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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 Case No.: 3:20-cv-2106-GPC-AHG

12 JAVAUGHN ROBINSON,  
13 CDCR # BD-1411,

14 Plaintiff,

15 v.

16 ZEMBRANO;  
17 DUARTE III,

18 Defendants.

**ORDER:**

**1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED IN FORMA  
PAUPERIS PURSUANT TO 28 U.S.C.  
§ 1915(a) (ECF No. 2);**

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

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21  
22 Javaughn Robinson ("Plaintiff"), incarcerated at the Richard J. Donovan  
23 Correctional Facility ("RJD") in San Diego, California filed a pro se civil rights  
24 Complaint pursuant to 42 U.S.C. Section 1983. (See ECF No. 1, Compl.) Plaintiff did  
25 not pay the fee required by 28 U.S.C. § 1914(a) when he filed his Complaint, instead  
26 filing a Motion to Proceed In Forma Pauperis ("IFP") pursuant to 28 U.S.C. § 1915(a).  
27 (See ECF No. 2.)

1 **I. Plaintiff’s Motion to Proceed IFP**

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

13 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
14 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the  
15 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
16 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
17 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
18 monthly deposits in the account for the past six months, or (b) the average monthly  
19 balance in the account for the past six months, whichever is greater, unless the prisoner  
20 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution  
21 having custody of the prisoner then collects subsequent payments, assessed at 20% of the  
22 preceding month’s income, in any month in which his account exceeds \$10, and forwards  
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25 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
26 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court  
27 Misc. Fee Schedule, § 14 (eff. Oct. 1, 2019)). The additional \$50 administrative fee does  
not apply to persons granted leave to proceed IFP. *Id.*

1 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.  
2 § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

3 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust  
4 account statement pursuant to 28 U.S.C. Section 1915(a)(2) and S.D. Cal. Civ. L.R. 3.2.  
5 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account activity, as  
6 well as the attached prison certificate verifying his available balances. (*See* ECF No. 4, at  
7 1-3.) These documents show that he carried an average monthly balance of \$200.60 and  
8 had \$200.00 in average monthly deposits to his trust account for the six months preceding  
9 the filing of this action, and that Plaintiff had an available balance of just \$0.03 at the  
10 time of filing. (*See id.*)

11 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2), and  
12 declines to impose the initial partial filing fee pursuant to 28 U.S.C. Section 1915(b)(1),  
13 because his prison certificate indicates he may currently have “no means to pay it.” *See*  
14 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from  
15 bringing a civil action or appealing a civil action or criminal judgment for the reason that  
16 the prisoner has no assets and no means by which to pay the initial partial filing fee.”);  
17 *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. Section 1915(b)(4) acts as a “safety-  
18 valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . .  
19 due to the lack of funds available to him when payment is ordered.”). Instead, the Court  
20 directs the Secretary of the California Department of Corrections and Rehabilitation  
21 (“CDCR”), or their designee, to collect the entire \$350 balance of the filing fees required  
22 by 28 U.S.C. Section 1914 and to forward them to the Clerk of the Court pursuant to the  
23 installment payment provisions set forth in 28 U.S.C. Section 1915(b)(1).

## 24 **II. Initial Screening pursuant to 28 U.S.C. Sections 1915(e)(2) and 1915A**

### 25 **A. Standard of Review**

26 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
27 Answer screening pursuant to 28 U.S.C. Sections 1915(e)(2) and 1915A(b). Under these

1 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of  
2 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
3 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
4 (discussing 28 U.S.C. Section 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th  
5 Cir. 2010) (discussing 28 U.S.C. Section 1915A(b)). “The purpose of [screening] is ‘to  
6 ensure that the targets of frivolous or malicious suits need not bear the expense of  
7 responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting  
8 *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

9 “The standard for determining whether a plaintiff has failed to state a claim upon  
10 which relief can be granted under [Section] 1915(e)(2)(B)(ii) is the same as the Federal  
11 Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*,  
12 668 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121  
13 (9th Cir. 2012) (noting that screening pursuant to Section 1915A “incorporates the  
14 familiar standard applied in the context of failure to state a claim under Federal Rule of  
15 Civil Procedure 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient  
16 factual matter, accepted as true, to state a claim to relief that is plausible on its face.”  
17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*,  
18 680 F.3d at 1121. While the court “ha[s] an obligation where the petitioner is pro se,  
19 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
20 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
21 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not  
22 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents*  
23 *of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

#### 24 B. Individual Causation

25 Plaintiff’s factual allegations are sparse. As an initial matter, the Court finds that  
26 Plaintiff has failed to state a claim against any of the named Defendants as to his Eighth  
27 Amendment claims relating to what appears to involve a transportation accident.

1 Plaintiff alleges that he was being transported to an “E.R. room” by Defendants  
2 Zebrano and Duarte. (Compl. at 3.) Plaintiff is claiming that Defendants “drove  
3 frantically down the highway speeding over the limits causing severe lower back  
4 complications from impact.” (*Id.*) Plaintiff also claims that Defendants engaged in  
5 “sexual interactions.” (*Id.*) These factual allegations against Defendants whom he claims  
6 violated his constitutional rights contain no “further factual enhancement” which  
7 describes how, or to what extent, these individuals became aware of, or were actually  
8 aware of, any alleged constitutional violation. “Because vicarious liability is inapplicable  
9 to . . . §1983 suits, a plaintiff must plead that each government-official defendant,  
10 through the official’s own individual actions, has violated the Constitution.” *Iqbal*, 556  
11 U.S. at 676; *see also Jones v. Community Redevelopment Agency of City of Los Angeles*,  
12 733 F.2d 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege with at least some  
13 degree of particularity overt acts which defendants engaged in” in order to state a claim).

14 “Causation is, of course, a required element of a § 1983 claim.” *Estate of Brooks*  
15 *v. United States*, 197 F.3d 1245, 1248 (9th Cir. 1999). “The inquiry into causation must  
16 be individualized and focus on the duties and responsibilities of each individual  
17 defendant whose acts or omissions are alleged to have caused a constitutional  
18 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*,  
19 423 U.S. 362, 370-71 (1976)). It appears that Plaintiff is alleging that the Defendants  
20 were negligent in how he was transported and committed sexual misconduct, but it is not  
21 clear which Defendant was driving or any factual allegations regarding the “impact” itself  
22 or the alleged sexual interactions. Plaintiff must allege with more specificity what each  
23 Defendant is purported to have done to violate his constitutional rights.

24 Plaintiff’s Complaint sets forth no facts which might be liberally construed to  
25 support an Eighth Amendment claim against Defendants. Therefore, the Court finds sua  
26 sponte dismissal of his Complaint is required pursuant to 28 U.S.C. § 1915(e)(2) and  
27 § 1915A(b). *See Lopez*, 203 F.3d at 1126–27

1 C. Eighth Amendment Claims

2 Plaintiff has failed to sufficiently allege that the Defendants were deliberately  
3 indifferent to his safety in violation of the Eighth Amendment. *See Farmer v. Brennan*,  
4 511 U.S. 825, 833 (1994) (holding that a prisoner’s Eighth Amendment rights are  
5 violated when prison officials are deliberately indifferent to his need for safety.) Plaintiff  
6 has only alleged that Defendants “drove frantically down the highway speeding over  
7 limits causing severe lower back complications from impact.” (Compl. at 4.) However,  
8 Plaintiff must allege, at the very least, that Defendants were aware that he was at risk for  
9 being injured due to the manner in which they were driving and that they were aware that  
10 the manner in which they were driving posed a danger.

11 To state a claim under the Eighth Amendment based upon Defendants’ alleged  
12 failure to prevent his injury, Plaintiff must allege Defendants were “deliberate[ly]  
13 indifferen[t]” to “conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S.  
14 at 834. Deliberate indifference is more than mere negligence, but less than purpose or  
15 knowledge. *See id.* at 836. A prison official acts with deliberate indifference only if he  
16 “knows of and disregards an excessive risk to inmate health and safety; the official must  
17 be both aware of facts from which the inference could be drawn that a substantial risk of  
18 serious harm exists, and he must also draw the inference.” *Id.* at 837.

19 Plaintiff’s sole allegations that Defendants “drove frantically” and were “speeding  
20 over the limits,” *see* Compl. at 3, are insufficient to support a plausible claim of  
21 deliberate indifference. Plaintiff has not alleged any facts with regard to whether he was  
22 injured due to the manner in which he was restrained. *See e.g. Brown v. Fortner*, 518  
23 F.3d 552, 560 (8th Cir. 2008) (affirming the denial of summary judgment where the  
24 “uncontested evidence indicates [a prison official] knew [prisoner] was shackled and  
25 restrained in a manner that prevented him from securing his own seatbelt . . . rejected  
26 [prisoner’s] request for a seatbelt . . . [and] drove recklessly and ignored requests by the  
27 inmate passengers in his van for him to slow down.” ); *Ford v. Fletes*, 211 F.3d 1273,

1 2000 WL 249124 at \*1 (9th Cir. 2000) (unpublished memorandum) (recognizing that  
2 prisoner may be able to allege deliberate indifference when he was injured from fall out  
3 of a vehicle while transported in handcuffs in a vehicle without doors, seat belts or  
4 restraints.). Plaintiff has not alleged that Defendants were aware there was an excessive  
5 risk to his safety due to the manner in which he was restrained and transported.

