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

Doyle Raybourn Emery,)	No. CV 09-1337-PHX-MHM (ECV)
Plaintiff,)	ORDER
vs.)	
Correctional Health Services,)	
Defendant.)	

Plaintiff Doyle Raybourn Emery, who is confined in the Maricopa County Lower Buckeye Jail, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. On July 8, 2009, the Court granted Plaintiff *in forma pauperis* status and dismissed the Complaint with leave to amend. On August 5, 2009, Plaintiff filed an Amended Complaint. The Court will dismiss the Amended Complaint with leave to amend.

I. Statutory Screening of Prisoner Complaints

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

A pleading must contain a “short and plain statement of the claim *showing* that the

1 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
2 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
3 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
4 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
5 statements, do not suffice.” Id.

6 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
7 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
8 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
9 that allows the court to draw the reasonable inference that the defendant is liable for the
10 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
11 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
12 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
13 allegations may be consistent with a constitutional claim, a court must assess whether there
14 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

15 If the Court determines that a pleading could be cured by the allegation of other facts,
16 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
17 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
18 should not, however, advise the litigant how to cure the defects. This type of advice “would
19 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,
20 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
21 required to inform a litigant of deficiencies). Plaintiff’s Amended Complaint will be
22 dismissed for failure to state a claim, with leave to amend because the Amended Complaint
23 may possibly be saved by further amendment.

24 **II. Amended Complaint**

25 Plaintiff sues: Maricopa County Sheriff Joseph Arpaio; Maricopa County Supervisors
26 Fulton Brock, Don Stapely, Andrew Kunasek, Max Wilson, and Mary Rose Wilcox; Doctors
27 Grogorio and Charles; and Sergeant Roberts.

28 Plaintiff raises nine claims for relief:

- 1 (1) Plaintiff's Eighth Amendment rights were violated when Defendants Grogorio
2 and Charles failed to provide him with adequate medical treatment for a
3 "closed head injury";
- 4 (2) Plaintiff's Fourteenth Amendment rights were violated by Defendants' failure
5 to provide adequate medical care;
- 6 (3) Plaintiff rights under article 2, section 3 of the Arizona Constitution were
7 violated by Defendants' failure to provide medical care;
- 8 (4) Plaintiff's Fourteenth Amendment rights were violated by Defendants' failure
9 to provide adequate medical care;
- 10 (5) Plaintiff's rights under article 2, section 15 of the Arizona Constitution were
11 violated by Defendants' failure to provide adequate medical care;
- 12 (6) Plaintiff's rights under article 2, section 32 of the Arizona Constitution were
13 violated by Defendants' failure to provide adequate medical care;
- 14 (7) Plaintiff's Fifth Amendment rights were violated when Defendant Roberts
15 transferred him to disciplinary segregation, which aggravated Plaintiff's
16 mental illness;
- 17 (8) Plaintiff's Fourteenth Amendment rights were violated when Defendant
18 Roberts transferred him to disciplinary segregation, which aggravated
19 Plaintiff's mental illness; and
- 20 (9) Defendant Charles failed to provide Plaintiff with adequate treatment for
21 Plaintiff's mental illness.

22 Plaintiff seeks declaratory and injunctive relief and money damages.

23 **III. Failure to State a Claim**

24 **A. Joe Arpaio and Maricopa County Board of Supervisors**

25 To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific
26 injury as a result of specific conduct of a defendant and show an affirmative link between the
27 injury and the conduct of that defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).
28 To state a claim against a supervisory official, the civil rights complainant must allege that

1 the official personally participated in the constitutional deprivation or that a supervisory
2 official was aware of widespread abuses and with deliberate indifference to the inmate's
3 constitutional rights, failed to take action to prevent further misconduct. King v. Atiyeh, 814
4 F.2d 565, 568 (9th Cir. 1987); see Monell v. New York City Department of Social Services,
5 436 U.S. 658, 691 (1978). There is no *respondeat superior* liability under § 1983, and
6 therefore, a defendant's position as the supervisor of persons who allegedly violated
7 Plaintiff's constitutional rights does not impose liability. Monell, 436 U.S. 658; Hamilton
8 v. Endell, 981 F.2d 1062, 1067 (9th Cir. 1992); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
9 1989).

