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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DARRYL DUNSMORE,
12 Inmate Booking No. 19777041,

13 Plaintiff,

14 vs.

15 STATE OF CALIFORNIA; SAN DIEGO
16 COUNTY; SAN DIEGO SHERIFF'S
17 DEP'T; DEPARTMENT OF
18 CORRECTIONS; GORE
19 XAVIER BECCERA; ATTORNEY
GENERAL,

20 Defendants.
21
22

Case No.: 3:20-cv-00406-AJB-WVG

**ORDER: (1) GRANTING MOTION
TO PROCEED IN FORMA
PAUPERIS [ECF No. 3]; AND (2)
DISMISSING COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
AND 28 U.S.C. § 1915A(b)**

23 Darryl Dunsmore ("Plaintiff"), currently housed at the San Diego Central Jail
24 located in San Diego, California, and proceeding pro se, has filed a civil rights action
25 pursuant to 42 U.S.C. § 1983. (See Compl., ECF No. 1.) In addition, Plaintiff has filed a
26 Motion to Proceed In Forma Pauperis ("IFP") pursuant to 28 U.S.C. § 1915(a). (See ECF
27 No. 2.)
28

1 **I. Motion to Proceed IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the
3 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*
4 28 U.S.C. § 1914(a). An action may proceed despite the plaintiff's failure to prepay the
5 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
6 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a
7 prisoner and is granted leave to proceed IFP, he nevertheless remains obligated to pay the
8 entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28
9 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

10 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
11 ("PLRA"), a prisoner seeking leave to proceed IFP must also submit a "certified copy of
12 the trust fund account statement (or institutional equivalent) for . . . the six-month period
13 immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v.*
14 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the
15 Court assesses an initial payment of 20% of (a) the average monthly deposits in the
16 account for the past six months, or (b) the average monthly balance in the account for the
17 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
18 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then
19 collects subsequent payments, assessed at 20% of the preceding month's income, in any
20 month in which the prisoner's account exceeds \$10, and forwards them to the Court until
21 the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

22 In support of his IFP Motion, Plaintiff has submitted a certified copy of his inmate
23 trust account statement. (ECF No. 3.) Plaintiff's statement shows that he had no
24 available funds to his credit at the time of filing. *See* 28 U.S.C. § 1915(b)(4) (providing
25 that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing
26 a civil action or criminal judgment for the reason that the prisoner has no assets and no
27 means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding
28 that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's

1 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him
2 when payment is ordered.”).

3 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 3) and
4 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
5 balance of the filing fees due for this case must be collected by the San Diego County
6 Sheriff’s Department and forwarded to the Clerk of the Court pursuant to the installment
7 payment provisions set forth in 28 U.S.C. § 1915(b)(1).

8 **II. Screening of Complaint pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

9 **A. Standard of Review**

10 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
11 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
12 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of
13 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
14 who are immune. *See Williams v. King*, 875 F.3d 500, 502 (9th Cir. 2017) (discussing 28
15 U.S.C. § 1915(e)(2)) (citing *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en
16 banc)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C.
17 § 1915A(b)). “The purpose of [screening] is ‘to ensure that the targets of frivolous or
18 malicious suits need not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d
19 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d
20 680, 681 (7th Cir. 2012)).

21 “The standard for determining whether a plaintiff has failed to state a claim upon
22 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
23 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
24 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
25 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
26 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
27 12(b)(6)”). Federal Rules of Civil Procedure 8 and 12(b)(6) require a complaint to
28 “contain sufficient factual matter, accepted as true, to state a claim to relief that is

1 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation
2 marks omitted).

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

10 B. Plaintiff’s Allegations¹

11 Plaintiff alleges he is a “state prisoner being held in County Jail.” (Compl. at 3.)
12 Plaintiff claims he has been “denied meaningful access” to the courts. (*Id.*) He further
13 claims that this denial of access has resulted in causing him to “serve a longer sentence
14 then [he] would have otherwise.” (*Id.*)

15 Plaintiff is an “ADA inmate” and alleges he is “being discriminated against” and
16 “denied ADA access to all programs.” (*Id.* at 4.) Plaintiff claims to be “totally disabled”
17 from Parkinson’s disease. (*Id.*) Plaintiff also claims he has been “denied shower for 90
18 days.” (*Id.*)

19 Plaintiff seeks injunctive relief, \$60,000,000 in compensatory damages, and
20 \$60,000,000 in punitive damages. (*See id.* at 7.)

