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

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9 Adam Narciso Garcia,  
10 Plaintiff,  
11 vs.  
12 Joseph M. Arpaio, et al.,  
13 Defendants.  
14

No. CV 14-286-PHX-RCB (DKD)

**ORDER**

15 Plaintiff Adam Narciso Garcia, who is confined in the Maricopa County Durango  
16 Jail, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and  
17 an Application to Proceed *In Forma Pauperis* (Doc. 2). The Court will dismiss the  
18 Complaint with leave to amend.

19 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

20 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.  
21 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).  
22 The Court will assess an initial partial filing fee of \$26.00. The remainder of the fee will  
23 be collected monthly in payments of 20% of the previous month's income credited to  
24 Plaintiff's trust account each time the amount in the account exceeds \$10.00. 28 U.S.C.  
25 § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government  
26 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             A pleading must contain a “short and plain statement of the claim *showing* that the  
9 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8  
10 does not demand detailed factual allegations, “it demands more than an unadorned, the-  
11 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
12 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere  
13 conclusory statements, do not suffice.” *Id.*

14             “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
15 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,  
16 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual  
17 content that allows the court to draw the reasonable inference that the defendant is liable  
18 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible  
19 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw  
20 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s  
21 specific factual allegations may be consistent with a constitutional claim, a court must  
22 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*  
23 at 681.

24             But as the United States Court of Appeals for the Ninth Circuit has instructed,  
25 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,  
26 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less  
27 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*  
28 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

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

### 10 **III. Complaint**

11           In his three-count Complaint, Plaintiff sues Maricopa County Sheriff Joseph  
12 Arpaio and the Maricopa County Sheriff’s Office for alleged unconstitutional conditions  
13 of confinement at the Durango Jail. He seeks damages.

14           Plaintiff alleges the following in Count I: The “air conditioning is on and cold no  
15 matter what [the] temperature is,” and the temperature is never above 69 degrees.  
16 Someone “will not turn on heat” and “will not give extra blankets” or clothes. There is  
17 “improper ventilation air exchange,” “staff infections,” and “multiple people with cold[s]  
18 in pods.” Plaintiff is sick, “uncomfortable at all times,” suffers loss of sleep and “P.T.S.”

19           In Count II, Plaintiff alleges the following: “They say there are (2500) calories  
20 served per day that is from 2005.” Plaintiff requested measurement but received no  
21 response. “Most of the food is lost during transportation from building to building” and it  
22 is not edible. There are two meals a day, no drink at dinner, and the “mysterious meat []  
23 is very greasy.” Plaintiff suffers from “malnutrition, no energy, loss of muscle mass, sick  
24 or getting sick,” weakness, headaches, “loss of proper vitamins and minerals,” and he is  
25 “not sure on long term effect.”

26           In Count III, Plaintiff alleges the following: “all county jails across the U.S. have  
27 done away with 3 & 4 men cells”; “no room between bunks to move”; “fire hazard”; “64  
28 men to two toilets, with no disinfectants”; and “64 men to two showers with no

1 disinfectants.” Someone has to “eat on bunk” and there are “not enough tables [and]  
2 chairs to eat.” There are “over 40 men in holding tank when going to court” and “chains  
3 on our feet when we[’]re not guilty for an offense.” Plaintiff has been injured by “no  
4 sleep, unable to get out easily to leave room, [and] untold of amount of illnesses.” He  
5 says “total effect will be unknown.”

#### 6 **IV. Failure to State a Claim**

7 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants  
8 (2) under color of state law (3) deprived him of federal rights, privileges or immunities  
9 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th  
10 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d  
11 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific  
12 injury as a result of the conduct of a particular defendant and he must allege an  
13 affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*,  
14 423 U.S. 362, 371-72, 377 (1976).

#### 15 **A. Arpaio**

16 Plaintiff sues Maricopa County Sheriff Arpaio. While Arpaio may be sued for  
17 constitutional violations, Plaintiff fails to state a claim against him. “A plaintiff must  
18 allege facts, not simply conclusions, that show that an individual was personally involved  
19 in the deprivation of his civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th  
20 Cir. 1998). For an individual to be liable in his official capacity, a plaintiff must allege  
21 that the official acted as a result of a policy, practice, or custom. *See Cortez v. County of*  
22 *Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002) (citation omitted). Further, there is no  
23 respondeat superior liability under § 1983, so a defendant’s position as the supervisor of  
24 someone who allegedly violated a plaintiff’s constitutional rights does not make him  
25 liable. *Monell v. Dep’t of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978); *Taylor v.*  
26 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (citation omitted). A supervisor in his  
27 individual capacity “is only liable for constitutional violations of his subordinates if the  
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1 supervisor participated in or directed the violations, or knew of the violations and failed  
2 to act to prevent them.” *Taylor*, 880 F.2d at 1045.

