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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 GREGORY ANTONIO WRIGHT,

11 Plaintiff,

12 v.

13 CLARK COUNTY SHERIFF'S OFFICE
14 et al.,

15 Defendants.

CASE NO. 3:15-CV-05887-BHS-JRC

SECOND ORDER TO SHOW CAUSE

16 The District Court has referred this 42 U.S.C. § 1983 civil rights action to United States
17 Magistrate Judge J. Richard Creatura. The Court's authority for the referral is 28 U.S.C. §
18 636(b)(1)(A) and (B), and Magistrate Judge Rules MJR3 and MJR4.

19 Plaintiff Gregory Antonio Wright, proceeding *pro se* and *in forma pauperis*, filed this
20 civil rights complaint under 42 U.S.C. § 1983. On March 14, 2016, the Court reviewed plaintiff's
21 complaint and found it deficient. The Court ordered plaintiff to show cause why his complaint
22 should not be dismissed. Dkt.18. Alternatively, plaintiff was given a deadline of April 15, 2016
23 to file an amended complaint. *Id.* Plaintiff did not file an amended complaint or otherwise
24 respond to the Court's order. *See* Dkt. Because the allegations of excessive force are concerning,

1 the Court again orders plaintiff to file an amended complaint or show cause why his complaint
2 should not be dismissed on or before May 27, 2016.

3 **BACKGROUND**

4 Plaintiff is currently incarcerated at the Clark County Jail and names the Clark County
5 Sheriff's Office and Sheriff Chuck Atkins as defendants. Plaintiff alleges that this is because
6 Sergeant Grant Austin is employed by the Sheriff's Office and that it is the Sheriff's Office's
7 duty to make sure that its officers are properly trained. *Id.*

8 On January 13, 2015, plaintiff alleges that he was placed in the rubber room at the Clark
9 County Jail and swallowed a part of his spork (a "spork" is a combination spoon and fork
10 commonly used in jails). Dkt. 13 at 3. Plaintiff alleges that he started to choke and that non-party
11 Mohan saw plaintiff on the ground and called for help. *Id.* Plaintiff alleges that non-parties
12 Austin and Schmierer responded along with other deputy officers and medical staff. *Id.* Plaintiff
13 alleges that Austin then handcuffed plaintiff and placed his legs in shackles. *Id.* Plaintiff alleges
14 that Mohan tried to get the piece of spork out of plaintiff's mouth and Austin placed his knee
15 down on plaintiff's neck and pushed down "with all of his weight." *Id.* Plaintiff alleges that he
16 then began to choke even worse. *Id.*

17 Plaintiff alleges that when Mohan saw Austin he asked Austin, "what are you doing" and
18 told him to stop. *Id.* Plaintiff alleges that when Mohan realized Austin was not going to stop, she
19 tried to push Austin off of plaintiff. *Id.* Plaintiff alleges that Mohan told Austin to stop again and
20 said "Austin stop stop Austin it's okay stop we won't get away with this one" and tried to pull
21 Austin off of plaintiff. *Id.* Plaintiff alleges that Austin removed his knee from plaintiff's neck and
22 placed it on plaintiff's jaw and pressed down with all of his weight. *Id.* Plaintiff alleges that
23 Austin then stopped. *Id.*

1 Plaintiff seeks \$5 million in damages, all of his current criminal charges dismissed, his
2 criminal record expunged, Autumn Bruce's criminal record expunged and something to be done
3 about Clark County Jail and how it is run. Dkt. 13 at 4.

4 DISCUSSION

5 Under the Prison Litigation Reform Act of 1995, the Court is required to screen
6 complaints brought by prisoners seeking relief against a governmental entity or officer or
7 employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must "dismiss the
8 complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to
9 state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant
10 who is immune from such relief." *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*,
11 152 F.3d 1193 (9th Cir. 1998).

12 In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he
13 suffered a violation of rights protected by the Constitution or created by federal statute, and (2)
14 the violation was proximately caused by a person acting under color of state law. *See Crumpton*
15 *v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is therefore to
16 identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271
17 (1994). To satisfy the second prong, a plaintiff must allege facts showing how individually
18 named defendants caused, or personally participated in causing, the harm alleged in the
19 complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).

