

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Williams v. Newman

No. 23-cv-00136-BAS-MDD (S.D. Cal. Mar. 8, 2023) · No. 23-cv-00136-BAS-MDD · Decided March 8, 2023

OPINION

Williams v. Newman

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 EZRA K. WILLIAMS, Case No. 23-cv-00136-BAS-MDD

CDCR #AF-1812

12 ORDER: Plaintiff, 13

v. (1) GRANTING MOTION TO

14

PROCEED IN FORMA

WILLIAM NEWMAN; D. GALLEGOS; 15 PAUPERIS [ECF No. 2];

WARREN MONTGOMERY

16 Defendants. (2) DENYING MOTION TO 17 APPOINT COUNSEL [ECF No. 3]; 18

(3) DISMISSING DEFENDANT

19 WARREN MONTGOMERY FOR

FAILING TO STATE A CLAIM

20

UNDER 28 U.S.C. §§ 1915(e)(2) &

21 1915A; and 22

(4) GRANTING PLAINTIFF LEAVE

23 TO AMEND

24 25 26 27 28 1 Plaintiff Ezra Williams (“Plaintiff” or “Williams”), an inmate currently
incarcerated 2 at the California Correctional Institute (“CCI”) located in Tehachapi, California, 3
commenced the instant civil rights lawsuit pursuant to 42 U.S.C. § 1983 on January 23, 4 2023.
(Compl., ECF No. 1.) The action arises out of Williams’ claim he was denied his 5 constitutional
rights when he previously was housed at Calipatria State Prison (“CAL”) in
6 February 2021. (See generally *id.*) Williams is proceeding pro se; he also applies for in
7 forma pauperis (“IFP”) status (IFP App., ECF No. 2) and requests appointment of counsel 8
(Mot. to Appoint Counsel, ECF No. 3).

9 I. MOTION TO PROCEED IFP

10 A party who institutes a civil action, suit, or proceeding in a district court of the 11 United States, except for an application for a writ of habeas corpus, must pay a filing fee 12 of \$402.1 See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff's failure to 13 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 14 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. 15 Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to 16 proceed IFP remains obligated to pay the entire fee in increments or "installments," *Bruce 17 v. Samuels*, 577 U.S. 82, 84 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 18 2015), regardless of whether his action is ultimately dismissed, see 28 U.S.C. § 1915(b)(1) 19 & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

20 Section 1915(a)(2) requires a prisoner who seeks to proceed IFP to submit a 21 "certified copy of the trust fund account statement (or institutional equivalent) for . . . the 22 6-month period immediately preceding the filing of the complaint." 28 U.S.C. 23 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified 24 trust account statement, the Court assesses an initial payment of 20% of (a) the average 25 26 1 In addition to the \$350 statutory fee, civil litigants must pay an administrative fee of \$52. See 28 27 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2020)). The additional \$52 administrative fee does not apply to persons granted leave to proceed 28 1 monthly deposits in the account for the past six months, or (b) the average monthly balance 2 in the account for the past six months, whichever is greater, unless the prisoner has no 3 assets. See 28 U.S.C. § 1915(b)(1), (b)(4). The institution having custody of the prisoner 4 then collects subsequent payments, assessed at 20% of the preceding month's income, in 5 any month in which the prisoner's account exceeds \$10, and forwards those payments to 6 the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2).

7 Under 28 U.S.C. § 1915, indigency is the benchmark for whether a plaintiff qualifies 8 for IFP status. The determination of indigency falls within the district court's sound 9 discretion. *Cal. Men's Colony v. Rowland*, 939 F.2d 854, 858 (9th Cir. 1991) (holding that 10 "[s]ection 1915 typically requires the reviewing court to exercise its sound discretion in 11 determining whether the affiant has satisfied the statute's requirement on indigency"), 12 rev'd on other grounds, 506 U.S. 194 (1993). It is well-settled that a party need not be 13 completely destitute to proceed IFP. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 14 331, 339–40 (1948). To satisfy the requirements of 28 U.S.C. § 1915(a), "an affidavit [of 15 poverty] is sufficient which states that one cannot because of his poverty pay or give 16 security for costs . . . and still be able to provide himself and the dependents with the 17 necessities of life." *Id.* at 339. However, "the same even-handed care must be employed 18 to assure that federal funds are not squandered to underwrite, at public expense . . . the 19 remonstrances of a suitor who is financially able, in whole or in part, to pull his own oar." 20 *Temple v. Ellerthorpe*, 586 F. Supp. 848, 850 (D.R.I. 1984). 21 In support of

