

*2 Plaintiff claims that the illegal planting of listening devices in his jaw violates his right to privacy and constitutes cruel and unusual punishment under the Eighth Amendment (Doc. 1 at 7). As relief, Plaintiff seeks \$15,000,000.00 for mental anguish and defamation of character (*id.*).

Plaintiff’s assertion that law enforcement officers, **prison officials**, medical personnel, and the local prosecutor have conspired to monitor and investigate him by **implanting** listening **devices** in his mouth falls into the very narrow category of allegations that are removed from reality and wholly incredible. Therefore, Plaintiff’s complaint should be **dismissed** as factually **frivolous**. *See, e.g., Bilal v. Driver*, 251 F.3d 1346, 1350 (11th Cir.2001) (**dismissing** as factually **frivolous claim** that **prison official** forced plaintiff to wear “bomb belt” containing 50,000 volts of electrical shock 1000 times in 19 days); *Williams v. St. Vincent Hosp.*, 258 Fed. Appx. 293, 294 (11th Cir.2007) (affirming **dismissal** of complaint as **frivolous** where complaint presented “far-fetched” scenario based on assertions of a massive conspiracy to monitor plaintiff that was “clearly baseless.”)^{FN1}

FN1. The undersigned cites *Williams v. St. Vincent Hosp.* only as persuasive authority and recognizes that the opinion is not considered binding precedent. *See* 11th Cir. R. 36-2.

Accordingly, it is respectfully **RECOMMENDED**:

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1. That this case be **DISMISSED WITH PREJUDICE** as frivolous under 28 U.S.C. § 1915(e)(2)(B)(i);

2. That the clerk be directed to close the file

At Pensacola, Florida this *23rd* day of December 2008.

N.D.Fla.,2009.
Fails v. Escambia County Jail
Slip Copy, 2009 WL 88493 (N.D.Fla.)

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 Not Reported in F.Supp.2d, 2008 WL 2810171 (W.D.Wis.)
 (Cite as: 2008 WL 2810171 (W.D.Wis.))

Page 1

Only the Westlaw citation is currently available.

United States District Court,
 W.D. Wisconsin,
 Jaquay HILER, Petitioner,
 v.

Cari J. TAYLOR, Deputy Warden, Respondent.
 No. 08-cv-333-slc.

July 18, 2008.

Jaquay Hiler, Black River Falls, WI, pro se.

Corey F. Finkelmeyer, Wisconsin Department of
 Justice, Madison, WI, for Respondent.

ORDER

BARBARA B. CRABB, District Judge.

*1 Because Judge Shabaz is on a medical leave of absence from the court for an indeterminate period, the court is assigning 50% of its caseload automatically to Magistrate Judge Stephen Crocker. It is this court's expectation that the parties in a case assigned to the magistrate judge will give deliberate thought to providing consent for the magistrate judge to preside over all aspects of their case, so as to insure that all cases filed in the Western District of Wisconsin receive the attention they deserve in a timely manner. At this early date, consents to the magistrate judge's jurisdiction have not yet been filed by all the parties to this action. Therefore, for the sole purpose of issuing this order, I am assuming jurisdiction over the case.

This is a proposed civil action requesting that the court require respondent to remove the "20/20 Neural Chip" **implanted** in petitioner's body. Petitioner Jaquay Hiler is presently confined at the Jackson Correctional Institution in Black River

Falls, Wisconsin. He asks for leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit petitioner has given the court, I conclude that he is unable to prepay the full fee for filing this lawsuit. Petitioner has paid the initial partial payment of \$7.67 required under § 1915(b)(1).

Because petitioner is a prisoner, his complaint must be **screened** pursuant to 28 U.S.C. § 1915(e)(2). In performing that **screening**, the court must construe the complaint liberally. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). However, it must **dismiss** the complaint if, even under a liberal construction, it is legally **frivolous** or malicious, fails to state a **claim** upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 42 U.S.C. § 1915(e).

A court may also **dismiss** a **prisoner's** complaint if it is factually **frivolous**. *Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). A complaint is factually **frivolous** "when the facts alleged rise to the level of the irrational or the wholly incredible." *Id.* at 33. Petitioner's allegations fit that description.

