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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

RUSSELL JAMES KELLY,  
CDCR #K-50742

Plaintiff,

vs.

JAMES TILTON, Secretary of the  
California Dep't of Corrections and  
Rehabilitation

Defendant.

Civil No. 07-1744 H (RBB)

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED *IN FORMA  
PAUPERIS*, ASSESSING NO  
INITIAL PARTIAL FILING FEE  
AND GARNISHING \$350 BALANCE  
FROM PRISONER'S TRUST  
ACCOUNT [Doc. No. 2]; AND**

**(2) SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM PURSUANT TO 28  
U.S.C. § 1915(e)(2)(B) & § 1915A(b).**

**[Doc. No. 2]**

Plaintiff, an inmate currently incarcerated at Kern Valley State Prison located in Delano, California and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. In his Complaint, Plaintiff alleges that he is being held against his will by the California Department of Corrections and Rehabilitation. (*See* Compl. at 3.) As a result, Plaintiff seeks an immediate release from custody. (*Id.* at 7.)

1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a) to  
2 commence a civil action; instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”)  
3 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

4 **I. Motion to Proceed IFP**

5 Effective April 9, 2006, all parties instituting any civil action, suit or proceeding in a  
6 district court of the United States, except an application for writ of habeas corpus, must pay a  
7 filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a party’s failure to  
8 prepay the entire fee only if the party is granted leave to proceed IFP pursuant to 28 U.S.C.  
9 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave  
10 to proceed IFP however, remain obligated to pay the entire fee in installments, regardless of  
11 whether the action is ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

12 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a  
13 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account  
14 statement (or institutional equivalent) for the prisoner for the six-month period immediately  
15 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2). From the certified trust account  
16 statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits  
17 in the account for the past six months, or (b) the average monthly balance in the account for the  
18 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.  
19 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must  
20 collect subsequent payments, assessed at 20% of the preceding month’s income, in any month  
21 in which the prisoner’s account exceeds \$10, and forward those payments to the Court until the  
22 entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

23 The Court finds that Plaintiff has attached a certified copy of his trust account statement  
24 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement  
25 shows that he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C.  
26 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil  
27 action or appealing a civil action or criminal judgment for the reason that the prisoner has no  
28 assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850

1 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s  
2 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him when  
3 payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc.  
4 No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire  
5 \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the  
6 Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 7 **II. Initial Screening per 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)**

### 8 **A. Standard of Review**

9 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
10 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
11 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
12 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
13 practicable after docketing.” *See* 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
14 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion  
15 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from  
16 defendants who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Calhoun v. Stahl*, 254  
17 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited  
18 to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that  
19 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss an *in forma*  
20 *pauperis* complaint that fails to state a claim); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir.  
21 2000) (§ 1915A).

22 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
23 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
24 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
25 324 (1989). However, 28 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court  
26 reviewing an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting  
27 service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *See Calhoun*,  
28 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601,

1 604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur  
2 “before service of process is made on the opposing parties”); *Barren v. Harrington*, 152 F.3d  
3 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

4 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
5 allegations of material fact and must construe those facts in the light most favorable to the  
6 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
7 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”); *Andrews*, 398 F.3d at  
8 1121. In addition, the Court has a duty to liberally construe a pro se’s pleadings, *see Karim-*  
9 *Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988), which is “particularly  
10 important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In  
11 giving liberal interpretation to a pro se civil rights complaint, however, the court may not  
12 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of*  
13 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

14 As currently pleaded, it is clear that Plaintiff’s Complaint fails to state a cognizable claim  
15 under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements upon a  
16 claimant: (1) that a person acting under color of state law committed the conduct at issue, and  
17 (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the  
18 Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S.  
19 637, 124 S. Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985)  
20 (en banc).

## 21 **B. Habeas Corpus Relief**

22 In Plaintiff’s Complaint, he alleges that he was acquitted by a jury of criminal charges on  
23 February 27, 1997. (*See* Compl. at 3.) Despite this acquittal, Plaintiff claims that he was  
24 sentenced to thirty (30) years to life and remains incarcerated under the control of the California  
25 Department of Corrections and Rehabilitation (“CDCR”). (*Id.*) The only form of relief Plaintiff  
26 seeks is an “injunction from holding Plaintiff against his will in the [CDCR].” (*Id.* at 8.)

