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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 WAYNE ELIJAH JONES,
12 INMATE #20902359,

Plaintiff,

13
14 vs.

15 R. PENG, et al.,

16 Defendants.
17

Case No.: 21-cv-1912-MMA (BLM)

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

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19 On November 11, 2021, Plaintiff Wayne Elijah Jones, incarcerated at the Vista
20 Detention Facility in Vista, California, at the time of filing but since transferred to the
21 San Diego Central Jail in San Diego, California, and proceeding *pro se*, filed this civil
22 rights action pursuant to 42 U.S.C. § 1983. Doc. No. 1. Plaintiff did not pay the civil
23 filing fee required by 28 U.S.C. § 1914(a) and instead filed a Motion to Proceed In Forma
24 Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). Doc. No. 2.

25 On November 22, 2021, the Court denied Plaintiff’s IFP Motion because it did not
26 contain a certified copy of the trust fund account statement or institutional equivalent.
27 Doc. No. 3. The Court also dismissed this action without prejudice to Plaintiff to either
28 pay the filing fee or submit a properly supported IFP Motion. Doc. No. 3.

1 On December 9, 2021, Plaintiff renewed his IFP motion. Doc. No. 5. On
2 December 15, 2021, the Court once again denied the motion based on Plaintiff’s failure
3 to provide the Court with the required financial documentation. Doc. No. 6.

4 On January 13, 2022, Plaintiff filed a certified copy of his inmate trust account
5 statement which the Court construes as a renewed IFP Motion. Doc. No. 8. In addition,
6 he filed exhibits in support of the Complaint on January 14, 2022, and January 25, 2022.
7 Doc. Nos. 9–10.

8 **I. MOTION TO PROCEED IFP**

9 All parties instituting any civil action in a district court of the United States, except
10 a petition for writ of habeas corpus, must pay a filing fee of \$402, and the action may
11 proceed despite a failure to prepay the entire fee only if leave to proceed IFP is granted
12 pursuant to 28 U.S.C. § 1915(a).¹ See 28 U.S.C. § 1914(a); *Andrews v. Cervantes*, 493
13 F.3d 1047, 1051 (9th Cir. 2007). Section 1915(a)(2) requires prisoners seeking leave to
14 proceed IFP to submit a “certified copy of the trust fund account statement (or
15 institutional equivalent) for . . . the 6-month period immediately preceding the filing of
16 the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir.
17 2005); 28 U.S.C. § 1915(h) (defining a “prisoner” as “any person” who at the time of
18 filing is “incarcerated or detained in any facility who is accused of, convicted of,
19 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
20 conditions of parole, probation, pretrial release, or diversionary program”). From the
21 certified trust account statement, the Court assesses an initial payment of 20% of (a) the
22 average monthly deposits in the account for the past six months, or (b) the average
23 monthly balance in the account for the past six months, whichever is greater, unless the
24 prisoner has no assets. See 28 U.S.C. § 1915(b)(1) & (4). The institution collects
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27 ¹ In addition to a \$350 fee, civil litigants, other than those granted leave to proceed IFP, must pay an
28 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 subsequent payments, assessed at 20% of the preceding month’s income, in any month in
2 which the account exceeds \$10, and forwards those payments to the Court until the entire
3 filing fee is paid. *See* 28 U.S.C. § 1915(b)(2). Plaintiff remains obligated to pay the
4 entire fee in monthly installments regardless of whether their action is ultimately
5 dismissed. *Bruce v. Samuels*, 577 U.S. 82, 84 (2016); 28 U.S.C. § 1915(b)(1) & (2);
6 *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

7 In support of his renewed IFP Motion, Plaintiff has submitted a certified copy of
8 his prison certificate which indicates that during the six months prior to filing suit he had
9 an average monthly balance of \$2.34 and average monthly deposits of \$50.14, and has an
10 available balance of \$14.05 in his account at the time he filed suit. Doc. No. 8 at 1.

