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

Bryan William Purvis,
Plaintiff,

vs.

Joseph M. Arpaio, et al.,
Defendants.

) No. CV 12-004-PHX-JAT (MEA)

) **ORDER**

On January 3, 2012, Plaintiff Bryan William Purvis, who is confined in the Arizona State Prison Complex-Yuma, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. In a February 21, 2012 Order, the Court granted the Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On May 7, 2012, Plaintiff filed his First Amended Complaint. In a June 22, 2012 Order, the Court dismissed the First Amended Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file a second amended complaint that cured the deficiencies identified in the Order.

On July 25, 2012, Plaintiff filed a Motion for Extension of Time to file a second amended complaint. On July 31, 2012, Plaintiff filed a Second Amended Complaint

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1 (Doc. 15). The Court will grant the Motion for Extension of Time and will accept the Second
2 Amended Complaint as timely filed. The Court will order Defendants Bello, A7681, and
3 A8444 to answer the Second Amended Complaint and will dismiss the remaining Defendants
4 without prejudice.

5 **I. Statutory Screening of Prisoner Complaints**

6 The Court is required to screen complaints brought by prisoners seeking relief against
7 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
8 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
9 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
10 be granted, or that seek monetary relief from a defendant who is immune from such relief.
11 28 U.S.C. § 1915A(b)(1), (2).

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

18 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
19 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
20 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
21 that allows the court to draw the reasonable inference that the defendant is liable for the
22 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
23 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
24 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
25 allegations may be consistent with a constitutional claim, a court must assess whether there
26 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

27 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
28 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th

1 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
2 than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89,
3 94 (2007) (*per curiam*)).

4 **II. Second Amended Complaint**

5 In his one-count Second Amended Complaint, Plaintiff sues the following Maricopa
6 County Detention Officers: Sergeants A7681, A8444, and Scott; Lieutenant W.S.
7 Whitcombe; and Officer Bello.

8 Plaintiff claims that while housed at the Maricopa County Jail, the conditions of his
9 confinement violated his Eighth Amendment rights. Specifically, Plaintiff claims that he:
10 was housed in an unsanitary cell where feces and urine were on the floor and walls; was not
11 provided daily outdoor recreation; did not receive daily showers; and did not have regular
12 access to cleaning supplies. Plaintiff alleges that as a result of the unsanitary conditions, he
13 contracted a “fungus type rash on [his] body along with severe psychological damage.”

14 Plaintiff claims that after being escorted to the unsanitary cell, he attempted to refuse
15 the cell, but that he was “shut down” by the detention officer who demanded that Plaintiff
16 step into the cell and then closed the door behind Plaintiff.

17 Plaintiff alleges that he later attracted the attention of Defendant Bello, showed the
18 unsanitary conditions to Defendant Bello, and requested that his cell be cleaned or that he be
19 moved to another cell. Plaintiff claims that Defendant Bello “failed to take the necessary
20 steps . . . to deliver [his] verbal legitimate complaint to a fellow officer or superior officer
21 who is able to remedy the situation.”

22 With respect to Defendant A7681, Plaintiff claims that he informed him of the
23 conditions in his cell and requested a cell change. Plaintiff alleges that Defendant A7681
24 ignored his complaint. Plaintiff claims that he waited two days for cleaning supplies and that
25 when the time came for his “hour out,” the cleaning supplies were not available.

26 Plaintiff further claims that he complained to Defendant A8444 about the unsanitary
27 conditions of his cell, the lack of daily showers, and the fact that he did not receive one hour
28 of recreation four days per week. Plaintiff claims that Defendant A8444 did nothing.

1 With respect to Defendant Scott, Plaintiff alleges that he brought his complaint to
2 Defendant Scott who told Plaintiff that he would “tell the officer who worked the house to
3 give [Plaintiff] chemicals and gloves to clean the cell, followed by a shower.” Plaintiff
4 claims that Defendant Scott made no comment about Plaintiff’s other issues and that Plaintiff
5 was not provided with cleaning supplies.

6 Finally, Plaintiff claims that Defendant Bello explained Plaintiff’s ongoing problems
7 to Defendant Whitcombe and that Defendant Whitcombe simply told Plaintiff, through
8 Defendant Bello, to take the matter up with a grievance officer.

