UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES D. GRIEPSMA,

Plaintiff,

v.

PA-C JO ELLA PHILLIPS, PA-C JENNIFER MEYERS, RN CARLEEN GRIMES, SUPERINTENDENT DONALD HOLBROOK, LIEUTENANT JAMIE TORRESCANO, C/O RYAN FARROW, C/O ROBERT SMITH, C/O DON ZARNT, C/O HEY GROGAN, C/O JUAN CORNEJO, C/O MICHAEL WALISER, C/O ALLEN DAHL, C/O WILLIAM RAILEY, and C/O JOHN DOE 1,

Defendants.

NO: 4:20-CV-5111-RMP

ORDER DISMISSING ACTION

1915(g)

BEFORE THE COURT are Plaintiff's Second Amended Complaint, ECF No. 28; a third Motion for Appointment of Counsel and Expert Witnesses, ECF No. 29; a Motion for Summons and Demand for Jury Trial, ECF No. 30; and a 32-page supplement to the Motion for Summons, ECF No. 31.

Plaintiff, a *pro se* prisoner at the Washington State Penitentiary, is proceeding *in forma pauperis*. ECF No. 11. Defendants have not been served in this action. Plaintiff seeks monetary damages and injunctive relief for alleged First, Fourth, Sixth, Eighth, and Fourteenth Amendment violations. ECF No. 28 at 4, 6, 7, and 9.

As a general rule, an amended complaint supersedes the original complaint and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012). Therefore, "[a]ll causes of action alleged in an original complaint which are not alleged in an amended complaint are waived." *King v. Atiyeh,* 814 F.2d 565, 567 (9th Cir. 1987) *overruled in party by Lacey,* 693 F.3d at 928 (any claims voluntarily dismissed are considered to be waived if not repled). Furthermore, defendants not named in an amended complaint are no longer defendants in the action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Accordingly, Defendant C/O John Doe 2 shall be **TERMINATED** from this action.

Liberally construing Plaintiff's submissions and for the reasons set forth below and in prior Orders, ECF Nos. 12 and 27, the Court finds that Plaintiff's Second Amended Complaint fails to cure the deficiencies of the prior complaints and fails to state a claim upon which relief may be granted.

SECOND AMENDED COMPLAINT

In Count I, Plaintiff contends that his Fourteenth Amendment rights under the due process clause and the equal protection clause were violated, as were his First,

Fourth, Sixth, and Eighth Amendment rights. ECF No. 28 at 4. In Count II, Plaintiff contends that Defendants Jamie Torrescano, Ryan Farrow, Robert Smith, John Doe 1, Don Zarnt, Hey Grogan, Juan Cornejo, Michael Waliser, Allen Dahl, William Railey and Donald Holbrook violated this Eighth Amendment right against cruel and unusual punishment and his equal protection rights under the Fourteenth Amendment. *Id.* at 6. In Count III, Plaintiff asserts that Defendants Jo Ella Phillips, Jennifer Meyers, Carleen Grimes and Donald Holbrook violated his right to "Adequate and Reasonable Medical Care for Serious Medical Needs" under the First, Eighth, and Fourteenth Amendments. *Id.* at 7.

EIGHTH AMENDMENT/SURGERY

Plaintiff claims that Kimberly E. Costas performed a thoracic surgery evaluation on March 29, 2019, and stated, "We'll arrange through the department of corrections." *Id.* at 4. He indicates that in response to a Health Services Kite at the Monroe Correctional Complex he was asked on March 31, 2019 if he was "positive" that he wanted "surgery on this." *Id.* at 5. On April 3, 2019, the same respondent stated, "I'll be curious how it works for you. Not a lot of cases in literature about a Xiphoidectomy. If you remember this was denied the first time above me. I have contacted the scheduler to schedule this." *Id.* at 5. It is unclear from the record why this did not occur while Plaintiff was housed at the Monroe Correctional Complex.

Plaintiff asserts that in a level 3 response to a Grievance, exhausted on February 4, 2020, he was told "12-16-18 for thoracic surgery (Approved by DOC

but determined not recommended by consultant)." ECF No. 28. at 5. He claims that Defendant PAC Jo Phillips falsely stated that during their initial encounter at the Washington State Penitentiary on August 26, 2019, that Plaintiff had relayed that a surgeon opined the removal of his xiphoid process would not be helpful, and for this reason the surgery was denied. *Id.* Plaintiff provides the following statement: "Based on her review of this information, PA – Palmer determined that surgery was not recommended at that time." *Id.* He claims Defendant Phillips stated, "Reviewed thoracic surgeon note on xiphoidectomy. Explained to pt. that on the consult in OMNI that there is a statement that this surgery is not necessary. I do not know who it was that did that, but that this time, I can tell him that it would not be a surgery that would be covered by the offender health plan." *Id.* at 5 and 13.

