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

Gregory Nidez Valencia, Jr.,)	No. CV 07-1294-PHX-DGC (MEA)
Plaintiff,)	ORDER
vs.)	
Reyna, et al.,)	
Defendants.)	

Plaintiff Gregory Nidez Valencia, Jr. filed this civil rights action under 42 U.S.C. § 1983 against various officials of the Arizona Department of Corrections (ADC). (Amend. Comp. Doc. #15.) Defendants Correctional Lieutenant Pfeiffer, Correctional Lieutenant Reyna, and Associate Deputy Warden Neese move to dismiss on the ground that Plaintiff failed to exhaust his administrative remedies.¹ (Doc. #48.) The matter is ready for ruling. (Doc. ##51, 52.) The Court will grant the motion and dismiss the action.

I. Background

In Count I, Plaintiff alleged that over a period of a week to ten days he was subjected to a course of physical and sexual assault designed to coerce him to sign false murder confessions and to transfer funds from a trust fund that had been left to him by his father. Plaintiff contended that in violation of the Eighth Amendment and state law regarding torts

¹The Court issued an Order, required under Wyatt v. Terhune, 315 F.3d 1108, 1120 n. 14 (9th Cir. 2003), informing Plaintiff of his obligation to respond and the evidence necessary to rebut Defendants’ contentions. (Doc. #49.)

1 of assault, aggravated assault, and sexual assault Reyna, Boggs, Control Room Officer Doe,
2 Neese, Pfiefer, and Notary Doe maliciously and sadistically (1) used physical force without
3 need or provocation or (2) failed to intervene to prevent the force and sexual assaults. He
4 alleged that various Defendants used stun guns on multiple occasions and that he suffered
5 strokes. He alleged multiple rapes by different Defendants as others stood by. He asserted
6 that various Defendants had on four occasions injected him using syringes containing the
7 Hepatitis C virus and on one occasion injected him with the AIDS virus. Plaintiff
8 additionally claimed that Control Room Officer Doe, Neese, Pfiefer, and Notary Doe's
9 failure to curb Reyna's and Bogg's physical and sexual abuse constituted deliberate
10 indifference in violation of the Eighth Amendment. Plaintiff alleged that he eventually
11 signed the confession.

12 In Count II, Plaintiff alleged that Reyna, Boggs, Pfiefer, Garcia, Powell, Ridgely,
13 Kaz, and Strubbel maliciously and sadistically (1) compelled Plaintiff to sign false
14 confessions and/or make false statements or (2) failed to intervene to prevent the coercion.
15 He claimed to have been forced to make four videotaped confessions. He also asserted that
16 Reyna, Boggs, Pfiefer, Garcia, Powell, Buchella, Unklesbay, Katz, and Strubbel's
17 submission of Plaintiff's false confessions, statements, and documentation constituted the
18 "tort of false statements and/or documentation" under 18 U.S.C. § 1001. In addition, he
19 claims that Defendant Neese's failure to curb the coercion violated the Eighth Amendment.

20 In Count III, Plaintiff alleged that Reyna, Boggs, Pfiefer, and Neese violated his
21 Fourteenth Amendment due process rights by failing to process his informal grievances, by
22 compelling him to make and sign false statements, and by submitting his false statements and
23 documents. He claimed that they threatened to infect him with the AIDS virus. He also
24 asserted that Pfiefer and Neese's submission of his false confessions and statements into his
25 institutional file constituted the "tort of false statements and/or documents" under 18 U.S.C.
26 § 1001.

27 In Count IV, Plaintiff alleged that Reyna, Boggs, Pfiefer, Powell, and Garcia retaliated
28 against Plaintiff for filing grievances when they unreasonably searched and seized Plaintiff's

1 documentation of his assaults. He alleged that Defendants told him that they were not “going
2 to sit back and let you sue us.”

3 In Count V, Plaintiff alleged that Neese, Pfiefer, and Nurse Doe failed to provide
4 adequate medical care in violation of the Eighth Amendment when they failed to provide
5 “blood testing for deadly disease[s] and treatment for his anus.”

