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

Andre William Armstrong,  
Plaintiff,  
vs.  
Brotherton, et al.,  
Defendants.

No. CV 13-1264-PHX-DGC (BSB)

**ORDER**

Plaintiff Andre William Armstrong, who is confined in the Maricopa County Fourth Avenue Jail, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1), an Application to Proceed *In Forma Pauperis* (Doc. 2), and a Motion to Appoint Guardian Ad Litem (Doc. 5). The Court will dismiss the Complaint with leave to amend and appoint counsel.

**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 \$10.00. 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.

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1     **II.     Statutory Screening of Prisoner Complaints**

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

8     **III.     Complaint**

9             Plaintiff names the following Defendants in the Complaint: Maricopa County  
10 Superior Court Judge Brotherton; Maricopa County Sheriff Joseph M. Arpaio; and  
11 Officers of the Court J.S. Jed. and O.E. Smith.

12             Plaintiff raises two claims for relief. In Count One, Plaintiff claims his Fifth and  
13 Fourteenth Amendment rights were violated when, on May 20, 2013, Defendant  
14 Brotherton ordered Defendants Jed and Smith to “jump on [Plaintiff] in the hallway . . .  
15 after [Plaintiff] informed the clerk that . . . [he] was having a medical problem.” Plaintiff  
16 claims that he called 911 and the Defendants “jumped on [him] and dragged [him] into  
17 the court room.” Plaintiff claims that he started crying and blacked out and that “they  
18 took [his] bond money.” In Count Two, Plaintiff alleges the same facts and claims  
19 Defendants Jed and Smith used excessive force against him in violation of the Eighth  
20 Amendment. Plaintiff seeks injunctive relief and money damages.

21             The Maricopa County Superior Court docket indicates that on May 20, 2013, the  
22 Maricopa County Superior Court revoked Plaintiff’s release conditions and remanded  
23 Plaintiff to the custody of the Maricopa County Sheriff’s Office. On July 2, 2013, the  
24 Maricopa County Superior Court found Plaintiff criminally incompetent and incompetent  
25 to refuse treatment and committed Plaintiff to the Maricopa County Correctional Health  
26 Services Restoration Program.<sup>1</sup>

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27  
28             <sup>1</sup> See July 2, 2013 Minute Entry in *Arizona v. Armstrong*, Maricopa County  
Superior Court case #CR2010-102059-002 DT, [http://www.courtminutes.maricopa.gov/  
docs/Criminal/072013/m5842816.pdf](http://www.courtminutes.maricopa.gov/docs/Criminal/072013/m5842816.pdf) (last visited Jan. 29, 2014).

1 **IV. Failure to State a Claim**

2 **A. Defendant Brotherton**

3 Judges are absolutely immune from § 1983 suits for damages for their judicial acts  
4 except when they are taken “in the clear absence of all jurisdiction.” *Stump v. Sparkman*,  
5 435 U.S. 349, 356-357 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).  
6 An act is “judicial” when it is a function normally performed by a judge and the parties  
7 dealt with the judge in his or her judicial capacity. *Stump*, 435 U.S. at 362; *Crooks v.*  
8 *Maynard*, 913 F.2d 699, 700 (9th Cir. 1990). In this case, Plaintiff’s only allegation  
9 regarding Defendant Brotherton is that he directed Defendants Jed and Smith to bring  
10 Plaintiff back into the courtroom. These actions were performed within Defendant  
11 Brotherton’s judicial capacity and Defendant Brotherton is therefore immune from suit.

12 **B. Defendant Arpaio**

13 To state a valid claim under § 1983, plaintiffs must allege that they suffered a  
14 specific injury as a result of specific conduct of a defendant and show an affirmative link  
15 between the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362,  
16 371-72, 377 (1976). Plaintiff makes no allegations against Defendant Arpaio and  
17 therefore fails to state a claim against him.

