

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JON GUERRERO,  
Inmate #1719376,

Plaintiff,

vs.

KENNETH SO;  
MAKENZI HARVEY;  
DAN LEE TANDEN;  
WHITNEY ANTRUM,

Defendants.

Case No.: 3:20-cv-01117-GPC-MSB

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
[ECF No. 3]**

**AND**

**(2) DISMISSING CIVIL ACTION  
PURSUANT TO 28 U.S.C.  
§ 1915(e)(2)(B) AND  
28 U.S.C. § 1915A(b)**

Plaintiff Jon Guerrero, currently incarcerated at California State Hospital in Patton, California (“DSH-Patton”), and proceeding pro se, has filed this civil action pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See Compl., ECF No. 1 at 1. While the exact nature of his suit is unclear, Plaintiff seeks trillions of dollars in monetary damages against a superior court judge, deputy district attorney, public defender, and a psychologist or psychiatrist, all of whom appear involved in his ongoing San Diego County Superior Court criminal proceedings in Case No. CD267850. Id. at 2–7.

1 **I. Procedural Background**

2 Because Plaintiff did not pay the \$400 civil filing fee required by 28 U.S.C.  
3 § 1914(a) at the time he filed his Complaint, and did not request leave to proceed in forma  
4 pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a), the Court dismissed his suit on July 6,  
5 2020. See ECF No. 2. The Court granted Plaintiff leave to re-open the case by paying the  
6 filing fee, or by submitting a motion to proceed IFP, but cautioned that should he meet the  
7 definition of a “prisoner” under 28 U.S.C. § 1915(h), he would nevertheless be required to  
8 pay the full filing in installments pursuant to 28 U.S.C. § 1915(b) and regardless of whether  
9 his Complaint was subject to sua sponte dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B).<sup>1</sup>  
10 See ECF No. 2 at 2–3, 4 n.3.

11 In response, Plaintiff has since re-opened his case by filing a Motion to Proceed IFP.  
12 See ECF No. 3.

13 **II. Motion to Proceed IFP**

14 As Plaintiff now knows, all parties instituting any civil action, suit or proceeding in  
15 a district court of the United States, except an application for writ of habeas corpus, must  
16 pay a filing fee of \$400.<sup>2</sup> See 28 U.S.C. § 1914(a). This case may proceed despite Plaintiff’s  
17 failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28  
18

---

19  
20 <sup>1</sup> Plaintiff’s status was unclear at the time. See ECF No. 2 at 2 n.2 This is because DSH-  
21 Patton is a forensic psychiatric hospital located San Bernardino County. See  
22 <https://www.dsh.ca.gov/Patton/index.html> (last visited Oct. 14, 2020). DSH-Patton  
23 “provides treatment to forensically and civilly committed patients within a secure treatment  
24 area,” id., but also houses persons who are found incompetent to stand trial pursuant to Cal.  
25 Penal Code § 1370, and “persons judged by the court to be guilty of a crime, but not guilty  
because they were insane at the time of the crime are committed” pursuant to Cal. Penal  
Code § 1026. Id.

26 <sup>2</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
27 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court  
28 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 U.S.C. § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007);  
2 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). As required by the Prison  
3 Litigation Reform Act (“PLRA”), prisoners proceeding IFP remain obligated to pay the  
4 entire fee in “increments” or “installments,” *Bruce v. Samuels*, \_\_ U.S. \_\_, 136 S. Ct. 627,  
5 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of  
6 outcome. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th  
7 Cir. 2002). A “prisoner” is defined as “any person” who at the time of filing is “incarcerated  
8 or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated  
9 delinquent for, violations of criminal law or the terms or conditions of parole, probation,  
10 pretrial release, or diversionary program.” 28 U.S.C. § 1915(h); *Taylor*, 281 F.3d at 847.

11 Section 1915(a)(2) requires all persons seeking to proceed without full prepayment  
12 of fees to submit an affidavit that includes a statement of all assets possessed and  
13 demonstrates an inability to pay. See *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th Cir.  
14 2015). In support of this affidavit, section 1915(a)(2) also requires that prisoners “seeking  
15 to bring a civil action ... without prepayment of fees ... shall submit a certified copy of the  
16 trust fund account statement (or institutional equivalent) ... for the 6-month period  
17 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v.*  
18 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005).

