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

ALLEN LEE RODRIQUEZ,  
CDCR # V-35218

Plaintiff,

vs.

RONALD BOBO, et al.,

Defendants.

Civil No. 10cv1134 JAH (AJB)

**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 California Rehabilitation Center located in Norco, 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 to 28 U.S.C. § 1915(a) [Doc. No. 2]. Plaintiff seeks “automatic immediate release,” along with monetary damages for his allegedly unconstitutional arrest and criminal conviction in 2003.

1 **I. MOTION TO PROCEED IFP**

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

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

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

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

20 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also  
21 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like  
22 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or  
23 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,  
24 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”  
25 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua  
26 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,  
27 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
28 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-

1 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.  
2 2000) (§ 1915A).

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

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

19 Where the running of the statute of limitations is apparent on the face of the complaint,  
20 dismissal for failure to state a claim is proper. See *Cervantes v. City of San Diego*, 5 F.3d 1273,  
21 1276 (9th Cir. 1993). Because section 1983 contains no specific statute of limitation, federal  
22 courts apply the forum state’s statute of limitations for personal injury actions. *Jones v. Blanas*,  
23 393 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004);  
24 *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of  
25 limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations  
26 period was extended to two years. *Id.* (citing CAL. CIV. PROC. CODE § 335.1). The two-years  
27 limitations period, however, does not apply retroactively. *Canatella v. Van de Kamp*, 486 F.3d  
28 1128, 1132-22 (9th Cir. 2007) (citing *Maldonado*, 370 F.3d at 955).

1 Unlike the length of the limitations period, however, “the accrual date of a § 1983 cause  
2 of action is a question of federal law that is not resolved by reference to state law.” *Wallace v.*  
3 *Kato*, 549 U.S. 384, 388 (2007); *Hardin v. Staub*, 490 U.S. 536, 543-44 (1989) (federal law  
4 governs when a § 1983 cause of action accrues). “Under the traditional rule of accrual ... the tort  
5 cause of action accrues, and the statute of limitation begins to run, when the wrongful act or  
6 omission results in damages.” *Wallace*, 549 U.S. at 391; *see also Maldonado*, 370 F.3d at 955  
7 (“Under federal law, a claim accrues when the plaintiff knows or has reason to know of the  
8 injury which is the basis of the action.” ).

9 Here, Plaintiff claims that he was falsely arrested and convicted of a crime in 2003. *See*  
10 *Compl.* at 1. Thus, Plaintiff would have reason to believe that his constitutional rights were  
11 violated seven years ago. *Id.*; *see also Maldonado*, 370 F.3d at 955. However, Plaintiff did not  
12 file his Complaint in this case until May 24, 2010, which exceeds California’s statute of  
13 limitation. *See CAL. CODE CIV. PROC. § 335.1; Jones*, 393 F.3d at 927.

14 Plaintiff does not allege any facts to suggest how or why California’s two-year statute  
15 of limitations might be tolled for a period of time which would make his claims timely. *See,*  
16 *e.g.*, CAL. CODE CIV. P. § 352.1 (tolling statute of limitations “for a maximum of 2 years” during  
17 a prisoner’s incarceration); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL.  
18 CODE CIV. P. § 352.1 tolls a California prisoner’s personal injury claims accruing before January  
19 1, 1995 for two years, or until January 1, 1995, whichever occurs later, unless application of the  
20 statute would result in a “manifest injustice.”). Assuming that Plaintiff has been incarcerated  
21 since 2003, pursuant to *Fink*, Plaintiff’s claims against Defendants, accruing in 2003, would be  
22 tolled for two years. California’s two-year statute of limitations would then begin to run --  
23 requiring Plaintiff to file this action against these Defendants no later than 2007.