18 **C. Defendants Jed and Smith**

19 The Fourteenth Amendment Due Process clause, not the Eighth Amendment,  
20 protects pretrial detainees from excessive force that amounts to punishment. *Gibson v.*  
21 *County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002). “[T]he Fourth Amendment sets  
22 the ‘applicable constitutional limitations’ for considering claims of excessive force during  
23 pretrial detention.” *Id.* (quoting *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th  
24 Cir. 1996).

25 The Fourth Amendment does not prohibit the use of reasonable force. *Tatum v.*  
26 *City & County of San Francisco*, 441 F.3d 1090, 1095 (9th Cir. 2006). Whether the force  
27 was excessive depends on “whether the officers’ actions [were] ‘objectively reasonable’  
28 in light of the facts and circumstances confronting them, without regard to their

1 underlying intent or motivation.” *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Tatum*,  
2 441 F.3d at 1095; *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003). The  
3 Court must balance the nature and quality of the intrusion against the countervailing  
4 governmental interests at stake. *Graham*, 490 U.S. at 396; *Lolli*, 351 F.3d at 415.  
5 Moreover,

6 [t]he “reasonableness” of a particular use of force must be  
7 judged from the perspective of a reasonable officer on the  
8 scene, rather than with the 20/20 vision of hindsight. . . .  
9 “Not every push or shove, even if it may later seem  
unnecessary in the peace of a judge’s chambers,” violates the  
Fourth Amendment.

10 *Graham*, 490 U.S. at 396 (citations omitted). The due process clause does not protect a  
11 pretrial detainee from the use of all force, but only from the use of excessive force that  
12 amounts to punishment. *Id.* at 395.

13 In evaluating a due process claim alleging excessive force, the court should  
14 consider: (1) the need for the application of force, (2) the relationship between the need  
15 and the amount of force use; (3) the extent of the injury inflicted, and (4) whether force  
16 was applied in a good faith effort to maintain and restore discipline. *White v. Roper*, 901  
17 F.2d 1501, 1507 (9th Cir. 1990). Assuming all facts alleged by Plaintiff are true,  
18 Plaintiff’s allegations fail to demonstrate that the use of force in this case was  
19 unreasonable. Plaintiff’s release conditions were revoked, Plaintiff left the courtroom to  
20 call 911, and Defendants Jed and Smith were directed to bring Plaintiff back to the  
21 courtroom. Plaintiff alleges Defendants Jed and Smith “dragged” him back to the  
22 courtroom, he started crying, and then “blacked out.” Plaintiff claims he suffered  
23 emotional distress and mental anguish, but alleges no physical injury.

24 Plaintiff’s facts show that although Plaintiff may not have been attempting to  
25 “escape,” Plaintiff did leave the courtroom after his release had been revoked and that  
26 Defendants Jed and Smith acted with what appears to be the minimum force necessary to  
27 return Plaintiff to the courtroom. Plaintiff does not allege that he suffered physical injury  
28 and it appears that Defendants Jed and Smith acted pursuant to instructions from the court

1 and with the purpose of restoring order. Plaintiff has therefore failed to state a claim  
2 against Defendants Jed and Smith and these Defendants will be dismissed.

3 **V. Leave to Amend and Appointment of Counsel**

4 As no Defendants now remain, the Court will dismiss the Complaint. Because  
5 Plaintiff's claims might be saved by the allegation of other facts, the Court will dismiss  
6 the Complaint without prejudice and with leave to amend.

7 **VI. Motion to Appoint Guardian Ad Litem**

8 On August 2, 2013, Plaintiff filed a Motion to Appoint Guardian Ad Litem  
9 (Doc. 5) in which he asks that the Court appoint a guardian ad litem for him in this case  
10 because he is mentally incompetent. Plaintiff's criminal court records support this  
11 assertion and indicate that he was formally adjudicated mentally incompetent.  
12 Consideration of whether to appoint a guardian ad litem is therefore warranted under  
13 Rule 17 of the Federal Rules of Civil Procedure.