11 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP and imposes an
12 initial partial filing fee of \$10.03 pursuant to 28 U.S.C. § 1915(b)(1). The remaining
13 balance of the \$339.97 fee owed in this case will be collected by the agency having
14 custody of the prisoner and forwarded to the Clerk of the Court pursuant to 28 U.S.C. §
15 1915(b)(2).

16 **II. SCREENING PURSUANT TO 28 U.S.C. § 1915A(b)**

17 **A. Standard of Review**

18 As defined by the PLRA, a “prisoner” is “any person incarcerated or detained in
19 any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for,
20 violations of criminal law or the terms and conditions of parole, probation, pretrial
21 release, or diversionary program.” 28 U.S.C. § 1915(h). Plaintiff satisfies that definition
22 because he indicates he is charged with a crime awaiting trial. Doc. No. 10 at 2.

23 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
24 Answer screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these
25 statutes, the Court must *sua sponte* dismiss a prisoner’s IFP complaint, or any portion of
26 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
27 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc)
28 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.

1 2010) (discussing 28 U.S.C. § 1915A(b)).

2 “The standard for determining whether a plaintiff has failed to state a claim upon
3 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
4 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
5 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
6 Cir. 2012) (noting that § 1915A screening “incorporates the familiar standard applied in
7 the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)”).
8 Rule 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true,
9 to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,
10 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

11 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
12 statements, do not suffice” to state a claim. *Iqbal*, 556 U.S. at 678.

13 Title 42 U.S.C. § 1983 “creates a private right of action against individuals who,
14 acting under color of state law, violate federal constitutional or statutory rights.”
15 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a
16 source of substantive rights, but merely provides a method for vindicating federal rights
17 elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal
18 quotation marks and citations omitted).

19 **B. Plaintiff’s Allegations**

20 Plaintiff brings this action for violation of his rights to due process and to be free
21 from cruel and unusual punishment under the Fourteenth Amendment, and names as
22 Defendants Oceanside Police Officers Peng, Ellgard, Kaldenbach and Schmidt, and “L.A.
23 Peace Officer Barrogan.” Doc. No. 1 at 1–3. He alleges that on January 11, 2021, an
24 “officer beat me with iron stick, before identifying me and tazzed me. I hit the ground
25 and another police jump on my back and tazz me.” *Id.* at 1. He alleges that while
26 subsequently incarcerated at the Vista Detention Facility, his right to be free from cruel
27 and unusual punishment was violated because he has been verbally harassed, subject to
28 injustices, and has had his human, civil, religious and constitutional rights violated. *Id.* at

1 2. He states that he has been hearing voices of people who are not there due to a
2 chemical imbalance in his brain for which he is taking medication, and that the voices
3 sometimes curse at him and tell him to kill himself. *Id.* He alleges inmates from the top
4 tier have been harassing him and threatening him and his family, and although he has
5 written to a deputy, nothing was done. *Id.* at 2. He claims his character has been
6 assassinated, that his arrest was based on false charges, false witnesses and a lack of
7 probable cause, and states that he wants to be released from custody. *Id.* at 2–4. He
8 seeks to hold Defendants financially liable for what he has been through during his arrest
9 and while housed at the Vista Detention Facility. *Id.* at 3.

10 C. Analysis

11 “Inmates who sue prison officials for injuries suffered while in custody may do so
12 under the Eighth Amendment’s Cruel and Unusual Punishment Clause or, if not yet
13 convicted, under the Fourteenth Amendment’s Due Process Clause.” *Castro v. County of*
14 *Los Angeles*, 833 F.3d 1060, 1067–68 (9th Cir. 2016). “Under both clauses, the plaintiff
15 must show that the prison officials acted with ‘deliberate indifference.’” *Id.* at 1068.

