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5 **UNITED STATES DISTRICT COURT**

6 EASTERN DISTRICT OF CALIFORNIA  
7

8 FLOYD FOSTER JR.,

9 Plaintiff,

10 v.

11 DIVISION OF ADULT PAROLE  
12 OPERATIONS, et al.,

13 Defendants.

Case No. 1:19-cv-00987-LJO-SAB

SCREENING ORDER GRANTING  
PLAINTIFF LEAVE TO FILE AMENDED  
COMPLAINT

(ECF No. 1)

THIRTY DAY DEADLINE

14  
15 Floyd Foster Jr. (“Plaintiff”), a pretrial detainee proceeding pro se and *in forma pauperis*,  
16 filed this civil rights action pursuant to 42 U.S.C. § 1983. Currently before the Court is  
17 Plaintiff’s complaint filed July 18, 2019.

18 **I.**

19 **SCREENING REQUIREMENT**

20 The Court is required to screen complaints brought by prisoners seeking relief against a  
21 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
22 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
23 legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or  
24 that “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §  
25 1915(e)(2)(B).

26 A complaint must contain “a short and plain statement of the claim showing that the  
27 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
28 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere

1 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
2 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate  
3 that each defendant personally participated in the deprivation of Plaintiff’s rights. Jones v.  
4 Williams, 297 F.3d 930, 934 (9th Cir. 2002).

5 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings  
6 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d  
7 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be  
8 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer  
9 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss  
10 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant  
11 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s  
12 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572  
13 F.3d at 969.

## 14 II.

### 15 COMPLAINT ALLEGATIONS

16 The Court accepts Plaintiff’s allegations in the complaint as true only for the purpose of  
17 the *sua sponte* screening requirement under 28 U.S.C. § 1915.

18 Plaintiff is a pretrial detainee being held at the Fresno County Jail. On October 9, 2017,  
19 Plaintiff was arrested for driving under the influence. (Compl. 3, ECF No. 1.) Nine days later,  
20 Plaintiff had an appearance in case no. P17900013-2. (Id.) Plaintiff appeared before Judge  
21 Kimberly Gaab on October 20, 2017, and Parole Agent S. Mason was present in court. (Id.) The  
22 hearing on Plaintiff’s parole violation was continued pending new charges being filed. (Id.)

23 On October 27, 2019, Plaintiff appeared before Judge Gaab and Parole Agent L. Wallace  
24 withdrew the parole violation, Plaintiff’s parole was reinstated, and Plaintiff was released on  
25 case no. P17900013-2. (Compl. at 3.) Plaintiff was remanded on the new charges in case no.  
26 F17906222, driving with a BAC of 0.08 or above and a third strike. (Id.) Plaintiff’s bail was set  
27 at \$280,000.00. (Id.) Plaintiff contacted Aladdin’s Bail bonds to make bail on this same date.  
28 (Id.) He tried to make bail every day for fifty-seven days and on December 17, 2017, Plaintiff

1 filed a letter explaining to the court that the parole hold had not been dropped. (Compl. at 4.)  
2 On December 22, 2017, an order issued granting Plaintiff's request for modification, and a copy  
3 of the Court's order releasing the parole hold and allowing bail issued. (Id.) The parole hold  
4 was not released. (Id.)

5 On July 3, 2018, Plaintiff appeared in front of Judge Adolfo Corona and addressed the  
6 fact that the parole hold was not lifted and he was being denied bail. (Compl. at 4.) Parole  
7 Agent L. Wallace was asked why the parole hold was not removed as had been ordered on two  
8 occasions. (Id.) Parole Agent Wallace apologized to the court and stipulated on the record that  
9 the error was her mistake and that she would correct it. (Id.) The parole hold was removed on  
10 July 27, 2018, but by that time, Plaintiff no longer had the funds to make bail. (Id.)

11 Plaintiff brings this action against the Division of Adult Parole Operations ("DAPO"),  
12 and Parole Agents Jorge Castro, S. Mason, and L. Wallace who are employed by the DAPO.  
13 Plaintiff alleges that his due process rights under the Fifth Amendment were violated by the not  
14 ensuring that the records were correct and by ignoring the two court orders to release the parole  
15 hold. Plaintiff seeks monetary, injunctive, and declaratory relief.

