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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 ROILAND FERNANDEZ-MEDINA,

11 Plaintiff,

12 v.

13 OLIVAREZ,

14 Defendants.

CASE NO. 3:20-cv-05703-RAJ-JRC

ORDER

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16 The District Court has referred this action, filed pursuant to 42 U.S.C. § 1983, to United  
17 States Magistrate Judge J. Richard Creatura. Plaintiff Roiland Fernandez-Medina, proceeding  
18 *pro se* and *in forma pauperis*, initiated this civil rights action on July 20, 2020. Dkt. 1, 4.

19 Plaintiff alleges that his constitutional rights were violated when he was assaulted during  
20 his arrest and was unlawfully searched. Dkt. 4. Having reviewed and screened plaintiff's  
21 complaint (hereinafter "complaint") under 28 U.S.C. § 1915A, the Court declines to serve the  
22 complaint because plaintiff has yet to plead sufficient facts to demonstrate that the named  
23 defendants personally participated in the alleged use of force. In addition, plaintiff cannot  
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1 maintain an action under § 1983 seeking damages for an alleged illegal search and seizure of  
2 evidence upon which criminal charges are based until such criminal charges have been dismissed  
3 or the conviction has been overturned. However, the Court provides plaintiff leave to file an  
4 amended pleading by September 4, 2020, to cure the deficiencies identified herein.

#### 5 BACKGROUND

6 In his complaint, plaintiff, who is currently housed at Pierce County Jail, alleges that on  
7 October 15, 2019, he was in a parking lot at the Hotel Murano in Tacoma, Washington  
8 “conducting a basic mechanical diagnostic” on an acquittance’s vehicle. Dkt. 4 at 4. While  
9 plaintiff was in the vehicle, he saw an unknown van “smash” into the vehicle. Dkt. 4 at 4-7.  
10 Plaintiff alleges that he saw several men exiting the van. *Id.* at 7. Plaintiff alleges that he feared  
11 for his life and ran away. *Id.* Plaintiff alleges that he was physically tackled and assaulted by  
12 “plain clothes police officers” who took plaintiff into custody. *Id.* Plaintiff alleges that he did not  
13 commit a crime and the officers lacked probable cause to detain, search, and arrest plaintiff. *Id.*  
14 at 8. Plaintiff alleges that he suffered from an ankle injury and was treated for a broken ankle at  
15 the St. Joseph’s Hospital in Tacoma, Washington. *Id.* at 8.

16 Plaintiff names defendant Olivarez, a Pierce County detective, and the Pierce County  
17 Sheriff’s Department as the only defendants in this matter. Dkt. 4. Plaintiff seeks monetary  
18 damages and dismissal of his state court case based on the alleged illegal arrest, search, and  
19 seizure. Dkt. 4 at 14.

#### 20 DISCUSSION

21 Under the Prison Litigation Reform Act of 1995 (“PLRA”), the Court is required to  
22 screen complaints brought by prisoners seeking relief against a governmental entity or officer or  
23 employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must “dismiss the  
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1 complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to  
2 state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant  
3 who is immune from such relief.” *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*,  
4 152 F.3d 1193 (9th Cir. 1998).

5 In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must sufficiently  
6 allege that: (1) he suffered a violation of rights protected by the Constitution or created by  
7 federal statute, and (2) the violation was proximately caused by a person acting under color of  
8 state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983  
9 claim is therefore to identify the specific constitutional right allegedly infringed. *Albright v.*  
10 *Oliver*, 510 U.S. 266, 271 (1994). To satisfy the second step, a plaintiff must allege facts  
11 showing how individually named defendants caused, or personally participated in causing, the  
12 harm alleged in the complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

13 Plaintiff’s complaint does not sufficiently allege these claims, which will result in  
14 dismissal of his case if not corrected in an amended complaint.