Plaintiff states that he received the following response to an October 20, 2019 kite: "You were told that your xyphoid process is a normal variant. That means that the surgery you are requesting is not medically necessary." ECF No. 28 at 13. Plaintiff also provides the following statement from an unidentified source: "He also complains of a bump over the xiphoid process. This can be a normal anatomic variant, however. I suggested that I could remove the xiphoid which may improve his chest wall pain but is not a guarantee of resolution of pain." *Id.*

Plaintiff claims that Defendant Phillips made the following statements: "The orthopedic surgeon that you saw said it was not necessary, though she would perform it. It was deemed not necessary by your DOC medical provider at the

time"; "This has been reviewed by an orthopedic surgeon and he/she did not feel that treatment is necessary"; "Explained to pt that the orthopedic surgeon that he saw (Dr. Kimberly Costas) stated that his xiphoid process was a normal variant. See orthopedic consult dated 3/29/2019"; "I need to do a physical exam. You were on my schedule last Wednesday to get it done, but due to your acting out, you were not pulled out. When you come of[f] your 4 man escort I will see you to do the exam and the [sic] submit to CRC." ECF No. 28 at 13–14.

Plaintiff avers that the events described above delayed him being seen for nearly 30 days. *Id.* at 14. He does not state when this occurred or any harm that resulted from this alleged 30-day delay. Plaintiff has failed to present "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *See Hudson v. McMillian*, 503 U.S. 1, 9 (1992); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

Liberally construing Plaintiff's statements in the light most favorable to him, the Court cannot infer that Defendant Phillips either knew that thoracic surgery was medically necessary or that she denied Plaintiff access to a scheduled thoracic surgery. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016). Although granted the opportunity to do so, Plaintiff has failed to amend his complaint to state a claim upon which relief may be granted.

Plaintiff also accuses RN Carleen Grimes of failing to make a report regarding

the use of force with oleoresin capsicum ("OC") on January 30, 2020. ECF No. 28 at 17. He claims that PA-C Jennifer Meyers falsely accused Plaintiff of refusing a medical callout on an unspecified date. *Id.* Neither failure to file a medical report when other reports documented Plaintiff's treatment after OC spray was deployed, nor accusing a prisoner of refusing a medical appointment, supports a claim of deliberate indifference to a serious medical need. *See Hudson v. McMillian*, 503 U.S. 1, 7 (1992). Plaintiff has failed to state claims against Defendants Grimes and Meyers upon which relief may be granted.

Plaintiff claims that Defendant Phillips refuses to treat his current serious medical conditions, without identifying what those medical conditions are or supporting his conclusory assertions with facts. ECF No. 28 at 17. Plaintiff also accuses Defendant Phillips of refusing to provide information regarding her medical license number, to answer questions regarding forms, to provide names of other persons, or to prescribe a shower chair. *Id*.

Plaintiff states that he had "heart complications" when he was left in a shower stall for 90 minutes on February 23, 2020. He does not state that he has been subjected to additional lengthy shower stays, or that he is likely to. Plaintiff presents no facts from which the Court could infer that a medical professional determined that a shower chair was medically necessary.

As previously advised, a difference of opinion between an inmate and medical authorities regarding proper medical treatment does not give rise to a § 1983 claim.

Franklin v. Oregon, State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981). Therefore, the Court cannot infer that Defendant Phillip's failure to prescribe a shower chair is deliberate indifference to a serious medical need. Plaintiff has failed to state a claim upon which relief may be granted.

DUE PROCESS

Plaintiff asserts that Defendants PA-C Jo Ella Phillips, PA-C Jennifer Meyers, Sergeant Jamie Torrescano, C/O Rayan Farrow, C/O Robert Smith and Superintendent Donald Holbrook instigated the "Use of Force with OC" on January 30, 2020, in violation of Plaintiff's right to due process. *Id.* at 14. He claims that they violated DOC policy 890.600 by permitting the use of OC spray without the requisite form (i.e., form 13-473 Medical Risk Evaluation for OC, CS and EID) being properly completed and present in his medical file. *Id.* at 15. Plaintiff contends that his "diagnosed mental health conditions, multiple physical conditions which [a]ffect [his] breathing ability" and the fact that he was "in a single-man cell, not threatening to cause any harm to [himself] or to others, or causing any harm to [himself]," should have precluded the use of OC spray. *Id.* at 14. The Court will address Plaintiff's assertions regarding the use of OC spray under Count II.