6 The Court held that liberally construed, Plaintiff stated (1) Eighth Amendment and
7 state law claims in Count I against Reyna, Boggs, Control Room Officer Doe, Pfiefer, Neese,
8 and Notary Doe; (2) Eighth Amendment claims in Count II against Reyna, Boggs, Pfiefer,
9 Garcia, Powell, Ridgely, and Neese; (3) Fourteenth Amendment due process claims in Count
10 III related to Reyna, Boggs, Pfiefer, and Neese submitting false statements and documents
11 and compelling Plaintiff to make and sign false statements; and (4) retaliation claims in
12 Count IV against Reyna, Boggs, Pfieffer, Powell, and Garcia. (Doc. #14.) The Court
13 dismissed the remaining Defendants and Count V. (Id.) But the Court noted that Plaintiff
14 had alleged that a criminal case involving the allegedly coerced confessions and statements
15 was currently ongoing and his prayer for relief included a request that his false confessions
16 and statements be precluded from his criminal proceedings. (Id., ref. Doc. #15.) His claims
17 appeared to “relate[] to rulings that will likely be made in a pending or anticipated criminal
18 trial.” Wallace v. Kato, 549 U.S. 384, 393-94 (2007). The Court concluded that if the
19 criminal case was ongoing, a stay of the civil case would be appropriate.² Id.

20 Because the Court could not determine at the time of screening pursuant to 28 U.S.C.
21 § 1915A(a) whether a dismissal, stay, or answer to the First Amended Complaint was
22 appropriate, the Court ordered that the civil action be served on Reyna, Boggs, Control Room
23 Officer John Doe, Neese, Pfiefer, Notary John Doe, Garcia, Powell, and Ridgely and gave
24 those Defendants 60 days after service of the First Amended Complaint within which to file
25

26 ² The Court also noted that if Plaintiff was ultimately convicted in that criminal case
27 and his conviction has not been reversed, expunged, or otherwise invalidated, those claims
28 in his First Amended Complaint that would imply the invalidity of his conviction would be
barred by Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). See Wallace, 549 U.S. at 393-
94. The Court further noted that an answer would be appropriate to any remaining claims.

1 a brief: (1) providing the Court with the status of any criminal case against Plaintiff related
2 to the incidents described in the First Amended Complaint, and (2) discussing the
3 applicability of Wallace based on the status of the criminal case. The Court also gave
4 Plaintiff 30 days after service of the brief to file a responsive brief.

5 On October 29, 2007, Defendants Reyna and Pfiefer filed the court-ordered Brief,
6 noting that Plaintiff had been found guilty in 1996 of charges including first-degree felony
7 murder and that no criminal charges or investigations were pending. (Doc. #27.) Defendants
8 concluded that, “[b]ecause it does not appear that there is a criminal case against Valencia
9 related to the incidents described in the First Amended Complaint, Wallace is inapplicable
10 here.” (Id.) On November 14, 2007, Plaintiff filed a Reply to the Brief (Doc. #30), stating:
11 “In being there is no criminal case against Plaintiff, he agrees also that Wallace v. Kato, 127
12 S. Ct. 1091 (2007)[,] is inapplicable here.” In light of the parties’ agreement that Wallace
13 does not apply, the Court called for an answer to the First Amended Complaint. (Doc. #35.)

14 **II. Motion to Dismiss**

15 **A. Legal Standard**

16 The PLRA provides that a prisoner may not bring a lawsuit with respect to prison
17 conditions under § 1983 unless all available administrative remedies have been exhausted.
18 See 42 U.S.C. § 1997e(a); Vaden v. Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006);
19 Brown v. Valoff, 422 F.3d 926, 934-35 (9th Cir. 2005). He must complete the administrative
20 review process in accordance with the applicable rules. See Woodford v. Ngo, 548 U.S. 81,
21 92 (2006). Exhaustion is required for all suits about prison life, Porter v. Nussle, 534 U.S.
22 516, 523 (2002), regardless of the type of relief offered through the administrative process,
23 Booth v. Churner, 532 U.S. 731, 741 (2001).

