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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CESAR ARMANDO ROJAS,  
12 CDCR #AB-4157,

13 Plaintiff,

14 vs.

15 RASHAD JOHNSON, Probation Officer,  
16 et al.,

17 Defendants.  
18  
19  
20  
21

Case No.: 3:17-cv-01287-JAH-JMA

**ORDER:**

**1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
[ECF No. 2]**

**AND**

**2) DISMISSING COMPLAINT FOR  
FAILING TO STATE A CLAIM  
PURSUANT TO 28 U.S.C. § 1915(e)(2)  
AND § 1915A(b)**

22 CESAR ARMANDO ROJAS (“Plaintiff”), currently incarcerated at Mule Creek  
23 State Prison (“MCSP”) in Ione, California, and proceeding pro se, has filed a civil rights  
24 Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1).

25 Plaintiff claims a San Diego County probation officer, his unnamed “transferring  
26 partner,” a San Diego County Deputy Sheriff, the University of California San Diego  
27 (“UCSD”) Emergency Room, and an unidentified emergency medical technician (“EMT”)  
28 violated his Eighth Amendment rights on December 22, 2014. See Compl., ECF No. 1 at

1 3-5. He seeks to enjoin Defendants from “bothering” him, and more than \$19 million in  
2 general and punitive damages. *Id.* at 7.

3 Plaintiff has not paid the civil filing fee required by 28 U.S.C. § 1914(a); instead he  
4 has filed a Motion to Proceed In Forma Pauperis pursuant to 28 U.S.C. § 1915(a) (ECF  
5 No. 2).

6 **I. Motion to Proceed In Forma Pauperis**

7 All parties instituting any civil action, suit or proceeding in a district court of the  
8 United States, except an application for writ of habeas corpus, must pay a filing fee of  
9 \$400.<sup>1</sup> See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
10 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
11 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
12 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed  
13 IFP remains obligated to pay the entire fee in “increments” or “installments,” *Bruce v.*  
14 *Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182,  
15 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. See 28  
16 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

17 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
18 “certified copy of the trust fund account statement (or institutional equivalent) for ... the 6-  
19 month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
20 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account  
21 statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits  
22 in the account for the past six months, or (b) the average monthly balance in the account  
23 for the past six months, whichever is greater, unless the prisoner has no assets. See 28  
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26 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
27 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court  
28 Misc. Fee Schedule, § 14 (eff. June 1, 2016). The additional \$50 administrative fee does  
not apply to persons granted leave to proceed IFP. *Id.*

1 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner  
2 then collects subsequent payments, assessed at 20% of the preceding month’s income, in  
3 any month in which his account exceeds \$10, and forwards those payments to the Court  
4 until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); Bruce, 136 S. Ct. at 629.

5 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate  
6 Statement Report. See ECF No. 2 at 2; 28 U.S.C. § 1915(a)(2); S.D. Cal. CivLR 3.2;  
7 Andrews, 398 F.3d at 1119. This statement shows that while Plaintiff carried an average  
8 monthly balance of \$77.63 and had average monthly deposits of \$52.86 to his account over  
9 the 6-month period immediately preceding the filing of his Complaint, he had an available  
10 balance of zero at the time of filing. See ECF No. 2 at 2. Thus, the Court assesses Plaintiff’s  
11 initial partial filing fee to be \$15.52 pursuant to 28 U.S.C. § 1915(b)(1), but acknowledges  
12 he may be unable to pay that initial fee at this time. See 28 U.S.C. § 1915(b)(4) (providing  
13 that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing  
14 a civil action or criminal judgment for the reason that the prisoner has no assets and no  
15 means by which to pay the initial partial filing fee.”); Bruce, 136 S. Ct. at 630; Taylor, 281  
16 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing  
17 dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of  
18 funds available to him when payment is ordered.”).

19 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2),  
20 declines to exact any initial filing fee because his prison certificate indicates he may have  
21 “no means to pay it,” Bruce, 136 S. Ct. at 629, and directs the Secretary of the California  
22 Department of Corrections and Rehabilitation (“CDCR”), or his designee, to instead collect  
23 the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and forward them  
24 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28  
25 U.S.C. § 1915(b)(1). See id.

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1 **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

2 A. Standard of Review

3 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees, the  
4 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP  
5 and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
6 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
7 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
8 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
9 statutes, the Court must sua sponte dismiss complaints, or any portions thereof, which are  
10 frivolous, malicious, fail to state a claim, or which seek damages from defendants who are  
11 immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203 F.3d 1122,  
12 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004  
13 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

14 All complaints must contain “a short and plain statement of the claim showing that  
15 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
16 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
17 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing  
18 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining whether a  
19 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the  
20 reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere  
21 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; see also  
22 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

23 “When there are well-pleaded factual allegations, a court should assume their  
24 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
25 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
26 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
27 allegations of material fact and must construe those facts in the light most favorable to the  
28 plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that

1 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”.

