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

CRAIG SMITH,  
CDCR # T-09268

Plaintiff,

vs.

DAN LINK, Deputy District Attorney,  
NICHOLAS GONZALEZ, San Diego Police  
Officer, CITY OF SAN DIEGO, COUNTY  
OF SAN DIEGO, ALBERT  
HARUTUNIAN, Judge of the Superior Court  
of California, San Diego,

Defendants.

Civil 07-2077 BTM (RBB)  
No.

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE AND GARNISHING  
\$350.00 BALANCE FROM  
PRISONER TRUST ACCOUNT  
[Doc. No. 2];**

**AND**

**(2) DISMISSING ACTION FOR  
FAILING TO STATE A CLAIM AND  
FOR SEEKING MONETARY  
DAMAGES AGAINST  
DEFENDANTS WHO ARE IMMUNE  
PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2)(B)  
& 1915A(b)**

Plaintiff, a state inmate currently incarcerated at Richard J. Donovan Correctional Facility in San Diego, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims that his constitutional rights were violated by a San Diego Police Officer, Deputy District Attorney and a Superior Court Judge when he was arrested and

1 ultimately convicted of driving under the influence. Plaintiff seeks compensatory damages for  
2 “malicious prosecution” and “false imprisonment.” (Compl. at 31.)

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

### 6 **I. MOTION TO PROCEED IFP**

7 All parties instituting any civil action, suit or proceeding in a district court of the United  
8 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
9 U.S.C. § 1914(a). An action may proceed despite a party’s failure to pay only if the party is  
10 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493  
11 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).  
12 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in  
13 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28  
14 U.S.C. § 1915(b)(1) & (2).

15 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.  
16 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to  
17 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement shows that  
18 he has insufficient funds from which to pay an initial partial filing fee.

19 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and  
20 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further  
21 orders the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”)  
22 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them  
23 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
24 § 1915(b)(1).

### 25 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

26 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also  
27 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like  
28 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or

1 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,  
2 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”  
3 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua  
4 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,  
5 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
6 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
7 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.  
8 2000) (§ 1915A).

9 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
10 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28  
11 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner’s suit  
12 make and rule on its own motion to dismiss before directing that the Complaint be served by the  
13 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits,  
14 but requires a district court to dismiss an in forma pauperis complaint that fails to state a  
15 claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing  
16 § 1915A).

17 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
18 allegations of material fact and must construe those facts in the light most favorable to the  
19 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
20 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even  
21 presuming Plaintiff’s factual allegations true, the Court finds his Complaint both fails to state  
22 a claim upon which relief can be granted and seeks monetary relief from defendants who are  
23 immune. *See* 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213  
24 F.3d at 446, n.1.

25 First, a review of Plaintiff’s Complaint indicates that he is seeking monetary damages  
26 based on allegations that a San Diego Police Officer gave false testimony at his criminal trial  
27 resulting in his conviction. In addition, Plaintiff also seeks monetary damages against the  
28 Deputy District Attorney who prosecuted him and the San Diego Superior Court Judge who

1 presided over his criminal trial.

2 These claims amount to an attack on the constitutional validity of an underlying state  
3 criminal proceeding, and as such, may not be maintained pursuant to 42 U.S.C. § 1983 unless  
4 and until he can show that conviction has already been invalidated. *Heck v. Humphrey*, 512 U.S.  
5 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a  
6 showing, ‘[e]ven a prisoner who has fully exhausted available state remedies has no cause of  
7 action under § 1983....’”) (quoting *Heck*, 512 U.S. at 489).

