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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DIEGO RIVERA VALENCIA,
12 BOP #36322-298,

13 Plaintiff,

14 vs.

15 LUIS CASTRO; CASTRO CASTRO
16 AND CASTRO TRUCK PARKING AND
17 TRUCKING PROPERTYS,

18 Defendants.
19
20

Case No.: 3:18-CV-1843 JLS (BGS)

**ORDER (1) GRANTING MOTION
TO PROCEED IN FORMA
PAUPERIS, AND (2) DISMISSING
CIVIL ACTION FOR FAILING TO
STATE A CLAIM AND FOR
SEEKING DAMAGES FROM
DEFENDANTS WHO ARE
ABSOLUTELY IMMUNE
PURSUANT TO 28 U.S.C. §
1915(e)(2)(B)**

(ECF No. 7)

21 On July 26, 2018, Plaintiff Diego Rivera Valencia, a federal prisoner incarcerated at
22 Federal Correctional Institution (“FCI”) Terminal Island, in San Pedro, California, and
23 proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 in the Central
24 District of California. *See* Compl., ECF No. 1.

25 **I. PROCEDURAL HISTORY**

26 On August 3, 2018, United States Magistrate Judge Shashi H. Kewalramani found
27 that, because the events giving rise to Plaintiff’s claims occurred in the Southern District
28 of California and Defendants are alleged to reside and work in Calexico, California,

1 Plaintiff's Complaint was filed in the improper venue. *See* ECF No. 4. Therefore, she
2 transferred the case here pursuant to 28 U.S.C. § 1406(a). *See id.*

3 In her transfer Order, Judge Kewalramani noted Plaintiff had not paid the civil filing
4 fees required by 28 U.S.C. § 1914(a), or filed a request to proceed in forma pauperis ("IFP")
5 pursuant to 28 U.S.C. § 1915(a). *Id.* at 1 n.1. After the case was transferred here, however,
6 Plaintiff submitted a Motion to Proceed IFP. *See* ECF No. 7.

7 **II. MOTION TO PROCEED IN FORMA PAUPERIS**

8 All parties instituting any civil action, suit, or proceeding in a district court of the
9 United States, except an application for writ of habeas corpus, must pay a filing fee of
10 \$400.¹ *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff's failure to
11 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
12 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007). Prisoners who
13 are granted leave to proceed IFP, however, remain obligated to pay the entire fee in
14 "increments" or "installments," *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016);
15 *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless of whether their
16 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281
17 F.3d 844, 847 (9th Cir. 2002).

18 Section 1915(a)(2) also requires prisoners seeking leave to proceed IFP to submit a
19 "certified copy of the trust fund account statement (or institutional equivalent) for . . . the
20 6-month period immediately preceding the filing of the complaint." 28 U.S.C.
21 § 1915(a)(2); *Andrews v. King* ("King"), 398 F.3d 1113, 1119 (9th Cir. 2005). From the
22 certified trust account statement, the Court assesses an initial payment of 20% of (a) the
23 average monthly deposits in the account for the past six months, or (b) the average monthly
24 balance in the account for the past six months, whichever is greater, unless the prisoner has
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27 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. *See*
28 28 U.S.C. § 1914(a) Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff.
June 1, 2016). The additional \$50 administrative fee does not apply to persons granted leave to proceed
IFP. *Id.*

1 no assets. *See* 28 U.S.C. §§ 1915(b)(1), (4). The institution having custody of the prisoner
2 then collects subsequent payments, assessed at 20% of the preceding month’s income, in
3 any month in which his account exceeds \$10, and forwards those payments to the Court
4 until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

5 In support of his IFP Motion, Plaintiff has submitted a prison certificate completed
6 by a FCI Terminal Island Trust Fund Specialist attesting to his trust account activity and
7 balances for the six-months preceding the filing of his Complaint. *See* ECF No. 7 at 3; 28
8 U.S.C. § 1915(a)(2); S.D. Cal. Civ. L.R. 3.2; *King*, 398 F.3d at 1119. This certificate shows
9 Plaintiff had an average monthly balance and average monthly deposits of \$15.75 to his
10 account over the 6-month period immediately preceding the filing of his Complaint, but an
11 available balance of only \$0.62 at the time of filing. *See* ECF No. 7 at 3. Based on this
12 financial information, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 7),
13 and assesses his initial partial filing fee to be \$3.15 pursuant to 28 U.S.C. § 1915(b)(1).

