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28UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

VAN J. ROSS,

vs.

LESLIE WOLF, *et al.*

Plaintiff,

Defendants.

CASE NO. 07cv2337-L (LSP)

**ORDER (1) GRANTING  
MOTION TO PROCEED IN  
FORMA PAUPERIS; (2)  
DISMISSING COMPLAINT  
WITHOUT PREJUDICE; (3)  
DENYING REQUEST FOR  
APPOINTMENT OF COUNSEL**

Plaintiff Van J. Ross, proceeding *pro se*, has submitted a complaint alleging that in December 2000, Defendant Leslie Wolf, a public defender, incorrectly advised him to plead guilty in state court, which resulted in a longer sentence. Defendant also alleges that the state court charged him an excessive amount, apparently for restitution. With his complaint, Plaintiff filed a Motion to Proceed *in Forma Pauperis* (“IFP”) and a Request for Appointment of Counsel.


All parties instituting any civil action, suit or proceeding in a United States District Court must pay a filing fee. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the fee only if the plaintiff is granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Plaintiff’s declaration shows he has insufficient income and assets to pay the filing fee. Accordingly, Plaintiff’s motion to proceed IFP is **GRANTED**.

1 The court is obligated to review a complaint filed IFP and must dismiss it if it  
2 determines that the action is frivolous or malicious, fails to state a claim on which relief  
3 may be granted or seeks monetary relief against a defendant who is immune from such  
4 relief. 28 U.S.C. § 1915(e)(2)(B); *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001).  
5 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
6 allegations of material fact and must construe those facts in the light most favorable to the  
7 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

8 The allegations in Plaintiff’s complaint may be read in two different ways. They  
9 can be read as a claim for professional negligence action against the public defender. In  
10 this instance, the court lacks subject matter jurisdiction as the action does not arise under  
11 federal law, and the complaint should be dismissed. Alternatively, the complaint may be  
12 read as a claim for violation of Plaintiff’s constitutional rights under 42 U.S.C. § 1983. In  
13 this instance, the complaint is barred by *Heck v. Humphrey*, 512 U.S. 475 (1994), because a  
14 judgment in Plaintiff’s favor would necessarily imply the invalidity of his conviction and  
15 sentence.

16 For the foregoing reasons, the complaint is **DISMISSED WITHOUT**  
17 **PREJUDICE**. Plaintiff’s request for appointment of counsel is **DENIED AS MOOT**.  
18 **IT IS SO ORDERED.**

19  
20 DATED: December 17, 2007

21   
22 M. James Lorenz  
United States District Court Judge

23 COPY TO:  
24 HON. LEO S. PAPAS  
UNITED STATES MAGISTRATE JUDGE  
25 ALL PARTIES/COUNSEL  
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