Petitioner alleges that respondent is ignoring that the Department of Corrections had a "Security 20/20 Neural Chip" **implanted** in his body. Petitioner alleges further that he has more than one such **implant** in his body and that the **prison** psychiatrist who diagnosed him as **delusional** regarding the **implant** is really just covering up the fact that the Department of Corrections uses these neural **implants** to **control** prisoners that are a threat to the **prison** system. Petitioner attached 35 pages of **inmate** complaints and psychiatric reports relating to petitioner's belief that he has neural chips **implanted** in his body. The documents establish that the Department of Corrections has been trying to help petitioner deal with his **delusion**, even to the

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point of providing him with an MRI to show him that there are no **implants** in his brain. Petitioner's allegations that he has several neural chips are clearly "irrational" and "wholly incredible" and his complaint will be **dismissed** as factually **frivolous**.

ORDER

* IT IS ORDERED that:

1. Petitioner Jaquay Hiler's request for leave to proceed *in forma pauperis* is DENIED and this case is **DISMISSED** with prejudice for petitioner's failure to state a **claim** upon which relief may be granted;
2. The unpaid balance of petitioner's filing fee is \$342.33; this amount is **to be** paid in monthly payments according to 28 U.S.C. § 1915(b)(2);
3. A strike will be recorded against petitioner pursuant to § 1915(g); and
4. The clerk of court is directed to close the file.

W.D.Wis.,2008.
Hiler v. Taylor
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(W.D.Wis.)

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 (Cite as: 2007 WL 2021824 (E.D.Ark.))

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Only the Westlaw citation is currently available.

United States District Court,
 E.D. Arkansas,
 Pine Bluff Division.
 Robert Scott PHILPOTT, ADC # 111495, Plaintiff
 v.
 ARKANSAS, State of et al., Defendants.
 No. 5:07CV00161 JLH.

July 10, 2007.

Robert Scott Philpott, Pine Bluff, AR, pro se.

ORDER

J. LEON HOLMES, United States District Judge.

*1 The Court has reviewed the Proposed Findings and Recommended Disposition submitted by United States Magistrate Judge H. David Young, and the objections filed. After carefully considering the objections and making a *de novo* review of the record in this case, the Court concludes that the Proposed Findings and Recommended Disposition should be, and hereby are, approved and adopted in their entirety as this Court's findings in all respects.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's complaint is **DISMISSED WITH PREJUDICE** as **frivolous**.
2. This **dismissal** counts as a "strike" for purposes of 28 U.S.C. § 1915(g).
3. The Court certifies that an *in forma pauperis* appeal taken from the order and judgment **dismissing** this action is considered **frivolous** and not in good faith.

PROPOSED FINDINGS AND RECOMMENDATIONS INSTRUCTIONS

H. DANIEL YOUNG, United States Magistrate Judge.

The following recommended disposition has been sent to United States District Court Judge J. Leon Holmes. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than eleven (11) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence proffered at the hearing before the District Judge (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.
3. The detail of any testimony desired to be introduced at the hearing before the District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

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From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court

Eastern District of Arkansas

500 West Capitol Avenue, Suite 402

Little Rock, AR 72201-3325

DISPOSITION

Plaintiff, an **inmate** at the Diagnostic Unit of the Arkansas Department of Correction ("ADC"), filed a *pro se* complaint (docket entry # 2), pursuant to 42 U.S.C. § 1983, on June 26, 2007, alleging that an electronic tracking **device** has been placed on him illegally, and is stuck in his ear. According to Plaintiff, the Federal Bureau of Investigation ("FBI") continually talks to him through the **device**, which amounts to him being **tortured**.^{FN1} Plaintiff also asserts that **prison** staff will not assist him in obtaining a "bug detector," which would help him prove the existence of the **device**. For relief, Plaintiff seeks access to an electronic **device** detector, that Defendants be removed from their employment, and that he be released from **prison**.

FN1. Plaintiff contends the **device** has an unlimited word processor.