his IFP Application, Williams submits a copy of his Inmate Trust 22 Account Statement. (See IFP App. at 5–6.) The statement shows Williams maintained an 23 average monthly balance of \$110.65 and had \$96.84 in average monthly deposits credited 24 to his account over the six month period immediately preceding the filing of his Complaint. 25 His available balance as of December 20, 2020 was \$58.56. (Id. at 4.) Williams has made 26 a satisfactory showing of indigency for the purpose of 28 U.S.C. § 1915(a). Therefore, the 27 Court GRANTS Plaintiff’s IFP Application and directs the Secretary of the CDCR, or their 28 designee, to collect this initial filing fee only if sufficient funds are available in Plaintiff’s 1 account at the time this Order is executed. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n 2 no event shall a prisoner be prohibited from bringing a civil action or appealing a civil 3 action or criminal judgment for the reason that the prisoner has no assets and no means by 4 which to pay the initial partial filing fee.”); Taylor, 281 F.3d at 850 (finding that 28 U.S.C. 5 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based 6 solely on a “failure to pay . . . due to the lack of funds available to him when payment is 7 ordered”).

8 II. SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)(B)

9 A. Standard of Review 10 Because Williams is a prisoner and is proceeding IFP, his Complaint requires a 11 preliminary screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these 12 statutes, the Court must review and sua sponte dismiss an IFP complaint, and any 13 complaint filed by a prisoner seeking redress from a governmental entity, or officer or 14 employee of a governmental entity, which is frivolous, malicious, fails to state a claim, or 15 seeks damages from defendants who are immune. See *Lopez v. Smith*, 203 F.3d 1122, 16 1126–27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. 17 Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)). “The 18 purpose of [screening] is ‘to ensure that the targets of frivolous or malicious suits need not 19 bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 20 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 21 2012)). 22 “The standard for determining whether a plaintiff has failed to state a claim upon 23 which relief can be granted under 28 U.S.C. § 1915(e)(2)(B)(ii) is the same as the Federal 24 Rule of Civil Procedure [(“Rule”)] 12(b)(6) standard for failure to state a claim.” *Watison 25 v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 26 1121 (9th Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar 27 standard applied in the context of failure to state a claim under Federal Rule of Civil

28 Procedure 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual 1 matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. 2 Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 3 1121. 4 Detailed factual allegations are not required, but “[t]hreadbare recitals of the 5 elements of a cause of action, supported by mere conclusory statements, do not suffice.” 6 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief 7 [is] . . . a context-

specific task that requires the reviewing court to draw on its judicial 8 experience and common sense.” Id. The “mere possibility of misconduct” or “unadorned, 9 the defendant-unlawfully-harmed-me accusation[s]” fall short of meeting this plausibility 10 standard. Id.; see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). 11 B. Allegations in the Complaint 12 Williams’ action arises out of his claim Defendants violated several of his 13 constitutionally protected rights when he was incarcerated at CAL in February 2021. 14 For several years, Williams has been a “devout practitioner of the Asatru faith.” 15 (Compl. at p. 3.) He alleges that practice of this religion requires him to wear religious 16 “headgear” and a talisman. (Id.) On approximately February 12, 2021, Williams was 17 released from his cell so that he could go to the “pill line” to pick up his medication. (Id.) 18 There, he was confronted by Defendant William Newman, a CAL Lieutenant (“Newman”). 19 (Id.) Citing 15 Cal. Code Regs. § 3213 and CDCR’s Religious Personal Property Matrix 20 (“RPP Matrix”), Newman admonished Williams he could only wear his religious headgear 21 while he confined in his cell, and demanded that Williams “remove his religious headgear,” 22 and. (Id.; see RPP Matrix (listing permissible religious personal property), Ex. 1 to Compl., 23 ECF No. 1); 15 Cal. Code Regs. § 3213(e) (“The institution head or designee retains 24 authority to remove or restrict use of an approved religious item . . . , based on a serious 25 threat to facility security or the safety of inmates, and to the degree necessary to eliminate 26 the threat.”). But Williams refused. (Compl. at p. 3.) This purportedly prompted Newman 27 to place Williams in handcuffs and physically remove Williams’ religious headgear and 28 talisman. (Id.) Williams threatened Newman that he would file a grievance, to which 1 Newman allegedly responded, “That wouldn’t be a smart idea, you know where you’re at.” 2 (Id.) Williams asked Newman what he meant by that statement, to which Newman 3 allegedly responded, “You’re in prison, anything can happen.” (Id. at p. 3–4.) 4 On approximately February 13, 2021, Williams filed a grievance against Newman 5 pertaining to the events that had taken place the day prior. (Compl. at p. 5.) Williams 6 alleges that the next day Defendant D. Gallegos, a Control Booth Officer, intentionally 7 “closed [William’s] electronic cell door on [William]’s skull as he set his breakfast tray 8 out for collection.” (Id.) As a result, Williams alleges he suffered from a loss of 9 consciousness, a laceration above his right ear, severe head pain, blurred vision, dizziness, 10 nausea, and “distorted equilibrium.” (Id.) 11 Williams sought medical assistance for his injuries, but he alleges the responding 12 CAL officers refused to get him medical attention, one of whom stated, “I’m not calling 13 medical, you can walk or crawl, or take your ass back to your cell.” (Compl. at p. 5.) Other 14 inmates helped escort Williams to the CAL medical unit, where Williams was “bandaged 15 [and] his laceration glued shut.” (Id.) Williams was instructed to return to his cell but to 16 “report to medical immediately if [his] condition worsen[ed].” (Id.) Williams condition 17 purportedly did worsen: he “experienced a blinding headache, vomiting, nosebleed, and 18 further loss of consciousness.” (Id.) Accordingly, he again sought medical attention from 19 CAL officers located on the floor where his cell was located, but these officers again 20 refused. (Id.) They purportedly told Williams, “You’re okay,