19 From the prisoner’s certified trust account statement, the Court must assess an initial  
20 payment of 20% of (a) the average monthly deposits in the account for the past six months,  
21 or (b) the average monthly balance in the account for the past six months, whichever is  
22 greater, unless he has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The  
23 institution having custody of the prisoner then must collect subsequent payments, assessed  
24 at 20% of the preceding month’s income, in any month in which his account exceeds \$10,  
25 and forwards those payments to the Court until the entire filing fee is paid. See 28 U.S.C.  
26 § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

27 ///

28 ///

1 A. 28 U.S.C. § 1915(h)

2 This Court and others have found that 28 U.S.C. § 1915(h)'s definition of "prisoner"  
3 does not apply to plaintiffs who have been committed to a state hospital after being  
4 adjudicated not guilty by reason of insanity ("NGI") pursuant to California Penal Code  
5 § 1026. See e.g., *Smith v. California*, 2014 WL 2180532, \*1 (S.D. Cal. May 22, 2014)  
6 (finding civil detainee at DSH-Patton was not required to comply with PLRA filing fee  
7 provisions); accord *Mieseгаes v. Allenby*, No. CV 15-1574 CJC (JC), 2015 WL 13763858,  
8 at \*1 n.2 (C.D. Cal. May 6, 2015); *Mullen v. Surtshin*, 590 F. Supp. 2d 1233, 1240 (N.D.  
9 Cal. 2008) (finding plaintiff involuntarily committed to state hospital based on NGI  
10 adjudication need not comply with PLRA exhaustion requirement), reconsideration  
11 denied, 2009 WL 734673 (N.D. Cal. Mar. 18, 2009).

12 Persons charged with a criminal offense but found to be incompetent "during the  
13 pendency of [the] action and prior to judgment," however, may have their criminal  
14 prosecution suspended until mental competence has been restored. See Cal. Penal Code  
15 §§ 1368, 1369. If found competent at the § 1369 trial, the criminal process resumes, i.e.,  
16 the defendant can be tried and judgment pronounced. See Cal. Penal Code § 1370(a)(1)(A).  
17 If found incompetent at the § 1369 trial, the criminal trial proceeding or judgment remain  
18 suspended until competency is restored. See *id.* § 1370(a)(1)(B). The defendant determined  
19 to be incompetent is then transferred to a state hospital by the court. See *id.*  
20 § 1370(a)(1)(B)(i). But "[h]ospitalization under § 1370 is part of the criminal proceedings  
21 against the defendant rather than a civil matter." *In re Rosenbalm*, No. C 06-7801 SI PR,  
22 2007 WL 1593207, at \*2 (N.D. Cal. June 1, 2007). And "[t]hough ... at a state hospital  
23 rather than in a county jail," a person found incompetent pursuant to Penal Code § 1370  
24 nevertheless "is being detained in a facility and accused of a violation of the criminal law  
25 and therefore is a prisoner for purposes of § 1915." *Id.* Thus, unlike a civil detainee or  
26 immigration detainee who has no criminal charges pending against him, see *Page v.*  
27 *Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000) (finding person civilly committed pursuant  
28 to California's Sexually Violent Predators Act is not a "prisoner" within meaning of 28

1 U.S.C. § 1915); *Agyeman v. INS*, 296 F.3d 871, 885-86 (9th Cir.2002) (finding alien  
2 detained pending civil deportation proceedings not a prisoner under the PLRA), a person  
3 detained at a California State Hospital pending a competency determination still stands  
4 “accused of ... violations of criminal law.” *In re Rosenbalm*, 2007 WL 1593207, at \*2  
5 (quoting 28 U.S.C. § 1915(h)).

6 As noted above, Plaintiff was incarcerated at DSH-Patton when he first filed his  
7 Complaint on June 17, 2020, see Compl., at 1, and he remained there at the time he  
8 submitted his Motion to Proceed IFP. See ECF No. 3 at 1. He alleges Defendants violated  
9 his civil rights in San Diego Superior Court Criminal Case No. CD267850 in early June  
10 2020. See Compl. at 6. In fact, Plaintiff has filed several other civil cases and habeas corpus  
11 petitions in the Southern District over the last several months—all of them while  
12 incarcerated at DSH-Patton, and all seeking to challenge the validity of his ongoing  
13 criminal proceedings in CD267850. See e.g., *Guerrero v. Wallace*, S.D. Cal. Civil Case  
14 No. 3:20-cv-01113-LAB-WVG (petition for writ of habeas corpus pursuant to 28 U.S.C.  
15 § 2241) (ECF No. 1); *Guerrero v. Wallace*, S.D. Cal. Civil Case No. 3:20-cv-01114-CAB-  
16 KSC (petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254) (ECF No. 1);  
17 *Guerrero v. San Diego Superior Court, et al.*, S.D. Cal. Civil Case No. 3:20-cv-01116-  
18 LAB-MSB (civil rights complaint pursuant to 42 U.S.C. § 1983) (ECF No. 1); and  
19 *Guerrero v. So, et al.*, S.D. Cal. Civil Case No. 3:20-cv-01346-CAB-LL (civil rights  
20 complaint pursuant to 42 U.S.C. § 1983) (ECF No. 1); see also *Bias v. Moynihan*, 508 F.3d  
21 1212, 1225 (9th Cir. 2007) (court “may take notice of proceedings in other courts, both  
22 within and without the federal judicial system, if those proceedings have a direct relation  
23 to matters at issue.”) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir.  
24 2002)).<sup>3</sup>