I. Screening

*2 Before docketing the complaint, or as soon thereafter as practicable, the Court must review the complaint to identify cognizable **claims** or **dismiss** the complaint if it: (1) is **frivolous** or malicious; (2) fails to state a **claim** upon which relief may be

granted; or (3) seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A. In conducting its review, the Court is mindful that a complaint should be **dismissed** for failure to state a **claim** only if it appears beyond doubt that a plaintiff can prove no set of facts in support of the **claim** or **claims** that would entitle him to relief. *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir.1998). The Court must accept the factual allegations in the complaint as true and hold a plaintiff's *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers...." *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)(*per curiam*). However, such liberal pleading standards apply only to a plaintiff's factual allegations. *Neitzke v. Williams*, 490 U.S. 319, 330 n. 9, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). A plaintiff's complaint still must contain allegations sufficient to state a **claim**, as a matter of law, and must not be merely conclusory in its allegations. *Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir.1985).

II. Analysis of Plaintiff's claims

Plaintiff has named 19 Defendants, none of whom are alleged to have had any role in **implanting** the **device**. According to Plaintiff, an unidentified girl gave Plaintiff an ear ring, which led to the **device** becoming stuck in his ear. Plaintiff's complaint that he has some sort of listening **device** in his ear, through which the FBI communicates with him in a **torturing** manner, is so obviously **fanciful** that it should be **dismissed**. *See Horsey v. Asher*, 741 F.2d 209, 213 (8th Cir.1984) (**fanciful** complaints should be swiftly **dismissed**).

III. Conclusion

IT IS THEREFORE RECOMMENDED THAT:

1. Plaintiff's complaint be **DISMISSED** WITH

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(Cite as: 2007 WL 2021824 (E.D.Ark.))

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PREJUDICE as **frivolous**.

2. This **dismissal** count as a “strike” for purposes of 28 U.S.C. § 1915(g).

3. The Court certify that an *in forma pauperis* appeal taken from the order and judgment **dismissing** this action be considered **frivolous** and not in good faith.

E.D.Ark.,2007.
Philpott v. Arkansas
Not Reported in F.Supp.2d, 2007 WL 2021824
(E.D.Ark.)

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 (Cite as: 2005 WL 3481494 (E.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,
 E.D. California,
 Steven Lloyd HRONIS, Plaintiff,

v.

CALIFORNIA DEPARTMENT OF CORREC-
 TIONS MEDICAL HEALTH PROFESSIONALS,
 et al., Defendants.

No. CIVS041267GEBDADP.

Dec. 19, 2005.

Steven Lloyd Hronis, Susanville, CA, pro se.

*ORDER AND FINDINGS AND RECOMMENDA-
 TIONS*

DROZD, Magistrate J.

*1 Plaintiff, a state prisoner proceeding pro se, has filed a complaint under the Civil Rights Act, 42 U.S.C. § 1983, and has requested leave to proceed in forma pauperis. The proceeding was referred to the undersigned magistrate judge in accordance with Local Rule 72-302 and 28 U.S.C. § 636(b)(1).

Plaintiff submitted a statement of indigency but did not file an application to proceed in forma pauperis that meets the requirements of 28 U.S.C. § 1915. The court granted plaintiff thirty days to file such an application. Plaintiff has filed an in forma pauperis application that makes the showing of indigency required by 28 U.S.C. § 1915(a).

When a plaintiff seeks leave to proceed in forma pauperis in federal court, the district court must **dismiss** the case if it is **frivolous** or malicious, fails to state a **claim** upon which relief may be granted, or seeks monetary relief against a defendant immune from such relief. 28 U.S.C. § 1915(e)(2). In addi-

tion, the district court must **screen** every complaint brought by a prisoner seeking relief against a governmental entity or officer or employee of a governmental entity and must **dismiss claims** that are **frivolous** or malicious, fail to state a **claim** upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(a) and (b)(1) and (2).

A **claim** is legally **frivolous** when it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. See *Jackson v. Arizona*, 885 F.2d 639, 640 (9th Cir.1989); *Franklin*, 745 F.2d at 1227.

A claim fails to state a claim upon which relief may be granted if it appears that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1294 (9th Cir.1981). For screening purposes, the court accepts as true the allegations of the complaint. *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976). The court also construes the pleading in the light most favorable to the plaintiff and resolve doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The court may disregard allegations that are contradicted by facts established by exhibits to the complaint. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.1987). The court is not required to accept as

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 (Cite as: 2005 WL 3481494 (E.D.Cal.))

