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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

**ELTON W. ERVIN,**  
  
**Plaintiff,**  
  
**v.7**  
  
**MERCED POLICE DEPARTMENT,  
MERCED POLICE OFFICERS:  
CHAVEZ – BADGE # 156, ALPONTE,  
SALLYER – BADGE # 191 and  
PADGETT – BADGE # 180, and DOES  
1 to 4,**  
  
**Defendants.**

**1:13-cv-0446 AWI GSA**

**MEMORANDUM OPINION AND ORDER  
ON DEFENDANTS MOTION TO DISMISS  
CLAIM FROM PLAINTIFF’S FIRST  
AMENDED COMPLAINT**

**Doc. # 6**

This is a civil rights action for damages by *pro se* plaintiff Elton W. Ervin (“Plaintiff”) against defendants City of Merced (improperly sued as Merced City of Merced Police Department), and individual Merced Police Officers Chavez, Alponete, Salyers and Padgett (collectively “Defendants”). Plaintiff’s First Amended Complaint (“FAC”) was removed from Merced County Superior Court on March 26, 2013, on the ground of federal subject matter jurisdiction. Plaintiff’s FAC is difficult to interpret, but the portion of the FAC that purports to set forth “Legal Claims” lists a total of eight claims for relief. Currently before the court is Defendants’ motion to dismiss Plaintiff’s first, second, third fourth, fifth, seventh and eighth

1 claims for relief. As of the date of this writing, Defendants' motion to dismiss is unopposed. For  
2 the reasons that follow, Defendants' motion to dismiss will be granted as further clarified.

### 3 **FADCTUAL BACKGROUND**

4 Plaintiff's action arises from the apprehension and arrest of Plaintiff by the individual  
5 Defendants on the night of January 14, 2012. The facts pertaining to this encounter appear to be  
6 summarized at pages 36 to 43 of Document number 1. Plaintiff alleges he was approached about  
7 10:30 p.m. by "an unidentified person who appeared out of the dark questioning [P]laintiff  
8 concerning his car and where [P]laintiff was coming from." Doc. #1 at 36:9-13. Plaintiff alleges  
9 the person who approached him, later identified as Defendant Chavez, did not identify himself  
10 and later falsely reported that his encounter with Plaintiff was the result of a traffic stop. Plaintiff  
11 declined to answer Chavez and continued walking toward his residence. Plaintiff was grabbed  
12 from behind around the neck and thrown to the ground. Plaintiff alleges officers Chavez and  
13 Alponete kicked Plaintiff in the head, back, and shoulder area. By the time officers Sallyer and  
14 Padgett arrived, Plaintiff was handcuffed. Officer Chavez forced Plaintiff's mouth open with a  
15 flashlight and baton using force sufficient to cause "cuts, wounds [and] piercings to [P]laintiff's  
16 lips, gums, tongue and inner mouth area, it also broke, chipped [and] fractured several of  
17 [P]laintiff[s] front top and bottom teeth and infected [P]laintiff with hepatitis – C virus as well as  
18 mental and emotional damage [and] injuries." Doc. # 1 at 37:16-21. Plaintiff's mouth was forced  
19 open because the officers believed Plaintiff was concealing a baggie of a narcotic substance in his  
20 mouth and was going to swallow the baggie. The FAC alleges that no illicit substances were  
21 recovered from Plaintiff.

22 Plaintiff alleges he experienced breathing problems from the bleeding in his mouth and  
23 requested medical attention, which was refused. Plaintiff was placed in Chavez's patrol car to be  
24 transported to the police station. In his FAC, Plaintiff alleges, "I was asked by Officer E. Chavez  
25 how much money I had in my Wallet, which was one thousand two hundred [and] fifth dollars  
26 [which] I had received as grant money from attending junior college, and his response was that  
27 it's mine now and so is your car." Plaintiff also alleges other property that was lodged by Officer  
28 Chavez was missing upon Plaintiff's transfer to state prison on February 23, 2012.