---

25  
26  
27 <sup>3</sup> All of these cases have been dismissed during preliminary screening due to Plaintiff’s  
28 failure to pay the appropriate filing fees or properly move to proceed IFP, see 3:20-cv-  
01113-LAB-WVG (ECF No. 2); 3:20-cv-01116-LAB-MSB (ECF No. 2), or his failure to

1           These public records show Plaintiff meets the definition of “prisoner” under 28  
2 U.S.C. § 1915(h) because he has not been not civilly committed at DSH-Patton nor  
3 adjudicated NGI, but instead has been hospitalized pending Cal. Penal Code § 1370 mental  
4 competency proceedings in San Diego Superior Court Criminal Case No. CD267850. See  
5 Guerrero v. Wallace, S.D. Cal. Civil Case No. 3:20-cv-01114-CAB-KSC, ECF No. 1 at  
6 12–15. On June 3, 2019, Plaintiff was found competent to stand trial and criminal  
7 proceedings were re-instated. Id. at 12 (citing In the Matter of the Application of Jon  
8 Guerrero, S.D. Superior Court Case No. HC 24531/ SCD 267850, Order Denying Petition  
9 for Writ of Habeas Corpus, dated June 2, 2020). On January 27, 2020, Plaintiff pleaded  
10 guilty to four counts of attempted murder, five counts of assault likely to produce great  
11 bodily injury, two counts of arson of property, and admitted to “corresponding  
12 enhancements and allegations” resulting in a stipulated sentence of four terms of life  
13 without the possibility of parole, and an additional term of 56 years to life, plus 87 years.  
14 Id. at 12–13. A sentencing hearing was set for May 1, 2020, but was trailed due to the  
15 COVID-19 pandemic. Id. at 13.

16           Therefore, the Court finds that because he stood accused, pleaded guilty, and awaited  
17 sentence for violations of criminal law at the time he filed this civil action, see 28 U.S.C.  
18 § 1915(h), Plaintiff’s IFP application must comply with 28 U.S.C. § 1915(a)(2), and he  
19 “shall be required to pay the full amount of a filing fee” as required by 28 U.S.C.  
20 § 1915(b)(1) and (2).

21 ///

22 ///

23 \_\_\_\_\_  
24  
25 name the proper respondent, state a cognizable federal claim, or allege exhaustion of state  
26 judicial remedies. See 3:20-cv-01114-CAB-KSC (ECF No. 3). Plaintiff’s most recent  
27 § 1983 complaint was found duplicative of his previously-filed complaint in 3:20-cv-  
28 01116-LAB-MSB, and was therefore dismissed as frivolous pursuant to 28 U.S.C.  
§ 1915A(b)(1). See 3:20-cv-1346-CAB-LL (ECF No. 3). Plaintiff also filed a motion to  
proceed IFP in 3:20-cv-1346-CAB-LL, but it was denied as moot in light of dismissal. Id.

