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

GARTH JASON GUMIENNY,
Inmate Booking No. 972164

Plaintiff,

vs.

EARL GOLDSTEIN, Medical Director San
Diego County Sheriff's Department; WILLIAM
GORE, San Diego County Sheriff,

Defendants.

Civil No. 09cv2800 JM (WVG)

ORDER:

**(1) GRANTING MOTION TO PROCEED
IN FORMA PAUPERIS, IMPOSING NO
INITIAL PARTIAL FILING FEE AND
GARNISHING \$350.00 BALANCE FROM
PRISONER TRUST ACCOUNT
[Doc. No. 2];**

AND

**(2) DISMISSING CIVIL ACTION FOR
FAILING TO STATE A CLAIM
PURSUANT TO
28 U.S.C. § 1915(e)(2)(B) & 1915A(b)**

21 Garth Jason Gumienny ("Plaintiff"), currently incarcerated at the George Bailey Detention Facility
22 located in San Diego, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42
23 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has
24 filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

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26 **I. MOTION TO PROCEED IFP**

27 All parties instituting any civil action, suit or proceeding in a district court of the United States, except
28 an application for writ of habeas corpus, must pay a filing fee of \$350. See 28 U.S.C. § 1914(a). An action

1 may proceed despite a party's failure to prepay the entire fee only if the party is granted leave to proceed IFP
2 pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). Prisoners
3 granted leave to proceed IFP however, remain obligated to pay the entire fee in installments, regardless of
4 whether the action is ultimately dismissed for any reason. *See* 28 U.S.C. § 1915(b)(1) & (2).

5 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner
6 seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional
7 equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28
8 U.S.C. § 1915(a)(2). From the certified trust account statement, the Court must assess an initial payment of
9 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly
10 balance in the account for the past six months, whichever is greater, unless the prisoner has no assets.
11 *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That institution having custody of the prisoner must
12 collect subsequent payments, assessed at 20% of the preceding month's income, in any month
13 in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing
14 fee is paid. *See* 28 U.S.C. § 1915(b)(2).

15 The Court finds that Plaintiff has attached a certified copy of his trust account statement pursuant to
16 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that he has
17 insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n
18 no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal
19 judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing
20 fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing
21 dismissal of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of funds available to
22 him when payment is ordered."). Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc.
23 No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance
24 of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant to the
25 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

26 **II. SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e) AND 1915A**

27 The PLRA's amendments to 28 U.S.C. § 1915 also obligate the Court to review complaints filed by
28 all persons proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and]

1 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions
2 of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See*
3 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any
4 prisoner civil action and all other IFP complaints, or any portions thereof, which are frivolous, malicious, fail
5 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B)
6 and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v.*
7 *Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000) (§ 1915A).

8 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal of
9 only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28 U.S.C. § 1915(e)(2) and
10 § 1915A now mandate that the court reviewing an IFP or prisoner’s suit make and rule on its own motion to
11 dismiss before directing that the Complaint be served by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2).
12 *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis
13 complaint that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
14 (discussing § 1915A).

15 “[W]hen determining whether a complaint states a claim, a court must accept as true all allegations
16 of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d
17 at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil
18 Procedure 12(b)(6)”). Here, however, even presuming Plaintiff’s allegations true, the Court finds his
19 Complaint fails to state a claim upon which relief can be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b);
20 *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.

21 **A. 42 U.S.C. § 1983**

22 To state a claim under § 1983, Plaintiff must allege that: (1) the conduct he complains of was
23 committed by a person acting under color of state law; and (2) that conduct violated a right secured by the
24 Constitution and laws of the United States. *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1184 (9th
25 Cir. 2009) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

26 **B. Inadequate medical care claims**

27 In his Complaint, it is unclear whether Plaintiff is a pre-trial detainee or whether he is serving a
28 sentence following a criminal conviction. The Ninth Circuit has noted that while different Constitutional

1 provisions may be applied dependent on whether a plaintiff's claim arise before or after conviction, a
2 "pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the
3 Eighth Amendment," and therefore, "the same standards apply." *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th
4 Cir. 1998); *but cf. Gibson v. County of Washoe*, 290 F.3d 1175, 1188 n.10 (9th Cir. 2002) (noting that while
5 the Court generally looks to Eighth Amendment cases when reviewing conditions of confinement claims
6 raised by pretrial detainees under the Fourteenth Amendment, "[i]t is quite possible ... that the protections
7 provided pretrial detainees by the Fourteenth Amendment in some instances exceed those provided convicted
8 prisoners by the Eighth Amendment."); *see also Lolli v. County of Orange*, 351 F.3d 410, 419 n.6 (9th Cir.
9 2003) (quoting *Gibson*, 290 F.3d at 1188 n.10).