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true conclusory allegations, unreasonable inferences, or unwarranted deductions of fact. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981).

*2 The Civil Rights Act under which this action has been filed provides as follows:

Every person who, under color of [state law] ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution ... shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The statute requires an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

“A person ‘subjects’ another to the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in another’s affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978). Supervisory personnel are generally not liable under § 1983 for the actions of their employees under a theory of *respondeat superior* and, therefore, when a named defendant holds a supervisory position, the causal link between him and the claimed constitutional violation must be specifically alleged. See *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir.1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.1978). Vague and conclusory allegations concerning the involvement of official personnel in civil rights violations are not sufficient. See *Ivey v. Board of Regents*, 673 F.2d 266, 268 (9th Cir.1982).

In the present case, plaintiff’s complaint begins with plaintiff’s admission that he filed a previous action in Lassen County Superior Court dealing with the same facts, that the parties were the same as in this case, and that the defendants prevailed in that action in 2003. (Compl. at 1-2.) Plaintiff states that he appealed to the California Court of Appeal on January 29, 2004, and that the matter is now pending before the California Supreme Court. (*Id.* at 2 & 4.) Plaintiff alleges that the facts relating to this case were also the subject of a prison grievance filed at High Desert State Prison, that he pursued the grievance to the highest available level, and that the grievance was granted in part and denied in part. (*Id.* at 2.)

In the caption of his complaint, plaintiff identifies the defendants as “California Department of Corrections Medical Health Professionals.” Plaintiff alleges that the defendants are or were employed in various positions with the CDC or were hired under contract by the director of the CDC and other **prison officials**, who are also defendants. (*Id.* at 3.) Plaintiff alleges that the facts of this case “revolve around a series of medical procedures done.” (*Id.* at 4.) Plaintiff cites knee surgery at Folsom State **Prison** in 1992, dental work at Sierra Conservation Center in 1996, and “suture work” at California Correctional Institution in 2001. Plaintiff **claims** that during one or all of these procedures “a **device** or **devices** were **implanted**” in his body without his authorization. He describes the **devices** as “security surveillance [sic] transmittable tracking **devices**.” (*Id.*) Plaintiff seeks relief in the form of removal of the **devices** from his body, compensatory damages, punitive damages, costs and attorney fees. (*Id.* at 5.)

*3 In a separately captioned section of his complaint, plaintiff reiterates the allegations described above and adds that he is alleging federal civil rights **claims** and state law **claims**. (*Id.* at 8-9.) Plaintiff alleges that the 1992 surgery was performed at Mercy Folsom Hospital, and the suture

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work was performed in June 2001 by a doctor and a registered nurse. (*Id.* at 10-11.) Plaintiff claims that the tracking devices were implanted in him in violation of the Eighth Amendment, the Due Process Clause, the Freedom of Speech and Religion Clauses of the First Amendment, and state tort laws. (*Id.* at 12-14.)

It is well established that “the *in forma pauperis* statute ... ‘accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.’” *Denton v. Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)). “Examples of the latter class are **claims** describing fantastic or **delusional** scenarios, **claims** with which federal district judges are all too familiar.” 490 U.S. at 328 (*quoted in Denton*, 504 U.S. at 32). Allegations that are **fanciful**, fantastic, or **delusional** give rise to **claims** that are factually **frivolous**. 504 U.S. at 32-33 (citing 490 U.S. at 325 & 327-28). The district court is therefore authorized to make a finding of factual **frivolousness** “when the facts alleged rise to the level of the irrational or the wholly incredible.” 504 U.S. at 33.

In the present case, plaintiff alleges no facts in support of his bald allegation that tracking **devices** were **implanted** in his body at least once and possibly two or three times during the twelve years preceding the filing of this action. Plaintiff cites no physical evidence, no notations in his medical records, and no witness statements. Nor does plaintiff allege any facts concerning observable consequences of the alleged **implantation** of tracking **devices**. In the absence of any factual allegations that remove plaintiff’s **claim** from the realm of fantasy, the undersigned finds that plaintiff’s allegations appear to be **delusional** and rise to the level of the irrational. *Cf. Monroe v. Arpaio*, No.