16 Under the Eighth Amendment, a prison official cannot be found liable for denying
17 an inmate humane conditions of confinement “unless the official knows of and disregards
18 an excessive risk to inmate health or safety; the official must both be aware of facts from
19 which the inference could be drawn that a substantial risk of serious harm exists, and he
20 must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The
21 Eighth Amendment provides for a subjective standard for deliberate indifference.
22 However, for pre-trial detainees bringing claims under the Fourteenth Amendment there
23 is an objective standard of deliberate indifference, which is “more than negligence but
24 less than subjective intent - something akin to reckless disregard.” *Castro*, 833 F.3d at
25 1068–71.

26 “To be cruel and unusual punishment, conduct that does not purport to be
27 punishment at all must involve more than ordinary lack of due care for the prisoner’s
28 interests or safety. . . . It is obduracy and wantonness, not inadvertence or error in good

1 faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments
2 Clause.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The allegations that other inmates
3 have verbally harassed Plaintiff and that he wrote to a deputy about it, but nothing was
4 done fail to state a cruel and unusual punishment claim. *See Oltarzewski v. Ruggiero*,
5 830 F.2d 136, 139 (9th Cir. 1987) (mere verbal harassment or abuse does not violate the
6 constitution and does not give rise as a 42 U.S.C. § 1983 claim); *Somers v. Thurman*, 109
7 F.3d 614, 624 (9th Cir. 1997) (“To hold that gawking, pointing, and joking violates the
8 prohibition against cruel and unusual punishment would trivialize the objective
9 component of the Eighth Amendment test and render it absurd.”)

10 Although Plaintiff references violations of his “Religious Rights” in the Complaint,
11 Doc. No. 1 at 2, and in an exhibit contends he has a right not to have a substantial burden
12 placed on the exercise of his religious beliefs and is “religiously being targeted” and
13 persecuted “for my religious beliefs,” Doc No. 10 at 1–11, there are no factual allegations
14 supporting such a claim. He has therefore failed to state a claim for relief regarding
15 deprivation of his right to freedom of religion. *See Iqbal*, 556 U.S. at 678 (“Threadbare
16 recitals of the elements of a cause of action, supported by mere conclusory statements, do
17 not suffice” to state a claim).

18 With respect Plaintiff’s claim that excessive force was used during his arrest,
19 allegations of excessive force during an arrest are analyzed under the Fourth
20 Amendment’s “objective reasonableness standard,” which prohibits arrests without
21 probable cause or other justification. *Graham*, 490 U.S. at 388 (“[T]he reasonableness
22 inquiry in an excessive force case is an objective one: the question is whether the
23 officers’ actions are objectively reasonable in light of the facts and circumstances
24 confronting them, without regard to their underlying intent or motivation.”).

25 Plaintiff alleges he was “beat with an iron stick,” was tasered, and that a police
26 officer jumped on his back during his arrest. Doc. No. 1 at 1. However, there are no
27 factual allegations regarding the circumstances surrounding his arrest which could
28 plausibly allege the officers’ actions were not “objectively reasonable in light of the facts

1 and circumstances confronting them.” *Graham*, 490 U.S. at 388. In addition, Plaintiff
2 fails to identify which Defendant committed which act. *See Leer v. Murphy*, 844 F.2d
3 628, 633 (9th Cir. 1988) (“The inquiry into causation must be individualized and focus on
4 the duties and responsibilities of each individual defendant whose acts or omissions are
5 alleged to have caused a constitutional deprivation.”). The conclusory allegations of
6 excessive use of force during Plaintiff’s arrest are insufficient to satisfy the screening
7 provisions of 28 U.S.C. §§ 1915(e)(2) & 1915A(b) because such “[t]hreadbare recitals of
8 the elements of a cause of action, supported by mere conclusory statements, do not
9 suffice” to state a claim. *Iqbal*, 556 U.S. at 678.