1 **LEGAL STANDARD**

2 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure can  
3 be based on the failure to allege a cognizable legal theory or the failure to allege sufficient facts  
4 under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34  
5 (9th Cir.1984). To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint must set  
6 forth factual allegations sufficient “to raise a right to relief above the speculative level.” Bell  
7 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (“Twombly”). While a court considering a  
8 motion to dismiss must accept as true the allegations of the complaint in question, Hospital Bldg.  
9 Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), and must construe the pleading in the  
10 light most favorable to the party opposing the motion, and resolve factual disputes in the pleader's  
11 favor, Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969), the  
12 allegations must be factual in nature. See Twombly, 550 U.S. at 555 (“a plaintiff’s obligation to  
13 provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and  
14 a formulaic recitation of the elements of a cause of action will not do”). The pleading standard  
15 set by Rule 8 of the Federal Rules of Civil Procedure “does not require ‘detailed factual  
16 allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me  
17 accusation.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (“Iqbal”).

18 The Ninth Circuit follows the methodological approach set forth in Iqbal for the  
19 assessment of a plaintiff’s complaint:

20 “[A] court considering a motion to dismiss can choose to begin by identifying  
21 pleadings that, because they are no more than conclusions, are not entitled to the  
22 assumption of truth. While legal conclusions can provide the framework of a  
23 complaint, they must be supported by factual allegations. When there are well-  
pleaded factual allegations, a court should assume their veracity and then  
determine whether they plausibly give rise to an entitlement to relief.”

24 Moss v. U.S. Secret Service, 572 F.3d 962, 970 (9th Cir. 2009) (quoting Iqbal, 129 S.Ct. at 1950).

25 **DISCUSSION**

26 As Defendants observe, Plaintiff’s FAC is a mix of legal bases for relief and labels  
27 denoting elements of other claims for relief. It is well settled that a court has the duty to construe  
28

1 *pro se* pleadings generously in favor of the pleader. In this case, the court finds it necessary to  
2 refer first to the facts alleged, which are clearly and adequately set forth and fit those facts into  
3 what the court construes to be Plaintiff's intended claims. The court understands Plaintiff's FAC  
4 as seeking to recover for three or possibly four wrongful acts by Defendants: (1) arrest without  
5 probable cause, (2) excessive use of force in making the arrest, (3) failure to render medical  
6 assistance, malicious prosecution and (possibly) (4) failure to return Plaintiff's property. Plaintiff  
7 seeks relief under a variety of legal theories each of which appears to be linked to allegation of  
8 constitutional violation and is brought pursuant to 42 U.S.C. § 1983.

9 **I. General Considerations: Eighth Amendment and Substantive Due Process Claims**

10 At the outset, it is clear to the court, as it is to Defendants, that Plaintiff's allegations of  
11 violations of rights under the Eighth Amendment and under the Substantive Due Process Clause  
12 of the Fourteenth Amendment are without merit as those constitutional provisions have no  
13 applicability to the facts of this case. Plaintiff's rights against the imposition of cruel and unusual  
14 punishment under the Eighth Amendment apply "only after the State has complied with the  
15 constitutional guarantees traditionally associated with criminal prosecution." Ingraham v.  
16 Wright, 430 U.S. 651, 671, n.40 (1977). Because Plaintiff's claims arose entirely out of events  
17 that occurred prior to any criminal proceedings, the Eighth Amendment is not applicable to any  
18 claim that could be alleged by Plaintiff.

19 With regard to the Substantive Due Process Clause of the Fourteenth Amendment, the  
20 Supreme Court has rejected the generalized application of substantive due process standards in  
21 the context of excessive force claims brought under § 1983. See Graham v. Connor, 490 U.S.  
22 386, 394 (1989). Where "the excessive force claim arises in the context of an arrest or  
23 investigatory stop of a free citizen, it is most properly characterized as one invoking the  
24 protections of the Fourth Amendment." Id.; see also Albright v. Oliver, 510 U.S. 266, 273-274  
25 (1993) (Fourth Amendment is appropriate for analysis of deprivation of pretrial liberty interests).  
26 The court concludes that, to the extent Plaintiff has sought to allege claims for relief under either  
27 the Eighth Amendment or Substantive Due Process Clause of the Fourteenth Amendment for  
28 claims arising out of his stop, arrest, detention or arising out of the force applied during any of

1 these, those claims are without merit because those violations are protected under the Fourth  
2 Amendment.

