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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ARMANDO R. LOPEZ,

Plaintiff,

v.

U.S. PROBATION DEPARTMENT
and IMELDA VALENZUELA,

Defendants.

Case No. 19-cv-1077-BAS-MSB

ORDER
(1) GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS;
(2) DISMISSING CASE WITHOUT PREJUDICE;
(3) DENYING MOTION FOR APPOINTMENT OF COUNSEL.

[ECF Nos. 6, 7]

Plaintiff Armando R. Lopez filed a complaint against the United States Probation Department and Imelda Valenzuela. (ECF No. 1.) Plaintiff also filed a motion for leave to proceed in forma pauperis and a motion for appointment of counsel. (ECF Nos. 2, 3.) The Court denied without prejudice the two motions and dismissed Plaintiff’s complaint for failure to comply with Federal Rule of Civil Procedure 8. (ECF No. 4.) Plaintiff has filed an amended complaint along with renewed motions. (ECF Nos. 5, 6, 7.)

I. MOTION TO PROCEED IN FORMA PAUPERIS

Under 28 U.S.C. § 1915, a litigant who because of indigency is unable to pay

1 the required fees or security to commence a legal action may petition the court to
2 proceed without making such payment. The determination of indigency falls within
3 the district court’s discretion. *Cal. Men’s Colony v. Rowland*, 939 F.2d 854, 858 (9th
4 Cir. 1991), *rev’d on other grounds*, 506 U.S. 194 (1993) (holding that “Section 1915
5 typically requires the reviewing court to exercise its sound discretion in determining
6 whether the affiant has satisfied the statute’s requirement of indigency”). It is well-
7 settled that a party need not be completely destitute to proceed IFP. *Adkins v. E.I.*
8 *DuPont de Nemours & Co.*, 335 U.S. 331, 339–40 (1948). To satisfy the
9 requirements of 28 U.S.C. § 1915(a), “an affidavit [of poverty] is sufficient which
10 states that one cannot because of his poverty pay or give security for costs . . . and
11 still be able to provide himself and dependents with the necessities of life.” *Id.* at
12 339. At the same time, however, “the same even-handed care must be employed to
13 assure that federal funds are not squandered to underwrite, at public expense . . . the
14 remonstrances of a suitor who is financially able, in whole or in material part, to pull
15 his own oar.” *Temple v. Ellerthorpe*, 586 F. Supp. 848, 850 (D.R.I. 1984). Finally,
16 the facts as to the affiant’s poverty must be stated “with some particularity,
17 definiteness, and certainty.” *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir.
18 1981).

19 Here, Plaintiff states he receives a total of \$1,540 per month in worker’s
20 compensation and \$400 per month from his spouse in gifts and child support. (ECF
21 No. 6.) He is unemployed. His expenses total \$1,129 per month. Plaintiff has no
22 assets and no money in his bank accounts. Plaintiff says the state is funding his living
23 conditions and he is “barely managing to stay off the street.” (*Id.* at 5.) Therefore
24 Plaintiff meets the requirements for IFP status under 28 U.S.C. § 1915 and the Court
25 **GRANTS** Plaintiff leave to proceed in forma pauperis. However, if it appears at any
26 time in the future that Plaintiff’s financial picture has improved for any reason, the
27 Court will direct Plaintiff to pay the filing fee to the Clerk of the Court. This includes
28 any recovery Plaintiff may realize from this suit or others and any assistance Plaintiff

1 may receive from family or the government.

2 **II. SCREENING**

3 The Court must screen every civil action brought pursuant to 28 U.S.C.
4 § 1915(a) and dismiss any case it finds “frivolous or malicious,” “fails to state a claim
5 on which relief may be granted,” or “seeks monetary relief against a defendant who
6 is immune from relief.” 28 U.S.C. § 1915(e)(2)(B); *see also Calhoun v. Stahl*, 254
7 F.3d 845, 845 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are
8 not limited to prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000)
9 (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires a district
10 court to dismiss an in forma pauperis complaint that fails to state a claim”).

11 As amended by the Prison Litigation Reform Act (“PLRA”), 28 U.S.C.
12 § 1915(e)(2) mandates that the court reviewing an action filed pursuant to the IFP
13 provisions of § 1915 make and rule on its own motion to dismiss before directing the
14 Marshal to effect service pursuant to Federal Rule of Civil Procedure 4(c)(3). *See*
15 Fed. R. Civ. P. 4(c)(3); *Navarette v. Pioneer Med. Ctr.*, No. 12-cv-0629-WQH
16 (DHB), 2013 WL 139925, at *1 (S.D. Cal. Jan. 9, 2013).

17 All complaints must contain a “short and plain statement of the claim showing
18 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual
19 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of
20 action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*,
21 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555
22 (2007)). “[D]etermining whether a complaint states a plausible claim is context-
23 specific, requiring the reviewing court to draw on its experience and common sense.”
24 *Iqbal*, 556 U.S. at 663–64 (citing *Twombly*, 550 U.S. at 556); *see also Barren v.*
25 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (“The language of §
26 1915(e)(2)(B)(ii) parallels the language of Federal Rule of Civil Procedure
27 12(b)(6).”).

