

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 8th day of October, two thousand and four.

Present: HON. JON O. NEWMAN,  
HON. JOSEPH M. MCLAUGHLIN,  
HON. RICHARD C. WESLEY,  
*Circuit Judges.*

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MICHAEL ERBER,

*Plaintiff-Appellant,*

- v -

(03-286)

MICHAEL D. HESS; GEORGE DEGIOVANI; JOHN SORRENTINO;  
CLIFTON PETERSON,

*Defendant-Appellee.*

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For Plaintiff-Appellant: MICHAEL ERBER, *pro se* (on submission), Comstock, NY.

For Defendant-Appellee: EDWARD F.X. HART *for* Michael A. Cardozo, Corporation Counsel of the City of New York (on submission), New York, NY.

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Appeal from the United States District Court for the Eastern District of New York  
(Johnson, J.).

1           **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED** that the judgment of  
2 the district court be **VACATED** and **REMANDED** so that the court may modify its judgment in  
3 accordance with this Summary Order.

4           Familiarity by the parties is assumed as to the facts, the procedural context, and the  
5 specification of appellate issues. Plaintiff-Appellant Michael Erber brought this action pursuant  
6 to 42 U.S.C. § 1983, alleging deprivation of property without due process of law. On appeal, he  
7 challenges the district court's dismissal of his complaint pursuant to 28 U.S.C. § 1915A for  
8 failure to state a claim upon which relief can be granted. This Court reviews the district court's  
9 dismissal *de novo*. See *Larkin v. Savage*, 318 F.3d 138, 139 (2d Cir. 2003).

10           On October 15, 1991, Erber was convicted of robbery in the first degree in state court for  
11 stealing \$103,914.65 from a check cashing location in Brooklyn.<sup>1</sup> In this action, he seeks  
12 recovery, with interest, of the \$103,914.65 seized from him by the New York Police Department  
13 in connection with his crime on the grounds that the defendants deprived him of due process of  
14 law when they failed to provide him with a voucher for the money and adequate notice of the  
15 procedures he was required to follow to recover the seized funds.

16           In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held:

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<sup>1</sup> The Appellate Division affirmed Erber's conviction, *People v. Erber*, 210 A.D.2d 250 (2d Dept. 1994), and the New York Court of Appeals denied leave to appeal, *People v. Erber*, 85 N.Y.2d 861 (1995). The District Court for the Eastern District of New York denied Erber's petition for writ of habeas corpus. *Erber v. Kelly*, 1995 WL 264124 (E.D.N.Y. Apr. 27, 1995) (No. 94-cv-4497).

1 [I]n order to recover damages for allegedly unconstitutional conviction or  
2 imprisonment, or for other harm caused by actions whose unlawfulness would  
3 render a conviction or sentence invalid, a § 1983 plaintiff must prove that the  
4 conviction or sentence has been reversed on direct appeal, expunged by executive  
5 order, declared invalid by a state tribunal authorized to make such determination,  
6 or called into question by a federal court's issuance of a writ of habeas corpus.  
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8 *Id.* at 486-87 (footnote omitted). In instances where a state prisoner files a § 1983 suit, “the  
9 district court must consider whether a judgment in favor of the plaintiff would necessarily imply  
10 the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless  
11 the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” *Id.* at  
12 487.

13 Before he can establish a due process violation, Erber must first show that he possessed a  
14 protected interest in the confiscated cash. *See, e.g., Alexandre v. Cortes*, 140 F.3d 406, 410 (2d  
15 Cir. 1998). Such a finding would “necessarily imply” that Erber was wrongfully convicted of  
16 robbery. *Heck*, 512 U.S. at 487. Thus, Erber cannot sustain a cognizable claim until his  
17 conviction is invalidated. However, cases dismissed on *Heck* grounds should be disposed of  
18 without prejudice. *See Amaker v. Weiner*, 179 F.3d 48, 52 (2d Cir. 1999). In the event Erber’s  
19 conviction is “expunged by executive order, declared invalid by a state tribunal authorized to  
20 make such determination, or called into question by a federal court’s issuance of a writ of habeas  
21 corpus,” *id.* (internal quotation marks omitted), Erber would be entitled to reassert his claim.

22 Accordingly, for the reasons set forth above, the judgment of the district court is hereby  
23 **VACATED** and **REMANDED** so that the court may modify its judgment in accordance with  
24 this Summary Order.  
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For the Court  
Roseann B. MacKechnie, Clerk

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By: