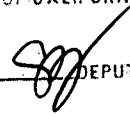


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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 MICHAEL J. BOOTH,
12 CDCR #G-27872,

13 Plaintiff,

Civil No. 10-1236 WQH (NLS)

ORDER:

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16 vs.

(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED *IN*
FORMA PAUPERIS, IMPOSING
NO INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[Doc. No. 2];

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19
20 GEORGE NEOTTI, Warden;
21 JOHN DOE, 2d Watch Correctional
Sergeant, Fac. 2, Bldg. 8;
22 R. BOLDING, Correctional Officer;
T. ARMSTEAD, Correctional Officer,

23
24 Defendants.

(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
WITHOUT PREJUDICE PURSUANT
TO 28 U.S.C. § 1915(e)(1) AND
REFERRING CASE TO SAN DIEGO
COUNTY VOLUNTEER
LAWYER PROGRAM
[Doc. No. 3]

AND

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

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26
27 Michael J. Booth ("Plaintiff"), a state prisoner currently incarcerated at California
28 Rehabilitation Center ("CRC") in Norco, California, and proceeding in pro se, has filed a civil

1 rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff claims prison officials at Richard J.
2 Donovan Correctional Facility (“RJD”) violated his Eighth Amendment rights by failing to
3 protect him from being drugged and violently and repeatedly raped by his cell mate while he was
4 housed in RJD’s Administrative Segregation Unit in June 2009. (Compl. ¶¶ 9-18, 22; Pl.’s
5 Decl., Ex. C.) Plaintiff has exhausted his administrative remedies as required by 42 U.S.C.
6 § 1997e(a). (*Id.* ¶ 19 & Ex. H.) Plaintiff seeks declaratory and injunctive relief as well as
7 compensatory and punitive damages, and both his Complaint and Declaration in support are
8 verified under penalty of perjury pursuant to 28 U.S.C. § 1746. (*Id.* ¶¶ 25-28, Pl.’s Ex. C.)

9 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he
10 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc.
11 No. 2], as well as a Motion for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1)
12 [Doc. No. 3].

13 **I.**

14 **MOTION TO PROCEED IFP**

15 All parties instituting any civil action, suit or proceeding in a district court of the United
16 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
17 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
18 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
19 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to
20 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their
21 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d
22 844, 847 (9th Cir. 2002).

23 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
24 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
25 statement (or institutional equivalent) for the prisoner for the six-month period immediately
26 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
27 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
28 payment of 20% of (a) the average monthly deposits in the account for the past six months, or

1 (b) the average monthly balance in the account for the past six months, whichever is greater,
2 unless the prisoner has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
3 institution having custody of the prisoner must collect subsequent payments, assessed at 20% of
4 the preceding month's income, in any month in which the prisoner's account exceeds \$10, and
5 forward those payments to the Court until the entire filing fee is paid. See 28 U.S.C.
6 § 1915(b)(2).

7 The Court finds that Plaintiff has no available funds from which to pay filing fees at this
8 time. See 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited
9 from bringing a civil action or appealing a civil action or criminal judgment for the reason that
10 the prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*,
11 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing
12 dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds
13 available to him when payment is ordered."). Therefore, the Court **GRANTS** Plaintiff's Motion
14 to Proceed IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
15 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
16 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
17 § 1915(b)(1).

18 II.

19 MOTION FOR APPOINTMENT OF COUNSEL

20 Plaintiff has also submitted a Motion for Appointment of Counsel [Doc. No. 3]. "[T]here
21 is no absolute right to counsel in civil proceedings." *Hedges v. Resolution Trust Corp. (In re*
22 *Hedges)*, 32 F.3d 1360, 1363 (9th Cir. 1994) (citation omitted). Thus, federal courts do not have
23 the authority "to make coercive appointments of counsel." *Mallard v. United States District*
24 *Court*, 490 U.S. 296, 310 (1989); see also *United States v. \$292,888.04 in U.S. Currency*, 54
25 F.3d 564, 569 (9th Cir. 1995).

