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

Robert J. Osborn,
Plaintiff,
vs.
Sheriff Joe Arpaio,
Defendant.

No. CV 07-0394-PHX-DGC (MEA)

ORDER

Plaintiff Robert J. Osborn, who is confined in the Maricopa County Jail in Phoenix, Arizona, 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 \$4.00. 28 U.S.C. § 1915(b)(1). The statutory 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.

1 **II. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief against
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.
7 28 U.S.C. § 1915A(b)(1), (2). If the Court determines that a pleading could be cured by the
8 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint
9 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)
10 (*en banc*).

11 The Court should not, however, advise the litigant how to cure the defects. This type
12 of advice “would undermine district judges’ role as impartial decisionmakers.” Pliler v.
13 Ford, 542 U.S. 225, 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide
14 whether the court was required to inform a litigant of deficiencies). Plaintiff’s Complaint
15 will be dismissed for failure to state a claim, with leave to amend, because the Complaint
16 may possibly be saved by amendment.

17 **III. Complaint**

18 In the Complaint, Plaintiff alleges that the conditions of confinement violate his
19 constitutional rights. Specifically, Plaintiff alleges that lighting is inadequate for reading and
20 writing; the pods are extremely cold; inmates receive only one blanket; exercise and
21 recreation are limited to 20 minutes once or twice per week; the noise and population are
22 excessive; inmates are not provided with clean laundry; inmates are limited to two meals per
23 day; living conditions are unhealthy; and inmates breathe asbestos. The sole Defendant
24 named in this action is Joseph Arpaio. Plaintiff seeks compensatory damages.

25 **IV. Failure to State a Claim**

26 To sustain an action under section 1983, Plaintiff must show (1) that the conduct
27 complained of was committed by a person acting under the color of state law; and (2) that
28 the conduct deprived the plaintiff of a federal constitutional or statutory right.” Wood v.

1 Ostreander, 879 F.2d 583, 587 (9th Cir. 1989). For a person to be liable in his official
2 capacity, Plaintiff must allege that he acted as a result of a policy, practice, or custom. See
3 Cortez v. County of Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2001).

4 A supervisor, in his individual capacity, “is only liable for constitutional violations
5 of his subordinates if the supervisor participated in or directed the violations, or knew of the
6 violations and failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
7 1989). “A plaintiff must allege facts, not simply conclusions, that show that an individual
8 was personally involved in the deprivation of his civil rights.” Barren v. Harrington, 152
9 F.3d 1193, 1194 (9th Cir. 1998).

10 Plaintiff has not alleged that Defendant Arpaio enacted or enforced a policy, custom,
11 or practice which resulted in the denial of his constitutional rights. Further, Plaintiff did not
12 allege that Defendant Arpaio violated his constitutional rights, or was even aware that his
13 rights were being violated. Accordingly, Plaintiff fails to sufficiently set forth a cause of
14 action against Defendant Arpaio.

15 **V. Leave to Amend**

16 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state
17 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
18 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
19 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
20 to use the court-approved form, the Court may strike the amended complaint and dismiss this
21 action without further notice to Plaintiff.

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

26 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
27 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
28 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as

1 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
2 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
3 565, 567 (9th Cir. 1987).

4 **VI. Warnings**

5 **A. Release**

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

10 **B. Address Changes**

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

15 **C. Copies**

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

19 **D. Possible “Strike”**

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

1 **E. Possible Dismissal**

2 If Plaintiff fails to timely comply with every provision of this Order, including these
3 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
4 1260-61 (a district court may dismiss an action for failure to comply with any order of the
5 Court).

6 **IT IS ORDERED:**

7 (1) Plaintiff's Application to Proceed *In Forma Pauperis*, filed with the Complaint,
8 is **granted**.

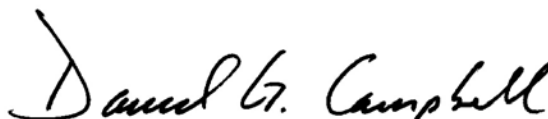
9 (2) As required by the accompanying Order to the appropriate government agency,
10 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$4.00.

11 (3) The Complaint (Doc. #1) is **dismissed** for failure to state a claim. Plaintiff has
12 **30 days** from the date this Order is filed to file a first amended complaint in compliance with
13 this Order.

14 (4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of
15 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
16 that states that the dismissal counts as a "strike" under 28 U.S.C. § 1915(g).

17 (5) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
18 rights complaint by a prisoner.

19 DATED this 27th day of February, 2007.

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David G. Campbell
24 United States District Judge