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

CHRISTOPHER SCOTT RIDER,
CDCR #P-96108,

Plaintiff,

vs.

THOMAS J. STOREY,

Defendant.

Civil No. 09-1979 JM (POR)

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350.00 BALANCE FROM INMATES'S
TRUST ACCOUNT; and**

**(2) DISMISSING ACTION
WITHOUT PREJUDICE FOR
FAILING TO STATE A
CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b)**

Christopher Scott Rider (“Plaintiff”), a state prisoner currently incarcerated at High Desert State Prison located in Susanville, California, and proceeding pro se, has submitted a civil rights Complaint pursuant to 28 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

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1 **I. Motion to Proceed IFP [Doc. No. 2]**

2 All parties instituting any civil action, suit or proceeding in a district court of the
3 United States, except an application for writ of habeas corpus, must pay a filing fee of
4 \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a party’s failure to
5 prepay the entire fee only if that party is granted leave to proceed IFP pursuant to 28
6 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
7 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee
8 in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C.
9 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

10 The Court finds that Plaintiff has submitted an affidavit which complies with 28
11 U.S.C. § 1915(a)(1), and that he has attached a certified copy of his trust account
12 statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust
13 account statement indicates that he has insufficient funds from which to pay filing fees
14 at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner
15 be prohibited from bringing a civil action or appealing a civil action or criminal judgment
16 for the reason that the prisoner has no assets and no means by which to pay the initial
17 partial filing fee.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP
18 [Doc. No. 4] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
19 However, the entire \$350 balance of the filing fees mandated shall be collected and
20 forwarded to the Clerk of the Court pursuant to the installment payment provisions set
21 forth in 28 U.S.C. § 1915(b)(1).

22 **II. Sua Sponte Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

23 Notwithstanding payment of any filing fee or portion thereof, the Prison Litigation
24 Reform Act (“PLRA”) requires courts to review complaints filed by prisoners against
25 officers or employees of governmental entities and dismiss those or any portion of those
26 found frivolous, malicious, failing to state a claim upon which relief may be granted, or
27 seeking monetary relief from a defendant immune from such relief. *See* 28 U.S.C. §§
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1 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en
2 banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

3 Prior to the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal
4 of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However 28
5 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing a prisoner’s suit
6 make and rule on its own motion to dismiss before directing that the complaint be served
7 by the U.S. Marshal pursuant to FED. R. CIV. P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e)
8 not only permits, but requires a district court to dismiss an in forma pauperis complaint
9 that fails to state a claim.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).
10 The district court should grant leave to amend, however, unless it determines that “the
11 pleading could not possibly be cured by the allegation of other facts” and if it appears “at
12 all possible that the plaintiff can correct the defect.” *Lopez*, 203 F.3d at 1130-31 (citing
13 *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995); *Balistreri v. Pacifica Police*
14 *Dep’t*, 901 F.2d 696, 701 (9th Cir. 1990)).

15 “[W]hen determining whether a complaint states a claim, a court must accept as
16 true all allegations of material fact and must construe those facts in the light most
17 favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting
18 that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).
19 However, while liberal construction is “particularly important in civil rights cases,”
20 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992), the court may nevertheless not
21 “supply essential elements of the claim that were not initially pled.” *Ivey v. Board of*
22 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

23 As currently pleaded, it is clear that Plaintiff’s Complaint fails to state a cognizable
24 claim under 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements
25 upon a claimant: (1) that a person acting under color of state law committed the conduct
26 at issue, and (2) that the conduct deprived the claimant of some right, privilege, or
27 immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. §
28 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by*

1 *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d 1350,
2 1354 (9th Cir. 1985) (en banc).

3 First, Plaintiff names as the only Defendant, Thomas Storey, the attorney appointed
4 to represent him during his criminal proceedings. However, a person “acts under color
5 of state law [for purposes of § 1983] only when exercising power ‘possessed by virtue
6 of state law and made possible only because the wrongdoer is clothed with the authority
7 of state law.’” *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United*
8 *States v. Classic*, 313 U.S. 299, 326 (1941)). Attorneys appointed to represent a criminal
9 defendant during trial, do not generally act under color of state law because representing
10 a client “is essentially a private function ... for which state office and authority are not
11 needed.” *Polk County*, 454 U.S. at 319; *United States v. De Gross*, 960 F.2d 1433, 1442
12 n.12 (9th Cir. 1992). Thus, when publicly appointed counsel are performing as
13 advocates, *i.e.*, meeting with clients, investigating possible defenses, presenting evidence
14 at trial and arguing to the jury, they do not act under color of state law for section 1983
15 purposes. See *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Polk County*, 454 U.S. at
16 320-25; *Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (finding
17 that public defender was not a state actor subject to suit under § 1983 because, so long
18 as he performs a traditional role of an attorney for a client, “his function,” no matter how
19 ineffective, is “to represent his client, not the interests of the state or county.”).

