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

CHRIS EDDIE GREENE,
CDCR #H-81453,

Plaintiff,

vs.

WILSON; D. STRAYHORN;
WARDEN; MATTHEW CATES,

Defendants.

Civil No. 10cv2317 WQH (WVG)

ORDER:

- (1) GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS*, [Doc. No. 4];**
- (2) GRANTING MOTION FOR COPIES OF COMPLAINT [Doc. No. 3]; and**
- (3) SUA SPONTE DISMISSING COMPLAINT FOR FAILING TO STATE A CLAIM PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A**

Chris Eddie Greene (“Plaintiff”), a state inmate currently incarcerated at Pelican Bay State Prison located in Crescent City, California and proceeding pro se, has filed a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4], along with a “Motion to Grant Original Complaint with Two Copies” [Doc. No. 3].

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1 I.

2 MOTION TO PROCEED IFP

3 All parties instituting any civil action, suit or proceeding in a district court of the United
4 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. See 28
5 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
6 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See *Rodriguez v.*
7 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
8 remains obligated to pay the entire fee in installments, regardless of whether his action is
9 ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
10 (9th Cir. 2002).

11 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
12 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
13 statement (or institutional equivalent) for the prisoner for the six-month period immediately
14 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
15 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
16 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
17 (b) the average monthly balance in the account for the past six months, whichever is greater,
18 unless the prisoner has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
19 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
20 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
21 forward those payments to the Court until the entire filing fee is paid. See 28 U.S.C.
22 § 1915(b)(2).

23 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
24 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
25 Plaintiff’s trust account statement shows he has insufficient funds with which to pay any initial
26 partial filing fee. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
27 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
28 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing

1 fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
2 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack
3 of funds available.”).

4 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP [Doc. No. 4], and
5 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
6 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court
7 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

8 II.

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

10 The PLRA also obligates the Court to review complaints filed by all persons proceeding
11 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
12 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
13 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
14 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
15 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
16 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
17 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
18 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
19 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
20 § 1915A).

21 “[W]hen determining whether a complaint states a claim, a court must accept as true all
22 allegations of material fact and must construe those facts in the light most favorable to the
23 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
24 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
25 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
26 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
27 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
28 pro se civil rights complaint, the court may not “supply essential elements of claims that were

1 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
2 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations
3 are not sufficient to withstand a motion to dismiss.” *Id.*

4 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
5 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
6 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
7 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
8 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
9 1350, 1354 (9th Cir. 1985) (en banc).

10 **A. Excessive Force Claims**

11 In his Complaint, Plaintiff alleges that he was housed in his cell at the Richard J. Donovan
12 Correctional Facility (“RJD”) on March 24, 2009. (*See* Compl. at 3.) Plaintiff acknowledges
13 that he had the window of his cell “covered due to his mental illness and depression.” (*Id.*)
14 Plaintiff then claims that Officer Wilson came to his cell. (*Id.*) The difficulty with Plaintiff’s
15 allegations is that it is far from clear what he alleges happened after Officer Wilson came to his
16 cell. It appears that there was an altercation between Plaintiff and correctional officers but there
17 are very few specific facts about what is alleged to have happened or the injuries that he may
18 have suffered.

19 When an inmate claims that prison officials violated his Eighth Amendment rights by
20 using excessive force, the relevant inquiry is “whether force was applied in a good-faith effort
21 to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson v.*
22 *McMillian*, 503 U.S. 1, 7 (1992). An Eighth Amendment violation occurs only when an inmate
23 is subjected to the “unnecessary and wanton infliction of pain.” *Whitley v. Albers*, 475 U.S. 312,
24 319 (1986). To determine whether Plaintiff has satisfied the malicious and sadistic standard, the
25 Court examines the following five factors: (1) the extent of the injury suffered; (2) the need for
26 the application of force; (3) the relationship between that need and the amount of force used; (4)
27 the threat reasonably perceived by Defendants; and (5) any efforts made to temper the severity
28 of a forceful response. *Hudson*, 503 U.S. at 7; *Whitley*, 475 U.S. at 321.

1 Here, Plaintiff's facts, at this time, fail to show that the actions of the Defendants rises
2 to the level of "malicious and sadistic." *Id.* Thus, Plaintiff's Eighth Amendment excessive
3 force claims are dismissed for failing to state a claim upon which § 1983 relief can be granted.