9 Plaintiff seeks injunctive relief and money damages.

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

11 **A. Daily Showers and Outdoor Recreation**

12 A pretrial detainee’s claim for unconstitutional conditions of confinement arises from
13 the Fourteenth Amendment Due Process Clause rather than from the Eighth Amendment
14 prohibition against cruel and unusual punishment. Bell v. Wolfish, 441 U.S. 520, 535 and
15 n.16 (1979). Nevertheless, the same standards are applied, requiring proof that the defendant
16 acted with deliberate indifference. See Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

17 Deliberate indifference is a higher standard than negligence or lack of ordinary due
18 care for the prisoner’s safety. Farmer v. Brennan, 511 U.S. 825, 835 (1994). To state a claim
19 of deliberate indifference, plaintiffs must meet a two-part test. First, the alleged
20 constitutional deprivation must be, objectively, “sufficiently serious”; the official’s act or
21 omission must result in the denial of “the minimal civilized measure of life’s necessities.”
22 Id. at 834. Second, the prison official must have a “sufficiently culpable state of mind,” *i.e.*,
23 he must act with deliberate indifference to inmate health or safety. Id. In defining
24 “deliberate indifference” in this context, the Supreme Court has imposed a subjective test:
25 “the official must both be aware of facts from which the inference could be drawn that a
26 substantial risk of serious harm exists, and he must also draw the inference.” Id. at 837
27 (emphasis added).

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1 Plaintiff has not demonstrated that the denial of daily showers was sufficiently serious
2 to rise to the level of a constitutional violation. See Davenport v. Derobertis, 844 F. 2d 1310,
3 1316 (7th Cir. 1988) (finding three showers per week did not violate an inmate’s
4 constitutional right and noting “the importance of the daily shower to the average American
5 is cultural rather than hygienic.”).

6 Similarly, Plaintiff has failed to allege facts showing that the denial of outdoor
7 recreation in his case rises to the level of a constitutional violation. Although Plaintiff has
8 a right to outdoor recreation, he does not allege that he was denied all outdoor recreation; he
9 claims only that he was denied a recreation schedule of one hour per day, four days per week.
10 Because Plaintiff has not described whether he received any outdoor recreation, and if so,
11 how much, he has failed to state a claim. The Court will dismiss Plaintiff’s claims regarding
12 daily showers and outdoor recreation.

13 **B. Defendant Scott**

14 Plaintiff claims that after informing Defendant Scott of the conditions of his cell,
15 Defendant Scott stated that he would order the housing officer to provide Plaintiff with
16 cleaning supplies, but that Plaintiff never received the supplies.

17 Plaintiff has not demonstrated that Defendant Scott was deliberately indifferent to the
18 conditions of Plaintiff’s cell. At best, Plaintiff has demonstrated that Defendant Scott was
19 negligent in failing to ensure Plaintiff received cleaning supplies from the housing officer.
20 Negligence is not sufficient to state a claim under § 1983. Daniels v. Williams, 474 U.S.
21 327, 328 (1986) (“[T]he Due Process Clause [of the Fourteenth Amendment] is simply not
22 implicated by a negligent act of an official causing unintended loss or injury to life, liberty,
23 or property.”). The Court will dismiss Defendant Scott.

24 **C. Defendant Whitcombe**

25 Plaintiff has also failed to allege facts demonstrating Defendant Whitcombe was
26 deliberately indifferent to the conditions of Plaintiff’s confinement.

27 Plaintiff’s allegations against Defendant Whitcombe fail to state a claim. Plaintiff did
28 not personally speak to Defendant Whitcombe or direct his complaints in writing to

1 Defendant Whitcombe. Although Plaintiff claims Defendant Bello spoke with Defendant
2 Whitcombe, Plaintiff has no personal knowledge of whether this happened or precisely what
3 information Defendant Bello may have communicated to Defendant Whitcombe.
4 Accordingly, Plaintiff's facts fail to demonstrate that Defendant Whitcombe had actual
5 knowledge of the conditions of Plaintiff's confinement. The Court will dismiss Plaintiff's
6 claims against Defendant Whitcombe.