21 C. 42 U.S.C. § 1983

22 Section 1983 is a “vehicle by which plaintiffs can bring federal constitutional and
23 statutory challenges to actions by state and local officials.” *Anderson v. Warner*, 451 F.3d
24 1063, 1067 (9th Cir. 2006). To state a claim under 42 U.S.C. § 1983, a plaintiff must
25 allege two essential elements: (1) that a right secured by the Constitution or laws of the
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28 ¹ The Court will refer to the page numbers as they are imprinted by the court’s electronic case filing
system.

1 United States was violated, and (2) that the alleged violation was committed by a person
2 acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*,
3 789 F.3d 1030, 1035-36 (9th Cir. 2015).

4 D. Access to Courts claims

5 Plaintiff's access to courts claim are far from clear but he generally alleges that he
6 has been denied access to the courts which purportedly led to Plaintiff "serv[ing] a longer
7 sentence." (Compl. at 3.)

8 Prisoners have a constitutional right of access to the courts. *Lewis v. Casey*, 518
9 U.S. 343, 346 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *limited in part on other*
10 *grounds by Lewis*, 518 U.S. at 354. To state a claim of a denial of the right to access the
11 courts, a prisoner must establish that he has suffered "actual injury," a jurisdictional
12 requirement derived from the standing doctrine. *Lewis*, 518 U.S. at 349. An "actual
13 injury" is "actual prejudice with respect to contemplated or existing litigation, such as the
14 inability to meet a filing deadline or to present a claim." *Id.* at 348 (citation and internal
15 quotations omitted). The right of access does *not* require the State to "enable the prisoner
16 to discover grievances," or even to "litigate effectively once in court." *Id.* at 354; *see also*
17 *Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury as the
18 "inability to file a complaint or defend against a charge"). Instead, *Lewis* holds:

19 [T]he injury requirement is not satisfied by just any type of frustrated legal
20 claim ... *Bounds* does not guarantee inmates the wherewithal to transform
21 themselves into litigating engines capable of filing everything from
22 shareholder derivative actions to slip-and-fall claims. The tools it requires to
23 be provided are those that the inmates need in order to attack their sentences,
24 directly or collaterally, and in order to challenge the conditions of their
25 confinement. Impairment of any other litigating capacity is simply one of the
26 incidental (and perfectly constitutional) consequences of conviction and
27 incarceration.

28 *Id.* at 346; *see also Spence v. Beard*, No. 2:16-CV-1828 KJN P, 2017 WL 896293, at *2-
3 (E.D. Cal. Mar. 6, 2017). Indeed, the failure to allege an actual injury is "fatal." *Alvarez*
v. Hill, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) ("Failure to show that a 'non-frivolous

1 legal claim had been frustrated’ is fatal.”) (quoting *Lewis*, 518 U.S. at 353 & n.4).

2 In addition to alleging an “actual injury,” Plaintiff must also plead facts sufficient
3 to describe the “non-frivolous” or “arguable” nature of underlying claim he contends was
4 lost as result of Defendants’ actions. *Christopher v. Harbury*, 536 U.S. 403, 413-14
5 (2002). The nature and description of the underlying claim must be set forth in the
6 pleading “as if it were being independently pursued.” *Id.* at 417.

7 Plaintiff references an appeal but offers no specific facts as to how the actions of
8 the Defendants impeded his ability to pursue an appeal of his conviction or sentence.
9 (See Compl. at 3.) Plaintiff does not allege any “actual injury” or identify any “prejudice
10 with respect to contemplated or existing litigation, such as the inability to meet a filing
11 deadline or to present a claim.” *Lewis*, 518 U.S. at 348. He does not describe the non-
12 frivolous or arguable nature of any of the underlying claims in his Complaint. He fails to
13 contend that any action was dismissed because he was “[u]nab[le] to meet a filing
14 deadline or to present a claim,” *Lewis*, 518 U.S. at 348, as the result of any act or
15 omission on the part of Defendants.

16 Accordingly, the Court finds that Plaintiff has failed to state an access to courts
17 upon which relief can be granted.