1           B.     Plaintiff’s IFP Application

2           In support of his Motion to Proceed IFP, Plaintiff has submitted a DSH-Patton  
3 Certificate and copy of his Patient Ledger Report from August 29, 2019 through May 14,  
4 2020. See ECF No. 3 at 4, 7–8; see also 28 U.S.C. § 1915(a)(2); Andrews, 398 F.3d at  
5 1119. These documents show that while Plaintiff had a total of \$484.43 deposited to his  
6 account from December 2019 through May 2020, he carried an available balance of only  
7 \$.18 at time of filing. See ECF No. 3 at 7–8. Based on this accounting, the Court GRANTS  
8 Plaintiff’s Motion to Proceed IFP (ECF No. 3), and assesses a \$16.14 initial partial filing  
9 fee. See 28 U.S.C. § 1915(b)(1). Because his available balance at the time of filing is  
10 insufficient to cover this initial fee, however, the Court will direct the Director of DSH-  
11 Patton to collect it only if sufficient funds exist in Plaintiff’s account at the time this Order  
12 is executed. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be  
13 prohibited from bringing a civil action or appealing a civil action or criminal judgment for  
14 the reason that the prisoner has no assets and no means by which to pay the initial partial  
15 filing fee.”); Bruce, 136 S. Ct. at 630; Taylor, 281 F.3d at 850 (finding that 28 U.S.C.  
16 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based  
17 solely on a “failure to pay ... due to the lack of funds available to him when payment is  
18 ordered.”). The Court will further direct the Director of DSH-Patton, his or her designee,  
19 and any agency hereafter having custody of Plaintiff, to collect the remainder of the \$350  
20 balance of the filing fee required by 28 U.S.C. § 1914 and to forward payments to the Clerk  
21 of the Court pursuant to 28 U.S.C. § 1915(b)(1).

22     **III.    Screening Pursuant to 28 U.S.C. § 1915(e)(2)(B) & 1915A**

23           A.     Standard of Review

24           As Plaintiff was advised on July 6, 2020, because he is a prisoner and is proceeding  
25 IFP, his Complaint requires a preliminary screening pursuant to 28 U.S.C. § 1915(e)(2)  
26 and § 1915A(b). Under these statutes, the Court must review and sua sponte dismiss an  
27 IFP complaint, and any complaint filed by a prisoner seeking redress from a governmental  
28 entity, or officer or employee of a governmental entity, which is frivolous, malicious, fails

1 to state a claim, or seeks damages from defendants who are immune. See *Lopez v. Smith*,  
2 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2));  
3 *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. §  
4 1915A(b)). “The purpose of [screening] is ‘to ensure that the targets of frivolous or  
5 malicious suits need not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d  
6 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d  
7 680, 681 (7th Cir. 2012)).

8 “The standard for determining whether a plaintiff has failed to state a claim upon  
9 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
10 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d  
11 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.  
12 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
13 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
14 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted  
15 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.  
16 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

17 Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
18 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
19 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief  
20 [is] ... a context-specific task that requires the reviewing court to draw on its judicial  
21 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,  
22 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility  
23 standard. *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

#### 24 B. Plaintiff’s Allegations

25 Plaintiff names a judge, district attorney, public defender, and the psychologist or  
26 psychiatrist involved his ongoing criminal proceedings in San Diego Superior Court Case  
27 No. CD267850 as Defendants. See Compl., at 2, 6. His Complaint contains no factual  
28 allegations whatsoever. Instead, it broadly proclaims Defendants “violat[ed] due process”



1 by proffering and/or relying on “false testimony evidence,” “prolong[ed] [his] trial,” and  
2 “bargain[ed]” with each other to deny him a “fair trial.” Id. at 2–4. He seeks unspecified  
3 “equitable injunctive relief” and \$21 trillion in general and punitive damages. Id. at 7.

#### 4 C. Bivens

5 As a preliminary matter, the Court notes Plaintiff’s Complaint was filed pursuant to  
6 Bivens; however, he does not allege that any Defendant acted under color of federal law.  
7 “In Bivens, the Supreme Court ‘recognized for the first time an implied right of action for  
8 damages against federal officers alleged to have violated a citizen’s constitutional rights.’”  
9 Vega v. United States, 881 F.3d 1146, 1152 (9th Cir. 2018) (quoting Hernandez v. Mesa,  
10 \_\_ U.S. \_\_, 137 S. Ct. 2003, 2006 (2017) (citation omitted)). “In the limited settings where  
11 Bivens does apply, the implied cause of action is the ‘federal analog to suits brought against  
12 state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983.’” Iqbal, 556 U.S. at 675-76  
13 (quoting Hartman v. Moore, 547 U.S. 250, 254 n.2 (2006)).

14 However, because “[a]ctions under § 1983 and those under Bivens are identical save  
15 for the replacement of a state actor under § 1983 by a federal actor under Bivens,” Van  
16 Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991), and pro se pleadings are subject to liberal  
17 construction, the Court will construe Plaintiff’s Complaint as if it were filed pursuant to  
18 U.S.C. § 1983, instead of simply dismissing for failing to state a plausible Bivens cause of  
19 action. See Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000) (noting court’s duty to  
20 construe pro se prisoner’s pleadings liberally when screening complaints pursuant to  
21 U.S.C. § 1915A) (citation omitted); cf. Navarette v. Pioneer Med. Ctr., No. 12CV0629  
22 WQH DHB, 2012 WL 4178682, at \*3 (S.D. Cal. Sept. 17, 2012) (liberally construing pro  
23 se prisoner’s § 1983 Complaint to instead arise under Bivens where prisoner claimed  
24 violations of his civil rights by a federal actors).