CV053441 PHX-NVW (VAM), 2005 WL 3054067, at *2-3 (D.Ariz. Nov.14, 2005) (**dismissing** with prejudice, at **screening, inmate’s claim** that he told jail **officials** he “had a mind-reader on him” but they did not transfer him to a secure facility, set up a “scrambler” to block radio waves and satellite frequencies, and arrest those responsible for the illegal use of a mind-reader); *Payne v. Contra Costa Sheriff’s Dep’t*, No. C 02-2382 CRB (PR), 2002 WL 1310748, at *1 (N .D. Cal. June 10, 2002) (denying leave to proceed in forma pauperis and dismissing inmate’s complaint where he alleged that the sheriff’s department was using telepathy and mind control to allow others to have access to his memories); *Shadeed v. California-San Quentin State Prison*, No. C 02-0379 PJH (PR), 2002 WL 981957, at *1 (N.D.Cal. Apr. 29, 2002) (denying leave to proceed in forma pauperis and dismissing prisoner’s complaint where he alleged that his wife was raped in his home in 1989 and was then incarcerated with him at three different California state prisons “for sexual purposes”).

*4 The undersigned takes judicial notice of the fact that plaintiff presented identical claims to this court in a federal petition for writ of habeas corpus filed seven days after this civil rights action was filed.^{FN1} (*See Steven Lloyd Hronis v. Warden Runnels*, case No. CIV S-04-1302 LKK PAN P, filed July 8, 2004.) In an order filed August 25, 2004, Magistrate Judge Nowinski construed the action as a § 1983 civil rights case. By findings and recommendations filed October 27, 2004, Magistrate Judge Nowinski found plaintiff’s allegations to be in the realm of the fantastic, delusional, and irrational, ruled that the action was factually frivolous, and recommended that plaintiff’s application to proceed in forma pauperis be denied. The district judge then assigned to the case adopted the recommendation and denied plaintiff’s in forma pauperis application on November 19, 2004. Plaintiff did not pay the filing fee, and the case was closed on April 27, 2005.

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FNI. A court may take judicial notice of court records. See *MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 505 (9th Cir.1986); *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir.1980).

Plaintiff has also affirmatively pled that he raised the same claims against the same parties in state court and that the defendants prevailed. The res judicata effect of a prior judgment may be examined by the court sua sponte. *McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th Cir.1986). An action may be summarily dismissed on the ground of res judicata if the defense appears from the face of the complaint. *Guam Inv. Co. v. Central Bldg., Inc.*, 288 F.2d 19, 24 (9th Cir.1961). See *Cato v. United States*, 70 F.3d 1103, 1105 n. 2 (9th Cir.1995) (stating that there is no abuse of discretion where a district court **dismisses** a complaint under § 1915 where the complaint merely repeats pending or previously litigated **claims**); *Allen v. Vaughn*, No. C 98-0276 VRW PR, 1998 WL 61317 (N.D.Cal. Feb.4, 1998) (**dismissing the prisoner's** complaint at **screening** because the prisoner alleged that he presented the same **claims** and issues to a state court and was denied relief).

Plaintiff's application for leave to proceed in forma pauperis should be denied because he has alleged **claims** that are factually **frivolous**. In addition, the **claims** are duplicative of **claims** presented to this federal district court in a case improperly brought as a habeas proceeding and it appears that those **claims** are barred by the doctrine of res judicata. For all of these reasons, the undersigned will recommend that plaintiff's application to proceed in forma pauperis be denied and that this action be **dismissed** with prejudice. Plaintiff's requests for discovery and for a copy of the docket will be denied.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's July 22, 2004 motion to obtain discov-

ery is denied;

2. Plaintiff's April 11, 2005 request for discovery production is denied;

3. Plaintiff's September 6, 2005, request for a copy of the docket is denied; and

IT IS RECOMMENDED that:

1. Plaintiff's August 9, 2004 application to proceed in forma pauperis be denied; and

*5 2. This action be dismissed with prejudice on the grounds that it is factually frivolous, fails to state a claim upon which relief may be granted, duplicative, and barred by the doctrine of res judicata.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, plaintiff may file written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court's order. See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

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