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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SEDRIC EUGENE JOHNSON,  
CDCR #AZ-2648,  
  
Plaintiff,  
  
vs.  
  
JOHN DOE, et al.,  
  
Defendants.

Case No.: 3:17-cv-00889-LAB-JLB

**ORDER:**

- 1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS [ECF No. 8]**
- 2) DENYING MOTION FOR APPOINTMENT OF COUNSEL [ECF No. 10]; AND**
- 3) DISMISSING COMPLAINT PURSUANT TO 28 U.S.C. § 1915(e)(2) AND § 1915A(b)(1)**

Sedric Eugene Johnson (“Plaintiff”), incarcerated at Kern Valley State Prison located in Delano, California, is proceeding pro se in this case with a civil rights Complaint filed pursuant to 22 U.S.C. § 1983 on May 1, 2017 (ECF No. 1).

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1 Plaintiff has not prepaid the \$400 civil filing fee required by 28 U.S.C. § 1914(a);  
2 instead, he has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28  
3 U.S.C. § 1915(a) (ECF No. 8). He has also filed a Motion to Appoint Counsel (ECF No.  
4 10).

5 **I. Motion to Proceed IFP**

6 All parties instituting any civil action, suit or proceeding in a district court of the  
7 United States, except an application for writ of habeas corpus, must pay a filing fee of  
8 \$400. *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
9 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
10 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
11 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
12 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
13 *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185  
14 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. *See* 28  
15 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).  
16 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a “certified  
17 copy of the trust fund account statement (or institutional equivalent) for ... the 6-month  
18 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
19 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account  
20 statement, the Court assesses an initial payment of 20% of (a) the average monthly  
21 deposits in the account for the past six months, or (b) the average monthly balance in the  
22 account for the past six months, whichever is greater, unless the prisoner has no assets. 28  
23 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the  
24 prisoner then collects subsequent payments, assessed at 20% of the preceding month's  
25 income, in any month in which his account exceeds \$10, and forwards those payments to  
26 the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct.  
27 at 629.

1 In support of his Motion to Proceed IFP, Plaintiff has submitted a copy of his  
2 CDCR Inmate Statement Report, together with a prison certificate attesting as to his trust  
3 account activity. *See* 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at  
4 1119. These statements show that Plaintiff has had no money in his trust account for the  
5 6-months preceding the filing of this action, and that he had a zero balance at the time of  
6 filing. *See* ECF No. 4 at 4-7. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event  
7 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or  
8 criminal judgment for the reason that the prisoner has no assets and no means by which to  
9 pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850  
10 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a  
11 prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available  
12 to him when payment is ordered.”).

13 Therefore, the Court grants Plaintiff’s Motion to Proceed IFP (ECF No. 8),  
14 declines to “exact” any initial filing fee because his trust account statement shows he “has  
15 no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California  
16 Department of Corrections and Rehabilitation (CDCR) to collect the entire \$350 balance  
17 of the filing fees required by 28 U.S.C. § 1914 and forward them to the Clerk of the  
18 Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 19 **II. Motion for Appointment of Counsel**

20 Plaintiff also requests that the Court appoint him counsel due to his indigence and  
21 the “complexity” of the issues involved in this case. (ECF No. 10 at 1.)

22 All documents filed pro se are liberally construed, and “a pro se complaint,  
23 however inartfully pleaded, must be held to less stringent standards than formal pleadings  
24 drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Estelle v.*  
25 *Gamble*, 429 U.S. 97, 106 (1976) (internal quotations omitted)). But there is no  
26 constitutional right to counsel in a civil case; and Plaintiff’s Complaint does not demand  
27 that the Court exercise its limited discretion to request that an attorney represent him pro  
28 bono pursuant to 28 U.S.C. § 1915(e)(1) at this stage of the case. *See Lassiter v. Dept. of*

1 *Social Servs.*, 452 U.S. 18, 25 (1981); *Agyeman v. Corr. Corp. of America*, 390 F.3d  
2 1101, 1103 (9th Cir. 2004). Only “exceptional circumstances” support such a  
3 discretionary appointment. *Terrell v. Brewer*, 935 F.3d 1015, 1017 (9th Cir. 1991);  
4 *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Exceptional circumstances exist  
5 where there is cumulative showing of both a likelihood of success on the merits and a  
6 demonstrated inability of the pro se litigant to articulate his claims in light of their legal  
7 complexity. *Id.*

8 As currently pleaded, Plaintiff’s Complaint demonstrates that while he may not be  
9 formally trained in law, he nevertheless is fully capable of legibly articulating the facts  
10 and circumstances relevant to his claims, which are typical and not legally “complex.”  
11 *Agyeman*, 390 F.3d at 1103. Moreover, for the reasons discussed below, Plaintiff has yet  
12 to show he is likely to succeed on the merits of the claims.

13 Therefore, the Court DENIES Plaintiff’s Motion for Appointment of Counsel  
14 (ECF No. 10).

### 15 **III. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

#### 16 A. Standard of Review

17 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
18 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
19 statutes, the Court must sua sponte dismiss a prisoner's IFP complaint, or any portion of  
20 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
21 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
22 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
23 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
24 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
25 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (citations omitted).