2       However, while the court “ha[s] an obligation where the petitioner is pro se,  
3 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
4 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
5 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not “supply  
6 essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the*  
7 *University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

8       B.     Plaintiff’s Allegations

9       While Plaintiff’s factual allegations are sparse and conclusory, he claims Rashad  
10 Johnson, his probation officer, “refused drug testing [him],” “forc[ed] [him] to urin[ate] in  
11 a trash can at UCSD,” and then took him to jail “for no reason” on December 22, 2014.  
12 See ECF No. 1 at 2, 3. Plaintiff further claims another probation officer, identified only as  
13 Johnson’s “transferring partner,” used “excessive force” against him by “splittin[g] [his]  
14 chin,” and an unidentified “EMT” in an ambulance handcuffed him while injured. *Id.* at 2.  
15 Finally, Plaintiff claims San Diego Sheriff’s Department Deputy Aychart “denied [him]  
16 medical care in front of [a] nurse at George Bailey Detention Facility,” on an unspecified  
17 occasion, and “kept [him] in for violation 120 days in County Jail.” *Id.* at 2, 5.

18       C.     42 U.S.C. § 1983

19       “Section 1983 creates a private right of action against individuals who, acting under  
20 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,  
21 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive  
22 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”  
23 *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations  
24 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a right  
25 secured by the Constitution and laws of the United States, and (2) that the deprivation was  
26 committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698  
27 F.3d 1128, 1138 (9th Cir. 2012).

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1           D.     Proper Parties

2           First, to the extent Plaintiff seeks to sue the USCD Emergency Room and an  
3 unidentified EMT, his Complaint fails to state a claim upon which § 1983 relief may be  
4 granted because neither of these purported parties are alleged to be persons acting “under  
5 color of state law.” Id.

6           As a general matter, private hospitals and medical officials are not state actors and  
7 therefore cannot be sued under § 1983. See *Briley v. California*, 564 F.2d 849, 855-856  
8 (9th Cir. 1977) (noting that “private hospitals and physicians have consistently been  
9 dismissed from § 1983 actions for failing to come within the color of state law requirement  
10 of this section.”); see also *Babchuk v. Indiana Univ. Health, Inc.*, 809 F.3d 966, 970-71  
11 (7th Cir. 2016). While Plaintiff might be able to hold these defendants liable if his  
12 Complaint alleged facts sufficient to plausibly show that either UCSD or the EMT who  
13 treated him contracted directly with the State or municipality to provide medical services  
14 to persons within their custody, his pleading contains no such allegations. See *West v.*  
15 *Atkins*, 487 U.S. 42, 53-54 (1988); *cf.*, *Lopez v. Dep’t of Health Servs.*, 939 F.2d 881, 883  
16 (9th Cir. 1991) (per curiam) (finding state action where hospital “contract[ed] with the state  
17 ... to provide medical services to indigent citizens”); *George v. Sonoma Cnty. Sheriff’s*  
18 *Dep’t*, 732 F. Supp. 2d 922, 934 (N.D. Cal. 2010) (“A private ... hospital that contracts  
19 with a public prison system to provide treatment for inmates performs a public function  
20 and acts under color of law for purposes of § 1983.”); *Coyle v. San Diego Sheriff’s Dep’t*,  
21 No. 3:16-CV-0667-GPC-JLB, 2016 WL 3523250, at \*3 (S.D. Cal. June 28, 2016).

22           E.     Official Capacity / Monell Claims

23           Against the remaining Defendants, probation officer Rashad Johnson, Johnson’s  
24 unidentified “transferring partner,” and San Diego Sheriff’s Department Deputy Ayehart,  
25 Plaintiff seeks damages for actions allegedly committed by them in their official capacities.  
26 See Compl., ECF No. 1 at 2.

27           His Complaint fails to state a claim against these persons, however, because while  
28 municipal officers may be sued in their official capacities, Plaintiff must allege facts to

1 plausibly show that the constitutional violations for which he seeks redress occurred as the  
2 result of the municipality’s official policy or custom, *Monell v. Dep’t. of Soc. Serv. of City*  
3 *of N.Y.*, 436 U.S. 658, 690 (1978), or through the municipality’s failure to train its  
4 employees adequately. *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989).