10 In order to assert a claim for inadequate medical care, Plaintiff must allege facts which are sufficient
11 to show that each person sued was "deliberately indifferent to his serious medical needs." *Helling v.*
12 *McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Prison officials must
13 purposefully ignore or fail to respond to Plaintiff's pain or medical needs; neither an inadvertent failure to
14 provide adequate medical care, nor mere negligence or medical malpractice constitutes a constitutional
15 violation. *Estelle*, 429 U.S. at 105-06.

16 Thus, to state a claim, Plaintiff must allege facts sufficient to show both: (1) an objectively "serious"
17 medical need, i.e., one that a reasonable doctor would think worthy of comment, one which significantly
18 affects his daily activities, or one which is chronic and accompanied by substantial pain, *see Doty v. County*
19 *of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994); and (2) a subjective, and "sufficiently culpable" state of mind
20 on the part of each individual Defendant. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991).

21 Here, Plaintiff names as the only Defendants the Medical Director and the San Diego Sheriff.
22 However, neither of these Defendants are alleged to have direct knowledge of Plaintiff's medical condition.
23 In fact, Plaintiff alleges that he was examined by more than one Doctor at the facility and prescribed pain
24 medication by these physicians. (*See Compl.* at 4-5.) While he does allege that other jail officials refused
25 to fill these prescriptions, Plaintiff does not name these Defendants in his Complaint. Plaintiff also alleges
26 that he has requested to be examined by an Orthopedic Surgeon but jail medical officials have refused to refer
27 him to a specialist. (*Id.*) However, a mere difference of opinion between an inmate and prison medical
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1 personnel regarding appropriate medical diagnosis and treatment are not enough to establish a deliberate
2 indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

3 Here, Plaintiff names only the Sheriff for San Diego County and the Medical Supervisor as
4 Defendants. Neither of these Defendants are alleged to have direct knowledge of Plaintiff's medical
5 condition.. Thus, Plaintiff cannot show that either the Medical Supervisor or the Sheriff for the County of
6 San Diego had a "sufficiently culpable" state of mind to state a "deliberate indifference" claim. *Wilson*, 501
7 U.S. at 302.

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9 Accordingly, Plaintiff's Complaint must be dismissed for failing to state a claim upon which section
10 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2) & 1915A(b)(1).

11 **III. CONCLUSION AND ORDER**

12 Good cause appearing, **IT IS HEREBY ORDERED** that:

13 (1) Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) is **GRANTED**.

14 (2) The Watch Commander, or his designee, is ordered to collect from Plaintiff's prison trust
15 account the \$350 balance of the filing fee owed in this case by collecting monthly payments from the trust
16 account in an amount equal to twenty percent (20%) of the preceding month's income credited to the account
17 and forward payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
18 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE
19 NAME AND NUMBER ASSIGNED TO THIS ACTION.

20 (3) The Clerk of the Court is directed to serve a copy of this Order on Watch Commander, George
21 Bailey Detention Facility, 446 Alta Road, San Diego, California 92158.

22 **IT IS FURTHER ORDERED** that:

23 (4) Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim upon
24 which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). However, Plaintiff is
25 further **GRANTED** sixty (60) days leave from the date this Order is filed in which to file a First Amended
26 Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must
27 be complete in itself without reference to his previous pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not
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1 named and all claims not re-alleged in the Amended Complaint will be considered waived. *See King v.*
2 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

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4 Further, Plaintiff is cautioned that should he elect not to amend, or if his Amended Complaint still
5 fails to state a claim upon which relief may be granted, the dismissal of this action may hereafter be counted
6 as a “strike” against him pursuant to 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79
7 (9th Cir. 1996).

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9 DATED: February 16, 2010

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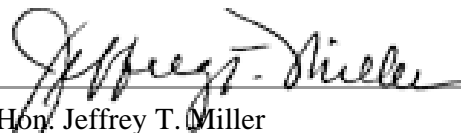
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Hon. Jeffrey T. Miller
United States District Judge