#### 25 D. 42 U.S.C. § 1983

26 “Section 1983 creates a private right of action against individuals who, acting under  
27 color of state law, violate federal constitutional or statutory rights.” Devereaux v. Abbey,  
28 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive

1 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”  
2 *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations  
3 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a right  
4 secured by the Constitution and laws of the United States, and (2) that the deprivation was  
5 committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698  
6 F.3d 1128, 1138 (9th Cir. 2012).

7 E. Discussion

8 Even as liberally construed to arise under § 1983, Plaintiff’s Complaint fails to  
9 comply with Federal Rule of Civil Procedure 8, is legally frivolous, fails to state a claim  
10 upon which § 1983 relief may be granted, and seeks damages from defendants who are  
11 absolutely immune. See *Iqbal*, 556 U.S. at 677-78; 28 U.S.C. §§ 1915(e)(2)(B)(ii), (iii),  
12 1915A(b)(1), (2).

13 1. Rule 8

14 First, “[u]nder Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a  
15 “short and plain statement of the claim showing that the pleader is entitled to relief.” *Iqbal*,  
16 556 U.S. at 677-78. “[T]he pleading standard Rule 8 announces does not require ‘detailed  
17 factual allegations,’ but it demands more than [the type of] unadorned, the defendant-  
18 unlawfully-harmed-me accusation[s],” Plaintiff offers here. *Id.* (quoting *Bell Atlantic v.*  
19 *Twombly*, 550 U.S. 544, 555 (2007)).

20 For example, Plaintiff invokes his right to “due process,” and claims Defendants  
21 made undefined “mistakes,” committed “clerical errors,” relied on “false testimony  
22 evidence,” and prolonged his trial. See *Compl.* at 2. He further charges the judge with  
23 denying him an appeal, and claims his public defender “bargain[ed] with the prosecutor  
24 and judge to become one of the D.A.’s favorites.” *Id.* However, “[w]hile legal conclusions”  
25 like the denial of “due process” and a “fair trial,” see *Compl.* at 2, 6, “can provide the  
26 framework of a complaint, they must be supported by factual allegations,” lest the Plaintiff  
27 face dismissal. *Iqbal*, 556 U.S. at 679. Mere “labels” and “naked assertions devoid of  
28 further factual enhancement” like those Plaintiff relies on here, simply “will not do.” *Id.* at

1 678 (citing *Twombly*, 550 U.S. at 555, 557).

2 2. Heck Bar

3 Second, to the extent Plaintiff seeks damages based on allegations that he has been  
4 denied a fair trial in San Diego Superior Court Case No. CD267850, his suit may not  
5 proceed as a civil rights action. There are two methods for state prisoners to raise  
6 complaints related to their imprisonment in federal court. See *Muhammad v. Close*, 540  
7 U.S. 749, 750 (2004) (“Federal law opens two main avenues to relief on complaints related  
8 to imprisonment...”) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). In general,  
9 claims of constitutional violations related to the “circumstances” of a prisoner’s  
10 confinement must be brought in a civil rights action under § 1983, see *id.*, while  
11 constitutional challenges to the validity or duration of a prisoner’s confinement which seek  
12 either “immediate release from prison” or the “shortening of [a state prison] term” must be  
13 raised in a petition for federal habeas corpus under 28 U.S.C. § 2254, or through  
14 appropriate state relief. *Wilkinson v. Dotson*, 544 U.S. 74, 78-79 (2005) (citations and  
15 internal quotation marks omitted); *Nettles v. Grounds*, 830 F.3d 922, 927 (9th Cir. 2016)  
16 (en banc) (“The Court has long held that habeas is the exclusive vehicle for claims brought  
17 by state prisoners that fall within the core of habeas, and such claims may not be brought  
18 in a § 1983 action.”) (citing *Dotson*, 544 U.S. at 81-82).