tell them at pill call.” (Id. 21 at pp. 5–6.) Six hours later, Williams was unable to bring himself to the CAL medical unit 22 under his own power, and was “immediately sent to [the] hospital for symptoms of head 23 trauma.” (Id. at p. 6.) 24 Williams alleges that as a result of the events that occurred in February 2021, he has 25 experienced a “campaign of harassment.” (Compl. at p. 6.) He claims he has suffered 26 several injuries for “filing civil rights grievances and grievances for staff misconduct which 27 initiated an internal affairs investigation.” (Id.) He further claims that he was told by 28 prison officials on several occasions that “we can make things very uncomfortable for you” 1 and “we can make your life hell” if he “insisted on pushing issues in CDCR.” (Id. at p. 7.) 2 Plaintiff seeks \$200,000 in compensatory and punitive damages. (Id. at p. 10.)

3 C. 42 U.S.C. § 1983

4 Williams brings the instant action under 42 U.S.C. § 1983 (“Section 1983). “Section 5 1983 creates a private right of action against individuals who, acting under color of state 6 law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*, 263 F.3d 1070, 7 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive rights, but merely 8 provides a method for vindicating federal rights elsewhere conferred.” *Graham v. Connor*, 9 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations omitted). “To 10 establish § 1983 liability, a plaintiff must show both (1) deprivation of a right secured by 11 the Constitution and laws of the United States, and (2) that the deprivation was committed 12 by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 13 1138 (9th Cir. 2012). 14 D. Analysis 15

1. Claims Against Defendant Warren Montgomery 16 Williams lists as Defendants to this action Lieutenant Newman, Officer Gallegos, 17 and Warden Warren Montgomery. (See Compl. at p. 1.) The Complaint does not, 18 however, contain any specific factual allegations relating to Montgomery, nor does the 19 Complaint allege any specific constitutional violation attributable to him. The absence of 20 any such allegations fells whatever constitutional claim Williams intends to press against 21 Montgomery in his Complaint. To state a claim, Williams must link each defendant, 22 individually, to an alleged constitutional violation. See generally, *Fed. R. Civ. P.* 8(a). 23 Moreover, to the extent that Williams may be attempting to sue Montgomery under 24 a theory of supervisory liability arising out of Montgomery’s position as CAL’s warden, 25 he has not alleged facts to support such a claim. Supervisory personnel are generally not 26 liable under Section 1983 for the actions of their employees. See *Iqbal*, 556 U.S. at 676. 27 When a named defendant holds a supervisory position, the causal link between him and 28 the claimed constitutional violation must be specifically alleged. See *Fayle v. Stapley*, 607 1 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978). To 2 do so, a plaintiff must allege facts indicating that the supervisory defendant either: (1) 3 personally participated in the alleged deprivation of constitutional rights; (2) knew of the 4 violations and failed to act to prevent them; or (3) promulgated or implemented a policy 5 “so deficient that the policy itself is a repudiation of constitutional rights” and is “the 6 moving force of the constitutional violation.”

Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 7 1989); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Because Williams has failed 8 to allege facts supporting any of these theories of supervisory liability as to Montgomery, 9 the claims alleged against Montgomery in the Complaint do not withstand this Court’s pre- 10 answer screen. See Iqbal, 556 U.S. at 678; 28 U.S.C. § 1915(e)(2)(B)(ii); Watson, 668 11 F.3d at 1112. 12 Accordingly, this action is DISMISSED WITHOUT PREJUDICE as to 13 Defendant Warren Montgomery. 14

2. Claims Arising Out of Failure to Provide Medical Attention 15 As stated above, in a Section 1983 lawsuit, a plaintiff must allege an “affirmative 16 link between the occurrence” of the constitutional violations alleged in the pleading and 17 the prison officials who are purportedly responsible for those deprivations. See Rizzo v. 18 Goode, 423 U.S. 362, 371 (1976). At minimum, this mandate requires that a plaintiff 19 identify and name as defendants the prison officials involved. Cf. De La Rosa v. Arpaio, 20 2015 WL 3795895, at *3 (D. Ariz. June 18, 2015) (“Plaintiff must identify and name as 21 defendants the individuals responsible for violating his constitutional rights.”). 22 Williams appears to invoke either an Eighth Amendment excessive force claim or, 23 more likely, an Eighth Amendment failure to provide adequate medical care, where he 24 alleges CAL “officers on the floor” twice refused to get Williams medical attention for his 25 injuries inflicted by Gallegos. Because Williams does not identify the CAL “officers on 26 the floor,” either by name or as “Doe” defendants, these allegations do not give rise to

27 Section 1983 liability. Cf. Kimes v. Cal. Dep’t of Corrs. & Rehabilitation, No. 21cv1873- 28 BTM (BLM), 2021 WL 5882605, at *4 (S.D. Cal. Dec. 13, 2021) (finding complaint that 1 did not identify any particular defendant but instead referred to purported wrongdoers 2 collectively as staff did not pass muster of § 1915(e)(2)’s standard). If Williams wishes 3 to pursue this variant of his Eighth Amendment claim, he must identify by name or as a 4 “Doe” defendant the “officers on the floor” who allegedly failed to respond appropriately 5 to his medical emergency. But see Estate of Escobar v. United States, No. 20-cv-2454-L- 6 KSC, 2022 WL 3209380, at *5 (S.D. Cal. Aug. 5, 2022) (opining “the use of Doe 7 defendants is not favored in federal court” and that to employ the practice properly the 8 allegations must “sufficiently put each Doe Defendant on notice of the [claims] against him 9 or her”). 10

3. Remaining Claims Against Remaining Defendants 11 As to the remaining Defendants, the Court finds the Complaint contains adequate 12 facts to support the elements of cognizable First Amendment free exercise claims and 13 Eighth Amendment excessive force claims, and that those claims are sufficiently robust to 14 survive the “low threshold” set for sua sponte screening pursuant to 28 U.S.C. §§ 15 1915(e)(2) and 1915A(b); see Wilhelm, 680 F.3d at 1123; Iqbal, 556 U.S. at 678. 16

First Amendment Free Exercise Claim: To state a First Amendment free exercise 17 claim, a plaintiff-inmate must allege a prison official’s actions: (1) “substantially 18 burden[ed]” the plaintiff’s exercise of a sincerely-held religious belief; and (2) were not 19 “rationally related to legitimate penological interests,” i.e., the official’s actions 20 unreasonably infringed upon the plaintiff’s religious rights. O’Lone v. Estate of Shabazz, 21 482 U.S. 342, 348–50 (1987). “[G]overnment action places a substantial