14 The Court, however, will direct the Warden of FCI Terminal Island, or his designee,
15 to collect this initial fee only if sufficient funds are available in Plaintiff’s inmate trust
16 account at the time this Order is executed. *See* 28 U.S.C. § 1915(b)(4) (“In no event shall
17 a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal
18 judgment for the reason that the prisoner has no assets and no means by which to pay the
19 initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that
20 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP
21 case based solely on a “failure to pay . . . due to the lack of funds available to him when
22 payment is ordered.”). The remaining balance of the \$350 total fee owed in this case must
23 be collected and forwarded to the Clerk of the Court pursuant to 28 U.S.C. § 1915(b)(1).

24 **III. SCREENING PURSUANT TO 28 U.S.C. § 1915(E)(2)**

25 **A. Standard of Review**

26 If a prisoner’s complaint “seeks redress from a governmental entity or officer or
27 employee of a governmental entity,” the Court “shall review” the pleading “as soon as
28 practicable after docketing,” and “dismiss the complaint, or any portion of the complaint,

1 if [it] . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted.”
2 28 U.S.C. §§ 1915A(a), (b)(1); *Nordstrom v. Ryan*, 762 F.3d 903, 907 n.1 (9th Cir. 2014).
3 Here, Plaintiff seeks to sue a private individual named Luis Castro, and “his business” or
4 employer identified as “Castro Castro and Castro Truck Parking, and Trucking, and
5 Propertys” [sic] in Calexico, California, pursuant to 42 U.S.C. § 1983. *See* ECF No. 1 at
6 1, 2–3. Plaintiff does not seek redress from or name any governmental actors or entities as
7 Defendants. *Id.* at 1–2.

8 Therefore, section 1915A(a)’s screening provisions do not apply. *See Chavez v.*
9 *Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016) (“Section 1915A mandates early review . . .
10 for all complaints ‘in which a prisoner seeks relief from a governmental entity.’”) (quoting
11 28 U.S.C. § 1915A(a)); *see also Thompson v. Hicks*, 213 Fed. App’x 939, 2007 WL 106785
12 at *3 (11th Cir. 2007) (noting that because a private defendant was not a “governmental
13 entity” as described in section 1915A, prisoner’s complaint as to that defendant was not
14 subject to dismissal under section 1915A).

15 Because Plaintiff is proceeding IFP, however, his Complaint is still subject to sua
16 sponte review, and mandatory dismissal, if it is “frivolous, malicious, fail[s] to state a claim
17 upon which relief may be granted, or seek[s] monetary relief from a defendant immune
18 from such relief,” regardless of whether he seeks redress from a “governmental entity.”
19 *See* 28 U.S.C. § 1915(e)(2)(B); *Coleman v. Tollefson*, ___ U.S. ___, 135 S. Ct. 1759, 1763
20 (2015) (“[T]he court shall dismiss the case [pursuant to 28 U.S.C. § 1915(e)(2)] at any time
21 if the court determines that—(A) the allegation of poverty is untrue; or (B) the action or
22 appeal—(i) is frivolous or malicious; [or] (ii) fails to state a claim on which relief may be
23 granted; [or] seeks monetary relief against a defendant who is immune from such relief.”);
24 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection 1915(e) not only
25 permits, but requires a district court to dismiss an in forma pauperis complaint that fails to
26 state a claim.”); *Chavez*, 817 F.3d at 1167–68 (section 1915(e)(2)(B)(iii) requires the court
27 to dismiss an action “at any time” if it “seeks monetary relief from a defendant who is
28 immune from such relief”). The purpose of section 1915’s screening provisions are “to

1 ensure that the targets of frivolous or malicious suits need not bear the expense of
2 responding.” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler*
3 *v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