18 E. CDCR

19 In addition, to the extent Plaintiff includes the CDCR as a named Defendant, his
20 Complaint fails to state any claim upon which § 1983 relief can be granted. See 28 U.S.C.
21 § 1915(e)(2)(B)(ii). This entity is not a “person” subject to suit under § 1983. See *Hale v.*
22 *State of Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993) (holding that a state department
23 of corrections is an arm of the state, and thus, not a “person” within the meaning of
24 § 1983.)

25 F. Monell Liability

26 To the extent that Plaintiff names the “San Diego Sheriff’s Department,”
27 (“SDSD”) as a Defendant, he fails to state a claim upon which § 1983 relief may be
28 granted. Departments of municipal entities are not “persons” subject to suit under § 1983;

1 therefore, a local law enforcement agency, like the SDSD, are not proper parties. *See*
2 *Vance v. County of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996) (“Naming a
3 municipal department as a defendant is not an appropriate means of pleading a § 1983
4 action against a municipality.”) (citation omitted); *Powell v. Cook County Jail*, 814 F.
5 Supp. 757, 758 (N.D. Ill. 1993) (“Section 1983 imposes liability on any ‘person’ who
6 violates someone’s constitutional rights ‘under color of law.’ Cook County Jail is not a
7 ‘person.’”).

8 “Persons” under § 1983 are state and local officials sued in their individual
9 capacities, private individuals and entities which act under color of state law, and/or the
10 local governmental entity itself. *Vance*, 928 F. Supp. at 995-96. The SDSD is a law
11 enforcement agency or department of the County of San Diego, but it is not a “person”
12 subject to suit under § 1983. *See e.g., United States v. Kama*, 394 F.3d 1236, 1239 (9th
13 Cir. 2005) (“[M]unicipal police departments and bureaus are generally not considered
14 ‘persons’ within the meaning of section 1983.”); *Rodriguez v. Cnty. of Contra Costa*,
15 2013 WL 5946112 at *3 (N.D. Cal. Nov. 5, 2013) (citing *Hervey v. Estes*, 65 F.3d 784,
16 791 (9th Cir. 1995)) (“Although municipalities, such as cities and counties, are amenable
17 to suit under *Monell [v. Dep’t of Social Servs]*, 436 U.S. 658 (1978)], sub-departments or
18 bureaus of municipalities, such as the police departments, are not generally considered
19 “persons” within the meaning of § 1983.”); *Nelson v. Cty. of Sacramento*, 926 F. Supp.
20 2d 1159, 1170 (E.D. Cal. 2013) (dismissing Sacramento Sheriff’s Department from
21 section 1983 action “with prejudice” because it “is a subdivision of a local government
22 entity,” *i.e.*, Sacramento County); *Gonzales v. City of Clovis*, 2013 WL 394522 (E.D. Cal.
23 Jan. 30, 2013) (holding that the Clovis Police Department is not a “person” for purposes
24 of section 1983).

25 To the extent Plaintiff also asserts a claim against the County of San Diego itself,
26 his allegations are also insufficient. A municipal entity may be held liable under § 1983
27 only if he alleges facts sufficient to plausibly show that he was deprived of a
28 constitutional right by individually identified employees who acted pursuant to the

1 municipality's policy or custom. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S.
2 274, 280 (1977); *Monell*, 436 U.S. at 691; *Villegas v. Gilroy Garlic Festival Ass'n*, 541
3 F.3d 950, 964 (9th Cir. 2008). The County of San Diego may not be held vicariously
4 liable under § 1983 simply because one of its employees is alleged to have acted
5 wrongfully. See *Board of Cty. Comm'rs. v. Brown*, 520 U.S. 397, 403 (1997); *Monell*,
6 436 U.S. at 691 (“[A] a municipality cannot be held liable solely because it employs a
7 tortfeasor.”); *Jackson v. Barnes*, 749 F.3d 755, 762 (9th Cir. 2014). Instead, the
8 municipality may be held liable “when execution of a government’s policy or custom ...
9 inflicts [a constitutional] injury.” *Monell*, 436 U.S. at 694; *Los Angeles Cty., Cal. v.*
10 *Humphries*, 562 U.S. 29, 36 (2010).

11 G. Sheriff Gore -- Individual Liability

12 While William Gore, the San Diego County Sheriff is a “person” subject to suit
13 under § 1983, there are no specific factual allegations as to this Defendant.