10 Plaintiff does not allege that Defendant Arpaio personally participated in the
11 deprivation of Plaintiff's constitutional rights, was aware of such deprivation and failed to
12 act, or that Defendant Arpaio formed policies that resulted in Plaintiff's injuries. Similarly,
13 the Board of Supervisors cannot be held liable for the actions of the Sheriff or his deputies
14 on a theory of *respondeat superior* liability. See Thompson v. City of Los Angeles, 885 F.2d
15 1439, 1443 (9th Cir. 1989). Accordingly, Plaintiff has failed to state a claim against
16 Defendants Arpaio and the Maricopa County Board of Supervisors.

17 **B. State Law Claims—Counts III, V, and VI**

18 Section 1983 provides a cause of action against persons acting under color of state
19 law who have violated rights guaranteed by the United States Constitution and federal law.
20 42 U.S.C. § 1983; see also Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995).
21 Section 1983 does not provide a cause of action for violations of state law or state
22 constitutional rights. Ybarra v. Bastian, 647 F.2d 891, 892 (9th Cir. 1981). Accordingly,
23 Plaintiff's state law allegations fail to state a claim for relief under § 1983.

24 **C. Medical Claims –Counts I, II, IV, and IX**

25 A pretrial detainee's claim for unconstitutional conditions of confinement arises from
26 the Fourteenth Amendment Due Process Clause rather than from the Eighth Amendment
27 prohibition against cruel and unusual punishment. Bell v. Wolfish, 441 U.S. 520, 535
28 (1979). Nevertheless, the same standards are applied, requiring proof that the defendant

1 acted with deliberate indifference. See Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

2 To maintain a claim under the Eighth Amendment based on prison medical treatment,
3 a prisoner must show deliberate indifference to serious medical needs. Estelle v. Gamble,
4 429 U.S. 97, 104 (1976). To act with deliberate indifference, a prison official must both
5 know of and disregard an excessive risk to inmate health. Farmer v. Brennan, 511 U.S. 825,
6 837 (1994). The official must both be aware of facts from which the inference could be
7 drawn that a substantial risk of serious harm exists and he must also draw the inference. Id.
8 This subjective approach focuses upon the mental attitude of the defendant. Id. at 839.

9 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
10 1060 (9th Cir. 2004). In the medical context, deliberate indifference may be shown by (1) a
11 purposeful act or failure to respond to a prisoner’s pain or possible medical need and
12 (2) harm caused by the indifference. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
13 (citing Estelle, 429 U.S. at 104).

14 Medical malpractice or negligence is insufficient to establish a violation. Toguchi,
15 391 F.3d at 1060. Thus, mere negligence in diagnosing or treating a condition does not
16 violate the Eighth Amendment. Toguchi, 391 F.3d at 1057. Also, an inadvertent failure to
17 provide adequate medical care alone does not rise to the Eighth Amendment level. Jett, 429
18 F.3d at 1096. A difference in medical opinion also does not amount to deliberate
19 indifference. Toguchi, 391 F.3d at 1058. To prevail on a claim involving choices between
20 alternative courses of treatment, a prisoner must show that the chosen course was medically
21 unacceptable under the circumstances and was chosen in conscious disregard of an excessive
22 risk to the prisoner’s health. Id.

23 Plaintiff’s allegations are insufficient to state a claim for inadequate medical treatment
24 under the Eighth and Fourteenth Amendments. Plaintiff alleges that for three months after
25 Plaintiff was booked in the Jail, Defendant Grogorio failed to obtain Plaintiff’s medical
26 records relating to a head injury Plaintiff received outside of prison. Plaintiff then alleges
27 that after the records were received, Defendants Grogorio and Charles failed to adequately
28 recognize and treat Plaintiff’s condition. Plaintiff’s allegations suggest that Defendants

1 Grogorio and Charles may have been negligent in diagnosing or treating Plaintiff's
2 conditions, but they do not demonstrate that Defendants were aware of a serious risk to
3 Plaintiff's health and failed to act.

