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

JOHN LELAND COMBS,  
Inmate Booking No. 11109312,  
  
Plaintiff,  
  
vs.  
  
JAMES PASTO; STAN JONES;  
SAN DIEGO PUBLIC DEFENDER'S  
OFFICE; CITY OF SAN DIEGO,  
  
Defendants.

Civil No. 11cv1412 MMA (WVG)  
  
**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE AND GARNISHING  
\$350.00 BALANCE FROM INMATE'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)**

John Leland Combs ("Plaintiff"), an inmate currently incarcerated at the San Diego Central Jail located in San Diego, 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) [ECF No. 2].

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

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 prepay the entire fee only  
5 if that party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*  
6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners granted leave to proceed IFP however,  
7 remain obligated to pay the entire fee in installments, regardless of whether their action is  
8 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847  
9 (9th Cir. 2002).

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

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

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

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

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

20 As currently pled, Plaintiff’s Complaint fails to state a cognizable claim under 42 U.S.C.  
21 § 1983. Section 1983 imposes two essential proof requirements upon a claimant: (1) that a  
22 person acting under color of state law committed the conduct at issue, and (2) that the conduct  
23 deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws  
24 of the United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981),  
25 *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v.*  
26 *Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

27 Plaintiff names as Defendants James Pasto and Stan Jones, attorneys appointed to  
28 represent him during his criminal proceedings. However, a person “acts under color of state law

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

15 Accordingly, Plaintiff’s claims against Pasto and Jones must be dismissed for failing to  
16 state a claim upon which section 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii)  
17 & 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

18 Moreover, to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 based on the  
19 alleged ineffectiveness of his trial counsel, his claim amounts to an attack on the validity of his  
20 underlying criminal proceedings, and as such, is not cognizable under 42 U.S.C. § 1983 unless  
21 and until he can show that the conviction has already been invalidated. *Heck v. Humphrey*, 512  
22 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334 F.3d 850, 855-56 (9th Cir. 2003) (“Absent  
23 such a showing, [e]ven a prisoner who has fully exhausted available state remedies has no cause  
24 of action under § 1983 . . . .”) (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388  
25 (2004).

26 *Heck* holds that “in order to recover damages for allegedly unconstitutional conviction  
27 or imprisonment, or for other harm caused by actions whose unlawfulness would render a  
28 conviction or sentence invalid, a section 1983 plaintiff must prove that the conviction or

1 sentence has been reversed on direct appeal, expunged by executive order, declared invalid by  
2 a state tribunal authorized to make such determination, or called into question by a federal  
3 court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. A claim challenging the  
4 legality of a conviction or sentence that has not been so invalidated is not cognizable under §  
5 1983. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643 (1997).

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

7 when a state prisoner seeks damages in a section 1983 suit, the  
8 district court must consider *whether a judgment in favor of the*  
9 *plaintiff would necessarily imply the invalidity of his conviction or*  
10 *sentence*; if it would, the complaint must be dismissed unless the  
11 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.

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

15 Here, Plaintiff's ineffective assistance of counsel claims against Pasto and Jones  
16 "necessarily imply the invalidity" of his criminal proceedings and continuing incarceration.  
17 *Heck*, 512 U.S. at 487. Were Plaintiff to succeed in showing that Pasto and Jones rendered  
18 ineffective assistance of counsel, an award of damages would "necessarily imply the invalidity"  
19 of his conviction. *Id.*; *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (to succeed  
20 on ineffective assistance claim petitioner must show that counsel's performance fell below  
21 objective standard of reasonableness and that but for counsel's errors the result of the trial would  
22 have been different); *Lozada v. Deeds*, 964 F.2d 956, 958-59 (9th Cir. 1992) (remedy for  
23 ineffective assistance of counsel is a conditional writ granting petitioner's release unless state  
24 retries him or allows him to pursue an appeal with the assistance of counsel within a reasonable  
25 time). Thus, because Plaintiff seeks damages for an allegedly unconstitutional criminal  
26 proceedings in a criminal case, and because he has not alleged that his conviction has already  
27 been invalidated, a section 1983 claim for damages has not yet accrued. *See Heck*, 512 U.S. at  
28 489-90.

1 Plaintiff also names the San Diego Public Defender’s Office as a Defendant in this matter.  
2 An agency or department of a municipal entity is not a proper defendant under § 1983. *Vance*  
3 *v. County of Santa Clara*, 928 F.Supp. 993, 996 (N.D. Cal. 1996). Rather, the county or city  
4 itself is the proper defendant. *See Id.* “[A] municipality cannot be held liable solely because it  
5 employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on  
6 a respondeat superior theory.” *Monell v. Department of Social Services*, 436 U.S. 658, 691  
7 (1978). A municipality may be liable under § 1983 for monetary, declaratory, or injunctive  
8 relief where the constitutional deprivation was caused by the implementation or execution of “a  
9 policy statement, ordinance, regulation, or decision officially adopted and promulgated by that  
10 body’s officers.” *Monell*, 436 U.S. at 690; *Board of the County Commissioners v. Brown*, 520  
11 U.S. 397, 117 S. Ct. 1382, 1388 (1997); *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995).

12 To establish municipal liability, plaintiff must show: (1) he was deprived of a  
13 constitutional right; (2) the city had a policy; (3) the policy amounted to deliberate indifference  
14 to plaintiff’s constitutional right; and (4) the policy was the “moving force behind the  
15 constitutional violation.” *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *see*  
16 *Board of the County Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct. at 1388; *Trevino v.*  
17 *Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Thus, in order to state a § 1983 claim against the City  
18 of San Diego, Plaintiff must allege facts showing that his injury was caused by individual  
19 officers whose conduct conformed to an official city policy, custom or practice. *See Karim-*  
20 *Panahi*, 839 F.2d at 624.

21 Therefore, the Court finds that Plaintiff has not stated a § 1983 claim against the City of  
22 San Diego because he has failed to allege that any individual police officer’s conduct conformed  
23 to an official city policy, custom or practice.

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

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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) [ECF 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 Watch  
13 Commander, San Diego Central Jail, 1173 Front Street, San Diego, California, 92101.

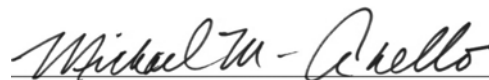
14 **IT IS FURTHER ORDERED** that:

15 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.  
16 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave  
17 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all  
18 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in  
19 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L.R. 15.1. Defendants  
20 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been  
21 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

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

23 **IT IS SO ORDERED.**

24 DATED: July 15, 2011



25 Hon. Michael M. Anello  
26 United States District Judge