24 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 216 (2007).
25 Defendants bear the burden of raising and proving the absence of exhaustion. Wyatt, 315
26 F.3d at 1119. Because exhaustion is a matter of abatement in an unenumerated Rule 12(b)
27 motion, a court may look beyond the pleadings to decide disputed issues of fact. Id. at 1119-
28 20. Further, a court has broad discretion as to the method to be used in resolving the factual

1 dispute. Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 369 (9th
2 Cir. 1988) (quotation omitted).

3 **B. Parties' Contentions**

4 **1. Defendants**

5 In support of their motion, Defendants include an internet site to the ADC Grievance
6 Procedure (Doc. #48, Ex. A, Department Order (DO) 802); the declarations of Boggs,
7 Pfeifer, Reyna, Neese, and Garcia (id., Exs. B-F, respectively) and attachments, including
8 work assignment and attendance reports; Plaintiff's 2007 Inmate Letters (id., Ex. G); and
9 ADC Inmate Letter Responses (id., Ex. H).

10 Defendants assert that Plaintiff acknowledged in the Amended Complaint that ADC
11 had administrative remedies available to him and did not use them but alleged that
12 "Defendants Neese, Pfeiffer, Reyna, and Boggs denied [him] his rights to Due Process
13 secured under the 14th Amendment to the United States Constitution. (See Claim III.)"
14 (Doc. #48 at 3-4, ref. Doc. #15.) They note that in Count III, Plaintiff alleged the following
15 regarding his failure to exhaust his administrative remedies:

- 16 • On August 25, 2005, Neese stated that she had okayed Reyna's and Boggs conduct
17 because Plaintiff didn't respect them, and she tore up Plaintiff's inmate letter and
informal resolution addressed to Pfeifer. (Doc. # 15 at 5.)
- 18 • On August 26, 2005, Neese, Reyna, and Boggs yelled at Plaintiff for submitting a
19 second informal resolution and inmate letter addressed to Director Schriro, and Neese
tore up that letter. (Id. at 5.)
- 20 • On August 27, 2005, Pfeifer came to Plaintiff's cell, stated that Reyna, Boggs, and
21 Neese had threatened her to prevent her from processing his third informal resolution
or inmate letter addressed to Director Schriro, and she never processed the letter. (Id.
22 at 5A.)
- 23 • On September 1, 2005, Plaintiff "submitted an informal resolution after being
24 compelled to give and sign false statements and a false confession at his psychological
evaluation to CO III Pfeifer, but those went unprocessed. Realizing that his attempts
25 to resolve the ongoing events through the grievance [process] at the prison were futile,
[he] began to learn the law to address his claims through a civil suit." (Id. at 5B.)

26 Defendants further note that to explain why Plaintiff has no copies of any of the
27 inmate letters that he allegedly wrote, he alleged in Count IV that:

- 28 • On August 29, 2005, Reyna and Boggs searched Plaintiff's cell and property while
Pfeifer watched. Reyna and Boggs stated that "We're not going to sit back and let you
sue us," and then wrongfully seized the copies of his informal resolutions, inmate

1 letters and HNRs (Health Needs Request form). (Id. at 6.)

2 • On August 30, 2005, Reyna and Boggs searched his cell and property for any
3 documentation related to the alleged events, but left after they found nothing. (Id.)

4 • On August 31, 2005, Garcia and Powell searched his cell, threatened him, stated that
5 “[w]e destroyed you and there isn’t a damn thing you can do about it. Neese gave us
6 permission to,” and then left after they found nothing. (Id.)

7 • On September 2, 2005, Reyna and Boggs searched his cell and wrongfully seized
8 his documents related to his psychological evaluation. (Id. at 6-6A.)