19 Here, because Plaintiff seeks damages based on claims that he has been unlawfully  
20 convicted, sentenced, and/or incarcerated, his suit is subject to dismissal because he may  
21 not pursue such claims in a civil rights action pursuant to 42 U.S.C. § 1983 without first  
22 showing his conviction in San Diego Superior Court Case No. CD267850 has already been  
23 invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

24 In *Heck*, the Supreme Court held:

25 in order to recover damages for allegedly unconstitutional conviction or  
26 imprisonment, or for other harm caused by actions whose unlawfulness would  
27 render a conviction or sentence invalid, a § 1983 plaintiff must prove that the  
28 conviction or sentence has been reversed on direct appeal, expunged by  
executive order, declared invalid by a state tribunal authorized to make such

1 determination, or called into question by a federal court's issuance of a writ  
2 of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that  
3 relationship to a conviction or sentence that has not been so invalidated is not  
cognizable under § 1983.

4 *Id.* at 486-87; *Washington v. Los Angeles County Sheriff's Dep't*, 833 F.3d 1048, 1054-55  
5 (9th Cir. 2016).

6 "Suits challenging the validity of the prisoner's continued incarceration lie within  
7 'the heart of habeas corpus,' whereas 'a § 1983 action is a proper remedy for a state prisoner  
8 who is making a constitutional challenge to the conditions of his prison life, but not to the  
9 fact or length of his custody.'" *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir. 2003)  
10 (emphasis added), quoting *Preiser*, 411 U.S. at 498-99 (holding that a writ of habeas corpus  
11 is "explicitly and historically designed" to provide a state prisoner with the "exclusive"  
12 means to "attack the validity of his confinement" in federal court).

13 Because Plaintiff seeks damages based on allegations that he has not received a fair  
14 trial, and asks that his criminal proceedings in CD267850 be "reversed," see *Compl.* at 3,  
15 6, he may not proceed pursuant to § 1983, unless and until that conviction has been  
16 invalidated. *Heck*, 512 U.S. at 486-87; *Ramirez*, 334 F.3d at 855-56 ("Absent such a  
17 showing, '[e]ven a prisoner who has fully exhausted available state remedies has no cause  
18 of action under § 1983.'"), quoting *Heck*, 512 U.S. at 489. A federal district court cannot  
19 "reverse" a state court criminal conviction pursuant to 42 U.S.C. § 1983, and an award of  
20 damages based on that conviction would necessarily imply its constitutional validity and  
21 consequently affect the duration of his confinement. See *Heck*, 512 U.S. at 487; see also  
22 *Pattillo v. Lombardo*, No. 2:17-CV-01849-JAD-VCF, 2017 WL 3622778, at \*4 (D. Nev.  
23 Aug. 23, 2017) ("When a prisoner challenges the legality or duration of his custody, raises  
24 a constitutional challenge which could entitle him to an earlier release ... or seeks damages  
25 for purported deficiencies in his state court criminal case, which effected a conviction or  
26 lengthier sentence, his sole federal remedy is the writ of habeas corpus.").

27 Because Plaintiff does not claim to have already invalidated the conviction which  
28 forms the basis of his suit by way of direct appeal, executive order, or through the issuance

1 of either a state or federal court writ of habeas corpus, Heck, 512 U.S. at 487, his Complaint  
2 must be dismissed sua sponte and in its entirety for failing to state a claim upon which  
3 § 1983 relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). See  
4 *Phillipi v. Does*, No. CIV. 11-2612 DMS RBB, 2011 WL 6400303, at \*2 (S.D. Cal. Dec.  
5 20, 2011) (sua sponte dismissing civil rights action pursuant to 28 U.S.C. § 1915(e)(2) and  
6 § 1915A because “habeas corpus is the exclusive federal remedy whenever the claim for  
7 damages depends on a determination that ... the sentence currently being served is  
8 unconstitutionally long.”) (citing *Edwards v. Balisok*, 520 U.S. 641, 643-44 (1997); Heck,  
9 512 U.S. at 486–87; *Preiser*, 411 U.S. at 500); *Lopez*, 203 F.3d at 1126-27; *Wilhelm*, 680  
10 F.3d at 1121.