20 A. Excessive Force

21 Plaintiff alleges that defendants used excessive force in violation of the Eighth
22 Amendment when they responded to plaintiff choking on a spork. Dkt. 13. An Eighth
23 Amendment claim may be predicated on an officer's use of excessive force when interacting with
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1 a prisoner. “When prison officials use excessive force against prisoners, they violate the inmates’
2 Eighth Amendment right to be free from cruel and unusual punishment.” *Clement v. Gomez*, 298
3 F.3d 898, 903 (9th Cir. 2002). However, “[f]orce does not amount to a constitutional violation in
4 this respect if it is applied in a good faith effort to restore discipline and order and not
5 ‘maliciously and sadistically for the very purpose of causing harm.’ ” *Id.* (quoting *Whitley v.*
6 *Albers*, 475 U.S. 312, 320–321 (1986)); see also *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010)
7 (holding that, to prevail on an excessive force claim, a plaintiff must allege “not only that the
8 assault actually occurred but also that it was carried out maliciously and sadistically rather than
9 as part of a good-faith effort to maintain or restore discipline”). The Court must consider the
10 following relevant factors to determine whether the use of force was wanton and unnecessary:
11 “the extent of injury suffered [,] ... the need for application of force, the relationship between that
12 need and the amount of force used, the threat [to the safety of staff and inmates] ‘reasonably
13 perceived by the responsible officials,’ and ‘any efforts to temper the severity of a forceful
14 response.’ ” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (quoting *Whitley*, 475 U.S. at 322). The
15 absence of an emergency situation is probative of whether force was applied maliciously or
16 sadistically. See *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc). The lack of
17 injuries is also probative. See *Hudson*, 503 U.S. at 7-9. However, the Eighth Amendment does
18 not reach *de minimis* uses of physical force. *Id.* at 6-7.

19 Plaintiff names the Clark County Sheriff’s Office as a defendant and then states in the
20 body of his complaint, “I’m adding the Clark County Sheriff’s Office and the Clark County
21 Sheriff Chuck Atkins to my claim because Sergeant [sic] Grant Austin is employed by the
22 Sheriff office and the Sheriff and its [sic] their duty to make sure that their officers are properly
23 trained (which they are not).” Dkt. 13 at 3.

1 A governmental agency such as the Clark County Sheriff's Office normally cannot be
2 sued under § 1983 because it is not a municipality. *See Howlett v. Rose*, 496 U.S. 356, 365
3 (1990). If sufficient facts are alleged, the proper defendant would be Clark County, which is a
4 municipality that can be sued under § 1983. However, to hold a municipality such as Clark
5 County liable, plaintiff must show that the municipality itself violated his rights or that it directed
6 its employee to do so. *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404
7 (1994). Under this theory of liability, the focus is on the municipality's "policy statement,
8 ordinance, regulation, or decision officially adopted and promulgated by that body's Officers."
9 *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988) (quoting *Monell*, 436 U.S. at 690). A
10 local governmental unit may not be held responsible for the acts of its employees under a
11 respondeat superior theory of liability. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694
12 (1978). Plaintiff fails to identify what custom or policy of Clark County, if any, caused the
13 injuries of which he complains. Therefore, his present allegations do not support a claim against
14 Clark County.

15 Plaintiff named Austin as a defendant in his original complaint, *see* Dkt. 8, but did not
16 name Austin in the amended complaint. Plaintiff's amended complaint supersedes his original
17 complaint. *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) *overruled in part*
18 *on other grounds, Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). Thus, it is not clear if
19 plaintiff intends for Austin to be named as a defendant, or if he only seeks to name as defendants
20 the Clark County Sheriff's Office and Sheriff Atkins. Even if plaintiff had named Austin as a
21 defendant, he must plead more specific facts from which it may be inferred that Austin used
22 excessive force. Plaintiff must describe whether he suffered any injury as a result of Austin's
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1 actions, whether there was a threat to plaintiff's safety, and whether there was any need for force
2 to stop plaintiff from choking.