9 Defendants argue that Plaintiff is “unequivocal” in terms of when and where these
10 alleged events took place and who was present. (Doc. #48 at 5.) But they assert that their
11 evidence shows that the events set out in the First Amended Complaint are “a work of
12 fiction.” (Id.) Boggs attests that all of Plaintiff’s allegations against him are fabricated and
13 that he was not even present at SMU II for most of the days that Plaintiff claims that Boggs
14 took some action against him. (Id., Ex. B, Boggs Decl. ¶ 7.) Specifically, Boggs attests that
15 he worked at the Phoenix Central Office as a STG Special Investigator starting on July 30,
16 2005. (Boggs Decl. ¶ 3.) He attests that does not recall going to ASPC-Eyman or SMU II
17 in his capacity as STG Special Investigator during August and September 2005. (Id. ¶ 4.)
18 The only day that Boggs was at SMU II for all of the days that Plaintiff makes allegations
19 was August 27, 2005, when Boggs was working as a security officer because of needed
20 security shift coverage. (Doc. #48 at 5, Boggs ¶¶ 5–6.) And the only contact that Boggs
21 recalls having with Plaintiff was his initial STG debriefing in July 2005. (Boggs at ¶ 8.)

22 Defendants further assert that although Plaintiff was assigned to Pfeifer’s CO III
23 caseload, she has no recollection of any particular issues or incidents related to him. (Doc.
24 #48, Ex. C, Pfeifer Decl. ¶ 6.) She attests that any contact that she may have had with
25 Plaintiff was professional and in furtherance of official duties as a CO III and that the
26 allegations against her are fabricated. (Id. ¶¶ 5-6.) Pfeifer further attests that she did not
27 even work August 27 and 29, 2005, the two days that Plaintiff alleges that she watched as
28 Reyna and Boggs searched his cell and took his copies of his inmate letters. (Id. ¶ 4.)

Likewise, Reyna and Neese attest that they have no independent recollection of
Plaintiff or any particular issues or incidents related to him and that the incidents are

1 fabricated. (Doc. #48, Ex. D, Reyna Decl. ¶ 5, Ex. E, Neese Decl. ¶ 7.) Garcia also attests
2 that the incidents are fabricated. (Id., Ex. F, Garcia Decl. ¶ 5.) Defendants assert that
3 Plaintiff's Individual Inmate Detention Records, which kept track of his daily activity for
4 the relevant time period, do not reflect that anything unusual or significant happened. (Neese
5 Decl. ¶ 8.) Furthermore, Defendants assert that on August 28, 2005 – a day that Plaintiff
6 makes allegations against Pfeifer, Garcia, Reyna, Boggs, and Powell – all of them had the
7 day off. (Pfeifer Decl. ¶ 5, Garcia Decl. ¶ 4, Reyna Decl. ¶ 4, Boggs Decl. ¶ 6, Neese Decl.
8 ¶ 6; ref. Doc. #15 at 4-4A.)

9 Defendants argue that the evidence shows that Plaintiff was not prevented from
10 exhausting his administrative remedies because his allegations are demonstrably false.
11 (Doc. #48 at 6.) They further assert that on June 26, 2007, three days before Plaintiff filed
12 his original Complaint, he submitted five inmate letters related to the above allegations
13 apparently in attempt to start the grievance process. (Id., Ex. G; ref. Doc. #1.) Defendants
14 contend that the inmate letters were returned unprocessed because Plaintiff was far out of the
15 DO 802.08 ten-day time frame to begin a grievance. (Id. at 6.) They note that Plaintiff did
16 not explain why it took him nearly two years to raise those issues and did not pursue the
17 grievance further. (Id.)

18 **2. Plaintiff**

19 In his opposition, Plaintiff argues that he cannot be expected to comply with the
20 PLRA if he is prevented from doing so as he alleged in Count III of his Amended Complaint.
21 (Doc. #51 at 1-2.) He asserts that if he was mistaken about the dates, that is all it was – a
22 mistake. (Id. at 2.) He also asserts that he was being tortured which left him
23 “psychologically devastated and traumatized” and he did his best to notify the Court of the
24 events. (Id.) He further asserts that it took him two years to learn how to file a civil
25 complaint. (Id.)

26 Plaintiff also alleges that in 2007, he again submitted inmate letters and a grievance
27 about the relevant events, which were denied or went unprocessed. (Id. at 3, ref. Doc. #38
28 pg 13-22.) Plaintiff asserts that he then submitted a grievance appeal, which was also

1 unprocessed, and a second appeal, which was unprocessed. (Id.) He argues that he signed
2 his Amended Complaint under penalty of perjury and would not have done so to deliberately
3 mislead the Court. (Id.)