15 **A. Use of Excessive Force and Personal Participation**

16 Plaintiff alleges that defendants used excessive force when he suffered a broken ankle  
17 during his arrest. Dkt. 4.

18 To the extent that plaintiff alleges a due process violation of the Fourteenth Amendment  
19 based on his allegations of excessive force, “the Fourth Amendment sets the applicable  
20 constitutional limitations on the treatment of an arrestee detained without a warrant up until the  
21 time such arrestee is released or found to be legally in custody based upon probable cause for  
22 arrest.” *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996); *see Graham v.*  
23 *Connor*, 490 U.S. 386, 395 (1989) (“all claims that law enforcement officers have used excessive  
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1 force ... in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be  
2 analyzed under the Fourth Amendment and its ‘reasonableness’ standard....”).

3 In the Ninth Circuit, courts “analyze all claims of excessive force that arise during or  
4 before arrest under the Fourth Amendment’s reasonableness standard[.]” *Coles v. Eagle*, 704  
5 F.3d 624, 627 (9th Cir. 2012) (citing *Graham v. Connor*, 490 U.S. 386 (1989)). “[T]he  
6 ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether  
7 the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances  
8 confronting them, without regard to their underlying intent or motivation.” *Graham*, 490 U.S. at  
9 397. “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a  
10 reasonable officer on the scene, rather than with 20/20 vision in hindsight.” *Id.* at 396 (citing  
11 *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). “Not every push or shove, even if it may later seem  
12 unnecessary in the peace of a judge’s chambers violates the Fourth Amendment.” *Jackson v. City*  
13 *of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001) (citing *Graham*, 490 U.S. at 396). “The calculus  
14 of reasonableness must embody allowance for the fact that police officers are often forced to  
15 make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—  
16 about the amount of force that is necessary in a particular situation.” *Graham*, 490 U.S. at 396-  
17 97.

18 To determine whether an officer used excessive force, the nature and quality of the  
19 intrusion must be weighed against the countervailing governmental interest in the use of that  
20 force. *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001). The Court considers the  
21 following factors in its analysis: (1) the severity of the crime or situation to which the officer was  
22 responding; (2) whether the plaintiff posed an immediate threat to the safety of the officer or  
23 others; (3) whether the plaintiff was actively resisting arrest or attempting to evade arrest by  
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1 flight; (4) the amount of time and any changing circumstances during which the officer had to  
2 determine the type and amount of force that appeared to be necessary; and (5) the availability of  
3 alternative methods to subdue the plaintiff. *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.  
4 2005); *see Graham*, 490 U.S. at 397. Because the balancing of these factors “nearly always  
5 requires a jury to sift through disputed factual contentions, and to draw inferences therefrom ...  
6 summary judgment [ ] in excessive force cases should be granted sparingly.” *Coles*, 704 F.2d at  
7 628.

8 Here, plaintiff’s allegations of excessive force all occurred prior to the time that plaintiff  
9 could be considered a pre-trial detainee and should be reviewed under the Fourth Amendment  
10 standard. However, plaintiff does not explain any personal actions by the named defendants to  
11 sufficiently allege a Fourth Amendment claim.

12 To state a claim under 42 U.S.C. § 1983, plaintiff must allege facts showing how a  
13 defendant caused or personally participated in causing the harm alleged in the complaint. *Leer v.*  
14 *Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Arnold*, 637 F.2d at 1355. A person subjects another  
15 to a deprivation of a constitutional right when committing an affirmative act, participating in  
16 another’s affirmative act, or failing to perform an act which is legally required. *Johnson v. Duffy*,  
17 588 F.2d 740, 743 (9th Cir. 1978). Sweeping conclusory allegations against an official are  
18 insufficient to state a claim for relief. *Leer*, 844 F.2d at 633. Further, a § 1983 suit cannot be  
19 based on vicarious liability alone but must allege the defendant’s own conduct violated the  
20 plaintiff’s civil rights. *City of Canton v. Harris*, 489 U.S. 378, 385-90 (1989).

