

1 WO

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

**MARVIN R. SWICHTENBERG, JR.** )

No. 08-690-PHX-ROS

10

Plaintiff, )

**ORDER**

11

vs. )

12

**ARIZONA DEPARTMENT OF )  
CORRECTIONS**, an entity of the State of )  
Arizona; **DR. DORA SCHIRO**, )  
Director of the Arizona Department of )  
Corrections; **STATE OF ARIZONA**; and )  
**TERRY GODDARD**, Arizona Attorney )  
General, )

16

Defendant. )

17

18

19

Pending before the Court is State Defendants’ Motion to Dismiss (Doc. 12). For the foregoing reasons, State Defendants’ Motion is granted as to the State of Arizona, Arizona Department of Corrections, and Terry Goddard. State Defendants’ Motion is granted as to Dr. Dora Schriro. Plaintiff has leave to amend his complaint as regards Defendant Schriro.

23

**BACKGROUND**

24

Marvin R. Swichtenberg, Jr. (“Plaintiff”) was incarcerated by the Arizona Department of Corrections (“ADOC”) in 1995 when he began serving a fifteen-year sentence which allowed Plaintiff to obtain earned release credits (Compl., Doc. 1 at ¶ 10). In September 2000, ADOC first computed Plaintiff’s release date as January 2007, then recalculated the

25

26

27

28

1 release date as March 2010 (Id. at ¶12). Plaintiff calculated the release date as August 2006  
2 (Id.). Seeking to resolve the discrepancy, Plaintiff filed a Motion for Clarification of  
3 Sentence in the Maricopa County Superior Court in 2005 (Id. at ¶ 13). This Motion was  
4 denied for failing to give notice and because ADOC, not the court, was the appropriate entity  
5 to recalculate the sentence (Id. at ¶ 15).

6 Plaintiff then requested a recalculation of his sentence from several unnamed ADOC  
7 officials, but each request was met with an instruction to pursue the recalculation with a  
8 different ADOC official or division (Id. at ¶ 17). Finally, a “Correctional Officer IV” denied  
9 Plaintiff’s request for recalculation (Id. at ¶ 18). Following denial, Plaintiff requested an  
10 audit of his sentencing records from ADOC’s Time Computation Unit, but ADOC never  
11 responded to this request (Id. at ¶ 19).

12 Plaintiff then filed a Petition for Special Action in the Maricopa County Superior  
13 Court on June 29, 2007, naming Dr. Dora Schriro, Director of ADOC (“Schriro”), as  
14 Defendant (Id. at ¶ 20). At the proceeding, the Arizona Attorney General’s Office,  
15 representing the State of Arizona (“State”), did not object to Plaintiff’s immediate release and  
16 Plaintiff was released from incarceration on September 28, 2007 (Id.).

17 On July 9, 2008, Plaintiff filed a two-count Complaint with the Court alleging civil  
18 rights violations under the Eighth and Fourteenth Amendments to the United States  
19 Constitution against ADOC, Schriro, the State and Terry Goddard, Arizona Attorney General  
20 (“Goddard”) (collectively, “State Defendants”) (Id. at ¶¶ 2-4). Plaintiff alleges State  
21 Defendants are liable for compensatory damages under 42 U.S.C. § 1983 (“§ 1983”), which  
22 allows claimants to bring a cause of action against state officials for civil rights violations.<sup>1</sup>  
23 Plaintiff alleges his Eighth Amendment rights against cruel and unusual punishment were  
24

---

25 <sup>1</sup>“Every person who, under color of any statute, ordinance, regulation, custom, or  
26 usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States  
27 . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and  
28 laws, shall be liable to the party injured in an action at law, suit in equity, or other proper  
proceeding for redress.” 42 U.S.C. § 1983 (2006).

1 violated when ADOC officials incarcerated Plaintiff past his correct release date (“Count  
2 One”) (Id. at ¶¶ 25-26). Further, Plaintiff alleges State Defendants violated his Fourteenth  
3 Amendment right to due process when they failed to provide a process for handling  
4 recalculation requests from inmates (“Count Two”) (Id. at ¶¶ 29-31).