3 Plaintiff fails to allege *any* facts regarding Arpaio in his Complaint. Plaintiff does  
4 not allege that Arpaio directly violated his constitutional rights. Moreover, Plaintiff does  
5 not allege facts to support that Plaintiff’s constitutional rights were violated as a result of  
6 a policy or custom promulgated or endorsed by Arpaio. Accordingly, Plaintiff fails to  
7 state a claim against Defendant Arpaio and he will be dismissed.

8 **B. Maricopa County Sheriff’s Office**

9 The Maricopa County Sheriff’s Office is not a proper defendant. In Arizona, the  
10 responsibility of operating jails and caring for prisoners is placed by law upon the sheriff.  
11 *See* Ariz. Rev. Stat. Ann. § 11-441(A)(5); Ariz. Rev. Stat. Ann. § 31-101. A sheriff’s  
12 office is simply an administrative creation of the county sheriff to allow him to carry out  
13 his statutory duties and is not a “person” amenable to suit pursuant to § 1983.  
14 Accordingly, the Maricopa County Sheriff’s Office will be dismissed as a Defendant.

15 **C. Conditions of Confinement**

16 Because Plaintiff has failed to state a claim against a properly named Defendant,  
17 his Complaint will be dismissed with leave to amend. If Plaintiff files an amended  
18 Complaint, he should be aware that a pretrial detainee’s claim for unconstitutional  
19 conditions of confinement arises from the Fourteenth Amendment Due Process Clause  
20 rather than from the Eighth Amendment prohibition against cruel and unusual  
21 punishment. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Nevertheless, the same  
22 standards are applied, requiring proof that the defendant acted with deliberate  
23 indifference. *See Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998) (citation omitted).

24 Deliberate indifference is a higher standard than negligence or lack of ordinary  
25 due care for the prisoner’s safety. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). To  
26 state a claim of deliberate indifference, plaintiffs must meet a two-part test. First, the  
27 alleged constitutional deprivation must be, objectively, “sufficiently serious”; the  
28 official’s act or omission must result in the denial of “the minimal civilized measure of

1 life's necessities." *Id.* at 834 (citations omitted). Second, the prison official must have a  
2 "sufficiently culpable state of mind," *i.e.*, he must act with deliberate indifference to  
3 inmate health or safety. *Id.* (citations omitted). In defining "deliberate indifference" in  
4 this context, the Supreme Court has imposed a subjective test: "the official must both be  
5 aware of facts from which the inference could be drawn that a substantial risk of serious  
6 harm exists, *and* he must also draw the inference." *Id.* at 837 (emphasis added).

7 To state a claim for unconstitutional conditions of confinement, a plaintiff must  
8 allege that a defendant's acts or omissions have deprived the inmate of "the minimal  
9 civilized measure of life's necessities" and that the defendant acted with deliberate  
10 indifference to an excessive risk to inmate health or safety. *Allen v. Sakai*, 48 F.3d 1082,  
11 1087 (9th Cir. 1994) (quoting *Farmer*, 511 U.S. at 834); *see Estate of Ford v. Ramirez-*  
12 *Palmer*, 301 F.3d 1043, 1049-50 (9th Cir. 2002). Whether conditions of confinement rise  
13 to the level of a constitutional violation may depend, in part, on the duration of an  
14 inmate's exposure to those conditions. *Keenan v. Hall*, 83 F.3d 1083, 1089, 1091 (9th  
15 Cir. 1996) (citing *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978)). "The circumstances,  
16 nature, and duration of a deprivation of [ ] necessities must be considered in determining  
17 whether a constitutional violation has occurred." *Hearns v. Terhune*, 413 F.3d 1036,  
18 1042 (9th Cir. 2005) (quoting *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000)).

