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

Shane Anthony Moulton,)	No. CV 10-322-PHX-RCB (DKD)
Plaintiff,)	ORDER
vs.)	
Officer Bossert, et al.,)	
Defendants.)	

Plaintiff Shane Anthony Moulton, who is confined in the Maricopa County Lower Buckeye Jail, has filed a *pro se* civil rights Complaint 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 \$39.95. The remainder of the 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.

II. 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.

1 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
2 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
3 be granted, or that seek monetary relief from a defendant who is immune from such relief.
4 28 U.S.C. § 1915A(b)(1), (2).

5 A pleading must contain a “short and plain statement of the claim *showing* that the
6 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
7 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
8 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
9 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
10 statements, do not suffice.” Id.

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

20 If the Court determines that a pleading could be cured by the allegation of other facts,
21 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
22 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
23 should not, however, advise the litigant how to cure the defects. This type of advice “would
24 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,
25 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
26 required to inform a litigant of deficiencies). Plaintiff’s Complaint will be dismissed for
27 failure to state a claim, with leave to amend because the Complaint may possibly be saved
28 by amendment.

1 **III. Complaint**

2 Plaintiff names Maricopa County Detention Officer Bossert as Defendant to the
3 Complaint. Plaintiff's sole ground for relief is that Defendant Bossert violated Plaintiff's
4 Eighth Amendment rights when he slammed the trap door of Plaintiff's cell down on
5 Plaintiff's fingers. Plaintiff seeks money damages.

6 **IV. Failure to Allege a Jurisdictional Basis**

7 Federal courts have limited jurisdiction, and limitations on the court's jurisdiction
8 must neither be disregarded nor evaded. Owen Equip. & Erection Co. v. Kroger, 437 U.S.
9 365, 374 (1978). The Court is obligated to determine *sua sponte* whether it has subject
10 matter jurisdiction. See Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1116 (9th Cir. 2004).
11 See also Fed. R. Civ. P. 12(h)(3) (If the court determines at any time that it lacks subject-
12 matter jurisdiction, the court must dismiss the action.”).

13 Rule 8(a) of the Federal Rules of Civil Procedure requires that “[a] pleading that states
14 a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s
15 jurisdiction” In order to proceed in federal court, Plaintiff must demonstrate some right
16 of action and legal entitlement to the damages he seeks. In a case challenging his conditions
17 of confinement while a state prisoner, Plaintiff’s most likely source of a right to sue is **42**
18 **U.S.C. § 1983**. The Court has jurisdiction over such cases pursuant to **28 U.S.C. § 1343(a)**.

19 Plaintiff has not alleged that this case arises pursuant to § 1983 or that the Court has
20 jurisdiction pursuant to 28 U.S.C. § 1343(a). See Watson v. Chessman, 362 F. Supp. 2d
21 1190, 1194 (S.D. Cal. 2005) (“The court will not . . . infer allegations supporting federal
22 jurisdiction; federal subject matter [jurisdiction] must always be affirmatively alleged.”).
23 Therefore, the Court will dismiss Plaintiff’s Complaint without prejudice.

24 **V. Leave to Amend**

25 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state
26 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
27 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
28 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails

1 to use the court-approved form, the Court may strike the amended complaint and dismiss this
2 action without further notice to Plaintiff.

3 Plaintiff should note that the Fourteenth Amendment Due Process clause protects
4 pretrial detainees from excessive force that amounts to punishment. Gibson v. County of
5 Washoe, 290 F.3d 1175, 1197 (9th Cir. 2002). “[T]he Fourth Amendment sets ‘the
6 applicable constitutional limitations’ for considering claims of excessive force during pretrial
7 detention.” Id. (quoting Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996)).

8 The Fourth Amendment does not prohibit the use of reasonable force. Tatum v. City
9 and County of San Francisco, 441 F.3d 1090, 1095 (9th Cir. 2006). Whether the force was
10 excessive depends on “whether the officers’ actions [were] ‘objectively reasonable’ in light
11 of the facts and circumstances confronting them, without regard to their underlying intent or
12 motivation.” Graham v. Connor, 490 U.S. 386, 397 (1989). See also Tatum, 441 F.3d at
13 1095; Lolli v. County of Orange, 351 F.3d 410, 415 (9th Cir. 2003). The Court must balance
14 the nature and quality of the intrusion against the countervailing governmental interests.
15 Lolli, 351 F.3d at 415. Moreover,

16 [t]he “reasonableness” of a particular use of force must be
17 judged from the perspective of a reasonable officer on the scene,
18 rather than with the 20/20 vision of hindsight. . . . “Not every
19 push or shove, even if it may later seem unnecessary in the
20 peace of a judge’s chambers,” violates the Fourth Amendment.
21 The calculus of reasonableness must embody allowance for the
22 fact that police officers are often forced to make split-second
23 judgments-in circumstances that are tense, uncertain, and rapidly
24 evolving-about the amount of force that is necessary in a
25 particular situation.

26 Graham, 490 U.S. at 396-97 (citation omitted).

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

A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,

1 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
2 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
3 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
4 565, 567 (9th Cir. 1987).

5 **VI. Warnings**

6 **A. Release**

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

11 **B. Address Changes**

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

16 **C. Copies**

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

20 **D. Possible “Strike”**

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

1 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

2 **E. Possible Dismissal**

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

7 **IT IS ORDERED:**

8 (1) Plaintiff’s Application to Proceed *In Forma Pauperis* (Doc. #3) 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 \$39.95.

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 may count 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
18 civil rights complaint by a prisoner.

19 Dated this 9th day of March , 2010 .

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22 _____
23 Robert C. Broomfield
24 Senior United States District Judge
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