## 5 **DISCUSSION**

### 6 **I. Legal Standard**

7 A court may dismiss a complaint when it “fails to state a claim for which relief may  
8 be granted.” Fed. R. Civ. P. 12(b)(6). However, a court may not dismiss a complaint “unless  
9 it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims  
10 which would entitle him to relief.” Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994).  
11 When evaluating a motion to dismiss, “allegations of material fact are taken in the light most  
12 favorable to the nonmoving party.” Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996).  
13 “However, conclusory allegations of law and unwarranted inferences are not sufficient to  
14 defeat a motion to dismiss.” Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). The Court  
15 may dismiss a complaint for “lack of a cognizable legal theory or the absence of sufficient  
16 facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dep’t, 901 F.2d  
17 696, 699 (9th Cir. 1990).

### 18 **II. State Defendants’ Motion to Dismiss**

#### 19 **A. Dismissal of Claims Against State, ADOC, and Goddard**

20 Plaintiff concedes that the claims against the State, ADOC, and Goddard should be  
21 dismissed (Pl.’s Resp. to Def’s Mot. Dismiss (“Resp.”), Doc. 13 at 4). Accordingly, the  
22 claims against the State, ADOC and Goddard are dismissed with prejudice.  
23

#### 24 **B. Dismissal of Claims Against Dr. Dora Schriro**

25 Remaining before the Court are Counts One and Two against Schriro who Plaintiff  
26 alleges violated his Eighth and Fourteenth Amendment rights. Plaintiff first pleaded that  
27 Schriro acted in her official capacity (Compl., Doc. 1 at ¶ 4). Plaintiff then changed course  
28

1 and now appears to allege Schriro acted in her personal capacity (Resp., Doc. 13 at 7).  
2 Section 1983 claims for monetary damages against state officers acting in their official  
3 capacity are barred on Eleventh Amendment immunity grounds because they are considered  
4 claims against the state. Will v. Mich. Dep't of State Police, 491 U.S. 58, 66-67 (1989).  
5 Claims for monetary damages against state officials in their *personal* capacity, however, can  
6 proceed. Kentucky v. Graham, 476 U.S. 159, 166-67 (1985). Even if Plaintiff correctly pled  
7 alleging Schriro acted in her *personal* capacity to violate his civil rights, such claim would  
8 not overcome State Defendants' Motion to Dismiss based on the facts alleged.

9 To prove a claim under § 1983, Plaintiff “must demonstrate that (1) the action  
10 occurred ‘under color of state law’ and (2) the action resulted in the deprivation of a  
11 constitutional right or federal statutory right.” Jones v. Williams, 297 F.3d 930, 934 (9th Cir.  
12 2002). Vicarious liability is not imposed under § 1983. E.g., Taylor v. List, 880 F.2d 1040,  
13 1045 (9th Cir. 1989). However,

14 [s]upervisors can be held liable for: 1) their own culpable action  
15 or inaction in the training, supervision, or control of  
16 subordinates; 2) their acquiescence in the constitutional  
deprivation of which a complaint is made; or 3) for conduct that  
showed a reckless or callous indifference to the rights of others.

17 Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000). See also, Taylor, 880 F.2d at  
18 1045 (imposing § 1983 liability on a supervisor only “if the supervisor participated in or  
19 directed the violations, or knew of the violations and failed to act to prevent them”); Tripathi  
20 v. State, 16 P.3d 783, 787 (Ariz. Ct. App. 2000) (for a § 1983 claim against the director of  
21 ADOC to be viable, a plaintiff “must allege personal participation by [defendant;] . . . the  
22 allegation that [defendant] is responsible for ADOC operations is insufficient, by itself, to  
23 support a § 1983 claim”).

24 Plaintiff alleges that because Schriro, as Director of ADOC, is “responsible for the  
25 overall operations and policies of the [ADOC],” A.R.S. § 41-1604(A)(1), she “should have  
26 known that by failing to provide a mechanism for reviewing release eligibility  
27 determinations, errors may go uncorrected and individuals may be incarcerated  
28 unconstitutionally,” (Resp., Doc. 13 at 6). However, Plaintiff offers no facts to support this

1 assertion, relying instead on Schriro's mere status as the Director of ADOC to state a claim  
2 against her. "Conclusory allegations of law," Pareto, 139 F.3d at 699, stemming from  
3 Schriro's status as Director of ADOC are insufficient to support a § 1983 claim.