### 16 III.

### 17 DISCUSSION

18 Plaintiff brings this action alleging violation of the Fifth Amendment. "[T]he Fifth  
19 Amendment's due process clause applies only to the federal government." Bingue v. Prunchak,  
20 512 F.3d 1169, 1174 (9th Cir. 2008); accord Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th  
21 Cir. 2001). Since all Defendants in this action are state employees the Fifth Amendment does  
22 not apply.

23 Any due process claims in this action would arise under the Fourteenth Amendment  
24 which "protects persons against deprivations of life, liberty, or property." Wilkinson v. Austin,  
25 545 U.S. 209, 221 (2005). The due process clause of the Fourteenth Amendment protects two  
26 distinct but related rights: procedural due process and substantive due process. Albright v.  
27 Oliver, 510 U.S. 266, 272 (1994). Here, Plaintiff's due process claim does not clearly state  
28 whether he is bringing a substantive or procedural due process claim, but he alleges that he has

1 been kept in custody for ten months due to the failure to lift the parole hold.

2 **A. Substantive Due Process**

3 The substantive protections of the due process clause bar certain governmental actions  
4 regardless of the fairness of the procedures that are used to implement them. Cty. of Sacramento  
5 v. Lewis, 523 U.S. 833, 840 (1998). Therefore, the substantive protections of the due process  
6 clause are intended to prevent government officials from abusing their power or employing it as  
7 an instrument of oppression. Lewis, 523 U.S. at 846. The Supreme Court has held that “the  
8 substantive component of the Due Process Clause is violated by executive action only when it  
9 ‘can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.’ ”  
10 Id. at 847. “[O]nly the most egregious official conduct can be said to be arbitrary in a  
11 constitutional sense.” Brittain v. Hansen, 451 F.3d 982, 990 (9th Cir. 2006) (quoting Lewis, 523  
12 U.S. at 846).

13 “Substantive due process is ordinarily reserved for those rights that are ‘fundamental.’ ”  
14 Brittain, 451 F.3d at 990. “The protections of substantive due process have for the most part  
15 been accorded to matters relating to marriage, family, procreation, and the right to bodily  
16 integrity[;] and the Supreme Court has been reluctant to expand the concept of substantive due  
17 process. Albright, 510 U.S. at 271-72. To state a substantive due process claim, a plaintiff must  
18 “show both a deprivation of [his] liberty and conscience shocking behavior by the government.”  
19 Brittain, 451 F.3d at 991.<sup>1</sup>

20 In Rochin v. California, 342 U.S. 165 (1952), the Supreme Court found that the Due  
21 Process Clause inescapably imposes upon the court an exercise of judgment of the whole  
22 proceedings to ascertain whether they offended those canons of decency and fairness with  
23 express the notions of justice, even toward those charged with the most heinous crimes. Rochin,  
24 342 U.S. at 169. “Due process of law is a summarized constitutional guarantee of respect for

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25 <sup>1</sup> Courts differ on whether a claim for wrongful detention following a reasonable initial seizure should be analyzed  
26 under substantive due process or procedural due process. Kennell v. Gates, 215 F.3d 825, 828 n.4 (8th Cir. 2000).  
27 Plaintiff has not challenged his initial detention here. Plaintiff was arrested for driving under the influence with at  
28 least three prior convictions. He alleges that due to the failure to release the parole hold he was unable to be  
released on bail and was kept in custody for ten months during which he could have been out on bail. The Court  
analyzes the claim under substantive due process although ultimately the result would be the same if considered in  
the procedural due process context.

1 those personal immunities which . . . are ‘so rooted in the traditions and conscience of our people  
2 as to be ranked as fundamental’, or are ‘implicit in the concept of ordered liberty’.” Id. (citations  
3 omitted). The Court held that the officials had engaged in conduct that shocked the conscious by  
4 “[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove  
5 what was there, the forcible extraction of his stomach’s contents—this course of proceeding by  
6 agents of government to obtain evidence is bound to offend even hardened sensibilities. They  
7 are methods too close to the rack and the screw to permit of constitutional differentiation.” Id. at  
8 172.

