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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CESAR ROJAS,

12 Plaintiff,

13 v.

14 BONNIE DUMANIS; SOUTH BAY
15 SUPERIOR COURT; DISTRICT
16 ATTORNEY,

17 Defendant.

Case No.: 3:17-cv-1432-CAB-MDD

**ORDER: (1) GRANTING MOTION
TO PROCEED IN FORMA
PAUPERIS PURSUANT TO 28 U.S.C.
§ 1915(a); AND(2) SUA SPONTE
DISMISSING CIVIL ACTION
PURSUANT TO 28 U.S.C. §§
1915(e)(2) & 1915A(b)**

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19 Cesar Armando Rojas (“Plaintiff”), a state inmate currently incarcerated at Mule
20 Creek State Prison, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C.
21 § 1983. (ECF No. 1.) Plaintiff has not paid the civil filing fees required by 28 U.S.C.
22 § 1914(a) to commence a civil action; instead he has filed a Motion to Proceed *In Forma*
23 *Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.)

24 **I. Motion to Proceed IFP**

25 All parties instituting any civil action, suit or proceeding in a district court of the
26 United States must pay a filing fee. *See* 28 U.S.C. § 1914(a). An action may proceed
27 despite a plaintiff’s failure to prepay the entire fee only if he is granted leave to proceed
28 IFP pursuant to 28 U.S.C. § 1915(a). *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir.

1 1999). However, if the plaintiff is a prisoner, as Plaintiff is here, even if he is granted
2 leave to proceed IFP, he remains obligated to pay the full entire fee in “increments,” *see*
3 *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless of whether his
4 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

5 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
6 (“PLRA”), prisoners seeking leave to proceed IFP must submit a “certified copy of the
7 trust fund account statement (or institutional equivalent) for the . . . six-month period
8 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v.*
9 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement,
10 the Court assesses an initial payment of 20 percent of (a) the average monthly deposits in
11 the account for the past six months, or (b) the average monthly balance in the account for
12 the past six months, whichever is greater, unless the prisoner has no assets. *See* 28
13 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the
14 prisoner then collects subsequent payments, assessed at 20 percent of the preceding
15 month’s income, in any month in which the prisoner’s account exceeds \$10, and forwards
16 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
17 § 1915(b)(2).

18 In support of his IFP Motion, Plaintiff has submitted a certified copy of his inmate
19 trust account statement and activity for the six-month period prior to the filing of his
20 Complaint as required by 28 U.S.C. § 1915(a)(2) and S.D. Cal. CivLR 3.2. The
21 statement shows Plaintiff has \$0.02 in available funds to his credit at the time of filing.
22 The Court GRANTS Plaintiff’s Motion to Proceed IFP. Because Plaintiff has insufficient
23 funds to pay a partial filing fee, the Court assesses no initial partial filing fee per 28
24 U.S.C. § 1915(b)(1). *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a
25 prisoner be prohibited from bringing a civil action or appealing a civil action or criminal
26 judgment for the reason that the prisoner has no assets and no means by which to pay the
27 initial partial filing fee.”); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding
28 that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s

1 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him
2 when payment is ordered.”) However, the entire \$350 balance of the filing fees due for
3 this case must be collected by the CDCR and forwarded to the Clerk of the Court
4 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

5 **II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

6 “The Court shall review, before docketing, if feasible or, in any event, as soon as
7 practicable after docketing,” complaints filed by all persons proceeding IFP, and by
8 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,
9 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
10 conditions of parole, probation, pretrial release, or diversionary program.” *See* 28 U.S.C.
11 §§ 1915(e)(2) and 1915A(b). The Court must sua sponte dismiss complaints, or any
12 portions thereof, which are frivolous, malicious, fail to state a claim, or which seek
13 damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A;
14 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc).

15 “Section 1983 creates a private right of action against individuals who, acting
16 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*
17 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
18 substantive rights, but merely provides a method for vindicating federal rights elsewhere
19 conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks
20 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)
21 deprivation of a right secured by the Constitution and laws of the United States, and (2)
22 that the deprivation was committed by a person acting under color of state law.” *Tsao v.*
23 *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

24 **A. Plaintiff’s allegations**

25 Plaintiff’s claims are far from clear but he appears to allege that he was engaged in
26 criminal proceedings in San Diego Superior Court from 2013 to 2014. (*See* Compl. at 3.)
27 Plaintiff claims Bonnie Dumanis, the District Attorney for the County of San Diego,
28 caused his bail to be increased and committed perjury. (*Id.* at 2-3.) It is not entirely

1 clear, but it appears that Plaintiff is claiming that he is serving a longer sentence
2 following his conviction because he claims Defendant Dumanis lied about how many
3 prior criminal convictions he has on his record. (*Id.* at 2-4.)

4 Plaintiff also indicates that he is “suing public defender” because he claims the
5 Deputy Public Defender assigned to his criminal matter “lied” to him and as a result,
6 Plaintiff must serve a longer prison sentence. (*Id.* at 4.) Plaintiff seeks monetary
7 damages and “my freedom in life working, eating, having fun.” (*Id.* at 7.)