4 **B. Factual Allegations**

5 Plaintiff seeks \$18 million in damages against Luis Castro, whom he claims
6 committed perjury and slandered him through witness testimony presented during August
7 2012 federal criminal proceedings held before the Honorable United States Magistrate
8 Judge Peter C. Lewis in El Centro, California.² *See* Compl., ECF No. 1 at 7. While not
9 altogether clear, Plaintiff appears to contend that a state district attorney named John Weis,³
10 while acting as a civilian, appeared unscheduled at Plaintiff’s federal arraignment before
11 Judge Lewis to “read the [a]rraignment” on August 9, 2012, and, either at that time or some
12 later time, “slip[ped] in” “inadmissible evidence” through Mr. Castro’s testimony to “put
13 charges on” Plaintiff, and to label him a “drug traffic[k]er” and the “Head of the MOB of
14 Imperial Valley.” *Id.* at 7–8. Plaintiff concludes that “[t]he point is this pair of witnesses
15 . . . tr[ie]d hard to send [him] to prison,” by “trying to place . . . ev[i]dence in the hands of
16 the court that will not set him free.” *Id.* at 8.

17 **C. Analysis**

18 “Section 1983 creates a private right of action against individuals who, acting under
19 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,

21 ² For purposes of screening, the Court takes judicial notice of the docketed proceedings in *United States*
22 *v. Diego Rivera-Valencia*, No. 3:12-CR-3547-CAB-1 (S.D. Cal. filed July 27, 2012). *Bias v. Moynihan*,
23 508 F.3d 1212, 1225 (9th Cir. 2007) (“[A court] may take notice of proceedings in other courts, both
24 within and without the federal judicial system, if those proceedings have a direct relation to matters at
25 issue.”) (citation omitted); *see also McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1094 (9th Cir. 2004)
(taking judicial notice of district court proceedings to determine whether prior alleged section 1983 claims
were dismissed pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994)).

26 ³ John Weis is not named as a defendant in this case, but Plaintiff previously filed a section 1983 case
27 against Mr. Weis and another Imperial County District Attorney raising similar allegations in *Valencia v.*
28 *Weis*, No. 3:18-CV-1261 WQH (NLS) (S.D. Cal. filed June 14, 2018). *See id.* Compl., ECF No. 1, at 1,
6,10, 12, 16. That case was also dismissed sua sponte by Judge Hayes based on Plaintiff’s failure to state
a claim pursuant to 28 U.S.C. § 1915(e)(2) on September 19, 2018. *See id.* ECF No. 10.

1 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive
2 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”
3 *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks and citations
4 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a
5 right secured by the Constitution and laws of the United States, and (2) that the deprivation
6 was committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*,
7 698 F.3d 1128, 1138 (9th Cir. 2012).

8 First, Plaintiff claims Mr. Castro, while employed by “Castro Castro and Castro
9 Truck Parking and Trucking Property,” either falsely testified as a witness against him
10 during federal criminal proceedings or provided evidence to another witness (Mr. Weis),
11 who similarly suborned perjury, and that Plaintiff’s “Fifth, Eighth, and Fourteenth
12 Amendment” rights were violated as a result. *See* Compl., ECF No. 1 at 7–8. But Plaintiff
13 fails to allege that either Castro or his employer did so while acting “under color of state
14 law.” *Tsao*, 698 F.3d at 1138.

15 A person “acts under color of state law [for purposes of section 1983] only when
16 exercising power ‘possessed by virtue of state law and made possible only because the
17 wrongdoer is clothed with the authority of state law.’” *Polk Cnty. v. Dodson*, 454 U.S.
18 312, 317–18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Plaintiff
19 claims Defendants are “civilians,” not state actors, and whatever testimony or evidence
20 they may have proffered was entered in Plaintiff’s *federal* criminal case. *See* Compl., ECF
21 No. 1 at 1, 7. “It is beyond question that, when a private party gives testimony in open
22 court in a criminal trial, that act is not performed ‘under color of law.’” *Briscoe v. LaHue*,
23 460 U.S. 325, 329–30 (1983).

