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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BRUCE JUSTICE  
Inmate No. 21133981,  
  
Plaintiff,  
  
v.  
  
UNNAMED DEPUTY SERGEANT;  
UNNAMED NURSE; GEORGE BAILEY  
FACILITY,  
  
Defendants.

Case No.: 21-cv-2066-MMA (WVG)

**ORDER: (1) GRANTING  
PLAINTIFF’S MOTION TO  
PROCEED IN FORMA PAUPERIS;**

[Doc. No. 2]

**(2) DENYING MOTION TO  
APPOINT COUNSEL;**

[Doc. No. 3]

**AND (3) SUA SPONTE DISMISSING  
COMPLAINT FOR FAILURE TO  
STATE A CLAIM PURSUANT TO  
28 U.S.C. § 1915(e)(2)(B)(ii)**

Bruce Justice (“Plaintiff”), currently detained at the George Bailey Detention Facility (“GBDF”) in San Diego, California, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Doc. No. 1 at 4–5. Plaintiff did not pay the filing fee required by 28 U.S.C. § 1914(a) to commence a civil action when he filed his Complaint; instead, he has

1 filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a),  
2 along with a Motion to Appoint Counsel. Doc. Nos. 2, 3.

3 **I. MOTION TO PROCEED IFP**

4 All parties instituting any civil action, suit or proceeding in a district court of the  
5 United States, except an application for writ of habeas corpus, must pay a filing fee of  
6 \$400.<sup>1</sup> See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
7 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
8 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez*  
9 *v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave  
10 to proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
11 *Bruce v. Samuels*, 577 U.S. 82, 84 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185  
12 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. See 28  
13 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

14 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
15 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the  
16 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
17 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
18 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
19 monthly deposits in the account for the past six months, or (b) the average monthly  
20 balance in the account for the past six months, whichever is greater, unless the prisoner  
21 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution  
22 having custody of the prisoner then collects subsequent payments, assessed at 20% of the  
23 preceding month’s income, in any month in which his account exceeds \$10, and forwards  
24 those payments to the Court until the entire filing fee is paid. See 28 U.S.C.

25 \_\_\_\_\_  
26  
27 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$52.  
28 See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14  
(eff. Dec. 2020). The additional \$50 administrative fee does not apply to persons granted leave to  
proceed IFP. *Id.*

1 § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

2 In support of his IFP Motion, Plaintiff has submitted a copy of his San Diego  
3 County Sheriff’s Department prison certificate. Doc. No. 2 at 6; 28 U.S.C. § 1915(a)(2);  
4 CivLR 3.2; *Andrews*, 398 F.3d at 1119. This certificate shows that Plaintiff carried an  
5 average monthly balance of \$61.73 but had \$0.00 in average monthly deposits to his trust  
6 account for the six months immediately preceding filing the Complaint, and that Plaintiff  
7 had an available balance of \$185.18 at the time of filing. Doc. No. 2 at 6.

8 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP and assesses an  
9 initial partial filing fee of \$12.35 pursuant to 28 U.S.C. Section 1915(b)(1)(A). The  
10 Court directs the Watch Commander for GBDF, or their designee, to collect this initial  
11 filing fee only if sufficient funds are available in Plaintiff’s account at the time this Order  
12 is executed. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be  
13 prohibited from bringing a civil action or appealing a civil action or criminal judgment  
14 for the reason that the prisoner has no assets and no means by which to pay the initial  
15 partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28  
16 U.S.C. Section 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s  
17 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him  
18 when payment is ordered.”). The Court further directs the Watch Commander for GBDF,  
19 or their designee, to collect the remaining balance of the filing fees required by 28 U.S.C.  
20 Section 1914 and to forward it to the Clerk of the Court pursuant to the installment  
21 payment provisions set forth in 28 U.S.C. Section 1915(b)(1).

22 **II. MOTION TO APPOINT COUNSEL**

23 Plaintiff also requests appointment of counsel due to his unspecified “mental health  
24 issues” and his housing unit is on “Covid 19 lockdown.” Doc. No. 3 at 1. All documents  
25 filed pro se are liberally construed, and “a *pro se* complaint, however inartfully pleaded,  
26 must be held to less stringent standards than formal pleadings drafted by lawyers.”  
27 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle*, 429 U.S. at 106). There is  
28 no constitutional right to counsel in a civil case, and the decision to appoint counsel under

1 28 U.S.C. § 1915(e)(1) is within “the sound discretion of the trial court and is granted  
2 only in exception circumstances.” *Agyeman v. Corr. Corp. of America*, 390 F.3d 1101,  
3 1103 (9th Cir. 2004); *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991) (noting that  
4 only “exceptional circumstances” support such a discretionary appointment).