9 Here, Plaintiff was arrested on a new law violation while on parole and charged with a  
10 felony. Plaintiff was held on the new charges with bail set in the amount of \$270,000.00. The  
11 gravamen of Plaintiff’s complaint is that the parole hold was not removed and, due to the parole  
12 hold, Plaintiff was therefore unable to be released on bail. “A prisoner’s petition for damages for  
13 excessive custody can be a legitimate § 1983 claim.” Haygood v. Younger, 769 F.2d 1350, 1359  
14 (9th Cir.1985) (en banc). However, “[i]t is not every erroneous administration of state law that  
15 results in a denial of due process.” Haygood, 769 F.2d at 1357. “A wrongful detention can ripen  
16 into a due process violation if ‘it was or should have been known [by the defendant] that the  
17 [plaintiff] was entitled to release.’ ” Gant v. Cty. of Los Angeles, 772 F.3d 608, 620 (9th Cir.  
18 2014) (quotations omitted; alterations in original). “Cases holding that an incarceration violated  
19 the Due Process Clause because defendants should have known the plaintiff was entitled to  
20 release fit at least one of two categories: (1) the circumstances indicated to the defendants that  
21 further investigation was warranted, or (2) the defendants denied the plaintiff access to the courts  
22 for an extended period of time.” Gant, 772 F.3d at 621 (quotation omitted).

23 1. Division of Adult Parole Operations

24 Plaintiff brings this action against DAPO in its official capacity. (Compl. at 3.) Plaintiff  
25 contends that the DAPO’s “omissive and improper policies and procedures” violated his due  
26 process rights by failing to ensure that their records “were correctly clear and by ignoring a court  
27 order.” (Id. at 5.)

28 “[T]he Eleventh Amendment bars suits for money damages in federal court against a

1 state, its agencies, and state officials acting in their official capacities.” Aholelei v. Dept. of  
2 Public Safety, 488 F.3d 1144, 1147 (9th Cir. 2007). Plaintiff cannot bring this action seeking  
3 monetary damages against DAPO. However, Plaintiff is also seeking injunctive and declaratory  
4 relief in this action.

5 To state a claim under section 1983 against a state entity, a plaintiff must allege facts  
6 showing that the defendant’s customs or policies amounted to deliberate indifference to  
7 constitutional rights and that these policies were the moving force behind the violations.  
8 Kentucky v. Graham, 473 U.S. 159, 166 (1985); Gomez v. Vernon, 255 F.3d 1118, 1127 (9th  
9 Cir. 2001); Gant, 772 F.3d at 620. “A policy or custom may be found either in an affirmative  
10 proclamation of policy or in the failure of an official ‘to take any remedial steps after the  
11 violations.’ ” Gomez, 255 F.3d at 1127 (quoting Larez v. City of Los Angeles, 946 F.2d 630,  
12 646 (9th Cir.1991)). To establish deliberate indifference, a plaintiff must show that the  
13 defendant actually knew of the risk of harm, yet failed to take reasonable steps to eliminate that  
14 risk. Farmer v. Brennan, 511 U.S. 825, 837 (1994); Bryan Cnty. v. Brown, 520 U.S. 397, 341  
15 (1997) (deliberate indifference is “a stringent standard of fault, requiring proof that a municipal  
16 actor disregarded a known or obvious consequence of his action.”).

17 Here, Plaintiff has failed to allege any facts by which the Court can reasonably infer that  
18 DAPO has a policy or procedure of failing to remove parole holds. Iqbal, 556 U.S. at 678-79.  
19 Plaintiff has only alleged that a parole hold was not removed in his case. “Liability for improper  
20 custom may not be predicated on isolated or sporadic incidents; it must be founded upon  
21 practices of sufficient duration, frequency and consistency that the conduct has become a  
22 traditional method of carrying out policy.” Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996),  
23 holding modified by Navarro v. Block, 250 F.3d 729 (9th Cir. 2001). “A plaintiff cannot prove  
24 the existence of a . . . policy or custom based solely on the occurrence of a single incident of  
25 unconstitutional action by a non-policymaking employee.” Davis v. City of Ellensburg, 869  
26 F.2d 1230, 1233 (9th Cir. 1989).