24 For this reason alone, Plaintiff’s Complaint must be dismissed for failing to state a
25 claim upon which relief can be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); *Watison*, 668
26 F.3d 1108, 1112 (9th Cir. 2012); *Woldmskel v. Keg N Bottle Liquor Store*, No. 15-CV-2469
27 WQH (PCL), 2016 WL 245850, at *3 (S.D. Cal. Jan. 21, 2016) (dismissing section 1983
28 claims sua sponte against defendants not alleged to have acted under color of state law

1 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b)).

2 Second, to the extent Plaintiff claims Defendants “slandered” him during a federal
3 pretrial proceeding, *see* Compl., ECF No. 1 at 7, he fails to allege the deprivation of any
4 constitutional right. *See Paul v. Davis*, 424 U.S. 693, 699–701 (1976) (holding defamation
5 is not actionable under section 1983); *Hernandez v. Johnson*, 833 F.2d 1316, 1319 (9th
6 Cir. 1987) (holding that libel and slander claims are precluded by *Paul*); *Whatley v. Gray*,
7 2018 WL 828200, at *2 (S.D. Cal. Feb. 8, 2018).

8 Third, a trial witness sued under section 1983 enjoys absolute immunity from any
9 claim based on his testimony. *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012) (citing *Briscoe*
10 *v. LaHue*, 460 U.S. 325 (1983)); 28 U.S.C. § 1915(e)(2)(B)(iii); *Chavez*, 817 F.3d at 1167–
11 68.

12 Fourth, to the extent Plaintiff seeks damages from Defendants for “trying hard to
13 send [him] to prison,” *see* Compl., ECF No. 1 at 8, a section 1983 suit is not the proper
14 vehicle through which to mount what is essentially a collateral challenge to the validity of
15 his federal criminal conviction. *See Heck v. Humphrey*, 512 U.S. 477, 484–85 (1994). In
16 *Heck*, the Supreme Court held:

17 [T]o recover damages for allegedly unconstitutional conviction
18 or imprisonment, or for other harm caused by actions whose
19 unlawfulness would render a conviction or sentence invalid, a
20 § 1983 plaintiff must prove that the conviction or sentence has
21 been reversed on direct appeal, expunged by executive order,
22 declared invalid by a state tribunal authorized to make such
determination, or called into question by a federal court’s
issuance of a writ of habeas corpus.

23 *Id.* at 486–87. Therefore, “where a prisoner file[s] a civil suit seeking purely money
24 damages related to an allegedly unlawful conviction,” *Heck* bars the suit if awarding those
25 damages “would undermine the validity of the underlying conviction,” and the entire action
26 must be dismissed. *Washington v. Los Angeles Cnty. Sheriff’s Dep’t*, 833 F.3d 1048, 1057
27 (9th Cir. 2016) (citing *Heck*, 512 U.S. at 486–87, 489). *Heck* arose in the context of a state
28 court conviction, but its rationale applies to federal convictions as well. *See Martin v. Sias*,

1 88 F.3d 774, 775 (9th Cir. 1996).

2 “Suits challenging the validity of the prisoner’s continued incarceration lie within
3 ‘the heart of habeas corpus,’ whereas ‘a § 1983 action is a proper remedy for . . . prisoner[s]
4 who . . . mak[e] . . . constitutional challenge[s] to the conditions of . . . prison life, *but not*
5 *to the fact or length of [their] custody.*” *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir.
6 2003) (emphasis added) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 498–99 (1973)).
7 Thus, because Plaintiff does not allege to have already invalidated his conviction or
8 sentence in *United States v. Diego Rivera-Valencia*, No. 3:12-CR-3547-CAB-1, either by
9 way of direct appeal, executive order, or through the issuance of a writ of habeas corpus,
10 *Heck*, 512 U.S. at 487, his current Complaint must be dismissed in its entirety for failing
11 to state a claim upon which § 1983 relief can be granted pursuant to 28 U.S.C.
12 § 1915(e)(2)(b)(ii). *See Phillipi v. Does*, No. CIV. 11-2612 DMS RBB, 2011 WL 6400303,
13 at *2 (S.D. Cal. Dec. 20, 2011) (sua sponte dismissing civil rights action pursuant to 28
14 U.S.C. § 1915(e)(2) because “habeas corpus is the exclusive federal remedy whenever the
15 claim for damages depends on a determination that . . . the sentence currently being served
16 is unconstitutionally long”) (citing *Edwards v. Balisok*, 520 U.S. 641, 643–44 (1997);
17 *Heck*, 512 U.S. at 486–87; *Preiser*, 411 U.S. at 500).

