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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID B. TURNER, Jr.,  
CDCR #G-30643,

Plaintiff,

vs.

METROPOLITAN TRANSIT SYSTEM;  
SAN DIEGO TROLLEY; SAN DIEGO  
SHERIFF DEPARTMENT; CITY OF SAN  
DIEGO; UNITED STATES OF AMERICA,  
Defendants.

Civil No. 09cv0770 L (POR)

**ORDER:**

**(1) DENYING AMENDED MOTION  
TO PROCEED *IN FORMA*  
*PAUPERIS* AS MOOT  
[Doc. No. 5]**

**AND**

**(2) DISMISSING AMENDED  
COMPLAINT FOR FAILING TO  
STATE A CLAIM AND FOR  
SEEKING DAMAGES FROM  
DEFENDANTS WHO ARE  
IMMUNE PURSUANT  
TO 28 U.S.C. § 1915(e)(2)(B)  
& 1915A(b)**

Plaintiff, a state inmate currently incarcerated at the California Rehabilitation Center in Norco, California, and proceeding pro se, has initiated this civil action pursuant to 42 U.S.C. § 1983.

**I. Procedural Background**

On June 4, 2009, the Court granted him leave to proceed *in forma pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a), but sua sponte dismissed his Complaint pursuant to 28 U.S.C.

1 § 1915(e)(2) and § 1915A(b) [Doc. No. 3]. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir.  
2 2000); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (2000). Specifically, the Court found that  
3 because, on the face of his pleading, Plaintiff claimed to have been subjected to excessive force  
4 by Metropolitan Transit System agents on June 26, 2004, his claims were barred by the statute  
5 of limitations. *See* June 4, 2009 Order [Doc. No. 3] at 4-5, *citing Cervantes v. City of San*  
6 *Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993) (where the running of the statute of limitations is  
7 apparent on the face of the complaint, dismissal for failure to state a claim is proper.)). The  
8 Court further found that while not entirely clear, it appeared Plaintiff claimed to have been  
9 subjected to excessive force and inadequate medical care at the hands of unidentified San Diego  
10 County Sheriff's deputies and/or employees of the County of San Diego; however, his  
11 Complaint failed to allege he was injured as the result of a municipal policy, custom or practice.  
12 (*Id.* at 6-7, *citing Monell v. Department of Social Services*, 436 U.S. at 658, 690-91 (1978)).  
13 Because Plaintiff is proceeding without counsel, the Court notified Plaintiff of his pleading  
14 deficiencies and granted him an opportunity to amend his Complaint in order to fix them. (*Id.*  
15 at 7-8.) *See also Lucas v. Dept. of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995) ("Unless it is  
16 absolutely clear that no amendment can cure the defect ... a pro se litigant is entitled to notice  
17 of the complaint's deficiencies and an opportunity to amend.")

18 Plaintiff has since filed an Amended Complaint [Doc No. 4], as well as an "Amended"  
19 Motion to Proceed IFP [Doc. No. 5].

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

21 As the Court noted in its previous Order, the Prison Litigation Reform Act ("PLRA")  
22 obligates it to review complaints filed by all persons proceeding IFP and by those, like Plaintiff,  
23 who are "incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated  
24 delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial  
25 release, or diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C.  
26 §§ 1915(e)(2), 1915A(b).

27 Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint,  
28 or any portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks

1 damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez*,  
2 203 F.3d at 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick*, 213 F.3d at 446 n.1  
3 (§ 1915A).

4 In his Amended Complaint, Plaintiff names the Metropolitan Transit System, the San  
5 Diego Trolley, the County of San Diego and the United States of America as Defendants.  
6 (Amend. Compl. at 1-2.) First, Plaintiff cannot sue the United States under § 1983. Under the  
7 well-established legal doctrine of sovereign immunity, the United States, its departments, and  
8 agencies cannot be sued without its express consent. *See U.S. v. Mitchell*, 463 U.S. 206, 212,  
9 (1983).

10 Second, as noted in the Court’s June 4, 2009 Order, while “municipalities and other local  
11 government units ... [are] among those ‘persons’ to whom § 1983 applies,” *Monell*, 436 U.S. at  
12 690, Plaintiff must allege an injury resulting from “execution of a government’s policy or  
13 custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to  
14 represent official policy.” *Id.* at 694. There is no respondeat superior liability. *Id.* at 691. Thus,

15 four conditions that must be satisfied in order to establish municipal  
16 liability for failing to act to preserve constitutional rights: (1) that  
17 the plaintiff possessed a constitutional right of which he was  
18 deprived; (2) that the municipality had a policy; (3) that this policy  
amounts to deliberate indifference to the plaintiff’s constitutional  
right; and (4) that the policy is the moving force behind the  
constitutional violation.

19 *Dietrich v. John Ascuaga’s Nugget*, 548 F.3d 892, 900 (9th Cir. 2008) (citing *Van Ort v. Estate*  
20 *of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996) (internal quotation marks omitted)). While  
21 Plaintiff has been notified of the pleading requirements for stating a claim based on municipal  
22 liability, his Amended Complaint, like his original Complaint, fails to allege any of the elements  
23 essential for pleading a *Monell* claim, and is subject to dismissal pursuant to 28 U.S.C.  
24 § 1915(e)(2) and § 1915A(b). *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446 n.1.

25 Finally, while the Court previously found Plaintiff’s claims untimely and permitted him  
26 leave to allege facts that might show he is entitled to either statutory or equitable tolling, *see*  
27 June 4, 2009 Order at 4-5, *citing Fink v. Shedler*, 192 F.2d 911, 916 (9th Cir. 1999), his  
28 Amended Complaint includes no such allegations. *See Cervantes v. City of San Diego*, 5 F.3d

1 1273, 1276 (9th Cir. 1993). Accordingly, for this additional reason, the Court finds Plaintiff's  
2 Amended Complaint fails to state a claim upon which relief can be granted. See 28 U.S.C.  
3 §§ 1915(e)(2), 1915A(b).

4 **III. Conclusion and Order**

5 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

6 (1) Plaintiff's Amended Motion to Proceed IFP [Doc. No. 5] is **DENIED** as moot;  
7 and

8 (2) Plaintiff's First Amended Complaint [Doc. No. 4] is **DISMISSED** without  
9 prejudice both for failing to state a claim upon which relief may be granted and for seeking  
10 damages against defendants who are immune pursuant to 28 U.S.C. § 1915(e)(2)(b) and  
11 § 1915A(b). However, because the Court finds amendment of Plaintiff's § 1983 claims would  
12 be futile at this time, leave to amend is **DENIED**. See *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d  
13 336, 339 (9th Cir. 1996) (denial of a leave to amend is not an abuse of discretion where further  
14 amendment would be futile); see also *Robinson v. California Bd. of Prison Terms*, 997 F. Supp.  
15 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has not, and cannot, state a claim containing an  
16 arguable basis in law, this action should be dismissed without leave to amend; any amendment  
17 would be futile.") (citing *Newland v. Dalton*, 81 F.3d 904, 907 (9th Cir. 1996)).

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

22 The Clerk shall close the file.

23 **IT IS SO ORDERED.**

24 DATED: November 20, 2009

25   
26 M. James Lorenz  
27 United States District Court Judge  
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