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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KRISTOPHER G. FRENCH,
CDCR #K-96643,

Plaintiff,

vs.

SERGEANT J. MITCHELL,

Defendant.

Case No.: 22-cv-1355-MMA (AHG)

**ORDER GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS;
AND**

[Doc. No. 3]

**DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF COMPLAINT
AND SUMMONS PURSUANT TO 28
U.S.C. § 1915(d) & FED. R. CIV. P.
4(c)(3)**

Plaintiff Kristopher G. French, a state prisoner incarcerated at the Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, proceeding *pro se*, has filed a Complaint pursuant to 42 U.S.C. § 1983. Doc. No. 1. Plaintiff has not paid the civil filing fee but has instead filed a Motion to Proceed in Forma Pauperis (“IFP”) with a separately filed inmate trust account statement. Doc. Nos. 3, 5.

I. MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of

1 \$402.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
2 prepay the entire fee only if they are granted leave to proceed IFP pursuant to 28 U.S.C.
3 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007) (“28 U.S.C.
4 § 1915(a) allows the district court to waive the fee, for most individuals unable to afford
5 it, by granting IFP status.”).

6 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
7 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
8 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
9 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
10 trust account statement, the Court assesses an initial payment of 20% of (a) the average
11 monthly deposits in the account for the past six months, or (b) the average monthly
12 balance in the account for the past six months, whichever is greater, unless the prisoner
13 has no assets. See 28 U.S.C. § 1915(b)(1) & (4). The institution collects subsequent
14 payments, assessed at 20% of the preceding month’s income, in any month in which the
15 account exceeds \$10, and forwards those payments to the Court until the entire filing fee
16 is paid. See 28 U.S.C. § 1915(b)(2). Plaintiff remains obligated to pay the entire fee in
17 monthly installments regardless of whether the action is ultimately dismissed. *Bruce v.*
18 *Samuels*, 577 U.S. 82, 84 (2016).

19 Plaintiff’s inmate trust account statement shows average monthly deposits of \$0.04
20 and an average monthly balance of \$0.22 over the 6-months prior to initiating this suit,
21 and an available balance of \$0.67 at the time of filing. Doc. No. 5 at 1. The Court
22 therefore **GRANTS** Plaintiff’s Motion to Proceed IFP and declines to impose an initial
23 partial filing fee pursuant to 28 U.S.C. § 1915(b)(1) because the prison certificate
24 indicates Plaintiff may have no means to pay it. See 28 U.S.C. § 1915(b)(4) (providing
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27 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$52.
28 See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule,
§ 14) (eff. Dec. 1, 2020). The additional \$52 administrative fee does not apply to persons granted leave
to proceed IFP. *Id.*

1 that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing
2 a civil action or criminal judgment for the reason that the prisoner has no assets and no
3 means by which to pay the initial partial filing fee”); *Taylor v. Delatoore*, 281 F.3d 844,
4 850 (9th Cir. 2002) (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
5 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to
6 the lack of funds available to him when payment is ordered”). Plaintiff remains obligated
7 to pay the entire fee in monthly installments.

8 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

9 **A. Standard of Review**

10 Because Plaintiff is a prisoner proceeding IFP, the Complaint requires a pre-
11 Answer screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). The Court must *sua*
12 *sponte* dismiss a prisoner’s IFP complaint, or any portion of it, which is frivolous,
13 malicious, fails to state a claim, or seeks damages from defendants who are immune.
14 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C.
15 § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28
16 U.S.C. § 1915A(b)).

17 “The standard for determining whether a plaintiff has failed to state a claim upon
18 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
19 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
20 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
21 Cir. 2012) (noting that § 1915A screening “incorporates the familiar standard applied in
22 the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)”).
23 Rule 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true,
24 to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,
25 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 “Determining whether a complaint states a plausible claim for relief [is] . . . a context-
27 specific task that requires the reviewing court to draw on its judicial experience and
28 common sense.” *Id.*

1 Title 42 U.S.C. § 1983 “creates a private right of action against individuals who,
2 acting under color of state law, violate federal constitutional or statutory rights.”
3 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). “To establish § 1983 liability,
4 a plaintiff must show both (1) deprivation of a right secured by the Constitution and laws
5 of the United States, and (2) that the deprivation was committed by a person acting under
6 color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