4 **3. Reply**

5 In their reply, Defendants argue that nowhere in his First Amended Complaint did
6 Plaintiff acknowledge that he might be mistaken about the dates; his allegations detail dates
7 and times, and exactly who was present. (Doc. #52 at 1.) They also argue that Plaintiff does
8 not rebut Boggs' declaration that he worked in Phoenix starting on July 30, 2005, and that
9 he only worked one day during the period that Plaintiff alleged that Boggs prevented him
10 from accessing the grievance system. (Id.) They also argue that Plaintiff does not otherwise
11 contradict Defendants' declarations or explain why he waited over a year and half before he
12 submitted inmate letters to initiate the grievance process. (Id. at 2.)

13 **C. Analysis**

14 The Court has the authority to dismiss a case at any time if it appears that the action
15 is frivolous, malicious, or fails to state a claim. 28 U.S.C. § 1915(e)(2)(B)(i and ii). “[A]
16 complaint, containing as it does both factual allegations and legal conclusions, is frivolous
17 where it lacks an arguable basis either in law or in fact. . . . [T]he term ‘frivolous,’ when
18 applied to a complaint, embraces not only the inarguable legal conclusion, but also the
19 fanciful factual allegation.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). When
20 determining whether a complaint is frivolous, the court need not accept the allegations as
21 true, but must “pierce the veil of the complaint’s factual allegations,” id. at 327, to determine
22 whether they are “‘fanciful,’ ‘fantastic,’ [or] ‘delusional.’” Denton v. Hernandez, 504 U.S.
23 25, 33 (1992) (quoting Neitzke, 490 U.S. at 328). A finding of factual frivolousness is
24 appropriate when the allegations are irrational or wholly incredible. Id.

25 Here, Plaintiff alleged that on multiple occasions over a period of more than a week,
26 Defendants used stun guns, beatings, sexual assaults, and attacks with syringes containing
27 Hepatitis C and AIDS viruses all to extract a confession to murder in a pending criminal case.
28 In Defendants' brief in response to the Wallace issue, they submitted the Arizona Court of

1 Appeals Memorandum Decision, filed May 31, 2007. The Memorandum Decision outlines
2 some of the procedural history of Plaintiff's criminal case which indicates that a jury found
3 Plaintiff guilty of two counts of first-degree burglary and one count of first-degree felony
4 murder; on appeal the Court of Appeals vacated one burglary conviction but affirmed the
5 remaining convictions. (Doc. # 27, Attach. A.) In the May 2007 Decision, the court of
6 appeals stated that

7 Valencia has subsequently filed at least seven petitions for post-conviction
8 relief pursuant to Rule 32, Ariz. R. Crim. P. . . and five petitions for review,
9 including the three consolidated here. In his first petition for post-conviction
10 relief, Valencia raised numerous claims of ineffective assistance of counsel
11 and requested a new trial. On review of the trial court's summary denial of
12 relief, we granted partial relief and remanded the case to the trial court for an
13 evidentiary hearing on the claim that trial counsel had rendered ineffective
14 assistance by not moving to suppress Valencia's confession to police
15 detectives. State v. Valencia, No. 2 CA-CR 01-0157-PR. . . .

12 Following that evidentiary hearing, the trial court concluded that Valencia's
13 statements to detectives had been voluntary and that the trial judge therefore
14 would not have suppressed Valencia's statements even had counsel made such
15 a motion. Because Valencia thus could not show prejudice resulting from trial
16 counsel's performance, the trial court found Valencia had failed to present a
17 colorable claim of ineffective assistance of counsel. We upheld that ruling on
18 review. State v. Valencia, No. 2 CA-CR 2003-0270-PR (memorandum
19 decision filed Jan. 4, 2005).

16 (Id.)