5 Exceptional circumstances exist where there is cumulative showing of both a likelihood  
6 of success on the merits and an inability of the pro se litigant to articulate his claims in  
7 light of their legal complexity. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).

8 Plaintiff’s Complaint demonstrates that while not formally trained in law, he is fully  
9 capable of legibly articulating the facts and circumstances relevant to his claims and has  
10 yet to show he is likely to succeed on the merits of his claims. Accordingly, the Court  
11 **DENIES** Plaintiff’s motion for appointment of counsel without prejudice.

### 12 **III. SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

#### 13 **A. Standard of Review**

14 Nevertheless, because he is proceeding IFP, Plaintiff’s Complaint *is* still subject to  
15 sua sponte review, and mandatory dismissal, if it is “frivolous, malicious, fail[s] to state a  
16 claim upon which relief may be granted, or seek[s] monetary relief from a defendant  
17 immune from such relief.” *See* 28 U.S.C. § 1915(e)(2)(B); *Coleman v. Tollefson*, 135 S.  
18 Ct. 1759, 1763 (2015) (pursuant to 28 U.S.C. § 1915(e)(2) “the court shall dismiss the  
19 case at any time if the court determines that—(A) the allegation of poverty is untrue; or  
20 (B) the action or appeal—(i) is frivolous or malicious; [or] (ii) fails to state a claim on  
21 which relief may be granted”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en  
22 banc) (“[S]ection 1915(e) not only permits, but requires a district court to dismiss an in  
23 forma pauperis complaint that fails to state a claim.”); *Calhoun v. Stahl*, 254 F.3d 845,  
24 845 (9th Cir. 2001) (per curiam) (holding that “the provisions of 28 U.S.C.  
25 § 1915(e)(2)(B) are not limited to prisoners”).

26 “The standard for determining whether a plaintiff has failed to state a claim upon  
27 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
28 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668

1 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
2 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
3 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
4 12(b)(6)”). Federal Rules of Civil Procedure 8 and 12(b)(6) require a complaint to  
5 “contain sufficient factual matter, accepted as true, to state a claim to relief that is  
6 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation  
7 marks omitted).

## 8 **B. Plaintiff’s Allegations**

9 Plaintiff’s factual allegations are far from clear but he appears to name an  
10 “Unnamed” Deputy Sergeant, an “Unnamed Sheriff Nurse,” and an “Unnamed County  
11 Jail Nurse” as Defendants. Doc. No. 1 at 2.

12 On November 5, 2021, Plaintiff filed a grievance “against the Psych-Medical staff  
13 at GBDF because he was “trying to be seen by the Psych Doctor for an increase of [his]  
14 psych-meds.” *Id.* at 3. On the morning of November 6, 2021, two “Unnamed Deputies”  
15 came to Plaintiff’s cell “by the order of an Unnamed Sergeant” and “took [him] to  
16 medical.” *Id.* Plaintiff was “seen by two Unnamed Nurses.” *Id.* He informed them that  
17 he was “not going to hurt anybody or [himself].” *Id.* “The next thing [he] knew, [he]  
18 was stripped naked and put in a cold isolation cell in a green suicide suit.” *Id.* Plaintiff  
19 alleges that he “froze all night” and “woke up with a cold.” *Id.* Plaintiff claims he was  
20 “afraid of getting Covid.” *Id.* After “all this, the Doctor still did not increase [his]  
21 meds.” *Id.*

## 22 **C. 42 U.S.C. § 1983**

23 Section 1983 is a “vehicle by which plaintiffs can bring federal constitutional and  
24 statutory challenges to actions by state and local officials.” *Anderson v. Warner*, 451  
25 F.3d 1063, 1067 (9th Cir. 2006). To state a claim under 42 U.S.C. § 1983, a plaintiff  
26 must allege two essential elements: (1) that a right secured by the Constitution or laws of  
27 the United States was violated, and (2) that the alleged violation was committed by a  
28 person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe*

1 *v. Frye*, 789 F.3d 1030, 1035-36 (9th Cir. 2015).

