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

MICHAEL DAYNE BRIDGEMAN,
CDCR # AD-946,

Plaintiff,

vs.

SAN DIEGO COUNTY; SAN DIEGO
COUNTY SHERIFF'S DEP'T;
WILLIAM KOLENDER;
WILLIAM GORE,

Defendants.

Civil No. 10-2470 WQH (BGS)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
[Doc. No. 2];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[Doc. No. 7];**

AND

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

On October 20, 2010, Plaintiff, a state inmate currently incarcerated at the Richard J. Donovan Correctional Facility, California, and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 in the Northern District of California. On November 30, 2010, United States District Judge Jeffrey White transferred the action for lack of proper venue to the Southern District of California. See Nov. 30, 2010 Order of Transfer [Doc. No. 3].

Pending are Plaintiff's Motion to Proceed *In Forma Pauperis* (IFP) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], and a Motion for Appointment of Counsel [Doc. No. 7].

1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
4 U.S.C. § 1914(a). An action may proceed despite a party’s failure to pay only if the party is
5 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493
6 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
7 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in
8 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28
9 U.S.C. § 1915(b)(1) & (2).

10 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
11 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
12 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement shows that
13 he has insufficient funds from which to pay an initial partial filing fee.

14 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and
15 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further
16 orders the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”)
17 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them
18 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
19 § 1915(b)(1).

20 **II. MOTION FOR APPOINTMENT OF COUNSEL**

21 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil
22 action. The Constitution provides no right to appointment of counsel in a civil case, however,
23 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v.*
24 *Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1),
25 district courts are granted discretion to appoint counsel for indigent persons. This discretion may
26 be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017
27 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the
28 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se

1 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and
2 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,
3 789 F.2d 1328, 1331 (9th Cir. 1986)).

4 The Court denies Plaintiff’s request without prejudice because, for the reasons set out
5 below, neither the interests of justice nor exceptional circumstances warrant appointment of
6 counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at
7 1017.

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

9 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also
10 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like
11 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or
12 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
13 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”
14 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua
15 sponte dismiss any prisoner civil action and all other IFP 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 n.1 (9th Cir.
19 2000) (§ 1915A).

20 Plaintiff claims that unnamed San Diego Central Jail deputies violated his right to be free
21 from “cruel and unusual punishment” by failing to provide him with “medical services,” and in
22 particular, a wheelchair. *See* Compl. at 3. It is unclear whether Plaintiff was a pre-trial detainee
23 at the time, or whether he was serving a sentence following a criminal conviction. However, the
24 Ninth Circuit has noted that while different constitutional provisions may apply depending on
25 whether a plaintiff’s claim arise before or after conviction, a “pretrial detainees’ rights under the
26 Fourteenth Amendment are comparable to prisoners’ rights under the Eighth Amendment,” and
27 therefore, “the same standards apply.” *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998); *but*
28 *cf. Gibson v. County of Washoe*, 290 F.3d 1175, 1188 n.10 (9th Cir. 2002) (noting that while the

1 Court generally looks to Eighth Amendment cases when reviewing conditions of confinement
2 claims raised by pretrial detainees under the Fourteenth Amendment, “[i]t is quite possible ...
3 that the protections provided pretrial detainees by the Fourteenth Amendment in some instances
4 exceed those provided convicted prisoners by the Eighth Amendment.”); *see also Lolli v. County*
5 *of Orange*, 351 F.3d 410, 419 n.6 (9th Cir. 2003) (quoting *Gibson*, 290 F.3d at 1188 n.10).

6 In order to assert a claim for inadequate medical care, Plaintiff must allege facts which
7 are sufficient to show that each person sued was “deliberately indifferent to his serious medical
8 needs.” *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106
9 (1976). Officials must purposefully ignore or fail to respond to Plaintiff’s pain or medical needs;
10 neither an inadvertent failure to provide adequate medical care, nor mere negligence or medical
11 malpractice constitutes a constitutional violation. *Estelle*, 429 U.S. at 105-06.

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

18 Plaintiff’s Complaint fails to allege facts sufficient to rise to the level of a constitutional
19 violation. Plaintiff both does not describe the “serious” nature of his medical need nor does he
20 identify with any specificity how any individual Defendant knew of his “serious” physical
21 limitations, yet deliberately disregarded his need for a wheelchair or other accommodations. *See*
22 *Estelle*, 429 U.S. at 105-06. Thus, Plaintiff’s cruel and unusual punishment claims must
23 dismissed for failing to state a claim upon which relief can be granted.

24 In addition, Plaintiff names San Diego County Sheriffs Kolender and Gore as parties but
25 fails to assert any specific factual allegations pertaining to either of these Defendants. There is
26 no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433,
27 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into causation must be individualized and focus
28 on the duties and responsibilities of each individual defendant whose acts or omissions are

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

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

13 Plaintiff also names the San Diego County Sheriff’s Department as a Defendant in this
14 matter. However, an agency or department of a municipal entity is not a proper defendant under
15 § 1983. *Vance v. County of Santa Clara*, 928 F.Supp. 993, 996 (N.D. Cal. 1996). Rather, the
16 County itself is the proper defendant. *See id.* “[A] municipality cannot be held liable solely
17 because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under
18 § 1983 on a respondeat superior theory.” *Monell v. Department of Social Services*, 436 U.S.
19 658, 691 (1978).

20 Finally, to the extent Plaintiff has named the County of San Diego as a Defendant, a
21 municipality may be liable under § 1983 for monetary, declaratory, or injunctive relief where
22 a constitutional deprivation was caused by the implementation or execution of “a policy
23 statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s
24 officers.” *Monell*, 436 U.S. at 690; *Board of the County Commissioners v. Brown*, 520 U.S. 397,
25 403 (1997) (“[A] plaintiff must show that the municipal action was taken with the requisite
26 degree of culpability and must demonstrate a direct causal link between the municipal action and
27 the deprivation of federal rights.”); *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995).

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1 Thus, to plead liability on behalf of the County, Plaintiff must allege: (1) he was deprived
2 of a constitutional right; (2) the County had a policy; (3) the policy amounted to deliberate
3 indifference to plaintiff's constitutional right; and (4) the policy was the "moving force behind
4 the constitutional violation." *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996);
5 *Brown*, 520 U.S. at 404; *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Put another way,
6 in order to state a § 1983 claim against the County of San Diego, Plaintiff must allege facts
7 showing that his injury was caused by individual county officers whose conduct both violated
8 the constitution and conformed to an official county policy, custom or practice. *See Karim-*
9 *Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988). All these things he has
10 failed to do.

11 For all these reasons, the Court finds that Plaintiff's Complaint must be dismissed sua
12 sponte for failing to state a claim upon which relief can be granted pursuant to 28 U.S.C.
13 §§ 1915(e)(2)(B) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446 n.1.

14 **IV. CONCLUSION AND ORDER**

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

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

18 2. Plaintiff's Motion for Appointment of Counsel [Doc. No. 7] is **DENIED**.

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

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


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IT IS FURTHER ORDERED that:

5. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(e)(2) & § 1915A(b).

6. 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 his original Complaint. *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). If Plaintiff fails to file an Amended Complaint within 45 days, this action shall remain dismissed without further Order by the Court.

DATED: February 4, 2011


WILLIAM Q. HAYES
United States District Judge