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1           “The standard for determining whether a plaintiff has failed to state a claim upon  
2 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
3 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
4 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
5 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
6 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
7 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted  
8 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.  
9 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

10           Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
12 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for  
13 relief [is] ... a context-specific task that requires the reviewing court to draw on its  
14 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or  
15 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting  
16 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969  
17 (9th Cir. 2009).

#### 18           B. Eighth Amendment claims

19           Plaintiff claims that he was in his cell at Centinela State Prison (“CEN”) on August  
20 2, 2016 when three unnamed individuals entered his cell and “attempted to assault” him.  
21 (ECF No. 1 at 3.) Plaintiff alleges that he “did his best to successfully defend” himself  
22 and after a “lapse in time” these individuals “proceed to back away into the open day  
23 room.” (*Id.*) However, Plaintiff was in a “mode of flight or fight” and “continued to  
24 approach these individuals.” (*Id.*) The “Tower Control Officer (John Doe)” is alleged to  
25 have “failed to assist or call for back up.” (*Id.*) Correctional Officers Lopez and Garcia  
26 “responded by approaching the situation with open-canisters at ready, yet never sprayed”  
27 anyone and they “sounded the code alarm.” (*Id.*) Plaintiff claims he was asked by Lopez  
28 and Garcia whether he required medical treatment but he refused. (*Id.* at 4.)

1           The Eighth Amendment requires that prison officials take reasonable measures to  
2 guarantee the safety and well-being of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832–  
3 33 (1994); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To state an Eighth  
4 Amendment failure to protect claim, however, Plaintiff must allege facts sufficient to  
5 plausibly show that (1) he faced conditions posing a “substantial risk of serious harm” to  
6 his health or safety, and (2) the individual prison official he seeks to hold liable was  
7 “deliberately indifferent” to those risks. *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*, 611  
8 F.3d 1144, 1150 (9th Cir. 2010). To demonstrate deliberate indifference, Plaintiff must  
9 allege facts sufficiently to plausibly show that the defendant both knew of and  
10 disregarded a substantial risk of serious harm to his health and safety. *Farmer*, 511 U.S.  
11 at 837. Thus, Plaintiff must allege “the official [was] both be aware of facts from which  
12 the inference could be drawn that a substantial risk of serious harm exist[ed], and [that]  
13 he . . . also dr[e]w that inference.” *Id.*

14           Plaintiff’s Complaint contains no facts to plausibly suggest that any of the named  
15 Defendants knew Plaintiff faced a “substantial risk of serious harm” by the unidentified  
16 other inmates. In fact, Plaintiff acknowledges that Defendants were ready to use pepper  
17 spray and “sounded the alarm code.” (ECF No. 1 at 3.) He alleges no additional facts  
18 from which the Court might reasonably infer that Defendants were aware or became  
19 aware that Plaintiff faced any risk, let alone a substantial one from any other inmate.  
20 *Iqbal*, 556 U.S. at 678; *see also Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987) (“mere  
21 threat” of possible harm does not violate the Eighth Amendment); *Berg v. Kincheloe*, 749  
22 F.2d 457, 459 (9th Cir. 1986) (deliberate indifference requires showing of “more than a  
23 mere suspicion that an attack will occur.”); *Hernandez v. Schriro*, No. CV 05-2853-PHX-  
24 DGC, 2011 WL 2910710, at \*6 (D. Ariz. July 20, 2011) (“While theoretical risk is  
25 always possible, *Farmer* requires more—‘conditions posing a substantial risk of serious  
26 harm.’”).

27           “Much like recklessness in criminal law, deliberate indifference . . . may be shown  
28 by circumstantial evidence when the facts are sufficient to demonstrate that a defendant

1 actually knew of a risk of harm.” *Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir.  
2 2003. Indeed, deliberate indifference may be established if Plaintiff had allege facts  
3 sufficient to “infer[] from circumstantial evidence” that “the risk was obvious,” *Farmer*,  
4 511 U.S. at 842; but he has alleged no such facts here. *See e.g., Cortez v. Skol*, 776 F.3d  
5 1046, 1050 (9th Cir. 2015). Thus, even if Defendants “should have been aware of the  
6 risk, but [were] not,” the standard of deliberate indifference is not satisfied “no matter  
7 how severe the risk.” *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002);  
8 *Dixon v. Harrington*, No. 1:11-CV-01323-GBC PC, 2013 WL 28639, at \*4 (E.D. Cal.  
9 Jan. 2, 2013) (finding claim that guard “fail[ed] to recognize” attacking inmate as  
10 plaintiff’s enemy amounted to “no more than negligence, which is an insufficient basis  
11 upon which to predicate a § 1983 claim.”).

12 For these reasons, the Court finds Plaintiff’s failure to protect claims must be  
13 DISMISSED for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii) and  
14 § 1915A(b)(1). *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

#### 15 **IV. Conclusion and Order**

16 Based on the foregoing, the Court:

- 17 1) **GRANTS** Plaintiff’s Motion to Proceed In Forma Pauperis (ECF No. 8).
- 18 2) **DIRECTS** the Secretary of the CDCR, or his designee, to collect from  
19 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing  
20 monthly payments from his account in an amount equal to twenty percent (20%) of the  
21 preceding month’s income and forwarding those payments to the Clerk of the Court each  
22 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL  
23 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
24 ASSIGNED TO THIS ACTION;
- 25 3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott  
26 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001;
- 27 4) **DENIES** Plaintiff’s Motion for Appointment of Counsel (ECF No. 10).

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