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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Michael David Johnson,

No. CV 14-2519-PHX-DGC (DMF)

10 Plaintiff,

11 v.

ORDER

12 Maricopa County Sheriff's Office, et al.,

13 Defendants.
14

15 On November 14, 2014, Plaintiff Michael David Johnson, who was then confined
16 in the Maricopa County Lower Buckeye Jail, filed a *pro se* civil rights Complaint
17 pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. In a
18 January 28, 2015 Order, the Court granted the Application to Proceed and dismissed the
19 Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days
20 to file an amended complaint that cured the deficiencies identified in the Order.

21 On March 5, 2015, Plaintiff filed a Notice of Change of Address indicating he is
22 no longer in custody, and on May 7, 2015, he filed his First Amended Complaint
23 (Doc. 14). At the time Plaintiff was released, he still owed \$292.00 towards his filing
24 fee. In a May 15, 2015 Order, the Court gave Plaintiff 30 days to either pay the \$292.00
25 balance of the filing fee or file a non-prisoner Application to Proceed in District Court
26 without Prepaying Fees or Costs. Plaintiff has since filed a non-prisoner Application to
27 Proceed (Doc. 17) and a Motion to Appoint Counsel (Doc. 18).

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1 The Court will grant the non-prisoner Application to Proceed, dismiss the First
2 Amended Complaint and this action, and deny the Motion to Appoint Counsel as moot.

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

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

10 A pleading must contain a “short and plain statement of the claim *showing* that the
11 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
12 does not demand detailed factual allegations, “it demands more than an unadorned, the-
13 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” *Id.*

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

26 But as the United States Court of Appeals for the Ninth Circuit has instructed,
27 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
28 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less

1 stringent standards than formal pleadings drafted by lawyers.” *Id.* (quoting *Erickson v.*
2 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

3 **II. First Amended Complaint**

4 In his single-count First Amended Complaint, Plaintiff names as Defendants
5 Maricopa County Sheriff Joseph M. Arpaio; Maricopa County Supervisors Denny
6 Barney, Steve Chucri, Andy Kunasek, Clint Hickman, and Steve Gallardo; and the
7 Scottsdale City Court. Plaintiff seeks punitive damages, “appeal of civil order of
8 protection hearing/re-hearing,” and court costs.

9 Plaintiff claims that Defendants violated his due process rights by denying him
10 access to a court transcript he needed to appeal an Order of Protection in Scottsdale City
11 Court. Plaintiff’s claim is based on the following allegations:

12 On July 3, 2014, Plaintiff was arrested for violating an Order of Protection issued
13 by the Scottsdale City Court, and he was placed in the Lower Buckeye Jail to await trial.
14 While in custody, Plaintiff was transported to an August 6, 2014 hearing in his Order of
15 Protection case. Plaintiff lost that hearing, and he filed for an appeal and requested a
16 copy of the August 6, 2014 hearing transcript. The Scottsdale City Court sent Plaintiff an
17 audio CD of the hearing per their policy. This CD was intercepted by the Lower
18 Buckeye Jail legal services and held by the property department.

19 On August 15, 2014, Plaintiff filed an inmate request, asking to listen to the CD,
20 and the request was denied on August 20, 2014. On August 22, 2014, Plaintiff wrote to
21 the Scottsdale City Court requesting assistance, and his request was denied on
22 September 29, 2014. In the meantime, Plaintiff filed a series of inmate grievances and
23 grievance appeals regarding the denial of his request to hear the CD. On October 6,
24 2014, Plaintiff’s final grievance was denied. Plaintiff wrote his memorandum appealing
25 the Scottsdale City Court’s Order of Protection decision without access to the hearing
26 transcript, and lost his appeal.

27 Plaintiff alleges that the Order of Protection was frivolous, and he believes he
28 would have won his appeal if he had been given access to the August 6, 2014 hearing

1 transcript. He claims that Defendants’ denial of due process in not making the transcript
2 available to him “directly interfered with and impacted [his] defense and subsequent
3 incarceration.”

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

5 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
6 (2) under color of state law (3) deprived him of federal rights, privileges or immunities
7 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th
8 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm’n*, 42 F.3d
9 1278, 1284 (9th Cir. 1994)). Negligence is not sufficient to state a claim under § 1983.
10 *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). In addition, a plaintiff must allege that
11 he suffered a specific injury as a result of the conduct of a particular defendant and he
12 must allege an affirmative link between the injury and the conduct of that defendant.
13 *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

14 Although *pro se* pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,
15 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*
16 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a
17 liberal interpretation of a civil rights complaint may not supply essential elements of the
18 claim that were not initially pled. *Id.*

19 **A. Failure to State a Claim Against Any Defendant**

20 **1. Arpaio**

21 Plaintiff fails to state a claim against Arpaio. For an individual to be liable in his
22 individual capacity, “[a] plaintiff must allege facts, not simply conclusions, that show that
23 the individual was personally involved in the deprivation of his civil rights.” *Barren v.*
24 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Further, there is no *respondeat*
25 *superior* liability under § 1983, so a defendant’s position as the supervisor of someone
26 who allegedly violated a plaintiff’s constitutional rights does not make him liable.
27 *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691; *Taylor v. List*, 880 F.2d 1040, 1045
28 (9th Cir. 1989) (citation omitted). A supervisor in his individual capacity “is only liable

1 for constitutional violations of his subordinates if the supervisor participated in or
2 directed the violations, or knew of the violations and failed to act to prevent them.”
3 *Taylor*, 880 F.2d at 1045. Alternatively, for an individual to be liable in his official
4 capacity, a plaintiff must allege injuries resulting from a policy, practice, or custom of the
5 entity for which that individual exercises final policy-making authority. *Monell*, 436 U.S.
6 694; *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188 (9th Cir. 2002).

7 Plaintiff does not allege that Arpaio personally kept him from being able to listen
8 to the CD, nor does he allege that, as a supervisor, Arpaio directed anyone else to keep
9 him from doing so, or knew that Plaintiff was unable to do so, yet failed to act. Plaintiff
10 also fails to allege any facts showing that the denial of his requests resulted from a policy,
11 practice, or custom observed at the Lower Buckeye Jail. Accordingly, Plaintiff fails to
12 state a claim against Arpaio in either his individual or official capacity.

13 **2. Barney, Chucri, Kunasek, Hickman, and Gallardo**

14 Plaintiff also fails to state a claim against Maricopa County Supervisors Barney,
15 Chucri, Kunasek, Hickman, and Gallardo. When individuals, such as members of the
16 Maricopa County Board of Supervisors, are sued in an official capacity, the real party in
17 interest is the entity of which the members are agents. *Kentucky v. Graham*, 473 U.S.
18 159, 165-66 (1985) (quoting *Monell*, 436 U.S. at 690 n. 55). In this case, that entity is
19 Maricopa County. A municipality may not be sued, however, solely because an injury
20 was inflicted by one of its employees or agents. *Long v. County of Los Angeles*, 442 F.3d
21 1178, 1185 (9th Cir. 2006) (citation omitted). Rather, the municipality is liable only
22 when the execution of its policy or custom inflicts a constitutional injury. *Id.* (citation
23 omitted); *Miranda v. City of Cornelius*, 429 F.3d 858, 868 (9th Cir. 2005) (citation
24 omitted).

25 Plaintiff has not alleged that his rights were violated as the result of any policy,
26 practice, or custom of Maricopa County. Moreover, official county policy may only be
27 set by an official with “final policymaking authority” (*Id.* (citing *Pembaur v. City of*
28 *Cincinnati*, 475 U.S. 469, 481-83 (1986) (plurality opinion))), and in Arizona, the

1 responsibility for operating jails is placed on the county sheriff, not on a county's board
2 of supervisors. *See* Ariz. Rev. Stat. Ann. § 11-441(A)(5); Ariz. Rev. Stat. Ann. § 31-101.
3 Therefore, even if Plaintiff had alleged facts showing his injury stemmed from a policy or
4 practice observed at the Lower Buckeye Jail, the Maricopa County Board of Supervisors
5 would not be liable under § 1983 because it lacks authority to establish an official policy
6 with respect to the operation of the jail. Further, the Board cannot be held liable for the
7 actions of the Sheriff or his deputies on a theory of *respondeat superior* liability. *See Los*
8 *Angeles Police Prot. League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990) (citation
9 omitted). Accordingly, Plaintiff fails to state a claim against Barney, Chucuri, Kunasek,
10 Hickman, and Gallardo.

11 3. Scottsdale City Court

12 Finally, Plaintiff fails to state a claim against the Scottsdale City Court. Claims
13 under § 1983 may be directed at “bodies politic and corporate.” *Monell*, 436 U.S. at 688-
14 89. “[A] municipality can be sued under § 1983, but it cannot be held liable unless a
15 municipal policy or custom caused the constitutional injury.” *Leatherman v. Tarrant*
16 *County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993). “A
17 municipality may be liable for actions resulting in violations of constitutional rights only
18 when the conduct of its official or agent is executed pursuant to a government policy or
19 custom.” *Lewis v. Sacramento County*, 98 F.3d 434, 446 (9th Cir. 1996), *rev'd on other*
20 *grounds*, 523 U.S. 833 (1998). Although the Scottsdale City Court is an arm or agency of
21 the City of Scottsdale, which is subject to suit under § 1983, Plaintiff does not allege that
22 his rights were violated due to a policy or custom of the City of Scottsdale. There is also
23 no *respondeat superior* liability under § 1983; thus, the City of Scottsdale's position as
24 the employer or supervisor of someone who may have violated Plaintiff's constitutional
25 rights does not impose liability. *Monell*, 436 U.S. at 691-92. Accordingly, Plaintiff fails
26 to state a claim against the Scottsdale City Court.

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1 **B. Failure to State a Constitutional Claim**

2 Even if Plaintiff had named a proper Defendant – someone who, through his own,
3 individual actions, kept Plaintiff from being able to listen to the CD of his Scottsdale City
4 Court hearing – Plaintiff fails to state a constitutional claim based on the loss of his
5 appeal in the Scottsdale City Court.