27 As Plaintiff has not alleged any facts to demonstrate a policy or practice of failing to  
28 remove parole holds, he has failed to state a cognizable claim against the DAPO.

1           2.       Defendants Castro, Mason, and Wallace

2           To state a claim under section 1983, a plaintiff is required to show that (1) each defendant  
3 acted under color of state law and (2) each defendant deprived him of rights secured by the  
4 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.  
5 2006). There is no *respondeat superior* liability under section 1983, and therefore, each  
6 defendant is only liable for his or her own misconduct. Iqbal, 556 U.S. at 677. To state a claim,  
7 Plaintiff must demonstrate that each defendant personally participated in the deprivation of his  
8 rights. Jones, 297 F.3d at 934.

9           **a.       Parole Agent Castro**

10          Plaintiff alleges that Parole Agent Castro “with oversight and omission” failed to ensure  
11 that the proper paperwork was filled out to lift the parole hold. (Compl. at 5.) Plaintiff has failed  
12 to allege any facts to indicate how Parole Agent Castro was aware of the parole hold, was aware  
13 that it should have been lifted, or that it had not been lifted. Plaintiff’s allegation that Parole  
14 Agent Castro did not ensure that the proper paperwork was filled out in insufficient for the Court  
15 to reasonably infer that he is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79.

16          To the extent that Plaintiff may be seeking to hold Parole Agent Castro liable because he  
17 holds a supervisory position at the DAPO, there is no *respondeat superior* liability under section  
18 1983. Crowley v. Bannister, 734 F.3d 967, 977 (9th Cir. 2013) (citation and internal quotation  
19 marks omitted); Iqbal, 556 U.S. at 676. “A supervisor may be liable only if (1) he or she is  
20 personally involved in the constitutional deprivation, or (2) there is ‘a sufficient causal  
21 connection between the supervisor’s wrongful conduct and the constitutional violation.’ ”  
22 Crowley, 734 F.3d at 977 (citation and internal quotation marks omitted). Plaintiff has failed to  
23 state a cognizable due process claim against Parole Agent Castro.

24          **b.       Parole Agents Mason and Wallace**

25          Plaintiff has not alleged any facts that would demonstrate that either Parole Agents  
26 Mason or Wallace were aware that the parole hold had not been released and that he was being  
27 denied bail prior to July 3, 2018. Plaintiff’s complaint alleges that he informed the court on July  
28 3, 2018 that the parole hold had not been lifted and during this hearing Parole Agent Wallace

1 admitted that it was her mistake. (Compl. at 4.) The parole hold was subsequently removed on  
2 July 27, 2018. (Id.)

3 Specifically, Plaintiff alleges that Parole Agent Mason was present in court for his first  
4 appearance on the parole violation on October 20, 2017 and the hearing was continued pending  
5 new charges being filed. (Id. at 3.) On October 27, 2019, Parole Agent Wallace was present in  
6 court and the parole violation was withdrawn. (Id.) Plaintiff was remanded on the new charges  
7 and his bail was set at \$280,000.00. (Id.) Although Plaintiff had been reinstated on parole, he  
8 was remanded based on the new law violations and there is no indication that Parole Agent  
9 Wallace would be aware that Plaintiff would not be released on bail following the hearing.

10 Although Plaintiff informed the court that the parole hold was still in place and an order  
11 issued releasing the parole hold on December 22, 2017, it was not until July 3, 2018, that Parole  
12 Agent Wallace was informed that the parole hold had not been lifted and informed the Court that  
13 it was her mistake. (Id.)