6 Similarly, as Plaintiff has failed to put forth any facts regarding the alleged “sexual  
7 interactions” that occurred during the transport, Plaintiff has not adequately stated a claim  
8 for an Eighth Amendment violation predicated on sexual abuse. *See Schwenk v. Hartford*,  
9 204 F.3d 1187, 1197 (9th Cir. 2000).

10 Thus, Plaintiff’s Eighth Amendment claims are dismissed for failing to state a  
11 claim upon which relief may be granted.

12 D. Emotional Distress

13 Plaintiff also alleges that he was “fearful of [his] life due to continuous gestures of  
14 Zembrano holding/grabbing his gun.” (Compl. at 3.) However, Plaintiff cannot recover  
15 monetary damages for a “mental or emotional injury” without a “prior showing of  
16 physical injury or the commission of a sexual act.” 42 U.S.C. § 1997e(e). As the Court  
17 has found with respect to his deliberate indifference claims, Plaintiff has not alleged  
18 sufficient details regarding the alleged “sexual interactions” or physical injury that  
19 occurred during his transport to the E.R., and accordingly Plaintiff cannot state an  
20 independent claim arising from his fear during the transport.

21 E. Leave to Amend

22 Because Plaintiff is proceeding pro se, however, the Court having now provided  
23 him with “notice of the deficiencies in his complaint,” will also grant him an opportunity  
24 to fix them. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v.*  
25 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)). However, the Court cautions Plaintiff  
26 that if he chooses to file an Amended Complaint, he must clearly identify, by name, each  
27 individual person he seeks to hold liable for violating his Eighth Amendment rights. He

1 must also be careful to allege facts showing the basis for liability for each individual  
2 Defendant. He must also name each Defendant and link them to his claims by explaining  
3 what each person did or failed to do that caused him constitutional injury. *See Barren v.*  
4 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (“A plaintiff must allege facts, not  
5 simply conclusions, t[o] show that [the Defendant] was personally involved in the  
6 deprivation of his civil rights.”).

### 7 **III. Conclusion and Order**

8 For the reasons discussed, the Court:

9 1) **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2);  
10 2) **DIRECTS** the Secretary of the CDCR, or her designee, to collect from  
11 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing  
12 monthly payments from his account in an amount equal to twenty percent (20%) of the  
13 preceding month’s income and forwarding those payments to the Clerk of the Court each  
14 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. Section 1915(b)(2).

15 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND**  
16 **NUMBER ASSIGNED TO THIS ACTION;**

17 3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Kathleen  
18 Allison, Secretary, California Department of Corrections and Rehabilitation, P.O. Box  
19 942883, Sacramento, California, 94283-0001;

20 4) **DISMISSES** Plaintiff’s Complaint in its entirety for failing to state a claim  
21 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and  
22 § 1915A(b)(1);

23 5) **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in  
24 which to file an Amended Complaint which cures the deficiencies of pleading noted.  
25 Plaintiff’s Amended Complaint must be complete by itself without reference to his  
26 original pleading. Defendants not named and any claim not re-alleged in his Amended  
27 Complaint will be considered waived. *See S.D. Cal. CivLR 15.1; Hal Roach Studios, Inc.*



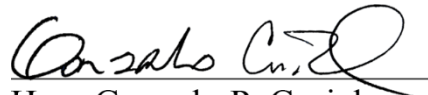
1 v. *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended  
2 pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.  
3 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an  
4 amended pleading may be “considered waived if not repled.”).

5 If Plaintiff fails to file an Amended Complaint within 45 days, the Court will enter  
6 a final Order dismissing this civil action based both on his failure to state a claim upon  
7 which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), and  
8 his failure to prosecute in compliance with a court order requiring amendment. *See Lira*  
9 *v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage  
10 of the opportunity to fix his complaint, a district court may convert the dismissal of the  
11 complaint into dismissal of the entire action.”).

12 6) The Clerk of Court is directed to mail Plaintiff a court approved civil rights  
13 form complaint for his use in amending.

14 **IT IS SO ORDERED.**

15 Dated: November 16, 2020

  
16 Hon. Gonzalo P. Curiel  
17 United States District Judge  
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