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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ANTERO CRUZ,
12 CDCR #AL-5491,

13 Plaintiff,

14 vs.

15 SAN DIEGO COUNTY SUPERIOR
16 COURT,

17 Defendant.
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Case No.: 21cv0952-WQH (MSB)

**ORDER GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
AND DISMISSING COMPLAINT
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2)(B) AND 1915A(b)**

21 Plaintiff Antero Cruz, incarcerated at Calipatria State Prison (“Calipatria”) in
22 Calipatria, California, is proceeding pro se in this civil rights action pursuant to 42 U.S.C.
23 § 1983. (ECF No. 1.) Plaintiff alleges his inability to pay the restitution fine imposed as
24 a result of his criminal conviction is causing nervousness and loss of sleep in violation of
25 his Eighth Amendment right to be free from cruel and unusual punishment, and requests
26 the fine be rescinded. (*See id.* at 2-10.) Plaintiff did not prepay the civil filing fee at the
27 time of filing and has instead filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant
28 to 28 U.S.C. Section 1915(a). (*See* ECF No. 2.)

1 **I. Motion to Proceed In Forma Pauperis**

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 \$402.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a failure to prepay the
5 entire fee only if leave to proceed in forma pauperis (“IFP”) is granted pursuant to 28
6 U.S.C. § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007). Section
7 1915(a)(2) also requires prisoners seeking leave to proceed IFP to submit a “certified copy
8 of the trust fund account statement (or institutional equivalent) for . . . the 6-month period
9 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v.*
10 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the
11 Court assesses an initial payment of 20% of (a) the average monthly deposits in the account
12 for the past six months, or (b) the average monthly balance in the account for the past six
13 months, whichever is greater, unless the prisoner has no assets. See 28 U.S.C. §
14 1915(b)(1)&(4). The institution collects subsequent payments, assessed at 20% of the
15 preceding month’s income, in any month in which his account exceeds \$10, and forwards
16 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2).
17 Plaintiff remains obligated to pay the entire fee in monthly installments regardless of
18 whether their action is ultimately dismissed. *Bruce v. Samuels*, 577 U.S. 82, 84 (2016); 28
19 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

20 In support of his IFP motion, Plaintiff has submitted a copy of his CDCR Inmate
21 Statement Report and Prison Certificate attested to by a CDCR trust account official. (ECF
22 No. 2 at 6.) The document shows he had an average monthly balance of \$206.12 and
23 average monthly deposits of \$496.08 for the 6-months preceding the filing of this action,
24 and an available balance of \$2.54 at the time of filing. (*Id.*)

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27 ¹ In addition to a \$350 fee, civil litigants, other than those granted leave to proceed IFP,
28 must pay an additional administrative fee of \$52. See 28 U.S.C. § 1914(a) (Judicial
Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2020)).

1 The Court **GRANTS** Plaintiff’s Motion to Proceed IFP and declines to impose the
2 \$99.22 initial partial filing fee pursuant to 28 U.S.C. Section 1915(b)(1) because his prison
3 certificate indicates he may have “no means to pay it.” *See* 28 U.S.C. § 1915(b)(4)
4 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or
5 appealing a civil action or criminal judgment for the reason that the prisoner has no assets
6 and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850
7 (finding that 28 U.S.C. Section 1915(b)(4) acts as a “safety-valve” preventing dismissal of
8 a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available
9 to him when payment is ordered.”). Instead, the Court directs the Secretary of the CDCR,
10 or her designee, to collect the entire \$350 balance of the filing fee required by 28 U.S.C.
11 Section 1914 and to forward it to the Clerk of the Court pursuant to the installment payment
12 provisions set forth in 28 U.S.C. Section 1915(b)(1).

13 **II. Screening pursuant to 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)**

14 **A. Standard of Review**

15 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
16 Answer screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these statutes,
17 the Court must *sua sponte* dismiss a prisoner’s IFP complaint, or any portion of it, which
18 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are
19 immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing
20 28 U.S.C. § 1915(e)(2); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
21 (discussing 28 U.S.C. § 1915A(b). “The purpose of § 1915A is to ensure that the targets
22 of frivolous or malicious suits need not bear the expense of responding.” *Nordstrom v.*
23 *Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (internal quote marks omitted).

24 “The standard for determining whether a plaintiff has failed to state a claim upon
25 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
26 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
27 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
28 2012) (noting that § 1915A screening “incorporates the familiar standard applied in the

1 context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).”) Rule
2 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state
3 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009),
4 quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

5 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
6 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
7 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief
8 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
9 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
10 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
11 standard. *Id.*; see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

12 Title 42 U.S.C. § 1983 “creates a private right of action against individuals who,
13 acting under color of state law, violate federal constitutional or statutory rights.”
14 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a
15 source of substantive rights, but merely provides a method for vindicating federal rights
16 elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation
17 marks and citations omitted). “To establish § 1983 liability, a plaintiff must show both
18 (1) deprivation of a right secured by the Constitution and laws of the United States, and
19 (2) that the deprivation was committed by a person acting under color of state law.” *Tsao*
20 *v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