6 As the Court noted in its January 28, 2015 Order, the right of meaningful access to
7 the courts prohibits officials from actively interfering with inmates’ attempts to prepare
8 or file legal documents. *Lewis v. Casey*, 518 U.S. 343, 350 (1996). The right of access to
9 the courts is only a right to bring petitions or complaints to court, however, and not a
10 right to discover such claims or even to litigate them effectively once filed with a court.
11 *Id.* at 354. The right “guarantees no particular methodology but rather the conferral of a
12 capability – the capability of bringing contemplated challenges to sentences or conditions
13 of confinement before the courts.” *Id.* at 356.

14 For an access-to-courts claim, a plaintiff must show that he suffered an “actual
15 injury” with respect to contemplated litigation. *Id.* at 349. To show actual injury, the
16 plaintiff must demonstrate that the defendants’ conduct frustrated or impeded him from
17 bringing to court a nonfrivolous claim that he wished to present. *Id.* at 352-53.

18 Moreover, “the injury requirement is not satisfied by just any type of frustrated
19 legal claim.” *Id.* at 354. The right of access to the courts “does not guarantee inmates the
20 wherewithal to transform themselves into litigating engines capable of filing everything
21 from shareholder derivative actions to slip-and-fall claims.” *Id.* at 355. The nonfrivolous
22 claim must be a direct or collateral attack on the inmate’s sentence or a challenge to the
23 conditions of his confinement. *Id.* “Impairment of any *other* litigating capacity is simply
24 one of the incidental (and perfectly constitutional) consequences of conviction and
25 incarceration.” *Id.* (emphasis in original).

26 Plaintiff’s claim fails for a number of reasons. First, Plaintiff does not allege facts
27 showing he was impaired in his ability to bring a direct or collateral attack on his
28 sentence or a challenge to the conditions of his confinement. Plaintiff alleges that his

1 inability to listen to the CD of his August 6, 2014 Order of Protection hearing “directly
2 interfered with and impacted [his criminal] defense and subsequent incarceration.” But
3 based on the facts alleged, Plaintiff was arrested for violating the Order of Protection on
4 July 3, 2014, a month before the date of the hearing in which he purportedly challenged
5 that order and lost. Thus, the facts alleged do not plausibly show that an appeal of that
6 decision, even if successful, would have impacted Plaintiff’s arrest and incarceration for a
7 criminal violation that had already taken place.

8 Additionally, Plaintiff has not alleged facts showing he had a nonfrivolous reason
9 for appealing the Scottsdale City Court’s ruling. Although Plaintiff baldly asserts that
10 “with access to the transcript and other legal materials regarding this case” he would have
11 won his appeal, he does not identify any claims the transcript and these “other legal
12 materials” would have allowed him to make. To the extent Plaintiff implies that access to
13 the Scottsdale City Court transcript would have allowed him to discover appealable errors
14 in that court’s decision that he was otherwise unable to identify, this supposition is too
15 speculative to form the basis of an access-to-the-courts claim. In short, Plaintiff fails to
16 allege any facts that plausibly show that being permitted to listen to the CD would have
17 allowed him to make a nonfrivolous claim, and, even if it did, that his ability to make that
18 claim would have either directly or indirectly impacted his criminal sentence.

19 **IV. Dismissal without Leave to Amend**

20 Because Plaintiff has failed to state a claim in his First Amended Complaint, the
21 Court will dismiss his First Amended Complaint. “Leave to amend need not be given if a
22 complaint, as amended, is subject to dismissal.” *Moore v. Kayport Package Express,*
23 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court’s discretion to deny leave to amend is
24 particularly broad where Plaintiff has previously been permitted to amend his complaint.
25 *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).
26 Repeated failure to cure deficiencies is one of the factors to be considered in deciding
27 whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538. The Court
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1 finds that further opportunities to amend would be futile. Therefore, the Court, in its
2 discretion, will dismiss Plaintiff's First Amended Complaint without leave to amend.

3 **IT IS ORDERED:**

4 (1) Plaintiff's non-prisoner Application to Proceed (Doc. 17) is **granted**.

5 (2) Plaintiff's Motions to Add Counts (Docs. 5 and 6) are **granted**, and his
6 Motion for Disclosure (Doc. 7) is **denied** pursuant to the Court's January 28, 2015 Order.

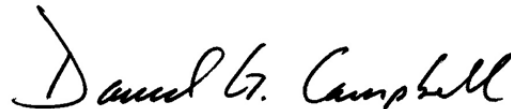
7 (3) Plaintiff Motion to Appoint Counsel (Doc. 18) is **denied as moot**.

8 (4) Plaintiff's First Amended Complaint (Doc. 14) and this action are
9 **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment
10 accordingly.

11 (5) The Clerk of Court must make an entry on the docket stating that the
12 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

13 (6) The docket shall reflect that the Court certifies, pursuant to 28 U.S.C.
14 § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), that any appeal of
15 this decision would not be taken in good faith.

16 Dated this 2nd day of July, 2015.

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21 David G. Campbell
22 United States District Judge
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