7 **IV. Claims for Which an Answer Will be Required**

8 Liberally construed, Plaintiff has adequately stated Eighth Amendment conditions of
9 confinement claims against Defendants Bello, A7681, and A8444, with respect to the
10 conditions of Plaintiff's cell and lack of cleaning supplies. The Court will require these
11 Defendants to answer the Second Amended Complaint.

12 **V. Warnings**

13 **A. Release**

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

18 **B. Address Changes**

19 Plaintiff must file and serve a notice of a change of address in accordance with Rule
20 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
21 relief with a notice of change of address. Failure to comply may result in dismissal of this
22 action.

23 **C. Copies**

24 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy
25 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
26 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
27 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
28 may result in the filing being stricken without further notice to Plaintiff.

1 **D. 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 v. Bonzelet*,
4 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
5 comply with any order of the Court).

6 **IT IS ORDERED:**

7 (1) Plaintiff’s Motion for Extension of Time (Doc. 14) is **granted**; the Clerk of
8 Court **must file** the Second Amended Complaint.

9 (2) Plaintiff’s claims regarding daily showers and outdoor recreation are **dismissed**
10 without prejudice.

11 (3) Defendants Scott and Whitcombe are **dismissed** without prejudice.

12 (4) Defendants Bello, A7681, and A8444 must answer the Second Amended
13 Complaint.

14 (5) The Clerk of Court must send Plaintiff a service packet including the Second
15 Amended Complaint (lodged at Doc. 15), this Order, and both summons and request for
16 waiver forms for Defendants Bello, A7681, and A8444.

17 (6) Plaintiff must complete and return the service packet to the Clerk of Court
18 within 21 days of the date of filing of this Order. The United States Marshal will not provide
19 service of process if Plaintiff fails to comply with this Order.

20 (7) If Plaintiff does not either obtain a waiver of service of the summons or
21 complete service of the Summons and Second Amended Complaint on a Defendant within
22 120 days of the filing of the Complaint or within 60 days of the filing of this Order,
23 whichever is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ.
24 P. 4(m); LRCiv 16.2(b)(2)(B)(I).

25 (8) The United States Marshal must retain the Summons, a copy of the Second
26 Amended Complaint, and a copy of this Order for future use.

27 (9) The United States Marshal must notify Defendants of the commencement of
28 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal

1 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. **The**
2 **Marshal must immediately file signed waivers of service of the summons. If a waiver**
3 **of service of summons is returned as undeliverable or is not returned by a Defendant**
4 **within 30 days from the date the request for waiver was sent by the Marshal, the**
5 **Marshal must:**

6 (a) personally serve copies of the Summons, Second Amended Complaint,
7 and this Order upon Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil
8 Procedure; and

9 (b) within 10 days after personal service is effected, file the return of service
10 for Defendant, along with evidence of the attempt to secure a waiver of service of the
11 summons and of the costs subsequently incurred in effecting service upon Defendant.
12 The costs of service must be enumerated on the return of service form (USM-285) and
13 must include the costs incurred by the Marshal for photocopying additional copies of
14 the Summons, Second Amended Complaint, or this Order and for preparing new
15 process receipt and return forms (USM-285), if required. Costs of service will be
16 taxed against the personally served Defendant pursuant to Rule 4(d)(2) of the Federal
17 Rules of Civil Procedure, unless otherwise ordered by the Court.

18 (10) **A Defendant who agrees to waive service of the Summons and Second**
19 **Amended Complaint must return the signed waiver forms to the United States Marshal,**
20 **not the Plaintiff.**

21 (11) Defendants must answer the Second Amended Complaint or otherwise respond
22 by appropriate motion within the time provided by the applicable provisions of Rule 12(a)
23 of the Federal Rules of Civil Procedure.

24 (12) Any answer or response must state the specific Defendant by name on whose
25 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
26 does not identify the specific Defendant by name on whose behalf it is filed.

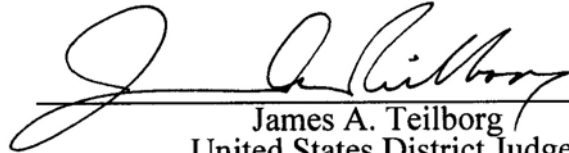
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(13) This matter is referred to Magistrate Judge Mark E. Aspey pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized under 28 U.S.C. § 636(b)(1).

DATED this 26th day of September, 2012.



James A. Teilborg
United States District Judge