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

DAVID B. TURNER, JR.,  
Inmate Booking No. 13719099

Plaintiff,

vs.

COUNTY OF SAN DIEGO; BLAIR  
SOPER; SAN DIEGO PROBATION;  
PUBLIC DEFENDERS,

Defendants.

Civil 13cv2288 LAB (RBB)  
No.

**ORDER:**

**(1) GRANTING PLAINTIFF’S  
MOTION TO PROCEED *IN  
FORMA PAUPERIS* AND  
GARNISHING BALANCE FROM  
INMATE’S TRUST ACCOUNT  
PURSUANT TO 28 U.S.C.  
§ 1915(a); and**

**(2) SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2) &  
1915A(b)**

Plaintiff, David B. Turner, Jr., currently housed at the George Bailey Detention Facility, has filed a civil rights action pursuant to 42 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. 3].

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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*  
4 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the  
5 entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C.  
6 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However,  
7 prisoners granted leave to proceed IFP remain obligated to pay the entire fee in  
8 installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C.  
9 § 1915(b)(1) & (2).

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 shows that he has no available funds from which to pay filing fees at  
14 this time. *See* 28 U.S.C. § 1915(b)(4). Therefore, the Court **GRANTS** Plaintiff’s  
15 Motion to Proceed IFP [ECF No. 3] and assesses no initial partial filing fee per 28 U.S.C.  
16 § 1915(b)(1). However, the entire \$350 balance of the filing fee mandated shall be  
17 collected and forwarded to the Clerk of the Court pursuant to the installment payment  
18 provisions set forth in 28 U.S.C. § 1915(b)(1).

19 **II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) and § 1915A**

20 **A. Standard**

21 The PLRA also obligates the Court to review complaints filed by all persons  
22 proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any  
23 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of  
24 criminal law or the terms or conditions of parole, probation, pretrial release, or  
25 diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. §§  
26 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss  
27 any IFP or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails  
28 to state a claim, or which seeks damages from defendants who are immune. *See* 28

1 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir.  
2 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§  
3 1915A).

4 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua  
5 sponte dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130.  
6 An action is frivolous if it lacks an arguable basis in either law or fact. *Neitzke v.*  
7 *Williams*, 490 U.S. 319, 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now  
8 mandate that the court reviewing an IFP or prisoner’s suit make and rule on its own  
9 motion to dismiss before effecting service of the Complaint by the U.S. Marshal pursuant  
10 to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires  
11 a district court to dismiss an in forma pauperis complaint that fails to state a claim.”); *see*  
12 *also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C.  
13 § 1915A).

14 “[W]hen determining whether a complaint states a claim, a court must accept as  
15 true all allegations of material fact and must construe those facts in the light most  
16 favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting  
17 that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).  
18 In addition, the Court’s duty to liberally construe a pro se’s pleadings, *see Karim-Panahi*  
19 *v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important  
20 in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

21 Plaintiff seeks monetary damages against Blair Soper, the Deputy Public Defender  
22 appointed to represent Plaintiff in his criminal proceedings. However, a person “acts  
23 under color of state law [for purposes of § 1983] only when exercising power ‘possessed  
24 by virtue of state law and made possible only because the wrongdoer is clothed with the  
25 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  
27 a criminal defendant during trial, do not generally act under color of state law because  
28 representing a client “is essentially a private function ... for which state office and

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

11 Accordingly, Plaintiff’s claims against Defendant Soper must be dismissed for  
12 failing to state a claim upon which section 1983 relief may be granted. *See* 28 U.S.C.  
13 § 1915(e)(2)(B)(ii) & 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

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

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

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

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

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

Plaintiff also names as Defendants the "San Diego County Probation County  
Program" and the "County of San Diego Public Defenders." (Compl. at 1-2.) However,

1 an agency or department of a municipal entity is not a proper defendant under § 1983.  
2 *Vance v. County of Santa Clara*, 928 F.Supp. 993, 996 (N.D. Cal. 1996). Rather, the  
3 county or city itself is the proper defendant. *See Id.* “[A] municipality cannot be held  
4 liable solely because it employs a tortfeasor – or, in other words, a municipality cannot  
5 be held liable under § 1983 on a respondeat superior theory.” *Monell v. Department of*  
6 *Social Services*, 436 U.S. 658, 691 (1978). A municipality may be liable under § 1983  
7 for monetary, declaratory, or injunctive relief where the constitutional deprivation was  
8 caused by the implementation or execution of “a policy statement, ordinance, regulation,  
9 or decision officially adopted and promulgated by that body’s officers.” *Monell*, 436  
10 U.S. at 690; *Board of the County Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct.  
11 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  
14 indifference to plaintiff’s constitutional right; and (4) the policy was the “moving force  
15 behind the constitutional violation.” *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835  
16 (9th Cir. 1996); *see Board of the County Commissioners v. Brown*, 520 U.S. 397, 117 S.  
17 Ct. at 1388; *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Thus, in order to state  
18 a § 1983 claim against the City or County of San Diego, Plaintiff must allege facts  
19 showing that his injury was caused by individual officers whose conduct conformed to  
20 an official city policy, custom or practice. *See Karim-Panahi*, 839 F.2d at 624.

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

24 Accordingly, the Court must DISMISS Plaintiff’s Complaint for all the reasons  
25 set forth above but will provide Plaintiff with the opportunity to amend his Complaint  
26 to correct the deficiencies of pleading identified by the Court.

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1 **III. CONCLUSION AND ORDER**

2 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

3 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF  
4 No. 3] is **GRANTED**.

5 2. The Watch Commander, or his designee, shall collect from Plaintiff's prison  
6 trust account the \$350 balance of the filing fee owed in this case by collecting monthly  
7 payments from the account in an amount equal to twenty percent (20%) of the preceding  
8 month's income and forward payments to the Clerk of the Court each time the amount  
9 in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL  
10 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, George Bailey Detention Facility, 446 Alta Road, Suite 5300, San Diego,  
14 California 92158.

15 **IT IS FURTHER ORDERED** that:

16 4. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state  
17 a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and  
18 § 1915A(b). However, Plaintiff is further **GRANTED** forty five (45) days leave from  
19 the date this Order is filed in which to file a First Amended Complaint which cures all  
20 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be  
21 complete in itself without reference to his previous pleading. *See* S.D. CAL. CIVLR 15.1.  
22 Defendants not named and all claims not re-alleged in the Amended Complaint will be  
23 considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

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5. The Clerk of Court is directed to mail a Court approved form civil rights complaint to Plaintiff.

**IT IS SO ORDERED.**

DATED: November 8, 2013

  
**HONORABLE LARRY ALAN BURNS**  
United States District Judge