18 **D. Leave to Amend**

19 While the Court would typically grant Plaintiff leave to amend in light of his pro se
20 status, it concludes that doing so under the circumstances would be futile. *See Lopez*, 203
21 F.3d at 1127; *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 824
22 (9th Cir. 2002) (recognizing “[f]utility of amendment” as a proper basis for dismissal
23 without leave to amend).

24 Amendment is futile because, even if Plaintiff could allege facts sufficient to
25 plausibly show Defendants acted under color of state law to violate his Fifth, Eighth and
26 Fourteenth Amendment rights during his August 9, 2012 arraignment, his claims for
27 damages under section 1983 could still not proceed because he waived his right to
28 collaterally attack his conviction as part of his plea in *United States v. Diego Rivera-*

1 *Valencia*, No. 3:12-CR-3547-CAB-1, and both his Motion to Reduce Sentence pursuant to
2 18 U.S.C. § 3582(a)(2), as well as his recently filed Motion to Vacate or Dismiss that case
3 pursuant to 28 U.S.C. § 2255, which appears to challenge his conviction based on the some
4 of the same claims raised in this section 1983 suit, have been denied by the Honorable
5 Cathy Ann Bencivengo, the district judge who sentenced him on November 19, 2012. *See*
6 *id.* ECF Nos. 27–28, 33, 37, 39, 41; *see also Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th
7 Cir. 2015) (leave to amend is not required if it is “absolutely clear that the deficiencies of
8 the complaint could not be cured by amendment”) (internal citations omitted).

9 **IV. CONCLUSION**

10 Accordingly, the Court:

11 1. **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 7);

12 2. **DIRECTS** the Warden of FCI Terminal Island, or his designee, to collect
13 from Plaintiff’s inmate trust account the \$3.15 initial filing fee assessed, if those funds are
14 available at the time this Order is executed, and to forward whatever balance remains of
15 the full \$350 owed in monthly payments in an amount equal to twenty percent (20%) of
16 the preceding month’s income to the Clerk of the Court each time the amount in Plaintiff’s
17 account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS MUST BE
18 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS
19 ACTION;

20 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Warden,
21 FCI Terminal Island, P.O. Box 269, San Pedro, California 90733;

22 4. **DISMISSES** this civil action for failing to state a claim upon which section
23 1983 relief can be granted and for seeking damages from defendants who are absolutely
24 immune without prejudice, but without leave to amend in this case, pursuant to 28 U.S.C.
25 §§ 1915(e)(2)(B)(ii), (iii).⁴

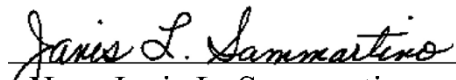
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28 ⁴ *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 586 (9th Cir. 1995) (court should dismiss claims barred
by *Heck* without prejudice “so that [the plaintiff] may reassert his claims if he ever succeeds in invalidating

1 5. **CERTIFIES** that an IFP appeal from this Order would not be taken in good
2 faith pursuant to 28 U.S.C. § 1915(a)(3); and

3 6. **DIRECTS** the Clerk of the Court to enter a final judgment of dismissal and
4 close the file.

5 **IT IS SO ORDERED.**

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7 Dated: November 13, 2018


Hon. Janis L. Sammartino
United States District Judge

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28 his conviction.”); *Briggs v. Enriquez*, No. CV 17-4615-FMO(E), 2017 WL 6210802, at *4 (C.D. Cal.
Nov. 1), *report and recommendation adopted*, 2017 WL 6209818 (Dec. 7, 2017).