

**United States Court of Appeals**  
**FOR THE EIGHTH CIRCUIT**

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No. 01-2974

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Clayton S. Creek,

Appellant,

v.

South Dakota Department of,  
Corrections; South Dakota State  
Penitentiary

Appellees.

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\* Appeal from the United States  
\* District Court for the  
\* District of South Dakota.  
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\* [UNPUBLISHED]  
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Submitted: November 30, 2001

Filed: December 18, 2001

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Before BOWMAN, BRIGHT, and LOKEN, Circuit Judges.

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PER CURIAM.

South Dakota inmate Clayton S. Creek appeals the district court's dismissal without prejudice of his 42 U.S.C. § 1983 action for failure to make an initial partial filing fee.

In January 2001, Creek filed a motion with the South Dakota Supreme Court concerning prison officials who violate prison policies that protect access to religious objects, such as ceremonial pow-wow wacipi, medicine pouches, and eagle parts.

Because the South Dakota Supreme Court returned Creek's motion without taking action on the motion, Creek filed a § 1983 claim alleging that his equal protection and due process rights were violated. Creek also alleged that prison officials prevented Native American inmates from participating in religious ceremonies, which Creek asserted pose no threat to security, discipline or good order.

After receiving Creek's in forma pauperis (IFP) application and Prisoner Trust Account Report, the district court granted Creek IFP status, ordered him to pay an initial partial filing fee of \$.03 on or before April 1, 2001, and ordered the custodial institution to forward to the clerk's office 20% of the funds credited to Creek's prison account from the previous month, whenever the account balance exceeds \$10. On July 2, 2001, the court dismissed the case without prejudice for failure to make the initial partial filing fee of \$.03 by April 1. The court also denied all pending motions as moot.

Creek filed a timely notice of appeal and after remand from this court to determine whether Creek should be allowed to proceed IFP on appeal, the district court granted him IFP status and assessed appellate filing fees pursuant to 28 U.S.C. § 1915(b)(2). The court ordered an initial partial fee payment for appellate docketing and filing fees in the amount of \$.02 to be paid on or before September 15, 2001, and the balance to be paid off in the same manner as described above.

We now determine that the district court improperly dismissed Creek's claim for failing to pay the initial partial filing fee of \$.03 by the deadline of April 1. Creek's Prisoner Trust Account Report indicated that he had a negative balance, and there is no indication in the record that he ever had a positive balance. See 28 U.S.C. § 1915(b)(4) ("In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets or no means by which to pay the initial partial filing fee.").

We vacate the dismissal and remand to the district court for such action as may be appropriate.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.