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

RICHARD EARL GEORGE,  
CDCR #V-56048,

Plaintiff,

vs.

DOMINGO URIBE; ALAN HERNANDEZ;  
FELIPE LOPEZ; JOSE VALASQUEZ;  
MANUEL FARIAS; L. VALENZUELA; F.  
GUTIERREZ; ALVARADO; L.  
CALDERON; J. CARVAJAL,

Defendants.

Civil No. 11cv0070 JLS (RBB)

**ORDER:**

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

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

**I.**

**PROCEDURAL HISTORY**

On January 12, 2011, Richard Earl George (“Plaintiff”), a state prisoner currently incarcerated at Salinas Valley State Prison located in Soledad, 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”).

On March 21, 2011, the Court granted Plaintiff’s Motion to Proceed IFP and sua sponte dismissed his Complaint for failing to state a claim. *See* March 21, 2011 Order at 5-6. Plaintiff

1 was granted leave to file an Amended Complaint in order to correct the deficiencies of pleading  
2 identified by the Court. *Id.* at 6. On April 15, 2011, Plaintiff filed his First Amended Complaint  
3 (“FAC”), along with a Motion for Appointment of Counsel.

## 4 **II.**

### 5 **MOTION FOR APPOINTMENT OF COUNSEL [ECF No. 4]**

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

17 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice  
18 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,  
19 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

## 20 **III.**

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

22 As discussed in the previous Order, because Plaintiff is proceeding IFP and is a  
23 “prisoner” as defined by 28 U.S.C. § 1915(h), the Court must also review his Amended  
24 Complaint sua sponte before service, and dismiss the entire action, or any part of his Amended  
25 Complaint, if it is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
26 who are immune. *See* 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Lopez v. Smith*, 203 F.3d 1122,  
27 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but  
28 requires” the court to sua sponte dismiss an *in forma pauperis* complaint that fails to state a

1 claim); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

2 Before amendment by the Prison Litigation Reform Act (“PLRA”), the former 28 U.S.C.  
3 § 1915(d) permitted sua sponte dismissal of only frivolous and malicious claims. *Lopez*, 203  
4 F.3d at 1126, 1130. An action is frivolous if it lacks an arguable basis in either law or fact.  
5 *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). However, 28 U.S.C. § 1915(e)(2) and § 1915A  
6 mandate that the court reviewing an IFP or prisoner’s suit make and rule on its own motion to  
7 dismiss before effecting service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P.  
8 4(c)(3). *See Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05  
9 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service  
10 of process is made on the opposing parties”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th  
11 Cir. 1998) (discussing 28 U.S.C. § 1915A).

12 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
13 allegations of material fact and must construe those facts in the light most favorable to the  
14 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
15 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”); *Andrews v. King*, 398 F.3d  
16 1113, 1121 (9th Cir. 2005). In addition, the Court has a duty to liberally construe a pro se’s  
17 pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),  
18 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261  
19 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the  
20 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*  
21 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

22 The Court finds that Plaintiff’s claims are now sufficiently pleaded to survive the sua  
23 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff is  
24 entitled to U.S. Marshal service on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C.  
25 § 1915(d) (“The officers of the court shall issue and serve all process, and perform all duties in  
26 [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made by a United  
27 States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis*  
28 under 28 U.S.C. § 1915.”). Plaintiff is cautioned, however, that “the sua sponte screening and

1 dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6)  
2 motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119  
3 (S.D. Cal. 2007).

4 **IV.**

5 **CONCLUSION AND ORDER**

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

7 1. Plaintiff’s Motion for Appointment of Counsel [ECF No. 4] is **DENIED** without  
8 prejudice.

9 **IT IS FURTHER ORDERED** that:

10 2. The Clerk shall issue a summons as to Plaintiff’s First Amended Complaint upon  
11 the remaining Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form  
12 285 for each of these Defendants. In addition, the Clerk shall provide Plaintiff with a copy of  
13 this Order, the Court’s March 21, 2011 Order granting Plaintiff leave to proceed IFP, and copies  
14 of his First Amended Complaint and the summons for purposes of serving each Defendant.  
15 Upon receipt of this “IFP Package,” Plaintiff is directed to complete the Form 285s as  
16 completely and accurately as possible, and to return them to the United States Marshal according  
17 to the instructions provided by the Clerk in the letter accompanying his IFP package. Thereafter,  
18 the U.S. Marshal shall serve a copy of the First Amended Complaint and summons upon each  
19 Defendant as directed by Plaintiff on each Form 285. All costs of service shall be advanced by  
20 the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

21 3. Defendants are thereafter **ORDERED** to reply to Plaintiff’s First Amended  
22 Complaint within the time provided by the applicable provisions of Federal Rule of Civil  
23 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted  
24 to “waive the right to reply to any action brought by a prisoner confined in any jail, prison, or  
25 other correctional facility under section 1983,” once the Court has conducted its sua sponte  
26 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary  
27 determination based on the face on the pleading alone that Plaintiff has a “reasonable  
28 opportunity to prevail on the merits,” Defendants are required to respond).

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

8                   **IT IS SO ORDERED.**

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10           DATED: May 24, 2011

11                                           *Janis L. Sammartino*  
12                                           \_\_\_\_\_  
13                                           Honorable Janis L. Sammartino  
14                                           United States District Judge  
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