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1           However, to the extent Plaintiff seeks injunctive relief in the form of a court order  
2 granting him release from prison, *see* Compl. at 3-5, such relief is simply not available under 42  
3 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (holding that “when a state  
4 prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he  
5 seeks is a determination that he is entitled to immediate release . . . his sole federal remedy is a  
6 writ of habeas corpus.”).

7           Even if Plaintiff were to amend his Complaint to seek monetary damages, this claim  
8 would not yet be cognizable pursuant to *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994);  
9 *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a showing, ‘[e]ven a  
10 prisoner who has fully exhausted available state remedies has no cause of action under  
11 § 1983....’”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds  
12 that “in order to recover damages for allegedly unconstitutional conviction or imprisonment, or  
13 for other harm caused by actions whose unlawfulness would render a conviction or sentence  
14 invalid, a section 1983 plaintiff must prove that the conviction or sentence has been reversed on  
15 direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to  
16 make such determination, or called into question by a federal court’s issuance of a writ of habeas  
17 corpus.” *Heck*, 512 U.S. at 486-87. A claim challenging the legality of a conviction or sentence  
18 that has not been so invalidated is not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*,  
19 520 U.S. 641, 643 (1997). In his Complaint, Plaintiff admits that he has not yet had his  
20 conviction invalidated and thus, this action is not yet cognizable pursuant to *Heck*.

21           Accordingly, the Court finds that Plaintiff’s Complaint must be **DISMISSED** for failing  
22 to state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)  
23 and 1915A. Because it does not appear “at all possible that the plaintiff can correct the  
24 defect(s)” of his pleading, further leave to amend is **DENIED** as futile. *See Cahill v. Liberty*  
25 *Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of a leave to amend is not an abuse of  
26 discretion where further amendment would be futile).

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1 **III. Conclusion and Order**

2 Good cause appearing, **IT IS HEREBY ORDERED** that:

3 (1) Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) is **GRANTED**.

4 (2) The Secretary of California Department of Corrections and Rehabilitation, or his  
5 designee, is ordered to collect from Plaintiff’s prison trust account the \$350 balance of the filing  
6 fee owed in this case by collecting monthly payments from the trust account in an amount equal  
7 to twenty percent (20%) of the preceding month’s income credited to the account and forward  
8 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in  
9 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY  
10 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

11 (3) The Clerk of the Court is directed to serve a copy of this Order on James Tilton,  
12 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,  
13 Sacramento, California, 94283-0001.

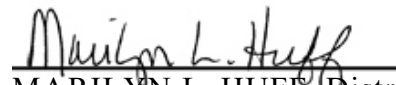
14 **IT IS FURTHER ORDERED** that:

15 (4) Plaintiff’s Complaint [Doc. No. 1] is **DISMISSED** for failing to state a claim and  
16 without further leave to amend pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A. Plaintiff is  
17 further notified that this dismissal may later be counted as a “strike” against him pursuant to 28  
18 U.S.C. § 1915(g).<sup>1</sup>

19 The Clerk shall close the file.

20 **IT IS SO ORDERED.**

21 DATED: September 11, 2007

22   
23 MARILYN L. HUFF, District Judge  
24 UNITED STATES DISTRICT COURT

25 <sup>1</sup> 28 U.S.C. § 1915(g) provides that “[i]n no event shall a prisoner bring a civil action or appeal  
26 ... under this section if the prisoner has, on 3 or more occasions, while incarcerated or detained in any  
27 facility, brought an action or appeal in a court of the United States that was dismissed on the grounds  
28 that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the  
prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g); *Andrews v. King*,  
398 F.3d 1113, 1116 n.1 (9th Cir. 2005) (“Pursuant to § 1915(g), a prisoner with three strikes,” *i.e.*, prior  
federal cases or appeals, brought while the plaintiff was a prisoner, which were dismissed on grounds  
that they were frivolous, malicious, or failed to state a claim, “cannot proceed *IFP*.”).