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

JESUS DIAZ,
CDCR #G-12594,

Plaintiff,

vs.

JOHN DOE, Correctional Officer;
SILVA, Correctional Officer; RAMOS,
Sergeant Correctional Officer;
J. MERCHANT, Correctional Officer,

Defendants.

Civil No. 11-0553 JLS (WMc)

ORDER:

(1) GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS*, IMPOSING NO INITIAL PARTIAL FILING FEE, GARNISHING \$350.00 BALANCE FROM PRISONER'S TRUST ACCOUNT [ECF No. 2];

(2) DENYING REQUEST FOR APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. § 1915(e)(1); and

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)

Jesus Diaz ("Plaintiff"), a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility, and proceeding in pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") [ECF No. 2], as well as a Request for Appointment of Counsel (Compl. at 5-12.)

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1 **I.**

2 **MOTION FOR APPOINTMENT OF COUNSEL**

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

14 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice
15 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
16 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

17 **II.**

18 **MOTION TO PROCEED IFP [ECF No. 2]**

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

26 The Court finds that Plaintiff has no available funds from which to pay filing fees at this
27 time. *See* 28 U.S.C. § 1915(b)(4). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed
28 IFP [ECF No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,

1 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk
2 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

3 **III.**

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

5 The PLRA also obligates the Court to review complaints filed by all persons proceeding
6 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
7 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
8 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
9 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
10 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
11 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
12 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A.

13 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua
14 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).¹ Accordingly, the Court
15 finds Plaintiff is entitled to U.S. Marshal service on his behalf. See 28 U.S.C. § 1915(d) (“The
16 officers of the court shall issue and serve all process, and perform all duties in [IFP] cases.”);
17 FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal
18 or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C.
19 § 1915.”).

20 **IV.**

21 **CONCLUSION AND ORDER**

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

23 1. Plaintiff’s Request for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1)
24 is **DENIED**.

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

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

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

13 **IT IS FURTHER ORDERED** that:

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

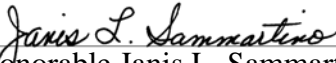
24 6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
25 counsel, upon Defendants’ counsel, a copy of every further pleading or other document
26 submitted for consideration of the Court. Plaintiff shall include with the original paper to be
27 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
28 of any document was served on Defendants, or counsel for Defendants, and the date of service.

1 Any paper received by the Court which has not been filed with the Clerk or which fails to
2 include a Certificate of Service will be disregarded.

3 7. Plaintiff is not to be limited in the amount of photocopies “necessary to advance
4 litigation.” *See* 15 Cal. Code Regs. § 3162(c).

5 **IT IS SO ORDERED.**

6 DATED: June 24, 2011

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9 Honorable Janis L. Sammartino
10 United States District Judge
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