21 In the complaint, plaintiff includes a list of the events during which he alleges that his  
22 constitutional rights were violated. Dkt. 4. However, none of his allegations explain how  
23 defendants Olivarez or the Pierce County Sheriff’s Department personally participated in these  
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1 | alleged constitutional violations. *Leer*, 844 F.2d at 633. Defendant Oliveraz is named as a  
2 | detective with the Pierce County Sheriff’s Department, (Dkt. 4 at 3) but plaintiff does not explain  
3 | how defendant Oliveraz’s actions harmed plaintiff. Plaintiff also fails to allege facts  
4 | demonstrating defendant Oliveraz was at the scene at the time of the alleged use of force, or in  
5 | any way participated in the alleged use of force. In addition, plaintiff does not name the “plain  
6 | clothes police officers” who allegedly assaulted him as defendants in this matter.

7 |       Without demonstrating personal participation, plaintiff cannot state a claim for which this  
8 | Court can grant relief. Insofar as plaintiff is arguing that defendant Oliveraz had supervisory  
9 | authority over the staff that caused his alleged harm, supervisory liability alone is insufficient to  
10 | state a claim. *Harris*, 489 U.S. at 385-90. Again, plaintiff must explain how the named  
11 | defendants personally participated in the alleged constitutional deprivation in order to effectively  
12 | state a claim for which relief can be granted.

13 |       To the extent that plaintiff seeks to bring claims against the Pierce County Sheriff’s  
14 | Department, local government entities can be held liable under § 1983 if the allegedly  
15 | unconstitutional actions of its employees are alleged to have been taken pursuant to a “policy  
16 | statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s  
17 | officers.” *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). Alternatively, local  
18 | government entities also can be liable for adopting an unconstitutional custom, even if such  
19 | custom has not received formal approval through the body’s official decision-making channels.  
20 | *Id.* at 690-91. But a local government entity cannot be held liable under § 1983 simply because it  
21 | employs someone who has allegedly acted unlawfully. *Id.* at 691, 694.

22 |       Here, plaintiff fails to allege that Pierce County policy or custom was the “moving force”  
23 | behind the alleged deprivation of his constitutional rights. *Bd. of Cnty. Comm’rs of Bryan Cnty.*,

1 *Oklahoma v. Brown*, 520 U.S. 397, 400 (1997). Instead, he claims generally that the alleged use  
2 of force and unconstitutional search was committed by police officers with the Pierce County  
3 Sheriff's Department. Dkt. 4. Such general allegations fall short of pleading a viable *Monell*  
4 claim, as they are vague, conclusory, and speculative. *See Iqbal*, 556 U.S. at 678; *Hernandez v.*  
5 *Cnty. of Tulare*, 666 F.3d 631, 636-37 (9th Cir. 2012) (applying *Iqbal* pleading standards to  
6 *Monell* claims). Therefore, the Court concludes that plaintiff's claims against the Pierce County  
7 Sheriff's Department fail to state a claim upon which relief may be granted pursuant to § 1983.

8 If plaintiff wishes to pursue this § 1983 action, he must provide an amended complaint  
9 with a short, plain statement explaining exactly what the named defendants did or failed to do  
10 and how the actions violated plaintiff's constitutional rights and caused him harm. Plaintiff may  
11 also provide an amended complaint including additional defendants, similarly including a short,  
12 plain statement explaining what those additional defendants did or failed to do and how their  
13 actions violated plaintiff's constitutional rights.

