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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY  DEPUTY

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

SHAWN ANDRE TWYNE,
CDCR # F-50770

Plaintiff,

vs.

BONNIE DUMANIS; ANGELA BARKIN;
JAMES SIMMONS, JR.; TIMOTHY
CHANDLER; VINCENT GARCIA;
CARMEN WAGNER; JOHN "C" MARTIN
DOE; TIMOTHY CASSERLY; ANNA
JAURE GUI; LEWIS WENZELL;
MATTHEW CATES; J.B. BENKE;
JOHN DOES,

Defendants.

Civil 10cv0747 BEN (WMc)
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
SEEKING MONETARY DAMAGES
AGAINST DEFENDANTS WHO ARE
IMMUNE AND FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)(B)
& 1915A(b)

Plaintiff, a state inmate currently incarcerated at the Mountain Home Conservation Center located in Springville, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant

1 to 28 U.S.C. § 1915(a) [Doc. No. 2].

2 **I. MOTION TO PROCEED IFP**

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

11 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
12 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
13 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that
14 he has insufficient funds from which to pay an initial partial filing fee.

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

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

22 The Prison Litigation Reform Act ("PLRA")'s amendments to 28 U.S.C. § 1915 also
23 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like
24 Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or
25 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
26 probation, pretrial release, or diversionary program," "as soon as practicable after docketing."
27 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua
28 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,

1 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
2 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
3 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.
4 2000) (§ 1915A).

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

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

21 First, Plaintiff names as Defendants Garcia, Chandler, Gui and Wenzell, who are
22 attorneys who were appointed to represent him during his criminal proceedings. However, a
23 person “acts under color of state law [for purposes of § 1983] only when exercising power
24 ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with
25 the authority of state law.’” *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting
26 *United States v. Classic*, 313 U.S. 299, 326 (1941)). Attorneys appointed to represent a criminal
27 defendant during trial, do not generally act under color of state law because representing a client
28 “is essentially a private function ... for which state office and authority are not needed.” *Polk*

1 County, 454 U.S. at 319; *United States v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992).
2 Thus, when publicly appointed counsel are performing as advocates, *i.e.*, meeting with clients,
3 investigating possible defenses, presenting evidence at trial and arguing to the jury, they do not
4 act under color of state law for § 1983 purposes. *See Georgia v. McCollum*, 505 U.S. 42, 53
5 (1992); *Polk County*, 454 U.S. at 320-25; *Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir.
6 2003) (en banc) (finding that public defender was not a state actor subject to suit under § 1983
7 because, so long as he performs a traditional role of an attorney for a client, “his function,” no
8 matter how ineffective, is “to represent his client, not the interests of the state or county.”).

9 Accordingly, Plaintiff’s claims against Garcia, Chandler, Gui and Wenzell must be dismissed
10 for failing to state a claim upon which section 1983 relief may be granted. *See 28 U.S.C.*
11 *§ 1915(e)(2)(B)(ii) & 1915A(b); Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

12 Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the
13 alleged ineffectiveness assistance of his trial and appellate counsel, his claim amounts to an
14 attack on the validity of his underlying criminal proceedings, and as such, is not cognizable
15 under 42 U.S.C. § 1983 unless and until he can show that conviction has already been
16 invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850,
17 855-56 (9th Cir. 2003) (“Absent such a showing, “[e]ven a prisoner who has fully exhausted
18 available state remedies has no cause of action under § 1983....”) (quoting *Heck*, 512 U.S. at
19 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds that “in order to recover damages for
20 allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions
21 whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must
22 prove that the conviction or sentence has been reversed on direct appeal, expunged by executive
23 order, declared invalid by a state tribunal authorized to make such determination, or called into
24 question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87.
25 A claim challenging the legality of a conviction or sentence that has not been so invalidated is
26 not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

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

2 when a state prisoner seeks damages in a section 1983 suit, the
3 district court must consider *whether a judgment in favor of the*
4 *plaintiff would necessarily imply the invalidity of his conviction or*
5 *sentence*; if it would, the complaint must be dismissed unless the
6 plaintiff can demonstrate that the conviction or sentence has already
7 been invalidated. But if the district court determines that the
8 plaintiff's action, even if successful, will not demonstrate the
9 invalidity of any outstanding criminal judgment against the
10 plaintiff, the action should be allowed to proceed.

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

14 Here, Plaintiff's ineffective assistance of counsel claims against Garcia, Chandler, Gui
15 and Wenzell "necessarily imply the invalidity" of his criminal proceedings and continuing
16 incarceration. *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that either
17 Defendant rendered ineffective assistance of counsel, an award of damages would "necessarily
18 imply the invalidity" of his conviction. *Id.*; *see also Strickland v. Washington*, 466 U.S. 668,
19 688 (1984) (to succeed on ineffective assistance claim petitioner must show that counsel's
20 performance fell below objective standard of reasonableness and that but for counsel's errors the
21 result of the trial would have been different); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir.
22 1992) (remedy for ineffective assistance of counsel is a conditional writ granting petitioner's
23 release unless state retries him or allows him to pursue an appeal with the assistance of counsel
24 within a reasonable time). Thus, because Plaintiff seeks damages for an allegedly
25 unconstitutional criminal proceedings in a criminal case, and because he has not alleged that his
26 conviction has already been invalidated, a § 1983 claim for damages has not yet accrued. *See*
27 *Heck*, 512 U.S. at 489-90.