21 **B. Plaintiff’s Allegations**

22 Plaintiff alleges that on March 23, 2012, he was sentenced to 26 years to life in prison
23 for the murder of a minor, and at that time the trial judge imposed a fine of \$10,400 plus
24 10% interest in restitution for funeral expenses, which has now reached \$17,795.32. (ECF
25 No. 1 at 3.) He states that he earns \$5.54 per month working at the prison, of which he is
26 permitted to keep \$2.54, that he believes he will never be able to pay the restitution fine,
27 and that it amounts to cruel and unusual punishment to require him to do so because it is
28 “creating a nervous system in me and lack of sleep for not being able to pay.” (*Id.*) He

1 requests the Court grant him “clemency” and eliminate the restitution fine in exchange for
2 changing his initial not guilty plea to an admission of guilt and remorse. (*Id.*)

3 C. Analysis

4 A violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment
5 has two requirements. “First, the deprivation alleged must be, objectively, ‘sufficiently
6 serious.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), quoting *Wilson v. Seiter*, 501
7 U.S. 294, 298 (1991). Second, Plaintiff must allege the prison official he seeks to hold
8 liable had a “sufficiently culpable state of mind,” that is, “one of ‘deliberate indifference’
9 to inmate health or safety.” *Id.*, quoting *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991).
10 Deliberate indifference is satisfied only where a defendant “knows of and disregards an
11 excessive risk to inmate health and safety; the official must both be aware of facts from
12 which the inference could be drawn that a substantial risk of serious harm exists, and he
13 must also draw the inference.” *Id.* at 837. “To be cruel and unusual punishment, conduct
14 that does not purport to be punishment at all must involve more than ordinary lack of due
15 care for the prisoner’s interests or safety. . . . It is obduracy and wantonness, not
16 inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel
17 and Unusual Punishments Clause.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

18 The allegations in the Complaint fail to satisfy either the subjective or objective
19 pleading requirements of an Eighth Amendment claim. First, Plaintiff has not alleged an
20 “objectively, sufficiently serious” injury arising from his inability to pay the restitution fine
21 which he admits was legally imposed at sentencing. His allegation that the prospect of his
22 fine never being paid off and forever increasing is “creating a nervous system in me and
23 lack of sleep for not being able to pay” (ECF No. 1 at 3), does not satisfy the objective
24 standard, as “only those deprivations denying ‘the minimal civilized measure of life’s
25 necessities’ are sufficiently grave to form the basis of an Eighth Amendment violation.”
26 *Wilson v.*, 501 U.S. at 298, quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

27 Second, even if Plaintiff can satisfy that standard, the Complaint does not identify a
28 defendant who has acted with deliberate indifference. The only Defendant named in the

1 Complaint is the San Diego County Superior Court, where his restitution fine was imposed.
2 However, neither accident nor negligence constitutes cruel and unusual punishment, as
3 “[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize
4 the conduct prohibited by the Cruel and Unusual Punishments Clause.” *Whitley*, 475 U.S.
5 at 319. There are no allegations in the Complaint that the Superior Court is aware he is
6 presently unable to pay the restitution fine but has refused to reduce or eliminate it. For
7 example, Plaintiff does not contend he has petitioned that court for an adjustment or
8 elimination of the fine. As currently pleaded, the Complaint at best alleges an inadvertent
9 error made in good faith by the Superior Court in imposing a fine at sentencing that it turns
10 out Plaintiff now believes he has no prospect of paying.

11 Based on the foregoing, the Complaint is **DISMISSED** pursuant to 28 U.S.C.
12 §§ 1915(e)(2) & 1915A(b)(1) for failure to state a claim upon which relief may be granted.
13 In light of Plaintiff’s pro se status, the Court grants him leave to amend his pleading to
14 attempt to sufficiently allege a 42 U.S.C. § 1983 claim if he can. *See Rosati v. Igbinoso*,
15 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not dismiss a pro se complaint
16 without leave to amend [pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)] unless ‘it is absolutely
17 clear that the deficiencies of the complaint could not be cured by amendment.’”), quoting
18 *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

19 **III. Conclusion and Orders**

20 Good cause appearing, the Court:

21 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. Section
22 1915(a) (ECF No. 2).

23 2. **ORDERS** the Secretary of the CDCR, or her designee, to collect from
24 Plaintiff’s prison trust account the \$350 filing fee owed by collecting monthly payments
25 from Plaintiff’s account in an amount equal to twenty percent (20%) of the preceding
26 month’s income and forwarding those payments to the Clerk of the Court each time the
27 amount in the account exceeds \$10 pursuant to 28 U.S.C. Section 1915(b)(2). All
28 payments shall be clearly identified by the name and number assigned to this action.


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

4 4. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
5 relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)(1) and
6 **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in which to file
7 an Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff’s
8 Amended Complaint must be complete by itself without reference to his original pleading.
9 Defendants not named and any claim not re-alleged in his Amended Complaint will be
10 considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*, 896 F.2d at 1546
11 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d
12 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not
13 re-alleged in an amended pleading may be “considered waived if not repled.”)

14 If Plaintiff fails to file an Amended Complaint within the time provided, the Court
15 will enter a final Order dismissing this civil action based both on Plaintiff’s failure to state
16 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) &
17 1915A(b)(1), and his failure to prosecute in compliance with a court order requiring
18 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does
19 not take advantage of the opportunity to fix his complaint, a district court may convert the
20 dismissal of the complaint into dismissal of the entire action.”).

21 **IT IS SO ORDERED.**

22 Dated: June 24, 2021

23 
24 Hon. William Q. Hayes
25 United States District Court
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