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

CONDALEE MORRIS,
CDCR #V-96203,

Plaintiff,

vs.

ARNOLD SCHWARZENEGGER;
MATTHEW CATE; LARRY SCRIBNER;
JOSE BUILTEMAN; J. SANDOVAL;
T. CANADA; K. BALL,

Defendants.

Civil No. 10cv1305 JAH (NLS)

ORDER:

**(1) DENYING MOTION FOR
APPOINTMENT OF COUNSEL; and**

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

**I.
Procedural History**

On June 17, 2010, Condalee Morris (“Plaintiff”), a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California, and proceeding in pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. In addition, Plaintiff filed a Motion to Proceed *In Forma Pauperis* (“IFP”), along with a Motion for Appointment of Counsel and a “Request for Court to Grant the Permanent Injunction.” [Doc. Nos. 2-4.]

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1 On August 25, 2010, the Court granted Plaintiff's Motion to Proceed IFP, denied
2 Plaintiff's Motion for Appointment of Counsel, denied Plaintiff's Motion for Permanent
3 Injunction and sua sponte dismissed his Complaint for failing to state a claim. *See* Aug. 25,
4 2010 Order at 7-8. Plaintiff was granted leave to file an Amended Complaint in order to correct
5 the deficiencies of pleading identified by the Court. *Id.* at 8. On September 23, 2010, Plaintiff
6 filed his First Amended Complaint ("FAC").

7 II.

8 MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 12]

9 Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action.
10 The Constitution provides no right to appointment of counsel in a civil case, however, unless an
11 indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social*
12 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are
13 granted discretion to appoint counsel for indigent persons. This discretion may be exercised only
14 under "exceptional circumstances." *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). "A
15 finding of exceptional circumstances requires an evaluation of both the 'likelihood of success
16 on the merits and the ability of the plaintiff to articulate his claims pro se in light of the
17 complexity of the legal issues involved.' Neither of these issues is dispositive and both must be
18 viewed together before reaching a decision." *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328,
19 1331 (9th Cir. 1986)).

20 The Court denies Plaintiff's request without prejudice, as neither the interests of justice
21 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
22 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

23 III.

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

25 The PLRA also obligates the Court to review complaints filed by all persons proceeding
26 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
27 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
28 conditions of parole, probation, pretrial release, or diversionary program," "as soon as

1 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
2 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
3 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
4 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A.

5 **A. 42 U.S.C. § 1983 Liability**

6 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
7 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
8 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
9 United States. See 42 U.S.C. § 1983.

10 **B. Eighth Amendment Inadequate Medical Care Claims**

11 Here, once again, Plaintiff claims that he was “denied and delayed medical care” for a
12 period of five days. FAC at 7. Plaintiff alleges that during these five days he complained of
13 “chest pain, shortness of breath, and pain in his lower back area, along with blood in his urine
14 and stool.” *Id.*

15 As the Court previously informed Plaintiff, in order to assert a claim for inadequate
16 medical care, Plaintiff must allege facts which are sufficient to show that each person sued was
17 “deliberately indifferent to his serious medical needs.” *Helling v. McKinney*, 509 U.S. 25, 32
18 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Hunt v. Dental Dept.*, 865 F.2d 198, 200
19 (9th Cir. 1989). To be liable, prison officials must purposefully ignore or fail to respond to
20 Plaintiff’s pain or medical needs. *Estelle*, 429 U.S. at 105-06.

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

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1 While Plaintiff alleges that he was denied medical treatment for five days, there are no
2 facts in the First Amended Complaint from which the Court can determine whether he has
3 suffered any injury as a result of the Defendants alleged delay in providing treatment. *See*
4 *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (a prisoner
5 can make “no claim for deliberate medical indifference unless the denial was harmful.”)
6 Accordingly, Plaintiff’s Eighth Amendment claims are dismissed for failing to state a claim upon
7 which relief may be granted.

8 **C. Supplemental State Law claims**

9 Plaintiff also seeks relief under a number of state law claims. However, because the
10 Court dismisses all federal claims in the First Amended Complaint, the Court declines to
11 exercise supplemental jurisdiction over Plaintiff’s state law claims. *See* 28 U.S.C. § 1367(c)(3);
12 *see also Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1995) (generally, dismissal of federal
13 claims before trial dictates that state pendent claims should be dismissed.) These claims are
14 dismissed without prejudice to Plaintiff to either pursue in state court or amend his First
15 Amended Complaint to correct the deficiencies noted in this Order.

16 Accordingly, the Court finds that Plaintiff’s First Amended Complaint fails to state a
17 section 1983 claim upon which relief may be granted , and is therefore subject to dismissal
18 pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an
19 opportunity to amend his pleading to cure the defects set forth above. Plaintiff is warned that
20 if his amended complaint fails to address the deficiencies of pleading noted above, it may be
21 dismissed with prejudice and without leave to amend.

22 **IV.**

23 **CONCLUSION AND ORDER**

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

25 1. Plaintiff’s Motion for Appointment of Counsel [Doc. No. 12] is **DENIED** without
26 prejudice.

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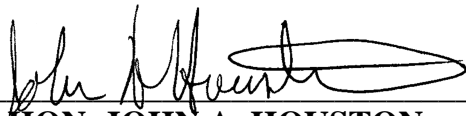
IT IS FURTHER ORDERED that:

2. Plaintiff's First Amended Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a Second Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)

3. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

IT IS SO ORDERED.

DATED: October 6, 2010



HON. JOHN A. HOUSTON
United States District Judge