28 Plaintiff’s complaint lists the “U.S. Probation Office in the Southern District

1 of San Diego” as Defendant, but other than that is completely blank with the words
2 “see attached file” written on the first page. (ECF No. 6.) Plaintiff attached seven
3 pages of exhibits. (ECF No. 5-2.) Two of the pages include allegations and claims.
4 (*Id.* at 1, 2.) The attachments indicate Plaintiff also intends to bring his complaint
5 against Imelda Valenzuela, but it is unclear if he also includes allegations against the
6 U.S. Probation Department. Plaintiff states he regularly checked into the probation
7 department in this district. Imelda was his “acting agent” (i.e. probation officer) and
8 Plaintiff told her he was “not in an environment safe for [him]self” and wished to be
9 relocated. Although it is not altogether clear, it appears something happened between
10 Plaintiff and his co-defendant Raphael Ceja, and Ceja “wanted to retaliate [against
11 Plaintiff] for [Ceja’s] incarceration.” Therefore Plaintiff felt unsafe. But Imelda did
12 not transfer Plaintiff because he had not completed a cognitive recovery program.
13 Due to this, Plaintiff states he is now in “a violent defensive mode” and his “mind no
14 longer functions correctly” but has not received any help. He also states he was
15 denied adequate legal representation and was coerced to pleading guilty in the
16 criminal case. He provides a list of what appears to be causes of action and
17 allegations against Imelda. (*Id.* at 2.) In sum, Plaintiff requests the Court
18 “vacate/expunge the latest order of probation[,]” reimburse him for “incarceration
19 time/life in san diego [sic] since 2014–present[,]” grant him leave to proceed in forma
20 pauperis, and provide him with legal representation. Plaintiff’s case is for
21 “deprivation of rights” pursuant to 42 U.S.C. § 1983, malicious prosecution, abuse
22 of process, and inadequate legal representation. (ECF No. 5-1.)¹

23
24 ¹ Plaintiff also checked the box on his civil cover sheet for the False Claims Act (“FCA”). The
25 False Claims Act imposes liability for defrauding the Government by making false or fraudulent
26 claims for money or property. The Act is “intended to reach all types of fraud, without
27 qualification, that might result in financial loss to the Government.” *U.S. v. Neifert-White Co.*, 390
28 U.S. 228, 232 (1968). Although Plaintiff appears to be alleging that Imelda submitted false reports
in his case, there is no indication that such reports would lead to any type of financial loss to the
Government. Therefore the Court dismisses Plaintiff’s FCA allegation. This case was previously
sealed because Plaintiff had checked the box indicating this was an FCA case. Because the case
does not involve the FCA, the Court unseals this case.

1 The Court proceeds through what appears to be Plaintiff's causes of action.

2 **Challenge to Probation.** The proper avenue for a defendant to challenge the
3 validity of his probation is through 28 U.S.C. § 2255. *United States v. Castro-*
4 *Verdugo*, 750 F.3d 1065, 1068 (9th Cir. 2014); *see also Andrews v. Superior Court*
5 *of Cal.*, No. 03-5750 MMC, 2004 WL 114972, at *3 (N.D. Cal. Jan. 20, 2004)
6 (holding a plaintiff seeking an order to terminate his probation must bring a petition
7 for a writ of habeas corpus). The present case is not a petition for writ of habeas
8 corpus and therefore Plaintiff may not challenge the terms or sentence of his
9 probation here.

10 **42 U.S.C. § 1983.** Under this claim, it appears Plaintiff alleges Imelda filed a
11 false probation report which led to Plaintiff being put in custody, and therefore
12 Plaintiff alleges a violation of his due process rights. (ECF No. 5-2, at 2.) Plaintiff
13 states Imelda works for the federal U.S. Probation Department.

14 42 U.S.C. § 1983 provides a private right of action against a person who: (1)
15 acts "under color of state law"; and (2) "deprives another of rights guaranteed under
16 the Constitution" or federal statute. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir.
17 2002). Section 1983 "provides no cause of action against federal agents acting under
18 color of federal law." *Billings v. United States*, 57 F.3d 797, 801 (9th Cir. 1995).
19 And the U.S. Probation Department, a federal agency, is not able to be sued under
20 section 1983. *Gerritsen v. Consulado General De Mexico*, 989 F.2d 340, 343 (9th
21 Cir. 1993). Therefore Plaintiff has not alleged either Defendant acted under color of
22 state law and the Court dismisses the section 1983 claim.

23 **Inadequate Legal Representation.** As Imelda was not Plaintiff's attorney, he
24 cannot bring a claim against her for inadequately representing him in legal
25 proceedings. The Court dismisses this claim.

