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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Michael Wayne Berry,  
Plaintiff,  
vs.  
Maricopa County Sheriff's Office,  
Defendant.

No. CV 09-1738-PHX-RCB (LOA)

**ORDER**

Plaintiff Michael Wayne Berry, who is confined in the Maricopa County Lower Buckeye Jail, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. The Court will dismiss the Complaint with leave to amend.

**I. Application to Proceed *In Forma Pauperis* and Filing Fee**

Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$5.00. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

**II. Statutory Screening of Prisoner Complaints**

The Court is required to screen complaints brought by prisoners seeking relief against

1 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.  
2 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised  
3 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may  
4 be granted, or that seek monetary relief from a defendant who is immune from such relief.  
5 28 U.S.C. § 1915A(b)(1), (2).

6 A pleading must contain a “short and plain statement of the claim *showing* that the  
7 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not  
8 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-  
9 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).  
10 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
11 statements, do not suffice.” Id.

12 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
13 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,  
14 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content  
15 that allows the court to draw the reasonable inference that the defendant is liable for the  
16 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for  
17 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial  
18 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual  
19 allegations may be consistent with a constitutional claim, a court must assess whether there  
20 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

21 If the Court determines that a pleading could be cured by the allegation of other facts,  
22 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the  
23 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court  
24 should not, however, advise the litigant how to cure the defects. This type of advice “would  
25 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,  
26 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was  
27 required to inform a litigant of deficiencies). Plaintiff’s Complaint will be dismissed for  
28 failure to state a claim, with leave to amend because the Complaint may possibly be saved

1 by amendment.

2 **III. Complaint**

3 Plaintiff sues the Maricopa County Sheriff's Office and raises three grounds for relief:

- 4 (1) Plaintiff was denied basic necessities for 74 hours in a very crowded area;  
5 (2) Staff refused to listen to Plaintiff's concerns; and  
6 (3) Plaintiff was denied medical treatment.

7 Plaintiff seeks money damages.

8 **IV. Improper Defendant**

9 The sole Defendant in this action, the Maricopa County Sheriff's Office, is not a  
10 proper defendant. In Arizona, the responsibility of operating jails and caring for prisoners  
11 is placed by law upon the sheriff. See Ariz. Rev. Stat. § 11-441(A)(5); Ariz. Rev. Stat.  
12 § 31-101. A sheriff's office is simply an administrative creation of the county sheriff to  
13 allow him to carry out his statutory duties and not a "person" amenable to suit pursuant to  
14 § 1983. Accordingly, the Maricopa County Sheriff's Office will be dismissed from this  
15 action.

16 **V. Failure to State a Claim**

17 In order to recover under § 1983, a plaintiff must show: (1) the violation of a right  
18 protected by the Constitution or federal law; (2) that was proximately caused; (3) by conduct  
19 of a "person" named as a defendant; (4) acting under color of state law. See Crumpton v.  
20 Gates, 947 F.2d 1418, 1420 (9th Cir. 1991). Plaintiff has not alleged a violation of a  
21 constitutional right in any of his claims.

22 Plaintiff should note that a pretrial detainee's claim for unconstitutional conditions of  
23 confinement arises from the Fourteenth Amendment Due Process Clause rather than from  
24 the Eighth Amendment prohibition against cruel and unusual punishment. Bell v. Wolfish,  
25 441 U.S. 520, 535 (1979). Nevertheless, the same standards are applied, requiring proof that  
26 the defendant acted with deliberate indifference. See Frost v. Agnos, 152 F.3d 1124, 1128  
27 (9th Cir. 1998).

28 To state a claim of deliberate indifference, plaintiffs must meet a two-part test. First,

1 the alleged constitutional deprivation must be, objectively, “sufficiently serious”; the  
2 official’s act or omission must result in the denial of “the minimal civilized measure of life’s  
3 necessities.” Farmer v. Brennan, 511 U.S. 825, 834 (1994). These are “deprivations of  
4 essential food, medical care, or sanitation” or “other conditions intolerable for prison  
5 confinement.” Rhodes v. Chapman, 452 U.S. 337, 348 (1981). To determine whether a  
6 violation has occurred, a Court should consider the circumstances, nature and duration of a  
7 deprivation of these necessities. Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000). “The  
8 more basic the need, the shorter the time it can be withheld.” Hoptowit v. Ray, 682 F.2d  
9 1287, 1259 (9th Cir. 1982).