8 **B. Heck v. Humphrey**

9 As an initial matter the Court finds that Plaintiff’s claims for monetary damages
10 are barred by the doctrine announced in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994),
11 where the Supreme Court stated:

12 “We hold that in order to recover damages for allegedly unconstitutional
13 conviction or imprisonment, or for other harm caused by actions whose
14 unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must
15 prove that the conviction or sentence has been reversed on direct appeal, expunged
16 by executive order, declared invalid by a state tribunal authorized to make such
17 determination, or called into question by a federal court’s issuance of a writ of
18 habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to
19 a conviction or sentence that has not been so invalidated is not cognizable under
20 § 1983.”

18 *Id.* at 486-87.

19 “Suits challenging the validity of the prisoner’s continued incarceration lie within
20 ‘the heart of habeas corpus,’ whereas ‘a § 1983 action is a proper remedy for a state
21 prisoner who is making a constitutional challenge to the conditions of his prison life, but
22 not to the fact or length of his custody.’” *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir.
23 2003), quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-99 (1973) (holding that a writ of
24 habeas corpus is “explicitly and historically designed” to provide a state prisoner with the
25 “exclusive” means to “attack the validity of his confinement” in federal court).

26 Because Plaintiff seeks relief based on a conviction arising from the alleged
27 perjury, his claims amount to an attack on the validity of his underlying criminal
28

1 conviction, and are not addressable under § 1983, unless his conviction has already been
2 invalidated. *Heck*, 512 U.S. at 486-87; *Ramirez*, 334 F.3d at 855-56 (“Absent such a
3 showing, ‘[e]ven a prisoner who has fully exhausted available state remedies has no
4 cause of action under § 1983’”), quoting *Heck*, 512 U.S. at 489. Plaintiff alleges the
5 District Attorney and his Deputy Public Defender committed perjury which resulted in a
6 longer prison sentence. (See Compl. at 3-5.) Such claims “necessarily imply the
7 invalidity” of his criminal conviction and continued incarceration. *Heck*, 512 U.S. at 487.
8 In other words, were Plaintiff to succeed, an award of damages would “necessarily imply
9 the invalidity” of his conviction and/or sentence. *Id.*, 512 U.S. at 487; *see also Guerrero*
10 *v. Gates*, 442 F.3d 697, 701 (9th Cir. 2006) (finding § 1983 action stemming from
11 allegations of wrongful arrest, malicious prosecution, and a general conspiracy of “bad
12 behavior” among officials in connection with the plaintiff’s arrest, prosecution, and
13 incarceration barred by Heck).

14 C. State Action

15 In addition, to state a claim under 42 U.S.C. § 1983 against his defense counsel,
16 Plaintiff must also allege that his defense counsel acted “under color of state law” to
17 deprive him of a right secured by the Constitution or laws of the United States. *West v.*
18 *Atkins*, 487 U.S. 42, 48 (1988). A person “acts under color of state law [for purposes of
19 § 1983] only when exercising power ‘possessed by virtue of state law and made possible
20 only because the wrongdoer is clothed with the authority of state law.’” *Polk County v.*
21 *Dodson*, 454 U.S. 312, 317-18 (1981), quoting *United States v. Classic*, 313 U.S. 299,
22 326 (1941). Attorneys who represent criminal defendants generally do not act under
23 color of state law because representing a client “is essentially a private function . . . for
24 which state office and authority are not needed.” *Dodson*, 454 U.S. at 319; *United States*
25 *v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992). When attorneys perform as
26 advocates, i.e., meet with clients, investigate possible defenses, present evidence at trial,
27 or make arguments to a judge or jury, they do not act under color of state law for section
28 1983 purposes. *See Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *Dodson*, 454 U.S. at

1 320-25; *Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (finding
2 that public defender was not a state actor subject to suit under § 1983 because, so long as
3 she performs a traditional role of an attorney for a client, “h[er] function,” no matter how
4 ineffective, is “to represent h[er] client, not the interests of the state or county.”)

5 **D. Judicial and Prosecutorial Immunity**

6 Finally, to the extent Plaintiff seeks damages against an unnamed San Diego
7 Superior Court Judge or Defendant Dumanis for either presiding over his criminal
8 proceedings or prosecuting his criminal matter, his claims are legally frivolous, for
9 “[j]udges are absolutely immune from damage liability for acts performed in their official
10 capacities.” *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). As a prosecutor,
11 Bonnie Dumanis is likewise entitled to absolute prosecutorial immunity. *Id.* at 1076
12 (“Where a prosecutor acts as an advocate ‘in initiating a prosecution and in presenting the
13 state’s case,’ absolute immunity applies.” (quoting *Imbler v. Pachtman*, 424 U.S. 409,
14 431 (1976)); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 912 (9th Cir. 2012)
15 (“Prosecutors performing their official prosecutorial functions are entitled to absolute
16 immunity against constitutional torts.”).

17 **E. Conclusion**

18 Thus, for all these reasons, the Court finds that Plaintiff’s Complaint must be
19 dismissed sua sponte because it fails to state a claim and for seeking monetary damages
20 against immune defendants. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez*, 203
21 F.3d at 1126-27. Because Plaintiff is proceeding without counsel, the Court has provided
22 him “notice of the deficiencies in his complaint,” and will grant him an opportunity to
23 amend his Complaint. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012), *citing*
24 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

25 **III. Conclusion and Orders**

26 Good cause appearing, the Court:

27 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
28 (ECF No. 2).

1 § 1983” for his use in amending.

2 IT IS SO ORDERED.

3 Dated: August 14, 2017



Hon. Cathy Ann Bencivengo
United States District Judge

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