4 Further, Plaintiff asserts that no system was in place for ADOC officials to respond  
5 to inmate's sentence recalculation requests. Without more facts, it appears a process did exist  
6 for Plaintiff to pursue the recalculation of his sentence by ADOC, even if such process was  
7 flawed and did not provide Plaintiff with a timely remedy. Moreover, Plaintiff obtained  
8 release from incarceration by pursuing a Special Action in Maricopa County Superior Court.  
9 These facts demonstrate there was a process in place; as such, Plaintiff failed to demonstrate  
10 that no process existed. Plaintiff fails to state a sufficient claim against Schriro on both  
11 Counts and as a result, the Court dismisses Plaintiff's complaint without prejudice and with  
12 leave to amend.

### 13 **C. Statute of Limitations**

14 State Defendants first asserted the statute of limitations ran on Plaintiff's claim in its  
15 Reply to Plaintiff's Response ("Reply") (Doc. 14). The Court does not have to grant  
16 dismissal on the basis of arguments first raised in the Reply. See, U.S. ex rel. Giles v. Sardie,  
17 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000) ("[i]t is improper for a moving party to  
18 introduce new facts or different legal arguments in the reply brief than those presented in the  
19 moving papers") (relying on Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 894-95 (1990)).

20 Even if it was proper for the Court to consider the issue, a statute of limitations  
21 defense may be considered at the motion to dismiss stage only "[i]f the running of the statute  
22 is apparent on the face of the complaint." Jablon v. Dean Witter & Co., 614 F.2d 677, 682  
23 (9th Cir. 1980). Then, a motion can be granted "only if the assertions of the complaint, read  
24 with the required liberality, would not permit the plaintiff to prove that the statute was  
25 tolled." Id. State law dictates the statute of limitations period and whether claims can be  
26 tolled. E.g., Cabrera v. City of Huntington Park, 159 F.3d 374, 379 (9th Cir. 1998).

1 Federal law determines when a claim accrues, which is when a plaintiff “knows or has  
2 reason to know of the injury which is the basis of the action.” Id. However, claims “for  
3 allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions  
4 whose unlawfulness would render a conviction or sentence invalid [are barred unless plaintiff  
5 first proves] that the conviction or sentence has been reversed on direct appeal.” Id. at 380  
6 (citing Heck v. Humphrey, 512 U.S. 477, 486-87 (1994)).

7 Given the complexity of the statute of limitations analysis, the facts provided by the  
8 parties are insufficient to determine when Plaintiff’s claims accrued and whether the statute  
9 of limitations bars Plaintiff’s claims. Further, because such analysis is not needed to render  
10 a dismissal in this case the Court withholds any decision on the statute of limitations issue.

#### 11 **D. Leave to Amend Complaint**

12 A plaintiff may amend the complaint once “before being served with a responsive  
13 pleading.” Fed. R. Civ. P. 15(a) (“Rule 15”). Also, a court may allow a plaintiff to amend  
14 the complaint “when justice so requires.” Id. Rule 15 favors a policy allowing amendments,  
15 and the Ninth Circuit has “applied this policy with liberality . . . [unless an] amendment of  
16 the complaint would cause the opposing party undue prejudice, is sought in bad faith,  
17 constitutes an exercise in futility, or creates undue delay.” Ascon Prop.’s, Inc. v. Mobil Oil  
18 Co., 866 F.2d 1149, 1160 (9th Cir. 1989).

19 State Defendants have not answered Plaintiff’s complaint, and Plaintiff has not yet  
20 amended the complaint (Resp., Doc. 13 at 9). Additionally, the facts do not demonstrate that  
21 amending the complaint would be an “exercise in futility” or give the Court any reason to  
22 limit the applicability of Rule 15 to the dispute between the parties.

23 Accordingly,

24  
25 Counts One and Two as pertaining to the State of Arizona, Arizona Department of  
26 Corrections and Terry Goddard are **DISMISSED** with prejudice.  
27  
28

1           Counts One and Two as pertaining to Dr. Dora Schriro are **DISMISSED** without  
2 prejudice with **LEAVE TO AMEND** the complaint within thirty days of the date of this  
3 Order. Failure to do so will result in the dismissal of the case in it's entirety.

4  
5 DATED this 27th day of March, 2009.

6  
7   
8 Roslyn O. Silver  
United States District Judge

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28