17 This Court finds that the evidence presented in the briefing on the Wallace issue – that
18 Plaintiff did not, in fact, have pending criminal charges at the time of the incidents alleged
19 in his Amended Complaint, that his conviction on first-degree felony murder was from 1996,
20 that he had filed multiple petitions for post-conviction relief by 2005, and that he apparently
21 voluntarily confessed to some participation in the crimes – undermines any credible factual
22 basis for the allegations in Plaintiff's Amended Complaint. That is, there was simply no
23 reason for anyone to attempt to extract a confession from Plaintiff in 2005, much less to do
24 so in the lurid and fantastic manner alleged. The Court believes that, in its discretion, it
25 could dismiss the Amended Complaint as frivolous. See Denton, 504 U.S. at 33. But
26 because it also appears that Plaintiff did not exhaust his administrative remedies, the Court
27 will dismiss on that ground.
28

1 Defendants have met their burden to show that Plaintiff failed to exhaust his
2 administrative remedies for the claims in his Amended Complaint. They present Plaintiff's
3 Amended Complaint, in which Plaintiff acknowledged the existence of an administrative
4 procedure and that he had not pursued it as to any of the claims in the Amended Complaint.
5 Although Plaintiff claims that the procedure was not available to him because on specific
6 dates Defendants refused to process his informal resolutions, Defendants also submit
7 evidence that the various Defendants, who deny the allegations in the Amended Complaint,
8 were not even present on many of the dates alleged by Plaintiff. In response, Plaintiff merely
9 asserts, in a conclusory fashion, that he got the dates wrong. The Court also notes that
10 Plaintiff's claims regarding Defendants' alleged refusal to process grievances contain an
11 allegation of a threat to infect him with AIDS for attempting to file grievances. (Doc. #15
12 at 5-A.) Plaintiff also argues that nearly two years later, he again submitted inmate letters
13 and grievances – the first step of which was initiated on June 26, 2007, only three days
14 before Plaintiff filed his Complaint, which is dated June 29, 2007. (Doc. #48, Ex. H; Doc.
15 #1.) The Court finds that the timing of the 2007 grievances is suspect and undermines any
16 credibility regarding Plaintiff's claim that he attempted to pursue the administrative process
17 in 2005. And Plaintiff offers no persuasive reason why he did not pursue the administrative
18 process earlier.

19 Unlike motions for summary judgment, in motions to dismiss for matters in abatement,
20 such as failure to exhaust administrative remedies, a court has the authority to resolve factual
21 disputes. Ritza, 837 F.2d at 369. This authority affects the standard of review – on appeal
22 the issue is not whether there are disputed issues of material fact but whether, to the extent
23 the district court made factual determinations, its determinations were clearly erroneous. Id.
24 Reviewing the record as a whole, the Court finds that Plaintiff has failed to rebut Defendants'
25 assertion that he did not exhaust his administrative remedies. Nor has Plaintiff persuasively
26 demonstrate that he was excused from doing so. The Court will grant Defendants' Motion
27 to Dismiss and dismiss the claims against them without prejudice.

28

1 **III. Unserved Defendants**

2 To date, Boggs, Garcia, Control Room Officer John Doe, Notary John Doe, Ridgely,
3 and Powell have not been served; the summons and complaints were returned unexecuted.
4 (Doc. ##18, 19, 20, 21, 22, 23.) They are all ADC employees, and the requirement of
5 exhaustion of administrative remedies applies to the claims against them. (See Doc. #15.)
6 Because the Court has found that Defendants Pfiefer, Reyna, and Neese met their burden to
7 show that Plaintiff failed to exhaust remedies as to the claims in the Amended Complaint,
8 the Court will dismiss the remaining Defendants as well.

9 **IT IS ORDERED:**

10 (1) The reference to the Magistrate Judge is withdrawn as to Defendants' Motion
11 to Dismiss (Doc. #48).

12 (2) Defendants' Motion to Dismiss (Doc. #48) is **granted**.

13 (3) Defendants Boggs, Garcia, Control Room Officer John Doe, Notary John Doe,
14 Ridgely, and Powell are **dismissed**.

15 (4) The claims in the Amended Complaint are **dismissed without prejudice**, and
16 the action is terminated.

17 (5) The Clerk of Court must enter judgment accordingly.

18 DATED this 28th day of May, 2009.

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22 _____
23 David G. Campbell
24 United States District Judge
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