### 11 3. Judicial, Prosecutorial & Witness Immunity

12 Third, to the extent Plaintiff seeks damages against Judge So for “not giving [him]  
13 an appeal,” for “breach of trust,” and for “postponing [his] case,” see Compl., at 2, 4, his  
14 claims are legally frivolous, because “[j]udges are absolutely immune from damage  
15 liability for acts performed in their official capacities.” *Ashelman v. Pope*, 793 F.2d 1072,  
16 1075 (9th Cir. 1986) (en banc) (“A judge lacks immunity where [s]he acts in the clear  
17 absence of all jurisdiction, or performs an act that is not judicial in nature.”) (internal  
18 quotation marks and citations omitted); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967);  
19 *Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001). “Issuing orders, setting  
20 schedules, and remanding criminal defendants into custody” are all acts performed within  
21 a trial judge’s official capacity. *Thomas v. Shah*, No. 5:18-CV-02193-AG (SHK), 2018 WL  
22 5734593, at \*2 (C.D. Cal. Oct. 31, 2018); see also *Mainez v. Gore*, No. 3:17-CV-01359-  
23 JAH-JLB, 2017 WL 4005269, at \*5 (S.D. Cal. Sept. 11, 2017) (finding § 1983 claims for  
24 monetary damages against Superior Court Judge subject to sua sponte dismissal as  
25 frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii) & 1915A(b)).

26 To the extent Plaintiff claims Assistant District Attorney Makenzi Harvey also  
27 “violat[ed] due process,” by “prolonging [his] trial,” and making “clerical errors,” see  
28 Compl. at 2, 4, his Complaint must also be dismissed pursuant to 28 U.S.C.

1 § 1915(e)(2)(B)(iii) & 1915A(b) because Harvey is entitled to absolute prosecutorial  
2 immunity. See *Van de Kamp v. Goldstein*, 555 U.S. 335, 341 (2009) (state prosecutors are  
3 entitled to absolute prosecutorial immunity for acts taken in their official capacity); *Imbler*  
4 *v. Pachtman*, 424 U.S. 409, 427, 430-31 (1976) (holding prosecutors absolutely immune  
5 from civil suits for damages under § 1983 for initiating criminal prosecutions and  
6 presenting cases); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004)  
7 (“Absolute immunity is generally accorded to judges and prosecutors functioning in their  
8 official capacities”); *Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir. 1989) (finding claim  
9 against prosecutors with clear immunity legally frivolous within the meaning of section  
10 1915) (citation omitted).

11 To the extent Plaintiff also seeks damages against Whitney Antrum, a psychologist  
12 or psychiatrist involved in his state court competency proceedings, based on claims that he  
13 or she proffered “false testimony evidence,” see Compl. at 2, his Complaint must also be  
14 dismissed on immunity grounds pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii) and  
15 § 1915A(b)(2). See *Rosenbalm*, 2010 WL 2764439, at \*5 (dismissing § 1983 damages  
16 claims against psychologist alleged to have committed perjury during Cal. Penal Code  
17 § 1370 competency proceedings pursuant to 28 U.S.C. § 1915A(b)(1), (2) based on  
18 absolute witness immunity) (citing *Briscoe v. LaHue*, 460 U.S. 325, 329–46 (1983); *Burns*  
19 *v. County of King*, 883 F.2d 819 (9th Cir. 1989)).

#### 20 4. “*Under Color*” Requirement

21 To the extent Plaintiff names his appointed public defender, Dan Lee Tanden, as a  
22 Defendant, see Compl. at 1-2, and alleges Tanden was “very poor at objecting” while  
23 representing Plaintiff during criminal proceedings in San Diego Criminal Case No.  
24 CD267850, he also fails to state a claim upon which section 1983 relief can be granted. See  
25 28 U.S.C. § 1915(e)(2)(B)(ii). “[A] public defender does not act under color of state law  
26 when performing a lawyer’s traditional functions as counsel to a defendant in a criminal  
27 proceeding.” *Polk County v. Dodson*, 454 U.S. 312, 325 (1981); *Garnier v. Clarke*, 332  
28 Fed. Appx. 416 (9th Cir. 2009) (affirming district court’s sua sponte dismissal of prisoner’s

1 section 1983 claims against appointed counsel); *Schmidt v. Mize*, No. 18-CV-00725-BAS-  
2 PCL, 2018 WL 2411750, at \*3 (S.D. Cal. May 29, 2018) (sua sponte dismissing prisoner’s  
3 § 1983 claims against public defender pursuant to 28 U.S.C. § 1915(e)(2)).

4 F. Leave to Amend

5 Finally, while the Court would normally grant Plaintiff leave to amend in light of his  
6 pro se status, it concludes that doing so in this case would be futile. See *Lopez*, 203 F.3d at  
7 1127; *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 824 (9th Cir.  
8 2002) (recognizing “[f]utility of amendment” as a proper basis for dismissal without leave  
9 to amend).