24 Generally, federal courts also apply the forum state’s law regarding equitable tolling.  
25 *Fink*, 192 F.3d at 914; *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir. 1988). Under  
26 California law, however, a plaintiff must meet three conditions to equitably toll a statute of  
27 limitations: (1) he must have diligently pursued his claim; (2) his situation must be the product  
28 of forces beyond his control; and (3) the defendants must not be prejudiced by the application

1 of equitable tolling. *See Hull v. Central Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328,  
2 1335 (Cal. Ct. App. 1994); *Addison v. State of California*, 21 Cal.3d 313, 316-17 (Cal. 1978);  
3 *Fink*, 192 F.3d at 916. Here, however, Plaintiff has failed to plead any facts which, if proved,  
4 would support the equitable tolling of his claims. *See Cervantes v. City of San Diego*, 5 F.3d  
5 1273, 1277 (9th Cir. 1993). Thus, Plaintiff’s entire action must be dismissed as barred by the  
6 statute of limitations.

7         Additionally, Plaintiff names Ronald Bobo, the attorney appointed to represent him  
8 during his criminal proceedings, Leslie Ann Rose, the attorney appointed to represent him during  
9 the appellate process and W. Mark Kirkness, Supervising Public Defender, as Defendants.  
10 However, a person “acts under color of state law [for purposes of § 1983] only when exercising  
11 power ‘possessed by virtue of state law and made possible only because the wrongdoer is  
12 clothed with the authority of state law.’” *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981)  
13 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Attorneys appointed to represent  
14 a criminal defendant during trial, do not generally act under color of state law because  
15 representing a client “is essentially a private function ... for which state office and authority are  
16 not needed.” *Polk County*, 454 U.S. at 319; *United States v. De Gross*, 960 F.2d 1433, 1442  
17 n.12 (9th Cir. 1992). Thus, when publicly appointed counsel are performing as advocates, *i.e.*,  
18 meeting with clients, investigating possible defenses, presenting evidence at trial and arguing  
19 to the jury, they do not act under color of state law for section 1983 purposes. *See Georgia v.*  
20 *McCullum*, 505 U.S. 42, 53 (1992); *Polk County*, 454 U.S. at 320-25; *Miranda v. Clark County*,  
21 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (finding that public defender was not a state actor  
22 subject to suit under § 1983 because, so long as he performs a traditional role of an attorney for  
23 a client, “his function,” no matter how ineffective, is “to represent his client, not the interests of  
24 the state or county.”).

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

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2 Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the  
3 alleged ineffectiveness assistance of his trial and appellate counsel, his claim amounts to an  
4 attack on the validity of his underlying criminal proceedings, and as such, is not cognizable  
5 under 42 U.S.C. § 1983 unless and until he can show that conviction has already been  
6 invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850,  
7 855-56 (9th Cir. 2003) (“Absent such a showing, ‘[e]ven a prisoner who has fully exhausted  
8 available state remedies has no cause of action under § 1983....’”) (quoting *Heck*, 512 U.S. at  
9 489), *cert. denied*, 124 S. Ct. 2388 (2004). *Heck* holds that “in order to recover damages for  
10 allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions  
11 whose unlawfulness would render a conviction or sentence invalid, a section 1983 plaintiff must  
12 prove that the conviction or sentence has been reversed on direct appeal, expunged by executive  
13 order, declared invalid by a state tribunal authorized to make such determination, or called into  
14 question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 486-87.  
15 A claim challenging the legality of a conviction or sentence that has not been so invalidated is  
16 not cognizable under § 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

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

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

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

26 Here, Plaintiff’s ineffective assistance of counsel claims against Bobo, Rose and Kirkness  
27 “necessarily imply the invalidity” of his criminal proceedings and continuing incarceration.  
28 *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that Defendants Bobo, Rose and

1 Kirkness rendered ineffective assistance of counsel, an award of damages would “necessarily  
2 imply the invalidity” of his conviction. *Id.*; *see also Strickland v. Washington*, 466 U.S. 668, 688  
3 (1984) (to succeed on ineffective assistance claim petitioner must show that counsel’s  
4 performance fell below objective standard of reasonableness and that but for counsel’s errors the  
5 result of the trial would have been different); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir.  
6 1992) (remedy for ineffective assistance of counsel is a conditional writ granting petitioner’s  
7 release unless state retries him or allows him to pursue an appeal with the assistance of counsel  
8 within a reasonable time). Thus, because Plaintiff seeks damages for an allegedly  
9 unconstitutional criminal proceedings in a criminal case, and because he has not alleged that his  
10 conviction has already been invalidated, a section 1983 claim for damages has not yet accrued.  
11 *See Heck*, 512 U.S. at 489-90.