14 These types of broad and conclusory allegations fail to plausibly show how, or to
15 what extent, Gore may be held individually liable for any constitutional injury. See *Iqbal*,
16 556 U.S. at 676-77; *Jones v. Comm'ty Redev. Agency of City of Los Angeles*, 733 F.2d
17 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege with at least some degree of
18 particularity overt acts which defendants engaged in” in order to state a claim). As
19 pleaded, Plaintiff plainly seeks to hold Gore liable for the acts of unidentified
20 subordinates. But “vicarious liability is inapplicable to ... § 1983 suits.” *Iqbal*, 556 U.S.
21 at 676. Instead, “Plaintiff must plead that each Government-official defendant, through
22 [his] own individual actions, has violated the Constitution” in order to plead a plausible
23 claim for relief. *Id.*; see also *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013)
24 (supervisor may be held liable under §1983 only if there is “a sufficient causal connection
25 between the supervisor’s wrongful conduct and the constitutional violation”) (citations
26 and internal quotation marks omitted); *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir.
27 1979) (when a named defendant holds a supervisory position, the causal link between
28 the defendant and the claimed constitutional violation must be specifically alleged).

1 H. Claims against Beccera

2 Plaintiff seeks to hold Defendant Becerra liable because he purportedly is
3 “responsible for upholding const[itution].” (Compl. at 2.) “The inquiry into causation
4 must be individualized and focus on the duties and responsibilities of each individual
5 defendant whose acts or omissions are alleged to have caused a constitutional
6 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988), citing *Rizzo v. Goode*,
7 423 U.S. 362, 370-71 (1976); *Berg v. Kincheloe*, 794 F.2d 457, 460 (9th Cir. 1986);
8 *Estate of Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (“Causation is, of
9 course, a required element of a § 1983 claim.”) A person deprives another “of a
10 constitutional right, within the meaning of section 1983, if he does an affirmative act,
11 participates in another’s affirmative acts, or omits to perform an act which he is legally
12 required to do that causes the deprivation of which [the plaintiff complains].” *Johnson v.*
13 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Plaintiff has not stated a claim against this
14 Defendant because he has failed to allege facts regarding what actions were taken or not
15 taken by this Defendant which caused the alleged constitutional violations.

16 I. Leave to Amend

17 Thus, for all these reasons, the Court finds Plaintiff’s Complaint fails to state any
18 § 1983 claim upon which relief can be granted, and that it must be dismissed sua sponte
19 and in its entirety pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See*
20 *Watison*, 668 F.3d at 1112; *Wilhelm*, 680 F.3d at 1121. Because Plaintiff is proceeding
21 pro se, however, the Court having now provided him with “notice of the deficiencies in
22 his complaint,” will also grant him an opportunity to fix them. *See Akhtar v. Mesa*, 698
23 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir.
24 1992)).

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1 **III. Conclusion and Orders**

2 For the reasons explained, the Court:

3 1. **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
4 (ECF No. 3);

5 2. **DIRECTS** the Watch Commander, or his designee, to collect from
6 Plaintiff's prison trust account the \$350 filing fee owed in this case by garnishing
7 monthly payments from his account 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 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Watch
13 Commander, San Diego Central Jail, 1173 Front Street, San Diego, California 92101;

14 4. **DISMISSES** Plaintiff's Complaint for failing to state a claim upon which
15 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b) and
16 **GRANTS** him forty-five (45) days leave from the date of this Order in which to file an
17 Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff's
18 Amended Complaint must be complete by itself without reference to his original
19 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint
20 will be considered waived. See S.D. Cal. CivLR 15.1; *Hal Roach Studios, Inc. v. Richard*
21 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended pleading
22 supersedes the original."); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)
23 (noting that claims dismissed with leave to amend which are not re-alleged in an
24 amended pleading may be "considered waived if not repled.").

25 If Plaintiff fails to file an Amended Complaint within the time provided, the Court
26 will enter a final Order dismissing this civil action based both on Plaintiff's failure to
27 state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)
28 and 1915A(b), and his failure to prosecute in compliance with a court order requiring

1 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does
2 not take advantage of the opportunity to fix his complaint, a district court may convert the
3 dismissal of the complaint into dismissal of the entire action.”).

4 5. The Clerk of Court is directed to mail a court approved form civil rights
5 complaint to Plaintiff.

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7 **IT IS SO ORDERED.**

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9 Dated: April 6, 2020

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11 Hon. Anthony J. Battaglia
12 United States District Judge
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