2 **D. Discussion**

3 “Inmates who sue prison officials for injuries suffered while in custody may do so  
4 under the Eighth Amendment’s Cruel and Unusual Punishment Clause or, if not yet  
5 convicted, under the Fourteenth Amendment’s Due Process Clause.” *Castro v. Cty. of*  
6 *Los Angeles*, 833 F.3d 1060, 1067–68 (9th Cir. 2016). Under either Amendment,  
7 Plaintiff must allege facts sufficient to show that Defendants acted with “deliberate  
8 indifference” in order to state a plausible claim for relief. *Id.* at 1068; *Iqbal*, 556 U.S. at  
9 678; *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). While Plaintiff  
10 invokes both the Eighth and Fourteenth Amendment, it is unclear whether he was a  
11 pretrial detainee or a convicted prisoner at the time he claims to have been denied  
12 medical care. Therefore, the Court will analyze his claim under both Eighth and  
13 Fourteenth Amendment standards.

14 First, where a prisoner’s constitutional claim is one for inadequate medical care,  
15 under the Eighth Amendment, he must allege “acts or omissions sufficiently harmful to  
16 evidence deliberate indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S.  
17 97, 106 (1976); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). The plaintiff must  
18 first establish a “serious medical need by demonstrating that [the] failure to treat [his]  
19 condition could result in further significant injury or the unnecessary and wanton  
20 infliction of pain.” *Jett*, 439 F.3d at 1096 (citation omitted). A medical need is serious  
21 “if the failure to treat the prisoner’s condition could result in further significant injury or  
22 the ‘unnecessary and wanton infliction of pain.’” *McGuckin v. Smith*, 974 F.2d 1050,  
23 1059 (9th Cir. 1991) (quoting *Estelle*, 429 U.S. at 104), *overruled on other grounds by*  
24 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997).

25 Next, Plaintiff must show that the defendant’s response to his objectively serious  
26 medical need was deliberately indifferent. *Jett*, 439 F.3d at 1096. To establish deliberate  
27 indifference, a prisoner must allege facts to show: (1) a purposeful act or failure to  
28 respond to the prisoner’s pain or possible medical need; and (2) harm caused by the

1 indifference. *Id.* “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*,  
2 391 F.3d 1051, 1060 (9th Cir. 2004). “Under this standard, the prison official must not  
3 only ‘be aware of the facts from which the inference could be drawn that a substantial  
4 risk of serious harm exists,’ but that person ‘must also draw the inference.’” *Id.* at 1057  
5 (quoting *Farmer v. Brennan*, 511 U.S. 828, 837 (1994)). “If a prison official should have  
6 been aware of the risk, but was not, then the official has not violated the Eighth  
7 Amendment, no matter how severe the risk.” *Id.* (quoting *Gibson v. County of Washoe*,  
8 *Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002)).

9 Here, Plaintiff alleges that he needed an increase in his medication. The only  
10 allegation he has with respect to the unnamed Deputy Sheriffs is that they escorted him to  
11 “medical,” but he does not allege that they had any role in his medical treatment. As for  
12 the unnamed Nurses, he claims they put him in a cold “isolation” cell overnight. Doc.  
13 No. 1 at 3. Plaintiff also alleges that he needed an increase in his psychiatric medication  
14 but he does not allege how any of the named Defendants would play a role in prescribing  
15 him additional medication. *See id.* Without more, he fails to allege facts sufficient to  
16 meet the Eighth Amendment’s objective requirements. *See Jett*, 439 F.3d at 1096 (a  
17 medical need is serious when the failure to treat it could result in significant injury or the  
18 unnecessary and wanton infliction of pain). Plaintiff does not allege any facts to show  
19 that these unnamed Sheriff Deputies or unnamed Nurses “kn[e]w of and disregard[ed] an  
20 excessive risk to [his] health or safety.” *Farmer*, 511 U.S. at 837; *Leer v. Murphy*, 844  
21 F.2d 628, 634 (9th Cir. 1988) (liability may be imposed on individual defendant under  
22 § 1983 only if plaintiff can show that defendant proximately caused deprivation of  
23 federally protected right). Therefore, the Complaint as currently alleged lacks the  
24 “further factual enhancement” required to plausibly show that the unnamed Sheriff  
25 Deputies or unnamed Nurses “purposeful act[s] or failure[s] to respond to [Plaintiff’s] . . .  
26 medical need,” or any “harm caused by [this] indifference.” *Iqbal*, 556 U.S. at 678  
27 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Wilhelm*, 680 F.3d at  
28 1122 (citing *Jett*, 439 F.3d at 1096). Instead, Plaintiff offers only the type of “labels and