3 Plaintiff's allegations against defendant Atkins are similarly deficient. Section 1983
4 supervisory liability cannot be based on respondeat superior. See *Monell v. New York City Dep't*
5 *of Social Servs.*, 436 U.S. 658, 691 (1978). A § 1983 action may not be brought against a
6 supervisor on a theory that the supervisor is liable for the acts of his or her subordinates. See
7 *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). To the extent that plaintiff's allegations
8 against Sheriff Atkins are premised on his responsibility for jail employees and operation of the
9 jail, such allegations are insufficient to state a § 1983 against Sheriff Atkins. To state a claim
10 against any individual defendant, plaintiff must allege facts showing that the individual
11 defendant participated in or directed the alleged violation, or knew of the violation and failed to
12 act to prevent it. See *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.1998), *cert. denied*, 525
13 U.S. 1154 (1999). Because vicarious liability is inapplicable to a § 1983 suit, a plaintiff must
14 plead that each government-official defendant, through the official's own individual actions, has
15 violated the Constitution. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1948, 173 L.Ed.2d
16 868 (2009). Plaintiff alleges only that Sheriff Atkins had a duty to make sure that his officers
17 were trained. Dkt. 13 at 3. This is not sufficient to establish that he is liable in his individual
18 capacity. Plaintiff must allege facts showing that defendant Atkins participated in or knowingly
19 failed to prevent a violation of plaintiff's constitutional rights.

20 As presently plead, plaintiff's amended complaint also fails to establish that defendant
21 Atkins may be held liable in his official capacity. Defendant Atkins is employed by Clark
22 County. A claim against a municipal official in his official capacity is treated as a claim against
23 the entity itself. *Kentucky v. Graham*, 472 U.S. 159, 166, 105 S.Ct. 2545, 86 L.Ed.2d 112
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1 (1985). Because plaintiff has failed to state a claim against Clark County, he has also failed to
2 state a claim that defendant Atkins violated his rights while acting in his official capacity.

3 If plaintiff wishes to pursue this § 1983 action, he must provide a second amended
4 complaint with a short, plain statement explaining exactly what the named defendants did or
5 failed to do and how the actions violated plaintiff's constitutional rights and caused him harm.
6 Plaintiff should specify who he intends to name as defendants in this cause of action, whether
7 Austin is a named defendant, and specific facts, if any, that show how Austin caused plaintiff
8 injury and how he used force maliciously and sadistically for the purpose of causing harm.

9 **B. Instruction to Plaintiff and the Clerk**

10 Due to the deficiencies described above, the Court will not serve plaintiff's amended
11 complaint. If plaintiff intends to pursue a § 1983 civil rights action in this Court, he must file an
12 second amended complaint and within the second amended complaint, he must write a short,
13 plain statement telling the Court: (1) the constitutional right plaintiff believes was violated; (2)
14 the name of the person who violated the right; (3) exactly what the individual did or failed to do;
15 (4) how the action or inaction of the individual is connected to the violation of plaintiff's
16 constitutional rights; and (5) what specific injury plaintiff suffered because of the individual's
17 conduct. *See Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

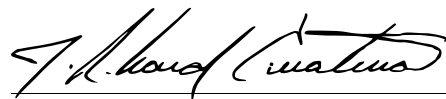
18 Plaintiff shall present the second amended complaint on the form provided by the Court.
19 The second amended complaint must be legibly rewritten or retyped in its entirety, it should be
20 an original and not a copy, it should contain the same case number, and it may not incorporate
21 any part of the original complaint by reference. The second amended complaint will act as a
22 complete substitute for the original complaint and amended complaint, and not as a supplement.
23 An amended complaint supersedes the original complaint. *Forsyth v. Humana, Inc.*, 114 F.3d
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1 1467, 1474 (9th Cir. 1997) *overruled in part on other grounds, Lacey v. Maricopa County*, 693
2 F.3d 896 (9th Cir. 2012). Therefore, the second amended complaint must be complete in itself
3 and all facts and causes of action alleged in the original complaint that are not alleged in the
4 amended complaint are waived. *Forsyth*, 114 F.3d at 1474. The Court will screen the second
5 amended complaint to determine whether it contains factual allegations linking each defendant to
6 the alleged violations of plaintiff's rights. The Court will not authorize service of the second
7 amended complaint on any defendant who is not specifically linked to a violation of plaintiff's
8 rights.

9 If plaintiff fails to file a second amended complaint or fails to adequately address the
10 issues raised herein on or before **May 27, 2016** the undersigned will recommend dismissal of this
11 action for failure to prosecute.

12 The Clerk is directed to send plaintiff the appropriate forms for filing a 42 U.S.C. § 1983
13 civil rights complaint and for service. The Clerk is further directed to send copies of this order
14 and Pro Se Instruction Sheet to plaintiff.

15 Dated this 26th day of April, 2016.

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18 J. Richard Creatura
19 United States Magistrate Judge
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