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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERNEST RODRIGUEZ CERVANTES,
Plaintiff,
v.
SAN JOSE SHERIFF'S DEPARTMENT, et
al.,
Defendants.

Case No. [18-cv-00644-JD](#)

**ORDER REOPENING CASE AND
DISMISSING COMPLAINT WITH
LEAVE TO AMEND**

Docket No. 17

Plaintiff, a detainee, filed a pro se civil rights complaint under 42 U.S.C. § 1983. The case was dismissed without prejudice due to plaintiff’s failure to pay the filing fee or submit a motion to proceed in forma pauperis. Plaintiff has filed a motion to proceed in forma pauperis, which will be addressed in a separate order. The case is reopened and the Court will review the complaint.

DISCUSSION

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696 , 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to

1 relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a
2 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above
3 the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
4 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its
5 face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face”
6 standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they
7 must be supported by factual allegations. When there are well-pleaded factual allegations, a court
8 should assume their veracity and then determine whether they plausibly give rise to an entitlement
9 to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) a right secured by
11 the Constitution or laws of the United States was violated, and (2) the alleged deprivation was
12 committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

13 **LEGAL CLAIMS**

14 Plaintiff alleges that he was improperly arrested and detained by the police. “Federal law
15 opens two main avenues to relief on complaints related to imprisonment: a petition for habeas
16 corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979,
17 as amended, 42 U.S.C. § 1983. Challenges to the lawfulness of confinement or to particulars
18 affecting its duration are the province of habeas corpus.” *Hill v. McDonough*, 547 U.S. 573, 579
19 (2006) (quoting *Muhammad v. Close*, 540 U.S. 749, 750 (2004)). “An inmate’s challenge to the
20 circumstances of his confinement, however, may be brought under § 1983.” *Id.*

21 Habeas is the “exclusive remedy” for the prisoner who seeks “‘immediate or speedier
22 release’” from confinement. *Skinner v. Switzer*, 131 S. Ct. 1289, 1293 (2011) (quoting *Wilkinson*
23 *v. Dotson*, 544 U.S. 74, 82 (2005)); see *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998); *Edwards*
24 *v. Balisok*, 520 U.S. 641, 648 (1997); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). “Where the
25 prisoner’s claim would not ‘necessarily spell speedier release,’ however, suit may be brought
26 under § 1983.” *Skinner*, 131 S. Ct. at 1293 (quoting *Wilkinson*, 544 U.S. at 82). As a
27 consequence, challenges to prison conditions traditionally have been cognizable only via § 1983,
28 while challenges implicating the fact or duration of confinement must be brought through a habeas

1 petition. *Docken v. Chase*, 393 F.3d 1024, 1026 (9th Cir. 2004).

2 Plaintiff states that the Santa Clara SWAT team used excessive force in arresting him. He
3 states he is currently detained pending murder charges. For relief he describes his injuries from
4 the arrest, states that he has been detained for two years and seeks this Court to appoint counsel.
5 The Court cannot appoint an attorney in plaintiff's case. To the extent that he seeks to be released
6 from custody, he may file a federal habeas petition after he has been convicted and he has
7 exhausted his claims. To the extent plaintiff seeks money damages resulting from his arrest,
8 plaintiff is informed that in order to recover damages for an allegedly unconstitutional conviction
9 or imprisonment, or for other harm caused by actions whose unlawfulness would render a
10 conviction or sentence invalid, a 42 U.S.C. § 1983 plaintiff must prove that the conviction or
11 sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a
12 state tribunal authorized to make such determination, or called into question by a federal court's
13 issuance of a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 486-487 (1994). A claim
14 for damages bearing that relationship to a conviction or sentence that has not been so invalidated is
15 not cognizable under § 1983. *Id.* at 487. The complaint is dismissed with leave to amend to
16 address the deficiencies noted above.

17 **CONCLUSION**

18 1. The Order of Dismissal (Docket No. 11) is **VACATED** and this case is
19 **REOPENED**. The motion to present a late claim (Docket No. 17) is **DENIED**. Plaintiff shall
20 present all of his claims in an amended complaint.

21 2. The complaint is **DISMISSED** with leave to amend. The amended complaint must
22 be filed within **twenty-eight (28) days** of the date this order is filed and must include the caption
23 and civil case number used in this order and the words **AMENDED COMPLAINT** on the first
24 page. Because an amended complaint completely replaces the original complaint, plaintiff must
25 include in it all the claims he wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th
26 Cir. 1992). He may not incorporate material from the original complaint by reference. Failure to
27 amend within the designated time will result in the dismissal of this action.


28 3. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the

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Court informed of any change of address by filing a separate paper with the clerk headed “Notice of Change of Address,” and must comply with the Court’s orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

IT IS SO ORDERED.

Dated: October 26, 2018



JAMES DONATO
United States District Judge

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CERTIFICATE OF SERVICE

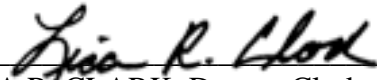
I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 26, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Ernest Rodriguez Cervantes ID: 16002835
County Jail
150 W. Hedding Street
San Jose, CA 95110

Dated: October 26, 2018

Susan Y. Soong
Clerk, United States District Court

By: 
LISA R. CLARK, Deputy Clerk to the
Honorable JAMES DONATO