4 **C. Heck Bar**

5 In addition, Plaintiff attaches documents to his Complaint that indicate he may have been
6 convicted of battery on a peace officer arising from the same set of facts which he claims form
7 the basis of his excessive force claim. These claims may amount to an attack on the
8 constitutional validity of Plaintiff's criminal proceeding, and as such, may not be maintained
9 pursuant to 42 U.S.C. § 1983 unless and until he can show that his criminal conviction has
10 already been invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

11 "In any § 1983 action, the first question is whether § 1983 is the appropriate avenue to
12 remedy the alleged wrong." *Haygood v. Younger*, 769 F.2d 1350, 1353 (9th Cir. 1985) (en
13 banc). A prisoner in state custody simply may not use a § 1983 civil rights action to challenge
14 the "fact or duration of his confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). The
15 prisoner must seek federal habeas corpus relief instead. *Wilkinson v. Dotson*, 544 U.S. 74, 78
16 (2005) (*quoting Preiser*, 411 U.S. at 489). Thus, Plaintiff's § 1983 action "is barred (absent
17 prior invalidation)--no matter the relief sought (damages or equitable relief), no matter the target
18 of his suit (state conduct leading to conviction or internal prison proceedings)--if success in that
19 action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*,
20 544 U.S. at 82.

21 **B. Respondeat Superior**

22 Plaintiff names the Warden of RJD and Matthew Cates, Director of the CDCR, as
23 Defendants in this matter but fails to set forth any factual allegations with regard to these
24 Defendants in the body of the Complaint. Thus, it appears that Plaintiff seeks to hold these
25 Defendants liable in their supervisory capacity. However, there is no respondeat superior
26 liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993).
27 Instead, "[t]he inquiry into causation must be individualized and focus on the duties and
28 responsibilities of each individual defendant whose acts or omissions are alleged to have caused

1 a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo*
2 *v. Goode*, 423 U.S. 362, 370-71 (1976)). In order to avoid the respondeat superior bar, Plaintiff
3 must allege personal acts by each individual Defendant which have a direct causal connection
4 to the constitutional violation at issue. *See Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir.
5 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

6 Supervisory prison officials may only be held liable for the allegedly unconstitutional
7 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
8 extent they personally participated in or directed a subordinate’s actions, and (2) in either acting
9 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff’s
10 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,
11 however, Plaintiff’s Complaint fails to set forth facts which might be liberally construed to
12 support an individualized constitutional claim against these Defendants.

13 Accordingly, the Court finds that Plaintiff’s Complaint fails to state a section 1983 claim
14 upon which relief may be granted , and is therefore subject to dismissal pursuant to 28 U.S.C.
15 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend
16 his pleading to cure the defects set forth above. Plaintiff is warned that if his amended complaint
17 fails to address the deficiencies of pleading noted above, it may be dismissed with prejudice and
18 without leave to amend.

19 **III.**

20 **MOTION TO GRANT ORIGINAL COMPLAINT WITH TWO COPIES**

21 Plaintiff has filed a motion in which he indicates that he has been denied the ability to
22 make photocopies of his Complaint. To the extent that Plaintiff is seeking a copy of his
23 Complaint, the Court will direct the Clerk of Court to mail a copy of Plaintiff’s Complaint [Doc.
24 No. 1] to him. However, the Court will not continue to provide Plaintiff with free photocopies
25 of any future pleadings he may choose to file.

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IV.

CONCLUSION AND ORDER

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

1. Plaintiff's Motion to provide copy of original Complaint [Doc. No. 4] is **GRANTED**. The Clerk of Court is directed to mail to Plaintiff a copy of his original Complaint [Doc. No. 1].

2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4] is **GRANTED**.

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

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

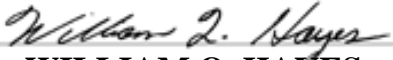
IT IS FURTHER ORDERED that:

5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A. However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is filed in which to file a First 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. CIVLR 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted, it may be dismissed without further

1 leave to amend and may hereafter be counted as a “strike” under 28 U.S.C. § 1915(g). *See*
2 *McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

3 **IT IS SO ORDERED.**

4 DATED: February 3, 2011

5 
6 **WILLIAM Q. HAYES**
7 United States District Judge

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