#### 14 **B. Heck Bar – Unconstitutional Search**

15 Plaintiff also alleges that his Fourth Amendment rights were violated when defendants  
16 conducted an illegal search and seizure during his arrest. Dkt. 4. However, an action under §  
17 1983 seeking damages for an alleged illegal search and seizure of evidence upon which criminal  
18 charges are based is barred until the criminal charges have been dismissed or the conviction has  
19 been overturned. *Harvey v. Waldron*, 210 F.3d 1008, 1015–16 (9th Cir. 2000); *Heck v.*  
20 *Humphrey*, 512 U.S. 477 (1994). The Ninth Circuit reasoned that this approach avoided the  
21 “potential for inconsistent determinations on the legality of a search and seizure in the civil and  
22 criminal cases,” thereby fulfilling *Heck's* objectives of “ ‘preserving consistency and finality, and  
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1 preventing ‘a collateral attack on [a] conviction through the vehicle of a civil suit.’ ” *Id.* (quoting  
2 *Heck*, 512 U.S. at 484-85).

3 Here, according to facts alleged in the complaint, it appeals the illegal search and seizure  
4 led to charges against plaintiff, for which he alleges he is currently awaiting trial at Pierce  
5 County Jail. Dkt. 4 at 14. Plaintiff does not allege he has been convicted but asks for the case  
6 against him to be dismissed. Dkt. 4 at 14. Because it appears plaintiff’s current detention, which  
7 plaintiff does not allege his underlying conviction has been overturned, was based in part on  
8 evidence gathered during the October 2019 allegedly unconstitutional search and seizure,  
9 plaintiff cannot now maintain a § 1983 action challenging the lawfulness of that search. Plaintiff  
10 must show cause why this claim should not be dismissed.

### 11 **C. Instructions to Plaintiff and the Clerk**

12 Due to the deficiencies described above, the Court will not serve plaintiff’s complaint. If  
13 plaintiff intends to pursue a § 1983 civil rights action in this Court, he must file an amended  
14 complaint and within the amended complaint, he must write a short, plain statement telling the  
15 Court: (1) the constitutional right plaintiff believes was violated; (2) the name or names of the  
16 person or persons who violated the right; (3) exactly what each individual or entity did or failed  
17 to do; (4) how the action or inaction of each individual or entity is connected to the violation of  
18 plaintiff’s constitutional rights; and (5) what specific injury plaintiff suffered because of the  
19 individuals’ conduct. *See Rizzo v. Goode*, 423 U.S. 362, 371–72, 377 (1976).

20 Plaintiff shall present the amended complaint on the form provided by the Court. The  
21 amended complaint must be legibly rewritten or retyped in its entirety, it should be an original  
22 and not a copy, it should contain the same case number, and it may not incorporate any part of  
23 the original complaint by reference. The amended complaint will act as a complete substitute for  
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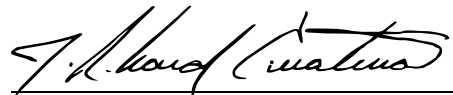


1 the original complaint, and not as a supplement. An amended complaint supersedes all previous  
2 complaints. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) *overruled in part on*  
3 *other grounds*, *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Therefore, the  
4 amended complaint must be complete in itself and all facts and causes of action alleged in the  
5 original complaint or amended complaint that are not alleged in the second amended complaint  
6 are waived. *Forsyth*, 114 F.3d at 1474. The Court will screen the amended complaint to  
7 determine whether it contains factual allegations linking each defendant to the alleged violations  
8 of plaintiff's rights. The Court will not authorize service of the amended complaint on any  
9 defendant who is not specifically linked to a violation of plaintiff's rights.

10 If plaintiff fails to file an amended complaint or fails to adequately address the issues  
11 raised herein on or before September 4, 2020, the undersigned will recommend dismissal of this  
12 action pursuant to 28 U.S.C. § 1915.

13 The Clerk is directed to send plaintiff the appropriate forms for filing a 42 U.S.C. § 1983  
14 civil rights complaint and for service. The Clerk is further directed to send copies of this Order  
15 and Pro Se Instruction Sheet to Plaintiff.

16 Dated this 3rd day of August, 2020.  
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21 J. Richard Creatura  
22 United States Magistrate Judge  
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