10 Plaintiff’s claim for false arrest based on his contention that probable cause was
11 lacking is also entirely conclusory. *See Yousefian v. City of Glendale*, 779 F.3d 1010,
12 1014 (9th Cir. 2015) (holding that absence of probable cause is an essential element of a
13 claim for false arrest under § 1983). “Police have probable cause to arrest where ‘the
14 facts and circumstances within their knowledge and of which they (have) reasonably
15 trustworthy information (are) sufficient to warrant a prudent man in believing that the
16 (suspect) had committed or was committing an offense.’” *Beier v. City of Lewiston*, 354
17 F.3d 1058, 1064 (9th Cir. 2004), quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see also*
18 *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1166 (9th Cir. 2011) (“[U]nder California law,
19 the indictment itself created a *prima facie* presumption ‘that probable cause existed for
20 the underlying prosecution.’”) (quoting *Conrad v. United States*, 447 F.3d 760, 768
21 (2006)). Without any factual allegations as to why Plaintiff claims he was arrested
22 without probable cause, the Complaint fails to state a claim for false arrest. *Yousefian*,
23 779 F.3d at 1014; *Iqbal*, 556 U.S. at 678.

24 To the extent Plaintiff seeks release from custody, such a remedy is not available in
25 a 42 U.S.C. § 1983 action but must be sought through habeas corpus. *See Wilkinson v.*
26 *Dotson*, 544 U.S. 74, 78 (2005) (“This Court has held that a prisoner in state custody
27 cannot use a § 1983 action to challenge the fact or duration of his confinement. He must
28 seek federal habeas corpus relief (or appropriate state relief) instead.”) (citations

1 omitted). Accordingly, Plaintiff's Complaint must be dismissed *sua sponte* for failure to
2 state a claim upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2) &
3 1915A(b).

4 **D. Leave to Amend**

5 In light of Plaintiff's *pro se* status, the Court grants him leave to amend to attempt
6 to sufficiently allege a claim if he can. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th
7 Cir. 2015) ("A district court should not dismiss a *pro se* complaint without leave to
8 amend [pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)] unless 'it is absolutely clear that the
9 deficiencies of the complaint could not be cured by amendment.'"), quoting *Akhtar v.*
10 *Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

11 **III. CONCLUSION**

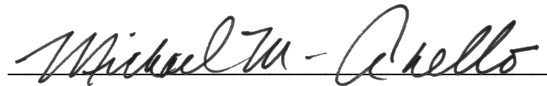
12 Based upon the foregoing, the Court **GRANTS** Plaintiff's Motion to Proceed IFP
13 pursuant to 28 U.S.C. § 1915(a) and **DIRECTS** the Watch Commander of the San Diego
14 Central Jail, or his or her designee, to collect from Plaintiff's inmate trust account the
15 initial partial filing fee of \$10.03 and forward it to the Court, and then collect the \$339.97
16 remainder of the filing fee owed in this case by garnishing monthly payments in an
17 amount equal to twenty percent (20%) of the preceding month's income and forwarding
18 those payments to the Clerk of the Court each time the amount in the account exceeds
19 \$10 pursuant to 28 U.S.C. § 1915(b)(2). The Court **DIRECTS** the Clerk of the Court to
20 serve a copy of this Order on Watch Commander, San Diego Central Jail, 1173 Front
21 Street, San Diego, California, 92101.

22 The Court further **DISMISSES** Plaintiff's Complaint for failing to state a claim
23 upon which relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)
24 and **GRANTS** him forty-five (45) days leave from the date of this Order in which to file
25 a First Amended Complaint which cures the deficiencies of pleading noted. The First
26 Amended Complaint must be complete by itself without reference to the original
27 Complaint. Any Defendants not named and any claims not re-alleged in the First
28 Amended Complaint will be considered waived. *See Cal. CivLR 15.1; Hal Roach*

1 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n
2 amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928
3 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not re-
4 alleged in an amended pleading may be “considered waived if not repled”). If Plaintiff
5 fails to timely file a First Amended Complaint, the Court will enter a final Order
6 dismissing this civil action. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If
7 a plaintiff does not take advantage of the opportunity to fix his complaint, a district court
8 may convert the dismissal of the complaint into dismissal of the entire action.”).

9 **IT IS SO ORDERED.**

10 Dated: January 28, 2022

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12 HON. MICHAEL M. ANELLO
13 United States District Judge
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