14 For Plaintiff's claim to arise to the level of deliberate indifference he must show more  
15 than mere negligence on the part of the named defendants. Daniels v. Williams, 474 U.S. 327,  
16 331 (1986) ("negligent conduct by a state official, even though causing injury, [does not]  
17 constitute[] a deprivation under the Due Process Clause"); Kennell v. Gates, 215 F.3d 825, 829-  
18 30 (8th Cir. 2000) (to prevail on claim that plaintiff was mistakenly detained, he must show that  
19 the defendant knew he was mistakenly detained and failed to act). Plaintiff has failed to allege  
20 any facts to reasonably infer that Parole Agents Mason or Wallace were aware that he was being  
21 denied release on bail due to the parole hold and that they failed to act. See Chavez v. City of  
22 Petaluma, No. 14-CV-05038-MEJ, 2015 WL 3766460, at \*7 (N.D. Cal. June 16, 2015) (failure  
23 to show how the named defendants knew or had reason to know that plaintiff had been  
24 improperly detained on a parole hold).

25 Plaintiff has failed to state a due process claim against Parole Agents Mason or Wallace  
26 for failure to remove the parole hold.

27 **B. Procedural Due Process**

28 "The Fourteenth Amendment's Due Process Clause protects persons against deprivations



1 of life, liberty, or property; and those who seek to invoke its procedural protection must establish  
2 that one of these interests is at stake.” Wilkinson, 545 U.S. 221; Brittain, 451 F.3d at 999.  
3 “[P]rocedural due process claims are resolved by balancing tests, where differing interests can  
4 give rise to many differing procedural requirements.” Brittain, 451 F.3d at 1000. “(D)ue process  
5 is flexible and calls for such procedural protections as the particular situation demands.”  
6 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481  
7 (1972)).

8 Here, Plaintiff alleges a deprivation of a liberty interest, his ability to be released on bail.  
9 However, Plaintiff has not alleged facts to demonstrate that any of the named defendants  
10 deprived him of procedural due process. Due process requires that a parolee is entitled to two  
11 hearings, one at the time of his arrest and detention to determine whether there is probable cause  
12 to believe that he has committed a violation of his parole and a more comprehensive hearing  
13 prior to making the final revocation decision. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

14 Plaintiff alleges that he received a hearing for his parole violation and at the time the  
15 parole violation was withdrawn. Plaintiff has failed to establish that any named defendant  
16 deprived him of due process during the parole revocation proceedings. Further, although  
17 Plaintiff alleges that the parole hold was not removed, he was in custody on his new law  
18 violations and had been charged with a felony for a fourth driving under the influence in  
19 violation of California law. Plaintiff has failed to state a cognizable claim for a violation of  
20 procedural due process.

### 21 C. Leave to Amend

22 Under Rule 15(a) of the Federal Rules of Civil Procedure, a leave to amend shall be  
23 freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). Plaintiff shall be granted one  
24 final opportunity to file an amended complaint to correct the deficiencies identified in this order.

## 25 IV.

### 26 CONCLUSION AND ORDER

27 For the reasons discussed, Plaintiff shall be granted leave to file an amended complaint to  
28 cure the deficiencies identified in this order. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.

1 2000).

2 Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but it must state what  
3 each named defendant did that led to the deprivation of Plaintiff's constitutional rights, Iqbal,  
4 556 U.S. at 678-79. Although accepted as true, the "[f]actual allegations must be [sufficient] to  
5 raise a right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555 (citations  
6 omitted). Further, Plaintiff may not change the nature of this suit by adding new, unrelated  
7 claims in his amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no  
8 "buckshot" complaints).

9 Finally, Plaintiff is advised that an amended complaint supersedes the original complaint.  
10 Lacey v. Maricopa Cnty., 693 F.3d 896, 927 (9th Cir. 2012). Therefore, Plaintiff's amended  
11 complaint must be "complete in itself without reference to the prior or superseded pleading."  
12 Local Rule 220.

13 Based on the foregoing, it is HEREBY ORDERED that:

- 14 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file  
15 an amended complaint; and
- 16 2. If Plaintiff fails to file an amended complaint in compliance with this order, the  
17 Court will recommend to the district judge that this action be dismissed consistent  
18 with the reasons stated in this order.

19 IT IS SO ORDERED.

20 Dated: July 29, 2019

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23 UNITED STATES MAGISTRATE JUDGE  
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