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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MEBRHATO TSEHAI,

Plaintiff - Appellant,

v.

TERESA A. SCHWARTZ; et al.,

Defendants - Appellees.

No. 07-15643

D.C. No. CV-05-01953-GEB/PAN

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Garland E. Burrell, Chief Judge, Presiding

Submitted December 17, 2008\*\*

Before: WALLACE, TROTT and RYMER, Circuit Judges.

Mebrhato Tsehai, a former California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action challenging his administrative segregation on the ground that it was barred by *Heck v. Humphrey*,

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997). We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a district court's dismissal pursuant to 28 U.S.C. § 1915A. *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). We may affirm on any ground supported by the record, *see Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir. 2008), and we affirm.

This action may not be *Heck*-barred because Tsehai is no longer in custody. *See Tsehai v. Schwartz*, No. 06-1521, 2007 WL 1544745, at \*1 (E.D. Cal. May 25, 2007); *see also Nonnette v. Small*, 316 F.3d 872, 875-77 (9th Cir. 2002) (holding that a former prisoner's section 1983 action was not barred by *Heck* where habeas relief was no longer available). Nevertheless, we affirm the district court's dismissal on the alternative ground that Tsehai's complaint failed to state a claim and amendment would have been futile. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995) (holding that a due process violation can only occur where the sentence is exceeded in an unexpected manner or where an atypical and significant hardship is imposed); *see also Ove v. Gwinn*, 264 F.3d 817, 822-25 (9th Cir. 2001) (holding that action was not *Heck*-barred but affirming dismissal without prejudice on alternative ground of failure to state a claim).

**AFFIRMED.**