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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 ISRAEL SOTO,  
11 Reg. No. 46410-298,

Plaintiff,

12 vs.

13 PEOPLE OF THE STATE OF  
14 CALIFORNIA,

15 Defendant.  
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Case No.: 3:17-cv-0965-AJB-MDD

**ORDER:**

**1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
[ECF No. 2]**

**AND**

**2) DISMISSING CIVIL ACTION  
FOR FAILING TO STATE A  
CLAIM PURSUANT TO  
28 U.S.C. § 1915(e)(2)(B)(ii)  
AND § 1915A(b)(1)**

21 ISRAEL SOTO (“Plaintiff”), a federal prisoner currently incarcerated at GEO  
22 Western Region Detention Facility (“WRDF”) in San Diego, proceeding pro se, and  
23 awaiting sentencing after entering a plea agreement in *United States v. Soto*, S.D. Cal.  
24 Criminal Case No. 14-cr-00216-MMA, has filed a civil rights Complaint pursuant to 42  
25 U.S.C. § 1983. (ECF No. 1.)<sup>1</sup>  
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28 <sup>1</sup> Plaintiff has attached a letter from his appointed counsel in four criminal cases filed against him in the Southern District of California. See ECF No. 2 at 4. They are *United States v. Nguyen, et al.*, S.D. Cal.

1 Plaintiff has not prepaid the filing fee required by 28 U.S.C. § 1914(a) to  
2 commence a civil action; instead, he has filed a Motion to Proceed In Forma Pauperis  
3 (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

4 **I. Motion to Proceed IFP**

5 All parties instituting any civil action, suit or proceeding in a district court of the  
6 United States, except an application for writ of habeas corpus, must pay a filing fee of  
7 \$400. *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
8 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
9 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
11 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
12 *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185  
13 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. *See* 28  
14 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).  
15 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a “certified  
16 copy of the trust fund account statement (or institutional equivalent) for ... the 6-month  
17 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
18 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account  
19 statement, the Court assesses an initial payment of 20% of (a) the average monthly  
20 deposits in the account for the past six months, or (b) the average monthly balance in the  
21 account for the past six months, whichever is greater, unless the prisoner has no assets. 28

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Crim. Case No. 14cr00216-MMA; *United States v. Miranda-Verdugo, et al.*, S.D. Cal. Crim. Case No. 14cr00219-MMA; *United States v. Nguyen, et al.*, S.D. Cal. Crim. Case No. 14cr00221-MMA; and *United States v. Soto, et al.*, 14cr00224-MMA. Plaintiff entered a guilty plea in 14cr00216 on November 3, 2016 (ECF No. 571), and awaits a sentencing hearing before Judge Anello currently scheduled for August 7, 2017 (ECF No. 605). *See Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (court “may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.”) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)).

1 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the  
2 prisoner then collects subsequent payments, assessed at 20% of the preceding month's  
3 income, in any month in which his account exceeds \$10, and forwards those payments to  
4 the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct.  
5 at 629.

6 In support of his Motion to Proceed IFP, Plaintiff has submitted a copy of his  
7 "Resident Account Summary" from WRDF, together with a prison certificate completed  
8 by a correctional counselor attesting to his trust account activity. *See* ECF No. 3 at 1, 3-4;  
9 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. These  
10 statements show that Plaintiff had an average monthly balance of \$1,200, and average  
11 monthly deposits of \$30 to his account over the 6-month period immediately preceding  
12 the filing of his Complaint, as well as an available balance of \$1,322.57 in his account at  
13 the time he filed it. *See* ECF No. 3 at 1, 3.

14 Based on this financial information, the Court GRANTS Plaintiff's Motion  
15 to Proceed IFP (ECF No. 2), and assesses his initial partial filing fee to be \$240 pursuant  
16 to 28 U.S.C. § 1915(b)(1). However, the Court will direct the Warden of the GEO  
17 WRDF, or his designee, to collect this initial fee only if sufficient funds are available in  
18 Plaintiff's account at the time this Order is executed. *See* 28 U.S.C. § 1915(b)(4)  
19 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action  
20 or appealing a civil action or criminal judgment for the reason that the prisoner has no  
21 assets and no means by which to pay the initial partial filing fee."); *Bruce*, 136 S. Ct. at  
22 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"  
23 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to  
24 the lack of funds available to him when payment is ordered."). The remaining balance of  
25 the \$350 total fee owed in this case must be collected and forwarded to the Clerk of the  
26 Court pursuant to 28 U.S.C. § 1915(b)(1).

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## 1 **II. Screening Pursuant to 28 U.S.C. § 1915(e)(2)(B) & 1915A**

### 2 A. Standard of Review

3 Because Plaintiff is a prisoner and is proceeding IFP, his complaint requires a pre-  
4 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
5 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of  
6 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
7 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
8 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
9 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
10 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
11 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
12 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

13 “The standard for determining whether a plaintiff has failed to state a claim upon  
14 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
15 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
16 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
17 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
18 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
19 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,  
20 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,  
21 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.  
22 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of  
23 a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556  
24 U.S. at 678. “Determining whether a complaint states a plausible claim for relief [is] ... a  
25 context-specific task that requires the reviewing court to draw on its judicial experience  
26 and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned, the  
27 defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility  
28 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

1           B.     Plaintiff's Allegations

2           Plaintiff claims that the “People of California” violated his “rights for a timely  
3 appeal” of a judicial termination of his parental rights while he was in custody, and facing  
4 criminal charges in San Diego Superior Court’s East County before Judge Patricia  
5 Cookson in Case No. SCE332422 on July 9, 2015. Plaintiff contends he was represented  
6 by a public defender at the time, and he believed his criminal attorney would file an  
7 appeal of the custody termination on his behalf. *See* ECF No. 1 at 1, 3-4. “But to [his]  
8 disappointment,” at some later time, Plaintiff “received a letter informing [him] that [his]  
9 time to file [an appeal] has passed.” *Id.* at 4.