10 Second, the prison official must have a “sufficiently culpable state of mind,” *i.e.*, he  
11 must act with deliberate indifference to inmate health or safety. Farmer, 511 U.S. at 834.  
12 In defining “deliberate indifference” in this context, the Supreme Court has imposed a  
13 subjective test: “the official must both be aware of facts from which the inference could be  
14 drawn that a substantial risk of serious harm exists, and he must also draw the inference.”  
15 Id. at 837 (emphasis added).

16 Similarly, to maintain a claim under the Eighth Amendment based on prison medical  
17 treatment, a prisoner must show deliberate indifference to serious medical needs. Estelle v.  
18 Gamble, 429 U.S. 97, 104 (1976). To act with deliberate indifference, a prison official must  
19 both know of and disregard an excessive risk to inmate health. Farmer, 511 U.S. at 837. The  
20 official must both be aware of facts from which the inference could be drawn that a  
21 substantial risk of serious harm exists and he must also draw the inference. Id. This  
22 subjective approach focuses upon the mental attitude of the defendant. Id. at 839.

23 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,  
24 1060 (9th Cir. 2004). In the medical context, deliberate indifference may be shown by (1) a  
25 purposeful act or failure to respond to a prisoner’s pain or possible medical need and  
26 (2) harm caused by the indifference. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)  
27 (citing Estelle, 429 U.S. at 104).

28 . . .

1 **VI. Leave to Amend**

2 For the foregoing reasons, Plaintiff's Complaint will be dismissed for failure to state  
3 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first  
4 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail  
5 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails  
6 to use the court-approved form, the Court may strike the amended complaint and dismiss this  
7 action without further notice to Plaintiff.

8 In any amended complaint, Plaintiff must write short, plain statements telling the  
9 Court: (1) the constitutional right Plaintiff believes was violated; (2) name of the Defendant  
10 who violated the right; (3) exactly what that Defendant did or failed to do; (4) how the action  
11 or inaction of that Defendant is connected to the violation of Plaintiff's constitutional right;  
12 and (5) what specific injury Plaintiff suffered because of that Defendant's conduct. Rizzo  
13 v. Goode, 423 U.S. 362, 371-72, 377 (1976).

14 Plaintiff must repeat this process for each person he names as a Defendant. If Plaintiff  
15 fails to affirmatively link the conduct of each named Defendant with the specific injury  
16 suffered by Plaintiff, the allegation against that Defendant will be dismissed for failure to  
17 state a claim. Further, Plaintiff must comply with any specific directions set out by the Court  
18 in its discussion of individual claims. Conclusory allegations that a Defendant or group of  
19 Defendants have violated a constitutional right are not acceptable, and will be dismissed.

20 Plaintiff must clearly designate on the face of the document that it is the "First  
21 Amended Complaint." The first amended complaint must be retyped or rewritten in its  
22 entirety on the court-approved form and may not incorporate any part of the original  
23 Complaint by reference. Plaintiff may include only one claim per count.

24 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963  
25 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,  
26 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as  
27 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original  
28 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d

1 565, 567 (9th Cir. 1987).

2 **VII. Warnings**

3 **A. Release**

4 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.  
5 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay  
6 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result  
7 in dismissal of this action.

8 **B. Address Changes**

9 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
10 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other  
11 relief with a notice of change of address. Failure to comply may result in dismissal of this  
12 action.

13 **C. Copies**

14 Plaintiff must submit an additional copy of every filing for use by the Court. See  
15 LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice  
16 to Plaintiff.

17 **D. Possible “Strike”**

18 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails  
19 to file an amended complaint correcting the deficiencies identified in this Order, the  
20 dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).  
21 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil  
22 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior  
23 occasions, while incarcerated or detained in any facility, brought an action or appeal in a  
24 court of the United States that was dismissed on the grounds that it is frivolous, malicious,  
25 or fails to state a claim upon which relief may be granted, unless the prisoner is under  
26 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