4 Similarly, with respect to Plaintiff's mental illness claims, Plaintiff has again failed
5 to show that Defendant Charles was deliberately indifferent to his serious medical needs.
6 Plaintiff alleges that Defendant Charles ordered medication for him but that the medication
7 was not consistently administered. Plaintiff has not alleged facts showing that Defendant
8 Charles was responsible for the administration of medication or that the inconsistent
9 administration was the result of deliberate indifference.

10 **D. Disciplinary Claims—Counts VII and VIII**

11 In Count VII and VIII, Plaintiff claims that Defendant Roberts moved him to
12 disciplinary segregation without due process. Plaintiff claims that the conditions in
13 segregation aggravated his mental illness. “[A] detainee may not be punished prior to an
14 adjudication of guilt in accordance with due process of law.” Bell v. Wolfish, 441 U.S. 520,
15 535 (1979). “There is, of course, a de minimis level of imposition with which the
16 Constitution is not concerned.” Bell, 441 U.S. at 539 n. 21 (quoting Ingraham v. Wright,
17 430 U.S. 651, 674 (1977)). No unconstitutional punishment occurs when the government
18 imposes restrictions as part of legitimate operational concerns to ensure security and order.
19 Bell, 441 U.S. at 540. Imposition of punishment for violating rules, however, requires the
20 procedural protections described by the Supreme Court in Wolff v. McDonnell, 418 U.S.
21 539, 565-66 (1974). Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996).

22 Plaintiff's claims in Count VII and VIII are vague and conclusory. Iqbal, 129 S. Ct.
23 at 1949 (“Threadbare recitals of the elements of a cause of action, supported by mere
24 conclusory statements, do not suffice.”). Plaintiff alleges that Defendant Roberts “made up
25 his own rules outside the scope of MCSO policies . . . purposefully punished Plaintiff and
26 abridged [Plaintiff's] rights.” Plaintiff does not describe whether he was placed in
27 segregation for the violation of rules or if he was transferred as part of operational concerns
28 to ensure security and order. Plaintiff states that he was “experiencing symptoms of active

1 schizo[phrenia] disorder” and it appears that Plaintiff may have been transferred for security
2 reasons. Moreover, Plaintiff does not describe how he was deprived of due process. Plaintiff
3 has failed to state a claim in Counts VII and VIII.

4 **IV. Leave to Amend**

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

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

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

22 A second amended complaint supersedes the original complaint and first amended
23 complaint. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v.
24 Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will
25 treat an original complaint and first amended complaint as nonexistent. Ferdik, 963 F.2d at
26 1262. Any cause of action that was raised in the original complaint or first amended
27 complaint is waived if it is not raised in a second amended complaint. King v. Atiyeh, 814
28 F.2d 565, 567 (9th Cir. 1987).

1 **V. Warnings**

2 **A. Release**

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

7 **B. Address Changes**

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

12 **C. Copies**

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

16 **D. Possible “Strike”**

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

26 **E. Possible Dismissal**

27 If Plaintiff fails to timely comply with every provision of this Order, including these
28 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at

1 1260-61 (a district court may dismiss an action for failure to comply with any order of the
2 Court).

3 **IT IS ORDERED:**

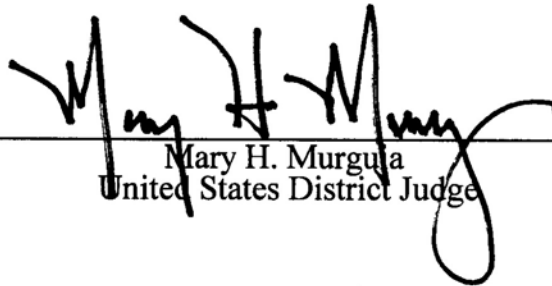
4 (1) The Amended Complaint (Doc. #6) is **dismissed** for failure to state a claim.
5 Plaintiff has **30 days** from the date this Order is filed to file a second amended complaint in
6 compliance with this Order.

7 (2) If Plaintiff fails to file a second amended complaint within 30 days, the Clerk
8 of Court must, without further notice, enter a judgment of dismissal of this action with
9 prejudice that states that the dismissal counts as a “strike” under 28 U.S.C. § 1915(g).

10 (3) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
11 rights complaint by a prisoner.

12 DATED this 2nd day of October, 2009.

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Mary H. Murgula
United States District Judge