## 3 **II. Plaintiff's Individual Claims**

### 4 ***A. Deliberate Indifference, Failure to Aide***

5 Plaintiff's FAC alleges two claims bearing the label "Deliberate Indifference." The first  
6 of these, claim number 5, is not actually a claim itself but appears to set forth Plaintiff's allegation  
7 that Defendants acted generally with "deliberate indifference." That allegation, together with  
8 Plaintiff's claim number 4, which is labeled "Shocks the Conscience Test," appear to be intended  
9 to support Plaintiff's claim for violation of Substantive Due Process rights as alleged in Plaintiff's  
10 first claim for relief. Since Plaintiff cannot allege a Substantive Due Process claim for harms  
11 arising from his arrest for the reasons explained above, the court finds that neither claim number  
12 four or claim number five state a claim upon which relief can be granted.

13 Plaintiff's other claim that bears the label "Deliberate Indifference" is claim number six.  
14 In that claim Plaintiff alleges that the forceful search of his mouth and the denial of requested  
15 medical treatment for the resulting injuries violated Plaintiff's rights under the Eighth and  
16 Fourteenth Amendments. As explained above, Plaintiff cannot allege a violation of Eighth  
17 Amendment rights under the facts of this case because those rights do not attach until there has  
18 been a conviction. However, it is at least theoretically possible for Plaintiff to state a claim for  
19 failure to render medical care under the Substantive Due Process Clause of the Fourteenth  
20 Amendment.

21 Although the [Fourteenth] Amendment does not generally require police  
22 officers to provide medical assistance to private citizens, DeShaney [v.  
23 Winnebago County Dept. Soc. Svcs., 489 U.S. 189, 197 (1989)] (holding  
24 that the due process clause does not generally confer affirmative rights to  
25 governmental aid, even where such aid may be necessary to secure life),  
26 when a state officer's conduct places a person in peril in deliberate  
27 indifference to their safety, that conduct creates a constitutional claim. See  
28 L.W. v. Grubbs, 974 F.2d 119 (9th Cir. 1992) [. . . ] (concluding a valid  
section 1983 claim existed against a supervisor at a state facility who  
placed plaintiff in danger by assigning her to work with an inmate sex  
offender who had a history of violent assaults on women; he subsequently

1 raped and kidnaped her); Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989)  
2 [. . .] (concluding that a valid section 1983 claim existed against a state  
3 police officer who caused a woman to be stranded in a high-crime area at  
4 night where she was subsequently raped).

5  
6 Penilla v. City of Huntington Park, 115 F.3d 707, 709 (9th Cir. 1997).

7 "Deliberate indifference is 'a stringent standard of fault; requiring proof that a municipal  
8 actor disregarded a known or obvious consequence of his action.' [Citation.]" Id. (quoting Bryan  
9 Cnty. Brown, 520 U.S. 397, 410 (1997). Pursuant to L.W. v. Grubbs, 92 F.3d 894 (9th Cir 1996).

10 We define the contours of deliberate indifference in [L.W. v. Grubbs, 92  
11 F.3d 894, 898-900 (9th Cir. 1996)]. Under Grubbs, the standard we apply  
12 is even higher than gross negligence – deliberate indifference requires a  
13 culpable mental state. Id. The state actor must "recognize[ ] [an]  
14 unreasonable risk and actually intend[ ] to expose the plaintiff to such risks  
15 without regard to the consequences to the plaintiff." Id. at 899 (internal  
16 quotation omitted). In other words, the defendant "knows that something is  
17 going to happen but ignores the risk and exposes [the plaintiff] to it." Id. at  
18 900. The deliberate-indifference inquiry should go to the jury if any  
19 rational factfinder could find this requisite mental state. [Citation].

