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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 WAYNE A. MURPHY,

7 Plaintiff,

8 v.

No. C11-5448 BHS/KLS

9 PIERCE COUNTY JAIL, PIERCE COUNTY
10 JAIL MEDICAL CARE CENTER, CARLOS
11 ORTIZ-VENEGAS, WILMER MELENDEZ,
12 MARY SCOTT, JULIETTE POHL-Y-
BACA, CRAIG ADAMS, VINCE
GOLDSMITH, and SAL MUNGIA,

Defendants.

SECOND ORDER TO AMEND OR SHOW
CAUSE

13 On July 19, 2011, Plaintiff was ordered to show cause why his complaint should not be
14 dismissed for failure to show cause or to file an amended complaint. ECF No. 9. On July 28,
15 2011, Plaintiff filed a motion for a thirty day extension of time to comply with the Court's Order.
16 ECF No. 10. On August 5, 2011, Plaintiff filed an Amended Complaint. ECF No. 11.

17 Plaintiff's motion for an extension is GRANTED. However, his Amended Complaint
18 suffers from the same deficiencies as his original and the Court declines to serve the amended
19 complaint. However, Plaintiff will be given one more opportunity to amend his complaint.

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21 **DISCUSSION**

22 Under the Prison Litigation Reform Act of 1995, the Court is required to screen
23 complaints brought by prisoners seeking relief against a governmental entity or officer or
24 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint
25 or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that
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1 fail to state a claim upon which relief may be granted, or that seek monetary relief from a
2 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See
3 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

4 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
5 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
6 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
7 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
8 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
9 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
10 to relief above the speculative level, on the assumption that all the allegations in the complaint
11 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted).
12 In other words, failure to present enough facts to state a claim for relief that is plausible on the
13 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

14 Although complaints are to be liberally construed in a plaintiff’s favor, conclusory
15 allegations of the law, unsupported conclusions, and unwarranted inferences need not be
16 accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply
17 essential facts that an inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of*
18 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Unless it is absolutely clear that
19 amendment would be futile, however, a pro se litigant must be given the opportunity to amend
20 his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

21 Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, “the complaint [must
22 provide] ‘the defendant fair notice of what the plaintiff’s claim is and the ground upon which it
23 rests.’” *Kimes v. Stone* 84 F.3d 1121, 1129 (9th Cir. 1996) (citations omitted). In addition, in

1 order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must prove that the
2 particular defendant has caused or personally participated in causing the deprivation of a
3 particular protected constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).
4 To be liable for “causing” the deprivation of a constitutional right, the particular defendant must
5 commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and
6 which causes the plaintiff’s deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).
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8 In his Amended Complaint Plaintiff claims that on July 3, 2008, he was assaulted by
9 another inmate at the Pierce County Jail. He was taken to the emergency room at St. Joseph
10 Hospital, where he was surgically treated for a broken jaw, including internal fixation of plates
11 and screws. After he returned to the jail on July 7, 2008, the jail medical staff ignored the
12 hospital treatment records and orders for medications and instead, started taking him off of his
13 medications. Plaintiff claims that he was then placed on suicide watch on September 26, 2008
14 where he was given his medications for one more day before being taken off of them. ECF No.
15 11, p. 3.
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17 In his Amended Complaint, Plaintiff sues Carlos Ortiz-Venegas and “Pierce County Jail,
18 Et-Al”. ECF No. 11. Plaintiff was previously advised that in order to sue the Pierce County Jail,
19 he must allege facts describing how a policy or practice of the Pierce County Jail resulted in a
20 deprivation of his constitutional rights. To establish liability against Pierce County under §
21 1983, a plaintiff must show that (1) he was deprived of a constitutional right; (2) the county has a
22 policy; (3) the policy amounts to deliberate indifference to plaintiff’s constitutional rights; and
23 (4) the policy is the moving force behind the constitutional violation. *Oviatt v. Pearce*, 954 F.2d
24 1470, 1474 (9th Cir.1992). The unconstitutional acts of a government agent cannot, standing
25 alone, lead to liability against a county; further, there is no respondeat superior liability under §
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1 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 692 (1978). A county
2 may only be liable where its policies are the ““moving force [behind] the constitutional
3 violation.”” *City of Canton v. Harris*, 489 U.S. 378, 389, (1989) (quoting *Monell* at 694); *Ortez*
4 *v. Washington County*, 88 F.3d 804 (9th Cir.1996).