10 Amendment is futile because even if Plaintiff could somehow allege facts to show  
11 Defendants violated his constitutional rights during the course of his criminal proceedings  
12 in San Diego Superior Court Case No. CD267850, and include facts to suggest the named  
13 Defendants could be liable for damages under § 1983, he still could not proceed because  
14 he has yet to invalidate his conviction and/or sentence via direct appeal or through the  
15 issuance of a federal writ of habeas corpus. See *Heck*, 512 U.S. at 486-87.

16 A court may take judicial notice of its own records, see *Molus v. Swan*, Civil Case  
17 No. 3:05-cv-00452–MMA-WMc, 2009 WL 160937, \*2 (S.D. Cal. Jan. 22, 2009) (citing  
18 *United States v. Author Services*, 804 F.2d 1520, 1523 (9th Cir. 1986)); *Gerritsen v.*  
19 *Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011, 1034 (C.D. Cal. 2015), and “‘may take  
20 notice of proceedings in other courts, both within and without the federal judicial system,  
21 if those proceedings have a direct relation to matters at issue.’” *Bias*, 508 F.3d at 1225  
22 (citations omitted).

23 Here, the Court takes judicial notice of *Guererro v. Wallace*, S. D. Cal. Civil Case  
24 No. 3:20-cv-01114-CAB-KSC, in which Plaintiff also filed a writ of habeas corpus seeking  
25 to challenge the constitutional validity of his criminal proceedings in San Diego Superior  
26 Court Case No. CD267850 in this Court pursuant to 28 U.S.C. § 2254. See *id.*, ECF No. 1,  
27 “Pet.” at 1–11. Plaintiff’s habeas petition, as well as an attached exhibit, a June 2, 2020  
28 San Diego Superior Court Order denying his petition for writ of habeas corpus in San Diego

1 Superior Court Case No. HC24531, see *id.* at 12–14, both demonstrate that efforts to  
2 invalidate Plaintiff’s conviction in CD267850 have not yet been successful. Therefore,  
3 because Plaintiff’s state and federal collateral proceedings reveal he cannot yet amend his  
4 Complaint to allege the additional facts required to show either that the underlying  
5 conviction or sentence which forms the basis of his claims in this case has already been  
6 invalidated, or that any of the Defendants he seeks to sue for money damages could be held  
7 liable under § 1983, the Court denies leave to amend as futile. See *Lopez*, 203 F.3d at 1127;  
8 *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (noting that leave to amend is not  
9 required if it is “absolutely clear that the deficiencies of the complaint could not be cured  
10 by amendment.”) (internal citations omitted).

#### 11 **IV. Conclusion and Orders**

12 For the reasons discussed, the Court:

- 13 1) **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 3);
- 14 2) **DIRECTS** the Director of DSH-Patton, or his or her designee, to collect from  
15 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing monthly  
16 payments from his account in an amount equal to twenty percent (20%) of the preceding  
17 month’s income and forwarding those payments to the Clerk of the Court each time the  
18 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS  
19 SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO  
20 THIS ACTION;
- 21 3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on the Director,  
22 DSH-Patton, 1600 9th Street, Rm 151, Sacramento, California, 95814;
- 23 4) **DISMISSES** Plaintiff’s Complaint as frivolous, for failing to state a claim,  
24 and for seeking damages from defendants who are absolutely immune pursuant to 28  
25 U.S.C. § 1915(e)(2)(B)(ii), (iii) and § 1915A(b)(1), (2) without prejudice,<sup>4</sup> but without  
26

---

27  
28 <sup>4</sup> 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



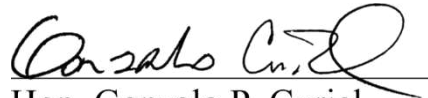
1 leave to amend;

2 5) **CERTIFIES** that an IFP appeal from this Order would be frivolous and  
3 therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). See  
4 *Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548,  
5 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if appeal  
6 would not be frivolous); and

7 6) **DIRECTS** the Clerk of Court to enter a final judgment of dismissal and to  
8 close the file.

9 **IT IS SO ORDERED.**

10 Dated: November 3, 2020

  
11 Hon. Gonzalo P. Curiel  
12 United States District Judge  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

25 \_\_\_\_\_  
26 he ever succeeds in invalidating his conviction.”); *Briggs v. Enriquez*, No. CV 17-4615-  
27 FMO(E), 2017 WL 6210802, at \*4 (C.D. Cal. Nov. 1, 2017), report and recommendation  
28 adopted, No. CV 17-4615-FMO(E), 2017 WL 6209818 (C.D. Cal. Dec. 7, 2017).