12 Moreover, Plaintiff’s names San Diego Superior Court Judge Eddie Sturgeon as a  
13 Defendant who appears to have presided over his criminal proceedings. To the extent Plaintiff  
14 seeks damages under § 1983 against Judge Sturgeon for allegedly violating his constitutional  
15 rights during his criminal proceedings, this Defendant is entitled to absolute judicial immunity.  
16 *See Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (noting the longstanding rule that “[a] judge  
17 is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed  
18 by the commission of grave procedural errors.”); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th  
19 Cir. 1986) (“Judges and those performing judge-like functions are absolutely immune from  
20 damage liability for acts performed in their official capacities.”).

21 Thus, Plaintiff’s claims against Defendant Sturgeon are dismissed pursuant to 28 U.S.C.  
22 § 1915(e)(2)(B)(iii) for seeking monetary relief against a Defendant who is immune from such  
23 relief without leave to amend.

24 Likewise, the Court must dismiss Plaintiff’s claims for money damages against Defendant  
25 Drain and Weiner. Criminal prosecutors are absolutely immune from civil damages suits  
26 premised upon acts committed within the scope of their official duties which are “intimately  
27 associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409,  
28 430 (1976); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73 (1993); *Burns v. Reed*, 500

1 U.S. 478, 487-93 (1991). A prosecutor is immune even when the prosecutor’s malicious or  
2 dishonest action deprived the defendant of his or her liberty. *Ashelman*, 793 F.2d at 1075.  
3 Thus, Plaintiff’s claim against Defendants Drain and Weiner are dismissed pursuant to 28 U.S.C.  
4 § 1915(e)(2)(B)(iii) for seeking monetary relief against defendants who are immune from such  
5 relief without leave to amend.

6 Moreover, to the extent that Plaintiff seeks monetary damages from the Sheriff Deputy  
7 Defendants who were witnesses at his trial for allegedly committing perjury, these Defendants  
8 are also absolutely immune. *See* 28 U.S.C. § 1915(e)(2)(b)(iii); § 1915A(b)(2). “Witnesses,  
9 including police witnesses, are immune from liability for their testimony in earlier proceedings  
10 even if they committed perjury.” *Paine v. City of Lompoc*, 965 F.3d 975, 981 (9th Cir. 2001)  
11 (citing *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983)). “Witness immunity also extends to  
12 conspiracies to commit perjury.” *Id.* (citing *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir.  
13 2000). *See also Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (witnesses are  
14 absolutely immune from suits for damages under 42 U.S.C. § 1983 for testimony given at trial,  
15 or for testimony given during adversarial pretrial proceedings); *Demoran v. Witt*, 781 F.2d 155,  
16 157-58 (9th Cir. 1986).

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

### 22 **III. CONCLUSION AND ORDER**

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

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

26 2. The Secretary of California Department of Corrections and Rehabilitation, or his  
27 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee  
28 owed in this case by collecting monthly payments from the account in an amount equal to twenty

1 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court  
2 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).  
3 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
4 ASSIGNED TO THIS ACTION.

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

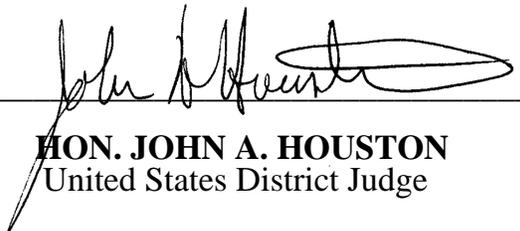
8 **IT IS FURTHER ORDERED** that:

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

18 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief  
19 may be granted, it may be dismissed without further leave to amend and may hereafter be  
20 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79  
21 (9th Cir. 1996).

22 5. The Clerk of the Court is directed to mail a form civil rights Complaint to Plaintiff.  
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24  
25 DATED: June 25, 2010

  
26 **HON. JOHN A. HOUSTON**  
27 United States District Judge  
28