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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 SHERBLY WAYNE GORDON,  
12 Plaintiff,  
13 v.  
14 DR. ELLOYHIM,  
15 Defendant.

Case No.: 21cv1346-JO-JLB

**ORDER DISMISSING PLAINTIFF'S  
COMPLAINT AGAINST  
DEFENDANT WITHOUT  
PREJUDICE FOR FAILURE TO  
EFFECT SERVICE AND DENYING  
MOTION FOR APPOINTMENT OF  
COUNSEL AS MOOT**

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20 On January 28, 2022, this Court ordered Plaintiff Sherbly Wayne Gordon  
21 ("Plaintiff") to show cause on or before April 28, 2022, as to why his Complaint should  
22 not be dismissed for failure to effect service. Dkt. 8. On April 11, 2022, Plaintiff filed a  
23 motion to appoint counsel. Dkt. 15. Plaintiff has not filed a response to the order to  
24 show cause. For the reasons discussed below, Plaintiff's Complaint is DISMISSED  
25 without prejudice for failure to effect service and the motion to appoint counsel is  
26 DENIED as moot.  
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## I. BACKGROUND

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2 On July 26, 2021, Plaintiff, incarcerated at the Richard J. Donovan Correctional  
3 Facility, filed a *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. Dkt. 1  
4 (“Complaint”). Plaintiff alleges that Defendant Dr. Elloyhim (“Defendant”) refused his  
5 request for mental health services when he complained of suicidal thoughts. *Id.* at 3-4. On  
6 August 11, 2021, the Court granted Plaintiff’s motion to proceed *in forma pauperis* (“IFP”)  
7 and directed the U.S. Marshal to effect service on Defendant in accordance with Plaintiff’s  
8 completed U.S. Marshal Form 285 (“Form 285”). Dkt. 5. A summons was issued, and the  
9 Court provided Plaintiff with a blank Form 285, a certified copy of the IFP Order, a  
10 certified copy of the Complaint, and the summons (collectively, the “IFP Package”). The  
11 Court ordered Plaintiff to return the IFP Package and the completed Form 285 to the U.S.  
12 Marshal. *Id.* Plaintiff did not return the IFP Package to the U.S. Marshal, and Plaintiff  
13 failed to serve Defendant within 90 days of filing the Complaint pursuant to Fed. R. Civ.  
14 P. 4(m).

15 On January 28, 2022, the Court ordered Plaintiff to show cause as to why the  
16 Complaint should not be dismissed for failure to prosecute. Dkt. 8 (“OSC”). The Court  
17 stated that failure to respond by April 28, 2022 to the OSC will result in dismissal of the  
18 action. On February 9, 2022, Plaintiff filed another motion to proceed IFP, and on March  
19 4, 2022, Plaintiff filed a motion to appoint counsel. Dkts. 9, 11. On March 9, 2022, the  
20 Court issued an order denying the motion to proceed IFP as moot, denying the motion to  
21 appoint counsel without prejudice, and extending the time for service for good cause under  
22 Fed. R. Civ. P. 4(m). Dkt. 12. Accordingly, the Court directed the Clerk to provide  
23 Plaintiff with a new IFP Package, and ordered Plaintiff to complete and return the IFP  
24 Package to the U.S. Marshal on or before April 14, 2022. The Court warned Plaintiff that  
25 failure to return the completed IFP Package to the U.S. Marshal by April 14, 2022, or to  
26 otherwise show cause by April 28, 2022, would result in dismissal of Plaintiff’s Complaint  
27 for failure to prosecute. To date, service has not been effectuated on Defendant, and  
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1 Plaintiff has neither filed a response to the OSC nor requested an extension of time to do  
2 so. On April 11, 2022, Plaintiff filed another motion to appoint counsel. Dkt. 15.

## 3 II. DISCUSSION

4 Federal Rule of Civil Procedure 4 provides in relevant part that “[i]f a  
5 defendant is not served within 90 days after the complaint is filed, the court—on motion  
6 or on its own after notice to the plaintiff—must dismiss the action without prejudice  
7 against that defendant or order that service be made within a specified time.” Fed. R.  
8 Civ. P. 4(m). Rule 4 also provides that “if the plaintiff shows good cause for the failure,  
9 the court must extend the time for service for an appropriate period.” *Id.* If a plaintiff is  
10 authorized to proceed IFP under 28 U.S.C. § 1915, the court must order that service be  
11 effectuated by a United States Marshal. Fed. R. Civ. P. 4(c)(3); *see also* 28 U.S.C. §  
12 1915(d) (when a plaintiff proceeds IFP, “[t]he officers of the court shall issue and serve  
13 all process, and perform all duties”). While a plaintiff proceeding IFP is entitled to rely  
14 on the U.S. Marshal for service of the summons and complaint, he is responsible for  
15 providing the information, such as an address, needed to effectuate service. *Puett v.*  
16 *Blandford*, 912 F.2d 270, 275 (9th Cir. 1990). The Court’s local rules similarly provide  
17 that “the party at whose request the summons is issued is responsible for providing the  
18 United States Marshal’s office with appropriate instructions regarding the person upon  
19 whom service is made.” S.D. Cal. Civ. R. 4.1(c).

20 In this case, the Court directed the U.S. Marshal to effect service upon Defendant,  
21 a summons was issued, and the Court sent Plaintiff the IFP Package on August 11, 2021.  
22 Plaintiff failed to return the IFP Package, and Defendant was not served within the 90  
23 days as required by Rule 4(m). Although the initial 90 days to serve Defendant had  
24 passed, the Court extended the time for service for good cause until April 14, 2022 and  
25 provided Plaintiff with a new IFP Package. However, Plaintiff has failed to serve  
26 Defendant by the specified time for service. Furthermore, Plaintiff has not filed a  
27 response to the OSC issued by this Court and has not otherwise established good cause  
28 for his failure to serve Defendant. Accordingly, the Court finds that Plaintiff failed to

1 effect service on Defendant pursuant to Rule 4(m) and DISMISSES the Complaint  
2 without prejudice.

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4 **III. CONCLUSION**

5 The Court hereby DISMISSES the Complaint without prejudice and DENIES  
6 Plaintiff's motion to appoint counsel (Dkt. 15) as moot.

7 **IT IS SO ORDERED.**

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9 Dated: 5/10/22

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13 Honorable Jinsook Ohta  
14 United States District Judge  
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