burden on an individual's right to free exercise of religion when it tends to coerce the individual to forego [his or] her sincerely held religious beliefs or to engage in conduct that violates those beliefs." *Jones v. Williams*, 791 F.3d 1023, 1031–33 (9th Cir. 2015). Here, Williams alleges he is an ardent practitioner of the Asatru faith, and that his religion requires him to wear certain "headgear" and a talisman. Williams alleges Defendant Newman forced him to remove his headgear and Talisman, and admonished him the only place he could wear these religious items is in his cell. Newman's asserted basis for doing so rested, in part, upon a California regulation that confers CAL officials authority to remove approved religious items "based on a serious threat to facility security or to the safety of inmates and staff." 15 Cal. Code Regs. § 3213. But Williams alleges he was simply standing in line to receive his medications at the time he was confronted by Newman. Simply put, the facts alleged in the Complaint appear to be incongruent with the circumstances under which Newman would be empowered to invoke his regulatory authority to strip Williams of his religious garments. At the pre-answer screening stage, these allegations suffice to state a First Amendment free exercise claim. Eighth Amendment Excessive Force Claims: To survive a pre-answer screen pursuant to 28 U.S.C. § 1915, a plaintiff seeking to press an Eighth Amendment excessive force claim must allege "the unnecessary and wanton infliction of pain[.]" *Whitley v. Abers*, 475 U.S. 312, 320 (1986). This requires alleging "overt acts with some degree of particularity such that his claim is set forth clearly enough to give defendants fair notice of the type of claim being pursued." *Ortez v. Wash. Cnty*, 88 F.3d 804, 810 (9th Cir. 1996) 15 (citing *Jones v. Cmty. Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984)). "A prison official may be liable for failure to protect an inmate from a use of excessive force if he is deliberately indifferent to a substantial risk of serious harm to an inmate." *Estate of Davis v. Delo*, 115 F.3d 1388, 1395 (8th Cir. 1997); see also *Cunningham v. Gates*, 229 F.3d 1271, 1289–90 (9th Cir. 2000). Williams alleges that while his head was protruding from his cell, Gallegos intentionally shut his cell door, injuring Williams. Since then, Williams alleges he has suffered from amnesia, blinding headaches, tinnitus, vision impairment, and neck pain. Hence, Williams' Complaint contains enough factual allegations to support the elements of an Eighth Amendment excessive force claim at this juncture. * * * * While the Court finds Williams' allegations are sufficient to survive the pre-answer screening standard, he is cautioned that "the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

III. MOTION TO APPOINT COUNSEL

Williams also requests the appointment of counsel in this case on the ground (1) he has been moved to different institutions by the CDCR and (2) there are "complex issues" in this matter. (Mot. to Appoint Counsel at 2.) There is no constitutional right to counsel in a civil case. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 24

(19810. The 9 decision to appoint counsel under 28 U.S.C. § 1915(e)(1) is within “the sound discretion 10 of the trial court and is granted only in exception circumstances.” *Agyeman v. Corr. Corp. 11 of America*, 390 F.3d 1101, 1103 (9th Cir. 2004); *Terrell v. Brewer*, 935 F.2d 1015, 1017 12 (9th Cir. 1991) (noting that only “exceptional circumstances” support such a discretionary 13 appointment). Such exceptional circumstances exist where there is cumulative showing of 14 both a likelihood of success on the merits and an inability of the pro se litigant to articulate 15 his claims given their legal complexity. See *Harrington v. Scribner*, 785 F.3d 1299, 1309 16 (9th Cir. 2015); *Palmer*, 560 F.3d at 970. 17 Here, nothing in Williams’ Complaint suggests he is incapable of articulating the 18 factual basis for his First and Eighth Amendment claims, which appear “relatively 19 straightforward.” *Harrington*, 785 F.3d at 1309. In fact, the Court has found, based on its 20 initial screening of the Complaint under 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b), that 21 he has stated a plausible claim for relief. See *Meeks v. Nunez*, No. 3:13-cv-00973-GPC- 22 GBS, 2017 WL 476425, at *3 (denying ADA inmate appointment of counsel where inmate 23 “successfully survived screening,” and had submitted motions “drafted with clarity and 24 [asserting] proper arguments”); *Garcia v. Blahnik*, No. 3:14-cv-00875-LAB-BGS, 2016 25 WL 4269561, at *3 (S.D. Cal. Aug. 15, 2016) (finding no “exceptional circumstances 26 warranting a judicial request for a voluntary legal counsel” where Plaintiff’s psychiatric 27 disorder and limited access to the law library did not “prevent[] him from filing a well- 28 articulated complaint and other motions with the Court”). 1 In addition, while Williams may have sufficiently pleaded plausible First and Eighth 2 Amendment claims at this preliminary stage of the proceedings, he has yet to 3 demonstrate—and it is too soon to tell—whether he is likely to succeed on the merits. 4 *Harrington*, 785 F.3d at 1309; *Cano v. Taylor*, 739 F.3d 1214, 1218 (9th Cir. 2014) 5 (affirming denial of counsel where prisoner could articulate his claims in light of the 6 complexity of the issues involved, but did not show likelihood of succeed on the merits); 7 see also *Dickey v. Strayhorn*, No. 3:17-cv-00546-JLS-JLB, 2017 WL 3118797, at *1 (S.D. 8 Cal. July 21, 2017), reconsideration denied, 2017 WL 4271975 at *1 (S.D. Cal. Sept. 26, 9 2017) (“To demonstrate that he has a likelihood of success at trial, Plaintiff must do more 10 than merely allege that one of his constitutional rights was violated. He must provide 11 evidence to the effect that he has a likelihood of success on the merits of his allegations.”); 12 *Torbert v. Gore*, No. 3:14-cv-02991-BEN-NLS, 2016 WL 1399230, at *1 (S.D. Cal. Apr. 13 8, 2016) (“A plaintiff that provides no evidence of his likelihood of success at trial fails to 14 satisfy the first factor of the [exceptional circumstances] test.”). 15 Accordingly, the Court finds no “exceptional circumstances” exist at this 16 preliminary stage of the case and DENIES Plaintiff’s Motion to Appoint Counsel (ECF 17 No. 3) without prejudice.