1 conclusions” or “a formulaic recitation of the elements of a[n] [Eighth Amendment]  
2 cause of action [that] will not do.” *Iqbal*, 662 U.S. at 678 (citing *Twombly*, 550 U.S. at  
3 555).

4 To the extent Plaintiff’s medical care claims may instead arise under the  
5 Fourteenth Amendment’s Due Process Clause, they “must be evaluated under an  
6 objective deliberate indifference standard.” *Gordon*, 888 F.3d at 1125 (citing *Castro*  
7 *v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016)). Under this test, “the  
8 plaintiff must ‘prove more than negligence but less than subjective intent - something  
9 akin to reckless disregard.’” *Id.* To sustain such a claim, Plaintiff must allege facts  
10 sufficient to show:

11  
12 (i) the defendant made an intentional decision with respect to the conditions  
13 under which the plaintiff was confined; (ii) those conditions put the plaintiff  
14 at substantial risk of suffering serious harm; (iii) the defendant did not take  
15 reasonable available measures to abate that risk, even though a reasonable  
16 official in the circumstances would have appreciated the high degree of risk  
17 involved—making the consequences of the defendant’s conduct obvious; and  
18 (iv) by not taking such measures, the defendant caused the plaintiff’s injuries.

19 *Gordon*, 888 F.3d at 1125.

20 Plaintiff claims that unnamed Nurses placed him in a cold “isolation” cell  
21 overnight and he was concerned that he would “get Covid.” Doc. No. 1 at 3. Plaintiff  
22 does not allege that he actually contracted Covid or any other serious illness. These facts  
23 alone are insufficient to plausibly suggest he faced any “substantial risk of serious harm,”  
24 that “a reasonable officer in the circumstances would have appreciated the high degree of  
25 risk involved,” or that the unnamed Nurses’ failure to abate any “substantial risk” caused  
26 him any injury whatsoever. *Castro*, 833 F.3d at 1071.

27 For all these reasons, the Court finds Plaintiff’s Complaint fails to state a claim  
28 upon which § 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); *Lopez*, 203  
F.3d at 1126–27.

1 **V. CONCLUSION**

2 For the reasons explained above, the Court **DENIES** Plaintiff’s Motion to Appoint  
3 Counsel and **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C.  
4 § 1915(a).

5 The Court **DIRECTS** the Watch Commander of GBDF, or their designee, to  
6 collect from Plaintiff’s inmate trust account the \$350 filing fee owed in this case by  
7 garnishing monthly payments in an amount equal to twenty percent (20%) of the  
8 preceding month’s income and forwarding those payments to the Clerk of the Court each  
9 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL  
10 PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
11 ASSIGNED TO THIS ACTION.

12 The Court **DIRECTS** the Clerk of the Court to serve a copy of this Order on  
13 Watch Commander, George Bailey Detention Facility, 446 Alta Road, San Diego,  
14 California, 92158.

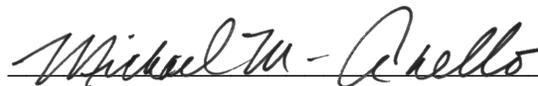
15 The Court further **DISMISSES** Plaintiff’s Complaint for failure to state a claim  
16 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)  
17 and **GRANTS** him thirty (30) days leave from the date of this Order in which to file an  
18 Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff’s  
19 Amended Complaint must be complete by itself without reference to his original  
20 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint  
21 will be considered waived. *See* CivLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner &*  
22 *Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the  
23 original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that  
24 claims dismissed with leave to amend which are not re-alleged in an amended pleading  
25 may be “considered waived if not repled”).

26  
27 \* \* \*

1           The Court **DIRECTS** the Clerk of Court to mail Plaintiff a court approved civil  
2 rights complaint form for his use in amending.

3           **IT IS SO ORDERED.**

4 Dated: January 25, 2022

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6 HON. MICHAEL M. ANELLO  
7 United States District Judge

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