8 “In any § 1983 action, the first question is whether § 1983 is the appropriate avenue to  
9 remedy the alleged wrong.” *Haygood v. Younger*, 769 F.2d 1350, 1353 (9th Cir. 1985) (en  
10 banc). A prisoner in state custody simply may not use a § 1983 civil rights action to challenge  
11 the “fact or duration of his confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). The  
12 prisoner must seek federal habeas corpus relief instead. *Wilkinson v. Dotson*, 544 U.S. 74, 78  
13 (2005) (quoting *Preiser*, 411 U.S. at 489). Thus, Plaintiff’s § 1983 action “is barred (absent  
14 prior invalidation)--no matter the relief sought (damages or equitable relief), no matter the target  
15 of his suit (state conduct leading to conviction or internal prison proceedings)--if success in that  
16 action would necessarily demonstrate the invalidity of confinement or its duration.” *Wilkinson*,  
17 544 U.S. at 82.

18 In this case, Plaintiff’s malicious prosecution and false imprisonment claims “necessarily  
19 imply the invalidity” of his criminal proceedings and continuing incarceration. *Heck*, 512 U.S.  
20 at 487. In creating the favorable termination rule in *Heck*, the Supreme Court relied on “the  
21 hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of  
22 outstanding *criminal judgments*.” *Heck*, 511 U.S. at 486 (emphasis added); *see also Huftile v.*  
23 *Miccio-Fonseca*, 410 F.3d 1136, 1139 (9th Cir. 2005). This is precisely what Plaintiff attempts  
24 to accomplish here. Therefore, to satisfy *Heck*’s “favorable termination” rule, Plaintiff must first  
25 allege facts which show that the conviction and/or sentence which forms the basis of his § 1983  
26 Complaint has already been: (1) reversed on direct appeal; (2) expunged by executive order;  
27 (3) declared invalid by a state tribunal authorized to make such a determination; or (4) called into  
28 question by the grant of a writ of habeas corpus. *Heck*, 512 U.S. at 487 (emphasis added); *see*

1 *also Butterfield v. Bail*, 120 F.3d 1023, 1025 (9th Cir. 1997).

2 Plaintiff's Complaint alleges no facts sufficient to satisfy *Heck*. In fact, Plaintiff argues  
3 that *Heck* does not apply because he "foresees" that the California Appellate Court will decide  
4 his criminal appeal in his favor and release him from prison by the time this Court allows him  
5 to proceed in this matter. (Compl. at 29.) However, the Court takes judicial notice of the direct  
6 appeal, as well as a state habeas petition, filed by Plaintiff in regard to his criminal matter in the  
7 Fourth Appellate District of the California Court of Appeals.<sup>1</sup> The direct appeal has yet to be  
8 ruled on. *See The People v. Smith*, Cal. Ct. App. Case No. D049993 (Case fully briefed as of  
9 October 24, 2007); *In re Craig Smith*, Cal. Ct. App. Case No. D050928 (4th. Dist., Div. 1, May  
10 31, 2007 Order denying petition without prejudice pending outcome of petitioner's appeal).

11 Thus, because Plaintiff seeks damages for allegedly unconstitutional criminal proceedings  
12 in a San Diego Superior Court criminal case, and because he has not, and apparently *cannot*  
13 currently show his conviction has been invalidated, either by way of direct appeal, state habeas  
14 or pursuant to 28 U.S.C. § 2254, a section 1983 claim for damages cannot be maintained, *see*  
15 *Heck*, 512 U.S. at 489-90, and his Complaint must be dismissed without prejudice. *See Trimble*  
16 *v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (finding that an action barred by *Heck*  
17 has not yet accrued and thus, must be dismissed without prejudice so that the plaintiff may  
18 reassert his § 1983 claims if he ever succeeds in invalidating the underlying conviction or  
19 sentence); *accord Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997).

20 Moreover, even if Plaintiff *could* show that the criminal conviction upon which his claims  
21 are based has already been terminated in his favor, his Complaint would still be subject to  
22 dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b) to the extent it seeks monetary  
23 damages against Deputy District Attorney Dan Link. Criminal prosecutors are absolutely  
24 immune from civil damages suits premised upon acts committed within the scope of their

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25  
26 <sup>1</sup> A court "may take notice of proceedings in other courts, both within and without the  
27 federal judicial system, if those proceedings have a direct relation to matters at issue." *Bias v.*  
28 *Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d  
801, 803 n.2 (9th Cir. 2002) (alterations in original); *United States ex rel. Robinson Rancheria*  
*Citizens Council v. Borneo*, 971 F.2d 244, 248 (9th Cir. 1992)). In fact, Plaintiff has specifically  
asked this Court to take judicial notice of his criminal action. *See* "Amendment to Take Judicial  
Notice of Superior Court File SCD 195342," Docket No. 3.