10           C.     42 U.S.C. § 1983

11           To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
12 elements: (1) that a right secured by the Constitution or laws of the United States was  
13 violated, and (2) that the alleged violation was committed by a person acting under the  
14 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*, 789 F.3d 1030,  
15 1035-36 (9th Cir. 2015).

16           D.     Discussion

17           Plaintiff’s Complaint requires sua sponte dismissal because he has failed to state a  
18 claim upon which § 1983 relief can be granted. *See Lopez*, 203 F.3d at 1126-27; *Rhodes*,  
19 621 F.3d at 1004. He names the “People of the State of California” as the sole Defendant.  
20 *See* ECF No. 1 at 1. Plaintiff may not sustain an action against the State, however; nor  
21 may he sue the California “Department of Family Services,” whom he claims took  
22 custody of his minor children after his parental rights were terminated. *Id.* at 3.

23           The Eleventh Amendment erects a general bar against federal lawsuits brought  
24 against the State itself. *Wolfson v. Brammer*, 616 F.3d 1045, 1065-66 (9th Cir. 2010)  
25 (citation and quotation marks omitted). And while “[t]he Eleventh Amendment does not  
26 bar suits against a state *official* for prospective relief,” *Wolfson*, 616 F.3d at 1065-66  
27 (emphasis added), suits against the state *or its agencies* are barred absolutely, regardless  
28 of the form of relief sought, *e.g.*, *Pennhurst State School & Hosp. v. Halderman*, 465

1 U.S. 89, 100 (1984); *Buckwalter v. Nevada Bd. of Medical Examiners*, 678 F.3d 737, 740  
2 n.1 (9th Cir. 2012); *see also Woods v. Dep’t of Child & Family Servs.*, No. CV-14-94-  
3 BMM, 2015 WL 3657609, at \*2 (D. Mont. June 12, 2015) (finding the State of  
4 Montana’s Department of Child and Family Services was entitled to Eleventh  
5 Amendment immunity and was not a “person” subject to suit under 42 U.S.C. § 1983)  
6 (citing *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997); *Wolfe v.*  
7 *Strankman*, 392 F.3d 358, 364 (9th Cir. 2004)).

8 For these reasons, the Court dismisses Plaintiff’s Complaint for failing to state a  
9 claim upon which § 1983 relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)  
10 and § 1915A(b)(1).

11 E. Leave to Amend

12 Because Plaintiff is proceeding pro se, the Court would normally grant him leave  
13 to amend. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th  
14 Cir. 2011) (setting forth standard of review and explaining that leave to amend should be  
15 given unless amendment would be futile); FED R. CIV. P. 15(a); *Lopez*, 203 F.3d at 1127  
16 (leave to amend should be granted unless the district court “determines that the pleading  
17 could not possibly be cured by the allegation of other facts.”)

18 However, the Court finds that with respect to the State, amendment in this case  
19 would be futile. *See Yakama Indian Nation v. State of Wash. Dep’t of Revenue*, 176 F.3d  
20 1241, 1246 (9th Cir. 1999); *Reed v. City of San Diego*, No. 06-CV-2724-JM (WMC),  
21 2007 WL 951302, at \*2 (S.D. Cal. Mar. 23, 2007) (dismissing with prejudice § 1983  
22 claim against the State of California and finding amendment futile since “[e]ven if  
23 Plaintiff were to sue the California Department of Justice, she could not prevail as  
24 Eleventh Amendment immunity extends to state agencies.”).

25 And with respect to Plaintiff’s public defender, whom he does *not* name as a party,  
26 but to whom Plaintiff attributes his lost opportunity to appeal, *see* ECF No. 1 at 3-4,  
27 amendment is also futile because no “allegation of other facts” could support a § 1983  
28 claim against him. *Lopez*, 203 F.3d at 1127. “A public defender does not act under color

1 of state law when performing a lawyer's traditional functions as counsel to a defendant in  
2 a criminal proceeding," and therefore is not subject to suit under § 1983. *See Polk Cnty.*  
3 *v. Dodson*, 454 U.S. 312, 325 (1981); *Rivera v. Cnty. of Los Angeles*, 745 F.3d 384, 392  
4 n.3 (9th Cir. 2014).

### 5 **III. Conclusion and Orders**

6 For the reasons discussed, the Court:


7 1) **GRANTS** Plaintiff's Motion to Proceed In Forma Pauperis (ECF No. 2).  
8 2) **ORDERS** the Warden of GEO Western Region Detention Facility, or his  
9 designee, to collect from Plaintiff's trust account the \$240 initial filing fee assessed, if  
10 those funds are available at the time this Order is executed, and forward whatever balance  
11 remains of the full \$350 owed in monthly payments in an amount equal to twenty percent  
12 (20%) of the preceding month's income to the Clerk of the Court each time the amount in  
13 Plaintiff's account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS  
14 MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO  
15 THIS ACTION.

16 3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Warden,  
17 GEO Western Region Detention Facility, 200 West C Street, San Diego, California,  
18 92101.

19 4) **DISMISSES** this civil action without leave to amend for failure to state a  
20 claim upon which § 1983 relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)  
21 and § 1915A(b)(1), **CERTIFIES** that an IFP appeal would not be taken in good faith  
22 pursuant to 28 U.S.C. § 1915(a)(3), and **DIRECTS** the Clerk of Court to enter a final  
23 judgment of dismissal and close the file.

24 **IT IS SO ORDERED.**

25 Dated: August 2, 2017

26   
27 Hon. Anthony J. Battaglia  
28 United States District Judge