5 In order to recover under § 1983, a plaintiff must allege and prove that defendants acted
6 under color of state law to deprive the plaintiff of a right secured by the Constitution or federal
7 statute. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir.1988). In this
8 case, Plaintiff names Craig Adams, a Pierce County prosecutor, as a defendant. Plaintiff is
9 advised, however, that a state prosecuting attorney who acts within the scope of his or her duties
10 in initiating and pursuing a criminal prosecution and presenting the State’s case is absolutely
11 immune from a suit brought for damages under 42 U.S.C. § 1983, *Imbler v. Pachtman*, 424 U.S.
12 409, 424, 427 (1976); *Ashelman v. Pope*, 793 F.2d 1072, 1076, 1078 (9th Cir. 1986) (en banc),
13 “insofar as that conduct is ‘intimately associated with the judicial phase of the criminal
14 process,’” *Burns v. Reed*, 500 U.S. 478, 486 (1991)(quoting *Imbler*, 424 U.S. at 431). This is so
15 even though the prosecutor has violated a plaintiff’s constitutional rights, *Broam v. Bogan*, 320
16 F.3d 1023, 1028-29 (9th Cir. 2003), or the prosecutor acts with malicious intent, *Genzler v.*
17 *Longanbach*, 410 F.3d 630, 637 (9th Cir.), cert. denied, 546 U.S. 1031, 126 S.Ct. 736, 546 U.S.
18 1031, 126 S.Ct. 737, 546 U.S. 1032, 126 S.Ct. 749 (2005); *Ashelman*, 793 F.2d at 1078.

19 Plaintiff also names Sal Mungia, a private attorney. “It is firmly established that a
20 defendant in a § 1983 suit acts under color of state law when he abuses the position given to him
21 by the state. Thus, generally, a public employee acts under color of state law while acting in his
22 official capacity or while exercising his responsibilities pursuant to state law.” *West v. Atkins*,
23 487 U.S. 42, 49-50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (citations omitted). “Under color of
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1 state law” means under pretense of state law. *Screws v. United States*, 325 U.S. 91, 111, 65 S.Ct.
2 1031, 89 L.Ed. 1495 (1945). There is no such pretense if the wrongful acts are wholly unrelated
3 to the employee’s duty. *Murphy v. Chicago Transit Auth.*, 638 F.Supp. 464, 467 (N.D.Ill.1986)
4 (citing *Johnson v. Hackett*, 284 F.Supp. 933, 937 (E.D.Pa.1968)). “[A]ctions taken under color of
5 state law must be related to the state authority conferred on the actor, even though the actions are
6 not actually permitted by the authority.” *Dang Vang*, 944 F.2d at 480 (citations omitted).
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8 Therefore, Plaintiff cannot pursue a Section 1983 claim in this court against a private attorney
9 who is not a state employee and was not acting under color of state law.