19 Allegations of overcrowding, without more, do not state a claim under the Eighth  
20 and Fourteenth Amendments. *See Hoptowit v. Ray*, 682 F.2d 1237, 1248-49 (9th Cir.  
21 1982). A plaintiff may, however, state a cognizable claim where he or she alleges that  
22 overcrowding results in some unconstitutional condition. *See, e.g., Akao v. Shimoda*, 832  
23 F.2d 119, 120 (9th Cir. 1987) (reversing district court's dismissal of claim that  
24 overcrowding caused increased stress, tension and communicable disease among inmate  
25 population); *see also Toussaint v. Yockey*, 722 F.2d 1490, 1492 (9th Cir. 1984) (affirming  
26 that an Eighth Amendment violation may occur as a result of overcrowded prison  
27 conditions causing increased violence, tension and psychiatric problems).

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1 With respect to meals, “[t]he Eighth [and Fourteenth] Amendment[s] require[]  
2 only that prisoners receive food that is adequate to maintain health; it need not be tasty or  
3 aesthetically pleasing.” *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993) (citation  
4 omitted); *see Frost*, 152 F.3d at 1128 (applying Eighth Amendment standard to a pretrial  
5 detainee’s Fourteenth Amendment claims regarding his conditions of confinement).  
6 “The fact that the food occasionally contains foreign objects or sometimes is served cold,  
7 while unpleasant, does not amount to a constitutional deprivation.” *LeMaire*, 12 F.3d at  
8 1456 (citations omitted). An inmate may, however, state a claim where he alleges that he  
9 is served meals with insufficient calories for long periods of time. *Id.*

10 Plaintiff fails to allege any specific facts such as when he was held in the alleged  
11 unconstitutional conditions of confinement or the duration of his confinement in such  
12 conditions. In addition, Plaintiff fails to allege that any individual was aware of the  
13 alleged unconditional conditions but failed to act. That is, Plaintiff fails to allege facts to  
14 support that Arpaio or anyone else acted with deliberate indifference to the alleged  
15 conditions. Moreover, in Count I, Plaintiff fails to allege when, or for how long, he was  
16 cold, if he requested heat, extra blankets or clothes, and, if so, to whom he directed those  
17 requests. In Count II, Plaintiff fails to allege what food he was served, or when or how  
18 often he was served food that was “damaged” or inedible. In Count III, Plaintiff fails to  
19 allege how many men were in his cell, and for how long, the size of his cell, or other facts  
20 to support a claim of overcrowding. For these reasons, Plaintiff fails to state a claim of  
21 unconstitutional conditions of confinement.

## 22 **V. Leave to Amend**

23 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to  
24 state a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a  
25 first amended complaint to cure the deficiencies outlined above. The Clerk of Court will  
26 mail Plaintiff a court-approved form to use for filing a first amended complaint. If  
27 Plaintiff fails to use the court-approved form, the Court may strike the amended  
28 complaint and dismiss this action without further notice to Plaintiff.

1           If Plaintiff files an amended complaint, Plaintiff must write short, plain statements  
2 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name  
3 of the Defendant who violated the right; (3) exactly what that Defendant did or failed to  
4 do; (4) how the action or inaction of that Defendant is connected to the violation of  
5 Plaintiff’s constitutional right; and (5) what specific injury Plaintiff suffered because of  
6 that Defendant’s conduct. *See Rizzo*, 423 U.S. at 371-72, 377.

7           Plaintiff must repeat this process for each person he names as a Defendant. If  
8 Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific  
9 injury suffered by Plaintiff, the allegations against that Defendant will be dismissed for  
10 failure to state a claim. **Conclusory allegations that a Defendant or group of**  
11 **Defendants has violated a constitutional right are not acceptable and will be**  
12 **dismissed.**

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

17           A first amended complaint supersedes the original complaint. *Ferdik v. Bonzelet*,  
18 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896  
19 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat an original  
20 complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised  
21 in the original complaint and that was voluntarily dismissed or was dismissed without  
22 prejudice is waived if it is not alleged in a first amended complaint. *Lacey v. Maricopa*  
23 *County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

## 24 **VI. Warnings**

### 25 **A. Release**

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

3 **B. Address Changes**

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

8 **C. Copies**

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

12 **D. Possible “Strike”**

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

22 **E. Possible Dismissal**

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

27 **IT IS ORDERED:**

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

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(2) As required by the accompanying Order to the appropriate government agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$26.00.

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

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

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

DATED this 17th day of April, 2014.



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Stephen M. McNamee  
Senior United States District Judge