

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

BRIAN TERWILLEGER,

Plaintiff,

V.

STATE OF WASHINGTON and  
GRAYS HARBOR COUNTY JAIL,

## Defendants.

CASE NO. 3:17-cv-05360-RJB-DWC

ORDER ON MOTIONS TO REOPEN  
CASE AND FOR COURT  
APPOINTED COUNSEL AND ORDER  
GIVING PLAINTIFF LEAVE TO  
AMEND

In response to an Order entered by the Honorable Robert J. Bryan, Plaintiff Brian

Terwilleger, proceeding *pro se*, has filed an amended civil rights complaint under 42 U.S.C. § 1983 (“Amended Complaint”). He has also filed a Motion to Reopen His Case and a Motion for Appointment of Counsel. However, he has neglected to provide a justification for reopening his case or for appointment of counsel and his Amended Complaint still suffers from other deficiencies. Therefore, the Court declines to reopen the case at this time, declines appointment of counsel, and orders Plaintiff to file a Second Amended Complaint addressing the deficiencies identified herein.

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## BACKGROUND

2 Plaintiff originally filed his complaint, along with an Application to Proceed *In Forma*  
3 *Pauperis*, on May 15, 2017. Dkt. 1.<sup>1</sup> Because of the nature of Plaintiff's allegations, the District  
4 Court could not determine whether Plaintiff was attempting to file a § 1983 complaint or a  
5 habeas petition. Dkts. 6, 10. After giving Plaintiff the opportunity to amend and choose between  
6 a § 1983 action or a habeas petition, Judge Bryan dismissed the case without prejudice. Dkts. 6,  
7 10. Plaintiff subsequently moved to reopen the case. Dkt. 11. Judge Bryan then entered two  
8 additional orders identifying the deficiencies in Plaintiff's complaint. *See* Dkts. 12, 17. However,  
9 he gave Plaintiff leave to amend, referred the case to the undersigned, and re-noted Plaintiff's  
10 motions for this Court's consideration. Dkt. 17. Plaintiff filed a Proposed Amended Complaint  
11 (Dkt. 20), a Supplement to the Complaint (Dkt. 22), and a Motion to Amend his Proposed  
12 Amended Complaint (Dkt. 23).

## DISCUSSION

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must “dismiss the complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

<sup>1</sup> The Court notes that Plaintiff has filed an Application to Proceed *In Forma Pauperis* that has not yet been ruled on by the District Court. The Court declines to analyze this Application here, but will make a ruling or recommendation after Plaintiff has remedied his Complaint's other deficiencies identified herein.

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1        In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he  
2        suffered a violation of rights protected by the Constitution or created by federal statute, and (2)  
3        the violation was proximately caused by a person acting under color of state law. *See Crumpton*  
4        *v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is therefore to  
5        identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271  
6        (1994). To satisfy the second prong, a plaintiff must allege facts showing how individually  
7        named defendants caused, or personally participated in causing, the harm alleged in the  
8        complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

9        **I.        Motion to Reopen Case and Motion to Appoint Counsel**

10       Plaintiff first moves to reopen his case and have the Court appoint him counsel.  
11       Plaintiff's Amended Complaint complies with Judge Bryan's orders requiring that his complaint  
12       not raise any claim related to past criminal convictions or current criminal proceedings. Plaintiff  
13       has limited his claim to unlawful restriction of his access to the law library, an appropriate §  
14       1983 claim that does not challenge any previous convictions. Dkt. 20 at 3-4. However, the  
15       Amended Complaint suffers from other deficiencies which are addressed herein. Because  
16       Plaintiff has remedied the deficiencies noted by Judge Bryan, but has other outstanding  
17       deficiencies he must address before his complaint can be served, the Court declines to grant his  
18       motions at this time. Instead, the Clerk is directed to re-note the Motion to Reopen Case and  
19       Motion to Appoint Counsel (Dkt. 11) to November 25, 2017--the same date Plaintiff's Second  
20       Amended Complaint will be due.

21       **II.        Additional Deficiencies**

22       Plaintiff appears to allege that, though he has ongoing litigation in this Court, jail staff  
23       have unlawfully restricted his access to the law library. To state a claim under 42 U.S.C. § 1983,  
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1 Plaintiff must allege facts showing how a defendant caused or personally participated in causing  
2 the harm alleged in the complaint. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Arnold*, 637  
3 F.2d at 1355. A person subjects another to a deprivation of a constitutional right when committing  
4 an affirmative act, participating in another's affirmative act, or omitting to perform an act which is  
5 legally required. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Sweeping conclusory  
6 allegations against an official are insufficient to state a claim for relief. *Leer*, 844 F.2d at 633.  
7 Further, § 1983 actions only apply to the actions of “persons” acting under the color of state law.  
8 See 42 U.S.C. § 1983. Jails and prisons, as arms of the state, are not “persons” for purposes of a §  
9 1983 action. See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 65, 71 (1989) (states are not  
10 “persons” amenable to suit under § 1983; the limitation extends to “governmental entities that are  
11 considered ‘arms of the state’”).