26 However, districts courts have discretion to "request" that an attorney represent indigent
27 civil litigants upon a showing of exceptional circumstances pursuant to 28 U.S.C. § 1915(e)(1).
28 See *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Burns v. County of King*, 883 F.2d

1 819, 823 (9th Cir. 1989). “A finding of exceptional circumstances requires an evaluation of both
2 the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro
3 se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive
4 and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v.*
5 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

6 Here, the Court finds that Plaintiff does appear to have an adequate grasp of his case as
7 well as the legal issues involved. *See Terrell*, 935 F.2d at 1017. As noted below, Plaintiff’s
8 Complaint alleges facts sufficient to survive the initial screening required by 28 U.S.C.
9 §§ 1915(e)(2) and 1915A. Thus, because Plaintiff has not satisfied the stringent standards
10 required for an appointment of counsel under 28 U.S.C. § 1915(e)(1), Plaintiff’s Motion for
11 Appointment of Counsel must be DENIED.

12 However, the Court will refer Plaintiff’s Complaint to the San Diego Volunteer Lawyer
13 Program pursuant to S.D. Cal. Local Civil Rule 83.8. Plaintiff is hereby cautioned that this
14 referral does not guarantee that attorney assistance will be offered or made available to him; this
15 Order merely notifies and requests that the Volunteer Lawyer Program attempt to locate pro
16 bono counsel for Plaintiff.

17 III.

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

19 The PLRA also obligates the Court to review complaints filed by all persons proceeding
20 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
21 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
22 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
23 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
24 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
25 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
26 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
27 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
28 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing

1 § 1915A).

2 “[W]hen determining whether a complaint states a claim, a court must accept as true all
3 allegations of material fact and must construe those facts in the light most favorable to the
4 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
5 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
6 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
7 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
8 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
9 pro se civil rights complaint, the court may not “supply essential elements of claims that were
10 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
11 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations
12 are not sufficient to withstand a motion to dismiss.” *Id.*

13 As currently pled, the Court finds Plaintiff’s allegations are sufficient to survive the sua
14 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).¹ See *Lopez*, 203 F.3d at
15 1126-27; *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (“Prison officials have a duty ... to
16 protect prisoners from violence.”). Accordingly, the Court finds Plaintiff is entitled to U.S.
17 Marshal service on his behalf. See 28 U.S.C. § 1915(d) (“The officers of the court shall issue
18 and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court
19 may order that service be made by a United States marshal or deputy marshal ... if the plaintiff
20 is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

21 IV.

22 CONCLUSION AND ORDER

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

24 1. Plaintiff’s Motion for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1)
25 [Doc. No. 3] is **DENIED**. However, the Court hereby **REFERS** Plaintiff’s Complaint to the San
26 Diego Volunteer Lawyer Program pursuant to S.D. CAL. CIV. L.R. 83.8(a) for purposes of

27 _____
28 ¹ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of,
and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.”
Teahan v. Wilhelm, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

1 investigating the possibility of obtaining pro bono representation on Plaintiff's behalf.

2 2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
3 **GRANTED.**

4 3. The Secretary of California Department of Corrections and Rehabilitation, or his
5 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
6 owed in this case by collecting monthly payments from the account in an amount equal to twenty
7 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
8 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
9 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
10 **ASSIGNED TO THIS ACTION.**

11 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
12 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
13 Sacramento, California 95814.

14 **IT IS FURTHER ORDERED** that:

15 5. The Clerk shall issue a summons as to Plaintiff's Complaint [Doc. No. 1] upon
16 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each
17 Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and
18 a certified copy of his Complaint and the summons so that he may serve Defendants. Upon
19 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and
20 accurately as possible, and to return them to the United States Marshal according to the
21 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,
22 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed
23 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.
24 *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

25 6. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the
26 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42
27 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to
28 reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility

1 under section 1983,” once the Court has conducted its sua sponte screening pursuant to 28
2 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on
3 the face on the pleading alone that Plaintiff has a “reasonable opportunity to prevail on the
4 merits,” the defendant is required to respond).

5 7. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
6 counsel, upon Defendants’ counsel, a copy of every further pleading or other document
7 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
8 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
9 of any document was served on Defendants, or counsel for Defendants, and the date of service.
10 Any paper received by the Court which has not been filed with the Clerk or which fails to
11 include a Certificate of Service will be disregarded.

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DATED: 6/13/10 
HON. WILLIAM Q. HAYES
United States District Judge