7 **B. Allegations in the Complaint**

8
9 The Plaintiff is a 39-year old Transgender who just recently came out 2 years
10 ago and started doing hormonal therapy. On August 21, 20[20] - C14 where
11 I am housed was being searched randomly. I was housed in C14-206 with my
12 cellmate “Blake” who is also Transgender. Our cell was approached by Sgt.
13 J. Mitchell the Defendant. He came to the door and immediately asked
14 “What’s on your back wall.” I informed him that they were Odinist GODs
15 printed out by the spych [sic] techs. Sgt. Mitchell then said “Oh Vall White
16 Power.” We both said “no” we-r-just Transgender with Odinist beliefs
17 (Odinist are Norse Religions). He quickly became upset, and said “strip out,
18 drop it and cough.” I went first. I took off all my clothes turned around, opened
19 by butt cheeks and coughed. Sgt Mitchell said do it again this time open your
20 ass real wide. I asked if this was necessary and he said it’s a verbal order, 115
21 if you refuse. I did as the Sgt asked and bent over opened by butt cheeks and
22 coughed. He then said no bust that thing open. I felt violated sexually and
23 scared/vulnerable. I bent over and held my butt cheeks open for what seemed
24 to be a minute, I thought that was over. Sgt Mitchell then said turn and look
25 at me and run your fingers thru your mouth in case you are hiding any
26 contraband. I told Sgt. Mitchell that my fingers have fecal matter on them and
27 I could smell it and I don’t want to run my fingers thru my mouth. The
28 Defendant became aggressive and told me that if I did not obey his order he
was gonna write me several RVRs and move me to another cell. I did as the
Sgt said. I started to cry because I can taste the fecal matter. I ran my fingers
thru my mouth and he saw the look on my face and bust out in uncontrollable
laughter, he even put his hands on his knees from laffing [sic] so hard. I found
the strength to tell Sgt. J. Mitchell that what he did to me was wrong and
violated me sexually and threatened me with RVRs if I did not comply with
his evil orders. Sgt J. Mitchell then stated “Black Lives Matter.”

1 Attached to the Complaint as an exhibit is a declaration from Plaintiff's cellmate,
2 Inmate Blake, who states that Defendant Sergeant Mitchell forced her through that same
3 sequence of events immediately after Plaintiff, that Defendant Mitchell made the strip
4 searches into "a racial issue" where no racial issue existed, and as a result of being forced
5 to run her fingers through her mouth which had fecal matter on them from the anal cavity
6 search, she "developed e-coli, a bacteria that's caused from feces and I was given anti-
7 biotics." Doc. No. 1-3 at 2-3.

8 **C. Discussion**

9 "[A] prisoner presents a viable Eighth Amendment claim where he or she proves
10 that a prison staff member, acting under color of law and without legitimate penological
11 justification, touched the prisoner in a sexual manner or otherwise engaged in sexual
12 conduct for the staff member's own sexual gratification, or for the purpose of
13 humiliating, degrading, or demeaning the prisoner." *Bearchild v. Cobban*, 947 F.3d
14 1130, 1144 (9th Cir. 2020). Searches of prisoners which begin as legitimate and
15 acceptable, albeit invasive, procedures, can become a constitutional violation where the
16 prison official's "conduct exceeded the scope of what was required to satisfy whatever
17 institutional concern justified the initiation of the procedure." *Id.* at 1145. In addition, a
18 body search inside a prison can become so unreasonable as to violate the federal
19 constitution where it is "excessive, vindictive, harassing, or unrelated to any legitimate
20 penological purpose." *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988) (citing
21 *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (holding that in determining the reasonableness
22 of a prison strip search, "[c]ourts must consider the *scope* of the particular intrusion, the
23 *manner* in which it is conducted, the *justification* for initiating it, and the *place* in which
24 it is conducted")).

25 Plaintiff alleges the strip search conducted by Defendant Sergeant Mitchell was
26 racially motivated, unnecessarily and gratuitously sexually demeaning and humiliating,
27 and subjected Plaintiff to the same unhygienic conditions which caused Plaintiff's
28 cellmate to develop a bacterial infection. Plaintiff's allegations against Defendant

1 Sergeant Mitchell are sufficient to survive the “low threshold” for proceeding past the
2 *sua sponte* screening required by 28 U.S.C. §§ 1915(e)(2) & 1915A(b) because they
3 plausibly allege a violation of Plaintiff’s right to be free from procedures conducted “for
4 the purpose of humiliating, degrading, or demeaning the prisoner,” and strip searches
5 which are “excessive, vindictive, harassing, or unrelated to any legitimate penological
6 purpose.” *Bearchild*, 947 F.3d at 1144–45; *Michenfelder*, 860 F.2d at 332; *Wolfish*, 441
7 U.S. at 559; *Watison*, 668 F.3d at 1112; *Wilhelm*, 680 F.3d at 1123; *Iqbal*, 556 U.S. at
8 678.