5 While individual-capacity actions seek to impose personal liability upon a  
6 government official for actions performed under color of state law, official-capacity actions  
7 generally represent another way of suing “an entity of which an officer is an agent.”  
8 *Kentucky v. Graham*, 473 U.S. 159, 165 (1984) (quoting *Monell*, 436 U.S. at 690 n.55).  
9 Local governments are responsible only for “their own illegal acts.” *Pembaur v. Cincinnati*,  
10 475 U.S. 469, 479 (1986) (citing *Monell*, 436 U.S. at 665-683). They may not be held  
11 vicariously liable under § 1983 for their employees’ actions. See *Monell*, 436 U.S. at 691;  
12 *Canton*, 489 U.S. at 392; *Board of Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403  
13 (1997) (collecting cases).

14 In addition, a municipality’s failure to train its employees in a relevant respect must  
15 amount to “deliberate indifference to the rights of persons with whom the [untrained  
16 employees] come into contact.” *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citing  
17 *Canton*, 489 U.S. at 388). “Only then “can such a shortcoming be properly thought of as a  
18 city ‘policy or custom’ that is actionable under § 1983.” *Id.* at 61 (citing *Canton*, 489 U.S.  
19 at 389).

20 As it stands, Plaintiff’s Complaint contains none of these critical pleading  
21 requirements. Therefore, it is subject to dismissal in its entirety for failing to state a claim  
22 upon which § 1983 relief can be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii); § 1915A(b)(1);  
23 *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

24 F. Cruel and Unusual Punishment

25 Moreover, even if Plaintiff had sufficiently pleaded facts to establish municipal  
26 liability, his Complaint alleges only violations of the Eighth Amendment’s prohibition on  
27 “cruel and unusual punishments.” See *Compl.*, ECF No. 1 at 3-4. The Eighth Amendment’s  
28 prohibition of “cruel and unusual punishments” applies only “after conviction and

1 sentence.” *Graham v. Connor*, 490 U.S. 386, 393 & n.6 (1989) (citing *Ingraham v. Wright*,  
2 430 U.S. 651, 671 n.40 (1977)); *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir.  
3 2001). Therefore, any allegations of excessive force or inadequate medical treatment  
4 arising during the course of an arrest or pretrial custody also fail to state an Eighth  
5 Amendment claim as a matter of law. See, e.g., *Langley v. Tulare Police Dep’t, et al.*, No.  
6 1:16-CV-0336-DAD-SKO, 2017 WL 4151246, at \*4 (E.D. Cal. Sept. 19, 2017).

### 7 G. Unlawful Detention

8 Finally, to the extent Plaintiff seeks damages for an unlawful or prolonged “120 days  
9 in County Jail,” see Compl., ECF No. 1 at 5, based on what the Court presumes was due  
10 to an alleged probation violation, Plaintiff cannot proceed under § 1983. Challenges to the  
11 fact or duration of confinement must be brought in a habeas action, not in a civil rights  
12 case. Habeas corpus “is the exclusive remedy ... for the prisoner who seeks ‘immediate or  
13 speedier release’ from confinement.” *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (quoting  
14 *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005)). A challenge to the fact or duration of  
15 confinement that would, if successful, result in immediate or speedier release falls within  
16 the “core” of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 487-89 (1973); see also  
17 *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam) (“Challenges to the validity  
18 of any confinement or to particulars affecting its duration are the province of habeas  
19 corpus.”); *Cristiano v. Brown*, No. 3:16-CV-3077-BEN-BLM, 2017 WL 3446812, at \*3  
20 (S.D. Cal. Aug. 9, 2017).

### 21 **III. Conclusion and Orders**

22 For the reasons explained, the Court:

- 23 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
24 (ECF No. 2);
- 25 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from  
26 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing monthly  
27 payments from his account in an amount equal to twenty percent (20%) of the preceding  
28 month’s income and forwarding those payments to the Clerk of the Court each time the



1 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS  
2 MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO  
3 THIS ACTION;


4 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott  
5 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001;

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

17 If Plaintiff fails to file an Amended Complaint within the time provided, the Court  
18 will enter a final Order dismissing this civil action based both on Plaintiff's failure to state  
19 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and  
20 1915A(b), and his failure to prosecute in compliance with a court order requiring  
21 amendment. See Lira v. Herrera, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does  
22 not take advantage of the opportunity to fix his complaint, a district court may convert the  
23 dismissal of the complaint into dismissal of the entire action.”).

24 **IT IS SO ORDERED.**

25 Dated: September 25, 2017

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27 \_\_\_\_\_  
28 HON. JOHN A. HOUSTON  
United States District Judge