18 IV. CONCLUSION

19 Based on the foregoing, the Court: 20 (1) GRANTS Plaintiff’s application to proceed IFP pursuant to 28 U.S.C. § 21 1915(a). (ECF No. 2.) 22 (2) ORDERS the Secretary of the CDCR, or their designee, to collect from 23 Plaintiff’s prison trust account the \$350 filing fee owed in this

case by collecting monthly 24 payments from the account in an amount equal to twenty percent (20%) of the preceding 25 month's income and forward payments to the Clerk of the Court each time the amount in 26 the account exceeds \$ 10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS

27 SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO
28 THIS ACTION. 1 (3) DIRECTS the Clerk of the Court to serve a copy of this Order on Jeff 2 Macomber, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001, by 3 U.S. Mail, or by forwarding an electronic copy to trusthelpdesk@cdcr.ca.gov. 4 (4) DISMISSES WITHOUT PREJUDICE all of Plaintiff's claims against 5 Defendant Montgomery for failure to state a claim pursuant to 28 U.S.C. §§ 1915(e)(2) and 6 1915A(b). 7 (5) DISMISSES WITHOUT PREJUDICE Plaintiff's Eighth Amendment 8 claim premised upon the allegation he was denied adequate medical care at CAL. 9 (6) GRANTS Plaintiff leave to either: (1) file a Notice of Intent to proceed with 10 only his First and Eighth Amendment claims against Newman and Gallegos, respectively, 11 or (2) file an Amended Complaint correcting all the deficiencies identified by the Court in 12 this Order. Plaintiff must file either a Notice of Intent or an Amended Complaint by no 13 later than April 7, 2023. 14 If Plaintiff files a Notice of Intent, this Court will issue an Order directing the U.S. 15 Marshal to effect service of his Complaint on Newman and Gallegos, and will dismiss the 16 remaining claims and Defendant. If Plaintiff chooses to file an amended pleading 17 correcting the deficiencies outlined in this Order, his Amended Complaint must be 18 complete in itself without reference to his original pleading. Defendants not named and 19 any claims not re-alleged in the Amended Complaint will be considered waived. See Civ. 20 L.R. 15.1; *Hal Roach Studios, Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended 21 complaint supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 22 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an 23 amended pleading may be “considered waived if not repled”). 24 // 25 // 26 // 27 // 28 // 1 Plaintiff's amended pleading must be titled “First Amended Complaint,” contain 2 ||S.D. Cal. Civil Case No. 23-cv0136-BAS-MDD in its caption, and comply both with 3 || Federal Rule of Civil Procedure 8 and Southern District of California Local Rule 8.2.a. In 4 || order to assist Plaintiff in complying with these requirements, the Court further DIRECTS 5 Clerk of the Court to provide Plaintiff with a blank copy of its form Complaint under 6 || the Civil Rights Act, 42 U.S.C. § 1983, for his use and convenience, should he choose to 7 |}amend. 8 (7) DENIES Plaintiff's motion to appoint counsel. (ECF No. 3.)

9 IT IS SO ORDERED. / ,

10 || DATED: March 8, 2023 Lin A (Lyohaa 6 11 United States District Judge 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 _~14-