14 Rule 17(c)(2) of the Federal Rule of Civil Procedure states that the Court "must  
15 appoint a guardian ad litem – or issue another appropriate order – to protect a minor or  
16 incompetent person who is unrepresented in an action." The Court will not appoint a  
17 guardian ad litem, but recognizes that Plaintiff's mental incompetence renders him unable  
18 to adequately protect his own interests or file an amended complaint. Accordingly, the  
19 Court will appoint counsel to represent Plaintiff in this action. Attorney Sara M. Athen  
20 has volunteered to accept Plaintiff's case and will be appointed as counsel for Plaintiff in  
21 this matter.

22 **VII. Instruction to Appointed Counsel**

23 The Court will direct the Clerk of Court to send to Attorney Sara M. Athen copies  
24 of Plaintiff's Complaint and this Order. Within 14 days of the filing date of this Order,  
25 Attorney Sara M. Athen must file a Notice of Appearance. Within 60 days of the filing  
26 date of this Order, Attorney Sara M. Athen must:

- 27 (a) meet and confer with Plaintiff,  
28 (b) make a preliminary investigation of Plaintiff's claims, and

1 (c) either:

2 (1) file an amended complaint; or

3 (2) if she determines, pursuant to Federal Rule of Civil Procedure  
4 11(b), that Plaintiff's claims are not warranted by existing law  
5 or that his factual contentions lack evidentiary support, file a  
6 notice explaining her findings and a motion to dismiss.

7 **VII. Instructions to Plaintiff**

8 The Court has appointed Attorney Sara M. Athen to represent Plaintiff.  
9 Therefore, Attorney Sara M. Athen "shall be recognized by the Court and by all the  
10 parties to the cause as having control of [Plaintiff's] case, in all proper ways, and shall, as  
11 such attorney, sign all papers which are to be signed on behalf of the client." LRCiv  
12 83.3(c)(2). Moreover, because Attorney Sara M. Athen is representing Plaintiff in this  
13 case, Plaintiff cannot "appear or act in [his] own behalf in the cause, or take any steps  
14 therein, unless an order of substitution shall first have been made by the Court after  
15 notice to the attorney of each such party, and to the opposite party." LRCiv 83.3(c)(2).  
16 This means that Attorney Sara M. Athen, not Plaintiff, shall file future documents in this  
17 case.

18 **IT IS ORDERED:**

19 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 2) is **granted**.

20 (2) As required by the accompanying Order to the appropriate government  
21 agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing  
22 fee of \$10.00.

23 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim, with leave  
24 to amend.

25 (4) Plaintiff's August 2, 2013 Motion to Appoint Guardian Ad Litem (Doc. 5)  
26 is **denied in part** to the extent that the Court will not appoint a guardian ad litem, and  
27 **granted in part** to the extent that the Court appoints counsel to represent Plaintiff in this  
28 action.

(5) Attorney Sara M. Athen is appointed as counsel for Plaintiff in this action.

1           (6) The Clerk of Court **must send** to Attorney Sara M. Athen, **by certified**  
2 **mail**, copies of Plaintiff's Complaint (Doc. 1) and this Order, at the following address:

3           Sara M. Athen  
4           Snell & Wilmer, LLP  
5           400 E. Van Buren St.  
6           Phoenix, AZ 85004-2202.

7           (7) Within **14 days** of the filing date of this Order, Attorney Sara M. Athen  
8 must file a Notice of Appearance.

9           (8) Within **60 days** of the filing date of this Order, Attorney Sara M. Athen  
10 must:

- 11           (a) meet and confer with Plaintiff,
- 12           (b) make a preliminary investigation of Plaintiff's claims, and
- 13           (c) either:
  - 14               (1) file an amended complaint; or
  - 15               (2) if counsel determines, pursuant to Federal Rule of Civil  
16 Procedure 11(b), that Plaintiff's claims are not warranted by  
17 existing law or that his factual contentions lack evidentiary  
18 support, file a notice explaining counsel's findings and a  
19 motion to dismiss.

20           Dated this 5th day of February, 2014.

21           

22           \_\_\_\_\_  
23           David G. Campbell  
24           United States District Judge