20 Accordingly, Plaintiff’s claims against Thomas Storey must be dismissed for
21 failing to state a claim upon which section 1983 relief may be granted. See 28 U.S.C.
22 § 1915(e)(2)(B)(ii) & 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

23 Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on
24 the alleged ineffectiveness assistance of his trial counsel, his claim amounts to an attack
25 on the validity of his underlying criminal proceedings, and as such, is not cognizable
26 under 42 U.S.C. § 1983 unless and until he can show that conviction has already been
27 invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334
28 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a showing, ‘[e]ven a prisoner who has

1 fully exhausted available state remedies has no cause of action under § 1983....”)
2 (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds
3 that “in order to recover damages for allegedly unconstitutional conviction or
4 imprisonment, or for other harm caused by actions whose unlawfulness would render a
5 conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or
6 sentence has been reversed on direct appeal, expunged by executive order, declared
7 invalid by a state tribunal authorized to make such determination, or called into question
8 by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87. A
9 claim challenging the legality of a conviction or sentence that has not been so invalidated
10 is not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643
11 (1997).

12 In *Heck*, the Supreme Court held that:

13 when a state prisoner seeks damages in a section 1983 suit, the
14 district court must consider *whether a judgment in favor of the*
15 *plaintiff would necessarily imply the invalidity of his*
16 *conviction or sentence*; if it would, the complaint must be
17 dismissed unless the plaintiff can demonstrate that the
18 conviction or sentence has already been invalidated. But if the
19 district court determines that the plaintiff’s action, even if
20 successful, will not demonstrate the invalidity of any
21 outstanding criminal judgment against the plaintiff, the action
22 should be allowed to proceed.

19 *Heck*, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be
20 dismissed for failure to state a claim without prejudice to Plaintiff’s right to file a new
21 action if he succeeds in invalidating his conviction. *Edwards*, 520 U.S. at 649.

22 Here, Plaintiff’s ineffective assistance of counsel claims against Storey
23 “necessarily imply the invalidity” of his criminal proceedings and continuing
24 incarceration. *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that Storey
25 rendered ineffective assistance of counsel, an award of damages would “necessarily
26 imply the invalidity” of his conviction. *Id.*; *see also Strickland v. Washington*, 466 U.S.
27 668, 688 (1984) (to succeed on ineffective assistance claim petitioner must show that
28 counsel’s performance fell below objective standard of reasonableness and that but for

1 counsel's errors the result of the trial would have been different); *Lozada v. Deeds*, 964
2 F.2d 956, 958-59 (9th Cir. 1992) (remedy for ineffective assistance of counsel is a
3 conditional writ granting petitioner's release unless state retries him or allows him to
4 pursue an appeal with the assistance of counsel within a reasonable time). Thus, because
5 Plaintiff seeks damages for an allegedly unconstitutional criminal proceedings in a
6 criminal case, and because he has not alleged that his conviction has already been
7 invalidated, a section 1983 claim for damages has not yet accrued. *See Heck*, 512 U.S.
8 at 489-90.

9 **III. CONCLUSION AND ORDER**

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

11 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No.
12 4] is **GRANTED**.

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

20 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew
21 Cate, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street,
22 Suite 502, Sacramento, California 95814.


23 **IT IS FURTHER ORDERED** that:

24 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28
25 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45)
26 days leave from the date this Order is "Filed" in which to file a First Amended Complaint
27 which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint
28 must be complete in itself without reference to the superseded pleading. *See S.D. Cal.*

1 Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended
2 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567
3 (9th Cir. 1987).

4 5. The Clerk is directed to mail a court approved § 1983 complaint form to
5 Plaintiff.

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7 DATED: October 22, 2009

8 
9 Hon. Jeffrey T. Miller
United States District Judge

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