

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

ELVIS JONES, JR.,
CDCR #G-41716,

Plaintiff,

vs.

DANIEL PARANO; ALAN
HERNANDEZ; K. BALAKAIN;
MANNY RECEDRO;

Defendants.

Civil No. 11cv2556 LAB (BGS)

ORDER:

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

**(2) DISMISSING COMPLAINT
FOR FAILURE TO STATE A
CLAIM PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) AND 1915A(b);**

Elvis Jones, Jr., a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility (“Donovan”) located in San Diego, California, and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a certified copy of his inmate trust account statement which the Court construes to be his Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2].

///

///

1 I.

2 MOTION TO PROCEED IFP [ECF No. 2]

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 the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See
7 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to
8 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their
9 action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d
10 844, 847 (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 no available funds from which to pay filing fees at this
24 time. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited
25 from bringing a civil action or appealing a civil action or criminal judgment for the reason that
26 the prisoner has no assets and no means by which to pay the initial partial filing fee.”); *Taylor*,
27 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing
28 dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds

1 available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion
2 to Proceed IFP [ECF No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
3 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
4 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
5 § 1915(b)(1).

6 **II.**

7 **REPRESENTATION**

8 As an initial matter, Plaintiff purports to bring this action on behalf of himself and other
9 inmates housed at Donovan. However, because Plaintiff is proceeding pro se, he has no
10 authority to represent the legal interest of any other party. *See Cato v. United States*, 70 F.3d
11 1103, 1105 n.1 (9th Cir. 1995); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th
12 Cir. 1987); *see also* FED.R.CIV.P. 11(a) (“Every pleading, written motion, and other paper shall
13 be signed by at least one attorney of record in the attorney’s original name, or if the party is not
14 represented by an attorney, shall be signed by the party.”). Here, while Plaintiff purports to bring
15 this action on behalf of an unidentified class, he may not do so.

16 **III.**

17 **INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

18 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
19 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening
20 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a
21 claim upon which relief may be granted, or seeking monetary relief from a defendant immune
22 from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.
23 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v.*
24 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not
25 only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that
26 fails to state a claim).

27 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
28 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as

1 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to
2 the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing
3 the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(3). *See Calhoun*, 254 F.3d at
4 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir.
5 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of
6 process is made on the opposing parties”).

7 “[W]hen determining whether a complaint states a claim, a court must accept as true all
8 allegations of material fact and must construe those facts in the light most favorable to the
9 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194
10 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);
11 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s
12 pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),
13 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
14 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the
15 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
16 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

17 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
18 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
19 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
20 United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122
21 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

22 Plaintiff claims, in very general terms, that he has been unable to obtain adequate time
23 in the prison’s law library. Prisoners do “have a constitutional right to petition the government
24 for redress of their grievances, which includes a reasonable right of access to the courts.”
25 *O’Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir. 1996); *accord Bradley v. Hall*, 64 F.3d
26 1276, 1279 (9th Cir. 1995). In *Bounds*, 430 U.S. at 817, the Supreme Court held that “the
27 fundamental constitutional right of access to the courts requires prison authorities to assist
28 inmates in the preparation and filing of meaningful legal papers by providing prisoners with

1 adequate law libraries or adequate assistance from persons who are trained in the law.” *Bounds*
2 *v. Smith*, 430 U.S. 817, 828 (1977). To establish a violation of the right to access to the courts,
3 however, a prisoner must allege facts sufficient to show that: (1) a nonfrivolous legal attack on
4 his conviction, sentence, or conditions of confinement has been frustrated or impeded, and (2)
5 he has suffered an actual injury as a result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An
6 “actual injury” is defined as “actual prejudice with respect to contemplated or existing litigation,
7 such as the inability to meet a filing deadline or to present a claim.” *Id.* at 348; *see also Vandelft*
8 *v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989);
9 *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

10 Here, Plaintiff has failed to alleged any actions with any particularity that have *precluded*
11 his pursuit of a non-frivolous direct or collateral attack upon either his criminal conviction or
12 sentence or the conditions of his current confinement. *See Lewis*, 518 U.S. at 355 (right to
13 access to the courts protects only an inmate’s need and ability to “attack [his] sentence[], directly
14 or collaterally, and ... to challenge the conditions of [his] confinement.”). In addition, Plaintiff
15 must also describe the non-frivolous nature of the “underlying cause of action, whether
16 anticipated or lost.” *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) .

17 In short, Plaintiff has not alleged that “a complaint he prepared was dismissed,” or that
18 he was “so stymied” by any individual defendant’s actions that “he was unable to even file a
19 complaint,” direct appeal or petition for writ of habeas corpus that was not “frivolous.” *Lewis*,
20 518 U.S. at 351; *Christopher*, 536 U.S. at 416 (“like any other element of an access claim[,] ...
21 the predicate claim [must] be described well enough to apply the ‘nonfrivolous’ test and to show
22 that the ‘arguable’ nature of the underlying claim is more than hope.”). Therefore, Plaintiff’s
23 access to courts claims must be dismissed for failing to state a claim upon which section 1983
24 relief can be granted. *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

25 Accordingly, the Court finds that Plaintiff’s Complaint fails to state a section 1983 claim
26 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.
27 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend
28 his pleading to cure the defects set forth above. Plaintiff is warned that if his amended complaint

1 fails to address the deficiencies of pleading noted above, it may be dismissed with prejudice and
2 without leave to amend.

3 **IV.**

4 **CONCLUSION AND ORDER**

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

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

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

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

18 **IT IS FURTHER ORDERED** that:


19 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
20 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
21 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all
22 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
23 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
24 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
25 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended
26 Complaint fails to state a claim upon which relief may be granted, it may be dismissed without
27 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g).
28 *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5. The Clerk of Court is directed to mail a court approved form § 1983 complaint to Plaintiff.

IT IS SO ORDERED.

DATED: December 13, 2011



HONORABLE LARRY ALAN BURNS
United States District Judge