20 Patel v. Kent School Dist., 648 F.3d 965, 974 (9th Cir. 2011).

21 A Fourteenth Amendment claim for relief for failure to provide aide seeks to capture  
22 damages that occur *after* the encounter with the officer that places the plaintiff foreseeably in the  
23 path of harm. What a claim for failure to provide care does not capture is damages that arise from  
24 the encounter itself. Thus, in the context of the facts of this case, Plaintiff cannot allege a claim  
25 for relief under the Fourteenth Amendment because he was injured by the officer or officers who  
26 forced Plaintiff's mouth open – those damages are captured by the Fourth Amendment claim – he  
27 can only claim damages for failure to provide medical aid if, as a result of not receiving medical  
28 attention, he suffered *additional* harm that was not caused by the initial encounter with the  
officers. Plaintiff has not alleged that he was subject to additional harm beyond what was caused  
by the force employed to open and search his mouth. As a result, Plaintiff has failed to state a

1 claim for relief under the Substantive Due Process Clause of the Fourteenth Amendment upon  
2 which relief can be granted. Plaintiff's sixth claim for relief will therefore be dismissed.

3 ***B. Malicious Prosecution***

4 Plaintiff's claim for malicious prosecution is ambiguous in that it is not explicitly  
5 stated whether the claim is alleged as a constitutional infringement pursuant to 42 U.S.C. § 1983  
6 or whether the claim is alleged as a claim under California common law. Defendants have  
7 assumed the latter and seek to dismiss Plaintiff's claim on the ground it fails to allege that the  
8 prosecution was "for the purpose of denying [Plaintiff] equal protection or another specific  
9 constitutional right" – an element that is necessary to assert a claim under § 1983. Awabdy v.  
10 City of Andelanto, 368 F.3d 1062, 1067 (9th Cir. 2004). The court, however, has a more basic  
11 concern regarding Plaintiff's malicious prosecution claim that brings into doubt Plaintiff's claim  
12 regardless of whether the claim is alleged pursuant to common law or § 1983. The court cannot  
13 discern from Plaintiff's FAC any indication that he was actually subjected to prosecution.

14 "In order to prevail on a § 1983 claim of malicious prosecution, a plaintiff 'must show that  
15 the defendants *prosecuted* [him] with malice and without probable cause, and that they did so for  
16 the purpose of denying [him] equal protection or another constitutional right.' [Citation]"  
17 Awabdy, 368 F.3d at 1066 (italics added). Plaintiff alleges that his arrest was without probable  
18 cause, and that he was initially detained. See Doc. # 1 at 40:9-12 ("Regarding all charges  
19 [P]laintiff was initially detained, accused and arrested for, all the charges and criminal  
20 proceedings were dismissed."). Plaintiff's own allegations indicate there was no prosecution of  
21 charges against him. As discussed above, the protections of the Due Process Clause of the  
22 Fourteenth Amendment have applicability only where some other, more specific, constitutional  
23 protection is not available. Albright, 510 U.S. at 273. Plaintiff's due process rights under the  
24 Fourteenth Amendment, whether substantive or procedural, only come into play where Plaintiff's  
25 Fourth Amendment rights cease to afford protection. The substance of Plaintiff's malicious  
26 prosecution claim appears to use the fact he was arrested without probable cause as proof that he  
27 was prosecuted with malice. The protections of the Fourth Amendment apply from the initial  
28 seizure of the person through a brief detention period prior to the determination by a magistrate

1 that the arrestee should be held to answer. Id. at 274. The Fourth Amendment is designed  
2 specifically to protect against arrest without probable cause. Id. Nothing in Plaintiff's FAC  
3 alleges or suggests that Plaintiff was subject to any criminal process beyond initial detention.

4 Similarly, to establish a claim for malicious prosecution, under California common law, a  
5 plaintiff is required to show that a prior claim initiated by the defendant was (1) pursued to a legal  
6 termination favorable to the plaintiff, (2) brought without probable cause, and (3) initiated with  
7 malice. Villa v. Cole, 4 Cal.App.4th 1327, 1335 (4th Dist. 1992). To the extent Plaintiff's FAC  
8 seeks to allege a claim under California common law for malicious prosecution, that claim fails  
9 because there is no indication that the criminal charges against him "were pursued to a legal  
10 termination." The facts alleged by plaintiff establish that the charges were not pursued at all.

11 Since Plaintiff has failed to allege he was subject to actual prosecution or subject to any  
12 process that was not protected under his Fourth Amendment rights, he has failed to allege facts  
13 that would support a claim for malicious prosecution.