9 Accordingly, Plaintiff is entitled to have the U.S. Marshal effect service of the
10 summons and Complaint against Defendant Sergeant Mitchell. *See* 28 U.S.C. § 1915(d)
11 (“The officers of the court shall issue and serve all process, and perform all duties in
12 [IFP] cases.”); Fed. R. Civ. P. 4(c)(3) (“[T]he court may order that service be made by a
13 United States marshal or deputy marshal . . . if the plaintiff is authorized to proceed in
14 forma pauperis under 28 U.S.C. § 1915.”). Nevertheless, the Court cautions Plaintiff that
15 the *sua sponte* screening process is “cumulative of, not a substitute for, any subsequent
16 [motion to dismiss] that the defendant may choose to bring.” *Teahan v. Wilhelm*, 481
17 F.Supp.2d 1115, 1119 (S.D. Cal. 2007).

18 **III. CONCLUSION**

19 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP.

20 The Court **DIRECTS** the Secretary of the CDCR, or her designee, to collect from
21 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing
22 monthly payments from Plaintiff’s account in an amount equal to twenty percent (20%)
23 of the preceding month’s income and forwarding those payments to the Clerk of the
24 Court each time the amount in the account exceeds \$10 pursuant to 28 U.S.C. §
25 1915(b)(2).

26 The Court **DIRECTS** the Clerk of the Court to serve a copy of this Order by U.S.
27 Mail on Kathleen Allison, Secretary, California Department of Corrections and
28 Rehabilitation, P.O. Box 942883, Sacramento, California, 94283-0001.

1 The Court further **DIRECTS** the Clerk to issue a summons as to Plaintiff's
2 Complaint (Doc. No. 1) for Defendant Mitchell and forward it to Plaintiff along with a
3 blank U.S. Marshal Form 285. The Clerk will provide Plaintiff with certified copies of
4 the Complaint and summons for use in serving Defendant. Upon receipt of this "In
5 Forma Pauperis Package," Plaintiff must complete the USM Form 285 as completely and
6 accurately as possible, *include an address where Defendant may be found and/or subject*
7 *to service* pursuant to S.D. Cal. CivLR 4.1(c), and return the forms to the United States
8 Marshal according to the instructions the Clerk provides in the letter accompanying the In
9 Forma Pauperis Package.

10 The Court **ORDERS** the U.S. Marshal to serve a copy of the Complaint and
11 summons upon Defendant Mitchell as directed by Plaintiff on the USM Form 285. Costs
12 of service will be advanced by the United States. *See* 28 U.S.C. § 1915(d); Fed. R. Civ.
13 P. 4(c)(3).

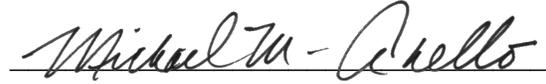
14 The Court **ORDERS** Defendant, once served, to respond to Plaintiff's Complaint
15 and any subsequent pleading Plaintiff files in this matter in which Defendant is named as
16 a party within the time provided by the applicable provisions of Federal Rules of Civil
17 Procedure 12(a) and 15(a)(3). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may
18 occasionally be permitted to "waive the right to reply to any action brought by a prisoner
19 confined in any jail, prison, or other correctional facility under section 1983," once the
20 Court has conducted its sua sponte screening Defendants are required to respond).

21 The Court **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal,
22 to serve upon Defendant, or if appearance has been entered by counsel, upon Defendant's
23 counsel, a copy of every further pleading, motion, or other document submitted for the
24 Court's consideration pursuant to Fed. R. Civ. P. 5(b). Plaintiff must include with every
25 original document sought to be filed with the Clerk, a certificate stating the manner in
26 which a true and correct copy of that document has been served on Defendant or his
27 counsel, and the date of that service. *See* S.D. Cal. CivLR 5.2. Any document received
28 by the Court which has not been properly filed with the Clerk or which fails to include a

1 Certificate of Service upon a Defendant, or their counsel, may be disregarded.

2 **IT IS SO ORDERED.**

3 Dated: October 3, 2022

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5 HON. MICHAEL M. ANELLO
6 United States District Judge

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