12 Here, Plaintiff has not properly alleged the personal participation of any defendants.  
13 Plaintiff names the State of Washington and the Grays Harbor County Jail as the two Defendants  
14 in this case. Dkt. 20 at 1. However, he currently alleges jail staff unlawfully restricted his access  
15 to the law library. He does not identify who actually violated his rights, and he does not explain  
16 the connection between the named Defendants and his alleged constitutional violation. Because  
17 of this, Plaintiff has not alleged personal participation as required in a § 1983 action. Further,  
18 Plaintiff names Grays Harbor County Jail as a Defendant along with the State of Washington.  
19 Neither the State nor an arm of the state, such as a county jail, are appropriate Defendants under  
20 § 1983. See *Will*, 491 U.S. at 65, 71. Therefore, Plaintiff should file an amended complaint,  
21 alleging which person or persons actually limited his access to the law library, what actions they  
22 took or failed to take when his access was limited, and how that caused him harm. Further,  
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1 Plaintiff should be sure to include the person or persons as named Defendants in his Second  
2 Amended Complaint.

3 Further, the Court notes Plaintiff stated he wants his amend his complaint to be read “as  
4 having only Grays Harbor County (Jail)” as a Defendant. Dkt. 23 at 1. As noted above, as an arm  
5 of the state, Grays Harbor County Jail is not an appropriate Defendant in a § 1983 claim.  
6 However, Plaintiff may be able to name Grays Harbor County itself as a Defendant. A  
7 municipality, such as a county, may be liable under § 1983 if its policies are the ““moving force  
8 [behind] the [alleged] constitutional violation.”” *City of Canton v. Harris*, 489 U.S. 378, 389  
9 (1989) (quoting *Monell v. Department of Social Services*, 463 U.S. 658, 694 (1978)). In order to  
10 state a claim against such an entity plaintiff must show that defendant’s employees or agents  
11 acted through an official custom or policy that violates, or permits deliberate indifference to,  
12 plaintiff’s civil rights; or that the entity ratified the unlawful conduct. *See Monell*, 436 U.S. at  
13 690-91; *Larez v. City of Los Angeles*, 946 F.2d 630, 646-47 (9th Cir. 1991). It cannot be held  
14 liable merely because a government employee under its purview engaged in unconstitutional  
15 acts. *Monell*, 436 U.S. at 692. Thus, to name Grays Harbor County as a Defendant under § 1983,  
16 Plaintiff must show: 1) deprivation of a constitutional right; 2) that the county has a policy; 3)  
17 the policy amounts to a violation or deliberate indifference to Plaintiff’s constitutional rights; and  
18 4) the policy is the moving force behind the constitutional violation. *See Oviatt v. Pearce*, 954  
19 F.2d 1470, 1474 (9th Cir. 1992).

20 Finally, because the Court has provided Plaintiff with leave to amend, the Court denies  
21 his Motion to Amend (Dkt. 23) as moot. Instead, Plaintiff should file a Second Amended  
22 Complaint and omit the State of Washington as a Defendant.

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1      **III. Instructions to Plaintiff and Clerk**

2      If Plaintiff intends to pursue a § 1983 civil rights action in this Court, he must file a  
3 Second Amended Complaint, which includes a short, plain statement alleging: (1) the  
4 constitutional right Plaintiff believes was violated; (2) the name of the *person or persons* who  
5 violated the right; (3) exactly what the individual did or failed to do; (4) how the action or  
6 inaction of the individual is connected to the violation of Plaintiff's constitutional rights; and (5)  
7 what specific injury Plaintiff suffered because of the individual's conduct. *See Rizzo v. Goode*,  
8 423 U.S. 362, 371–72, 377, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). Plaintiff should further ensure  
9 that the person or persons are named as Defendants in his Second Amended Complaint.

10     Plaintiff shall present the Second Amended Complaint on the form provided by the  
11 Court. The Complaint must be legibly rewritten or retyped in its entirety, it should be an original  
12 and not a copy, it should contain the same case number, and it may not incorporate any part of  
13 the original complaint by reference. The Second Amended Complaint will act as a complete  
14 substitute for the Amended Complaint, and not as a supplement. The Court will screen the  
15 Second Amended to determine whether it contains factual allegations linking each defendant to  
16 the alleged violations of Plaintiff's rights. The Court will not recommend that Plaintiff's Motion  
17 to Reopen be granted or authorize service of the amended complaint until the above noted  
18 deficiencies are remedied.

19     If Plaintiff fails to file a Second Amended Complaint or fails to adequately address the  
20 issues raised herein on or before November 24, 2017, the undersigned will recommend Judge  
21 Bryan deny the Motion to Reopen and Motion to Appoint Counsel.

22     The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C. § 1983  
23 civil rights complaint and for service. The Clerk is further directed to send copies of this Order

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1 and Pro Se Instruction Sheet to Plaintiff. The Clerk is finally directed to re-note the Motion to  
2 Reopen and Motion to Appoint Counsel to November 24, 2017.

3 **CONCLUSION**

4 For the reasons noted above, the Court declines to grant Plaintiff's Motion to Reopen or  
5 his Motion to Appoint Counsel at this time. Both motions are re-noted to November 24, 2017.  
6 Plaintiff is directed to file an amended complaint on or before November 24, 2017 addressing the  
7 deficiencies raised herein. If Plaintiff can remedy these deficiencies, the Court will reconsider  
8 granting his Motion to Reopen. Further, because the Court has provided Plaintiff with leave to  
9 amend, the Court denies Plaintiff's Motion to Amend (Dkt. 23) at moot.

10 Dated this 25th day of October, 2017.

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14 David W. Christel  
United States Magistrate Judge  
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