28 Moreover, Plaintiff names San Diego Superior Court Judge Timothy Casserly as a
29 Defendant who appears to have presided over his criminal proceedings. To the extent Plaintiff
30 seeks damages under § 1983 against Judge Casserly for allegedly violating his constitutional
31 rights during his criminal proceedings, this Defendant is entitled to absolute judicial immunity.
32 *See Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (noting the longstanding rule that "[a] judge

1 is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed
2 by the commission of grave procedural errors.”); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th
3 Cir. 1986) (“Judges and those performing judge-like functions are absolutely immune from
4 damage liability for acts performed in their official capacities.”).

5 Thus, Plaintiff’s claims against Defendant Casserly are dismissed pursuant to 28 U.S.C.
6 § 1915(e)(2)(B)(iii) for seeking monetary relief against a Defendant who is immune from such
7 relief.

8 Finally, the Court must dismiss Plaintiff’s claims for money damages against Defendants
9 Dumanis, Barkin, and Simmons. Criminal prosecutors are absolutely immune from civil
10 damages suits premised upon acts committed within the scope of their official duties which are
11 “intimately associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424
12 U.S. 409, 430 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73 (1993); *Burns v.*
13 *Reed*, 500 U.S. 478, 487-93 (1991). A prosecutor is immune even when the prosecutor’s
14 malicious or dishonest action deprived the defendant of his or her liberty. *Ashelman*, 793 F.2d
15 at 1075. Thus, Plaintiff’s claims against Defendants Dumanis, Barkin, and Simmons are
16 dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii) for seeking monetary relief against
17 defendants who are immune from such relief.

18 Accordingly, the Court finds that Plaintiff’s entire Complaint must be dismissed sua
19 sponte for seeking monetary damages against an immune defendant and for failing to state a
20 claim upon which relief could be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).
21 *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.

22 In addition, Plaintiff states allegations arising from events which he claims occurred at
23 Sierra Conservation Camp which is located in the County of Tuolumne. Thus, Plaintiff’s Eighth
24 Amendment inadequate medical care claims should be brought in the Eastern District of
25 California. Venue may be raised by a court sua sponte where the defendant has not yet filed a
26 responsive pleading and the time for doing so has not run. *Costlow v. Weeks*, 790 F.2d 1486,
27 1488 (9th Cir. 1986). “A civil action wherein jurisdiction is not founded solely on diversity of
28 citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district

1 where any defendant resides, if all defendants reside in the same State, (2) a judicial district in
2 which a substantial part of the events or omissions giving rise to the claim occurred, or a
3 substantial part of property that is the subject of the action is situated, or (3) a judicial district
4 in which any defendant may be found, if there is no district in which the action may otherwise
5 be brought.” 28 U.S.C. § 1391(b); *Costlow*, 790 F.2d at 1488; *Decker Coal Co. v.*
6 *Commonwealth Edison Co.*, 805 F.2d 834, 842 (9th Cir. 1986). “The district court of a district
7 in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in
8 the interests of justice, transfer such case to any district in or division in which it could have
9 been brought.” 28 U.S.C. § 1406(a).

10 Here, Plaintiff alleges constitutional violations based on events which are alleged to have
11 occurred in Tuolumne County. *See* Compl. at 21-22. Therefore, venue is proper as to Plaintiff’s
12 Eighth Amendment medical care claims in the Eastern District of California, pursuant to 28
13 U.S.C. § 84(b), but not in the Southern District of California. *See* 28 U.S.C. § 1391(b); *Costlow*,
14 790 F.2d at 1488.

15 **III. CONCLUSION AND ORDER**

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

17 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
18 **GRANTED.**

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

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

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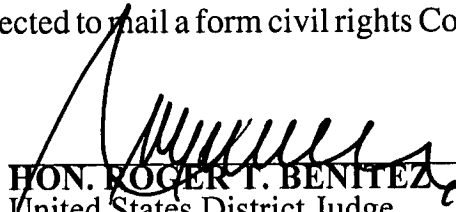
IT IS FURTHER ORDERED that:

4. Plaintiff's Complaint is **DISMISSED** without prejudice for seeking monetary damages against immune defendants and for failing to state a claim upon which relief could be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S. D.CAL. CIVLR. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

5. The Clerk of the Court is directed to mail a form civil rights Complaint to Plaintiff.

DATED: 4/14/2010



HON. ROGER T. BENITEZ
United States District Judge