#### 14 ***C. Procedural Due Process – Failure to Return Property***

15 The factual background of Plaintiff's FAC alleges the taking by the Defendant officers of  
16 Plaintiff's property, including money, jewelry and items of sentimental significance. The  
17 portions of the FAC labeled "Legal Claims" and "Prayer For Relief" do not mention or seek the  
18 return of non-returned property. The court finds that Plaintiff has not stated a claim for violation  
19 of his procedural due process rights for the taking of his property. To the extent Plaintiff's failure  
20 to make such an allegation was inadvertent, the court feels it best to inform Plaintiff that he  
21 cannot allege a procedural due process claim for failure to return property unless he can allege  
22 facts to show that he has either exhausted all available civil remedies or that adequate civil  
23 remedies do not exist or are not sufficient to provide relief. See . Paratt v. Taylor, 451 U.S. 527,  
24 542 (1981) (there is no Due Process violation where there is an adequate state process to address  
25 the harm the plaintiff alleges).

#### 26 ***D. Punitive Damages***

27 Defendants seek dismissal of Plaintiff's claims for punitive damages are alleges against  
28 the City of Merced or against the Individual Defendants in their individual capacities. As noted



1 by Defendants, where individual officials of a municipality are sued in their official capacities, it  
2 is the municipality that is the real party in interest and punitive damages may not be recovered  
3 from a municipal entity in an action pursuant to 42 U.S.C. § 1983 as a matter of law. City of  
4 Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Defendants' motion is not opposed  
5 and will be granted to the extent Plaintiff's FAC seeks to impose punitive damages against the  
6 individual Defendants in their official capacities or against the City of Merced.

### 7 **CONCLUSION AND ORDER**

8 Owing, perhaps, to the length and somewhat repetitive nature of Plaintiff's FAC, there  
9 appears to be some confusion as to what claims are to be dismissed and which are not.  
10 Defendants omit Plaintiff's claim # 6 from the list of claims to be dismissed and Defendants make  
11 no argument that Plaintiff has failed to allege a claim for Fourth Amendment violation, either on  
12 the theory of excessive force or on the theory of arrest without probable cause. On the court's list  
13 of claims, however, Plaintiff's sixth claim for relief is the claim that the court has interpreted as a  
14 claim for failure to provide medical aide, erroneously pled pursuant to the Eighth Amendment  
15 instead of the Fourteenth Amendment. As the court understands Defendants' motion to dismiss,  
16 they have moved to dismiss all claims under the Fourteenth and Eighth Amendments, which  
17 would include Plaintiff's sixth claim for relief. As the court interprets Plaintiff's FAC, Plaintiff's  
18 eighth claim for relief alleges what can reasonably be interpreted as a claim for violation of his  
19 right against the excessive use of force under the Fourth Amendment. Defendants, so far as the  
20 court can tell, have not addressed Plaintiff's eighth claim for relief. The court will grant  
21 Defendants' motion to dismiss in its entirety with the understanding that what remains of  
22 Plaintiff's FAC is the eighth claim for relief, which the court interprets as alleging any claim or  
23 claims for violation of Plaintiff's rights under the Fourth Amendment that is supported by the  
24 facts alleged. Those theories are excessive use of force and arrest without probable cause.

25  
26 THEREFORE, for the reasons discussed above, it is hereby ORDERED that Defendants'  
27 motion to dismiss is hereby GRANTED in its entirety. Plaintiff's First Amended Complaint is  
28 hereby DISMISSED with prejudice as to all Defendants and as to all claims alleged therein.

1 Defendants' motion to dismiss is granted with the understanding that Defendants did not move to  
2 dismiss Plaintiff's claims for violation of Fourth Amendment rights under theories of excessive  
3 force or lack of probable cause. Consequently, Plaintiff's eighth claim for relief, which the court  
4 deems to set forth claims for violation of Plaintiff's rights under the Fourth Amendment in  
5 violation of 42 U.S.C. § 1983 on theories of arrest without probable cause and excessive use of  
6 force, is not dismissed.

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IT IS SO ORDERED.

Dated: October 23, 2013

  
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SENIOR DISTRICT JUDGE