10 Plaintiff also names “Carlos Ortiz-Venegas Et-Al” as a defendant, but nowhere in his
11 complaint does he explain what Mr. Ortiz-Venegas or any other named defendant did or did not
12 do to violate Plaintiff’s constitutional rights. Instead, Plaintiff refers only to the “medical staff at
13 the jail.” In order to proceed in a civil rights suit, Plaintiff must name the individuals and
14 describe what each of the individuals did to violate his constitutional rights.
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16 Under 42 U.S.C. § 1983, claims can only be brought against people who personally
17 participated in causing the alleged deprivation of a right. *Arnold v. IBM*, 637 F.2d 1350, 1355
18 (9th Cir. 1981). Neither a State nor its officials acting in their official capacities are “persons”
19 under section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Plaintiff
20 must set forth factual allegations and allege with specificity the names of the persons who caused
21 or personally participated in causing the alleged deprivation of his constitutional rights. A
22 defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory
23 responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694
24 n.58 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. *Padway v.*
25 *Palches*, 665 F.2d 965 (9th Cir. 1982).
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1 Due to the deficiencies described above, the Court will not serve the amended complaint.
2 Plaintiff may file a second amended complaint curing, if possible, the above noted deficiencies,
3 or show cause explaining why this matter should not be dismissed no later than **October 21,**
4 **2011.** If Plaintiff chooses to amend his complaint, he must demonstrate how the conditions
5 complained of have resulted in a deprivation of his constitutional rights. The complaint must
6 allege in specific terms how each named defendant is involved. If Plaintiff chooses to proceed
7 against Pierce County, he must allege facts showing that he was deprived of a constitutional
8 right, that the county has a policy amounting to deliberate indifference to his constitutional rights
9 and that the policy is the moving force behind the constitutional violation or violations that he is
10 claiming.
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12 The amended complaint must set forth all of Plaintiff's factual claims, causes of action,
13 and claims for relief. Plaintiff shall set forth his factual allegations **in separately numbered**
14 **paragraphs** and shall allege with specificity the following:
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- 16 (1) the names of the persons who caused or personally participated in causing the
17 alleged deprivation of his constitutional rights;
- 18 (2) the dates on which the conduct of each Defendant allegedly took place; and
- 19 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

20 An amended complaint operates as a complete substitute for (rather than a mere
21 supplement to) the present complaint. In other words, an amended complaint supersedes the
22 original in its entirety, making the original as if it never existed. Therefore, reference to a prior
23 pleading or another document is unacceptable – once Plaintiff files an amended complaint, the
24 original pleading or pleadings will no longer serve any function in this case. *See Loux v. Rhay,*
25 *375 F.2d 55, 57 (9th Cir. 1967)* (as a general rule, an amended complaint supersedes the prior
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1 complaint). Therefore, in an amended complaint, as in an original complaint, each claim and the
2 involvement of each defendant must be sufficiently alleged.

3 Plaintiff shall present his complaint on the form provided by the court. The amended
4 complaint must be **legibly rewritten or retyped in its entirety**, it should be an original and not a
5 copy, it may not incorporate any part of the original complaint by reference, and it must be
6 clearly labeled the “Amended Complaint” and must contain the same cause number as this case.
7 Plaintiff should complete all sections of the court’s form. Plaintiff may attach continuation
8 pages as needed but may not attach a separate document that purports to be his amended
9 complaint. **Plaintiff is advised that he should make a short and plain statement of claims**
10 **against the defendants. He may do so by listing his complaints in separately numbered**
11 **paragraphs. He should include facts explaining how each defendant was involved in the**
12 **denial of his rights.**

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15 The Court will screen the amended complaint to determine whether it contains factual
16 allegations linking each defendant to the alleged violations of Plaintiff's rights. The Court will
17 not authorize service of the amended complaint on any Defendant who is not specifically linked
18 to the violation of Plaintiff's rights.

19 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned
20 that if the amended complaint is not timely filed or if he fails to adequately address the issues
21 raised herein on or before **October 21, 2011**, the Court will recommend dismissal of this action
22 as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike” under 28
23 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
24 brings three or more civil actions or appeals which are dismissed on grounds they are legally
25 frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil
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1 action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious
2 physical injury.” 28 U.S.C. § 1915(g).

3 **The Clerk is directed to send Plaintiff the appropriate forms for filing a 42 U.S.C.**
4 **1983 civil rights complaint and for service. The Clerk is further directed to send a copy of**
5 **this Order and a copy of the General Order to Plaintiff.**

6 Plaintiff’s motion for extension (ECF No. 10) is **GRANTED**.

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9 **DATED** this 26th day of September, 2011.

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11 Karen L. Strombom
12 Karen L. Strombom
13 United States Magistrate Judge
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