26 **Abuse of Process and Malicious Prosecution.** Plaintiff alleges Imelda was
27 his "acting agent" starting in 2013, and he alleges he informed her from 2014 to 2017
28 that he did not feel safe. He alleges she submitted false statements and lied to the

1 court regarding Plaintiff's probation. It is unclear if these alleged false statements
2 led to Plaintiff's incarceration or to probation, or if it resulted in probation being
3 revoked. "[W]here it is alleged that a probation officer has wrongfully requested that
4 a court revoke probation, the relevant constitutional violation is malicious
5 prosecution." *Hernandez v. City of Oakley*, No. C-11-02415 JCS, 2012 WL
6 5411781, at *18 (N.D. Cal. Nov. 6, 2012). And to state a claim for abuse of process,
7 the plaintiff must allege two elements: "(1) an ulterior motive; and (2) a willful act
8 in the use of process not proper in the regular conduct of the proceedings." *Drum v.*
9 *Bleau, Fox & Assocs.*, 107 Cal. App. 4th 1009, 132 (Ct. App. 2003). Plaintiff may
10 be able to sufficiently state a claim for these two causes of action if he is able to
11 allege what Imelda did and what occurred as a result. *See Hebbe v. Pliler*, 627 F.3d
12 338, 341–42 (9th Cir. 2010) (although pro se pleadings are to be liberally construed,
13 a plaintiff must still present factual allegations sufficient to state a plausible claim
14 for relief).

15 However, "[t]he California statute of limitations for both malicious
16 prosecution and abuse of process is one year." *Anderson v. Allstate Ins. Co.*, 630
17 F.2d 677, 682 (9th Cir. 1980). Plaintiff alleges Imelda filed false reports beginning
18 in 2013 and was his probation officer until 2017. (ECF No. 5-2, at 1.) The present
19 lawsuit was not filed until 2019, therefore it appears Plaintiff's claims are barred by
20 the statute of limitations. However, Plaintiff's allegations are not a model of clarity
21 and the Court is hesitant to bar the claims at this time given the unclear allegations.
22 The Court will grant Plaintiff leave to amend these claims to the extent Plaintiff can
23 allege claims that are not barred by the statute of limitations.

24 Plaintiff may refile an amended complaint detailing the specific causes of
25 action he alleges against Defendants. If Plaintiff intends to sue both Imelda and the
26 U.S. Probation Department, he is to state which claims are against which Defendant.
27 He is to provide factual allegations for each cause of action. Plaintiff is to ensure his
28 amended complaint is complete and does not refer to prior complaints. *See Forsyth*

1 *v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) (“[A] plaintiff waives all claims
2 alleged in the dismissed complaint which are not realleged in an amended
3 complaint.”), *aff’d*, 525 U.S. 299 (1999).

4 **III. MOTION FOR APPOINTMENT OF COUNSEL**

5 “[T]here is no absolute right to counsel in civil proceedings.” *Hedges v.*
6 *Resolution Tr. Corp. (In re Hedges)*, 32 F.3d 1360, 1363 (9th Cir. 1994). Thus,
7 federal courts do not have the authority “to make coercive appointments of counsel.”
8 *Mallard v. U.S. District Court*, 490 U.S. 296, 310 (1989); *see also United States v.*
9 *\$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995).

10 Districts courts have discretion, however, pursuant to 28 U.S.C. § 1915(e)(1)
11 to “request” that an attorney represent indigent civil litigants upon a showing of
12 “exceptional circumstances.” *See Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101,
13 1103 (9th Cir. 2004); *accord Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997).
14 “A finding of the exceptional circumstances of the plaintiff seeking assistance
15 requires at least an evaluation of the likelihood of the plaintiff’s success on the merits
16 and an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the
17 complexity of the legal issues involved.’” *Agyeman*, 390 F.3d at 1103 (quoting
18 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)); *see also Terrell v.*
19 *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).

20 For the same reasons as articulated in the Court’s prior order, the Court again
21 finds the circumstances fail to demonstrate “exceptional circumstances” warranting
22 the appointment of counsel at this time. (*See* ECF No. 4, at 5.) The Court **DENIES**
23 **WITHOUT PREJUDICE** Plaintiff’s Motion.

24 **IV. CONCLUSION**

25 For the foregoing reasons, the Court:

26 (1) **GRANTS** Plaintiff’s Motion for Leave to Proceed in Forma Pauperis,
27 (ECF No 6);


28 (2) **DENIES WITHOUT PREJUDICE** Plaintiff’s Motion for Appointment

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of Counsel, (ECF No 7);
(3) **DISMISSES** Plaintiff's first amended complaint pursuant to 28 U.S.C. § 1915(a); and
(4) **GRANTS** Plaintiff leave to file a second amended complaint **on or before September 20, 2019.** *If Plaintiff fails to file an amended complaint by this date, his case may be dismissed for failure to prosecute.*
(5) **DIRECTS** the Clerk to unseal this entire matter.

IT IS SO ORDERED.

DATED: August 21, 2019


Hon. Cynthia Bashant
United States District Judge