1 official duties which are “intimately associated with the judicial phase of the criminal process.”  
2 *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259,  
3 272-73 (1993); *Burns v. Reed*, 500 U.S. 478, 487-93 (1991). A prosecutor is immune even when  
4 the prosecutor’s malicious or dishonest action deprived the defendant of his or her liberty.  
5 *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).

6 In addition, Plaintiff’s claims against San Diego Superior Court Judge Albert Harutunian  
7 are barred by absolute immunity. “Judges and those performing judge-like functions are  
8 absolutely immune from damage liability for acts performed in their official capacities.”  
9 *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). Therefore, as a Superior Court Judge  
10 for the State of California, Judge Harutunian has absolute immunity from civil proceedings  
11 relating to these actions, which were performed within his judicial discretion.

12 Thus, Plaintiff’s claims against Defendants Link and Harutunian will be dismissed  
13 pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b) for seeking monetary relief against  
14 defendants who are immune from such relief. *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213  
15 F.3d at 446, n.1.

16 Finally, Plaintiff may not sue Nicholas Gonzalez, a witness who testified for the  
17 prosecution during his trial, under 42 U.S.C § 1983 based on his testimony. “Witnesses,  
18 including police witnesses, are immune from liability for their testimony in earlier proceedings  
19 even if they committed perjury.” *Paine v. City of Lompoc*, 965 F.3d 975, 981 (9th Cir. 2001)  
20 (citing *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983)). “Witness immunity also extends to  
21 conspiracies to commit perjury.” *Id.* (citing *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir.  
22 2000). *See also Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (witnesses are  
23 absolutely immune from suits for damages under 42 U.S.C. § 1983 for testimony given at trial,  
24 or for testimony given during adversarial pretrial proceedings); *Demoran v. Witt*, 781 F.2d 155,  
25 157-58 (9th Cir. 1986).

26 Thus, for all these reasons, the Court finds that Plaintiff’s Complaint must be dismissed  
27 sua sponte for failing to state a claim upon which relief can be granted and for seeking monetary  
28 damages against immune defendants pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).



1 **III. CONCLUSION AND ORDER**

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

3 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is

4 **GRANTED.**

5 2. The Secretary of California Department of Corrections and Rehabilitation, or his  
6 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee  
7 owed in this case by collecting monthly payments from the account in an amount equal to twenty  
8 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court  
9 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).

10 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
11 **ASSIGNED TO THIS ACTION.**

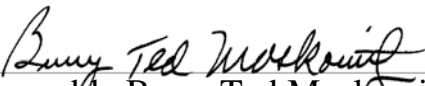
12 3. The Clerk of the Court is directed to serve a copy of this Order on James Tilton,  
13 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
14 Sacramento, California 95814.

15 **IT IS FURTHER ORDERED** that:

16 4. Plaintiff's Complaint is **DISMISSED** without prejudice both for failing to state  
17 a claim upon which relief may be granted and for seeking monetary relief against defendants  
18 who are immune pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). Moreover, because  
19 the Court finds amendment of Plaintiff's § 1983 claims would be futile at this time, leave to  
20 amend is **DENIED**. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial  
21 of a leave to amend is not an abuse of discretion where further amendment would be futile); *see*  
22 *also Robinson v. California Bd. of Prison Terms*, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998)  
23 ("Since plaintiff has not, and cannot, state a claim containing an arguable basis in law, this action  
24 should be dismissed without leave to amend; any amendment would be futile.") (citing *Newland*  
25 *v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996)).

26 The Clerk shall close the file.

27 **DATED:** March 3, 2008

28   
Honorable Barry Ted Moskowitz  
United States District Judge