Plaintiff states that Defendant Superintendent Holbrook responded on March 5, 2020, to Plaintiff's letter complaining of the use of OC spray and made allegedly false statements, gave his "tacit consent to everything that is occurring to [Plaintiff]," and allegedly made belligerent statements including, "You were then

evaluated by medical staff who ensured you did not have injuries from the Use of Force or that you needed further medical attention from the wounds you inflicted . . . These were appropriate responses to the dangerous behavior that you exhibited." *Id.* at 15. Plaintiff asserts that, because there are no independent medical reports for that date, Defendant Holbrook either "completely failed to do an investigation before responding or tried to cover it up." *Id.* at 16.

Plaintiff also contends that Defendant Holbrook's response violated due process because Plaintiff experienced an elevated heart rate, or tachycardia, on February 1, 2020, for which he was transported to the infirmary for an electrocardiogram ("EKG") at 5:00 a.m.; he was subsequently transported by ambulance to an Emergency Room; and he was prescribed heart medication and two weeks of heart rate monitoring on February 3, 2020. *Id.*

As addressed in the Court's prior Order, an off-site Cardiologist performed a complete transthoracic echocardiogram on July 23, 2020, and opined that the tachycardia was a "side effect" of Plaintiff's use of albuterol. ECF No. 27 at 24–25. The Cardiologist also noted that because asthma had been "ruled out" and Plaintiff no longer needed albuterol, in addition to the start of "metoprolol 25 mg in February due to palpitations," Plaintiff was feeling "much better" after "stopping albuterol." *Id.* at 25. The Cardiologist further noted that there were "no signs and symptoms of overt congestive heart failure." *Id.*

It is unclear how the absence of a medical report on January 30, 2020, belies

Defendant Holbrook's statements. It is equally unclear how events occurring in February 2020 support a claim that Plaintiff's due process rights were violated. As previously advised, the existence of an administrative remedy process does not create any substantive rights and mere dissatisfaction with the remedy process or its results cannot, without more, support a claim for relief for violation of a constitutional right, *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir.1988).

The failure of prison officials to respond to or process a grievance does not violate the Constitution. *See Flick v. Alba*, 932 F.2d 728, 729 (8th Cir. 1991); *see also Baltoski v. Pretorius*, 291 F.Supp.2d 807, 811 (N.D. Ind. 2003) ("[t]he right to petition the government for redress of grievances, however, does not guarantee a favorable response, or indeed any response, from state officials"). Therefore, Defendant Holbrook's response to Plaintiff's letter of complaint does not state a claim upon which relief may be granted.

A supervising state official may be liable under section 1983 only if they "knew of the violation[ ] and failed to prevent [it]," or they established a custom or policy that led to the violation. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *see also Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 680 (9th Cir. 1984); *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (a supervisor can only be held liable for his or her own culpable action or inaction). Plaintiff asserts that Defendant Holbrook "refused and continues to act to stop the violations of my Due

Process Rights. Holbrook has had an ample opportunity to stop the above named Defendants, Phillips, Meyers, Torrescano, Farrow and Smith's knowing, intentional, malicious, and willful unlawful acts but by his inaction to curb their misconduct, he is giving his tacit consent to it, thereafter, he himself is choosing to violate my Due Process Rights. Ultimately causing my xiphoidectomy to be denied, which had already been approved. Then causing damage to my heart by not enforcing his medical staff to abide by DOC medical policies such as 890.620, then making the Use of Force policies unavailable to me, even after I follow due process by requesting them from staff by form." *Id.* at 16-17.

As previously advised, the failure to follow prison policy does not establish a constitutional violation. *See Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009). Apart from his conclusory assertions, Plaintiff presents no facts from which the Court could infer that Defendant Holbrook was aware of constitutional violations or that any alleged violations were caused by a custom or policy that he established. Plaintiff has failed to alleged facts sufficient to state a claim that he was deprived of liberty without due process under the Fourteenth Amendment. *See Wolff v. McDonnell,* 418 U.S. 539, 556 (1974); *Matthews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

Plaintiff does not state on what basis he is complaining that his First, Fourth, or Sixth Amendment rights were violated or how he was denied equal protection. As previously advised, to state a claim for violation of the Equal Protection Clause of

the Fourteenth Amendment, a plaintiff must allege that he was treated differently from other similarly situated persons. *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985); *Fraley v. U.S. Bureau of Prisons*, 1 F.3d 924, 926 (9th Cir. 1993). Here, Plaintiff presents no facts from which the Court could infer that any of the named Defendants treated Plaintiff differently than similarly situated persons. He has failed to state an equal protection claim upon which relief may be granted.

To the extent Plaintiff may be attempting to assert a First Amendment retaliation claim, he again fails to present facts supporting a plausible claim that adverse action was taken against him because he engaged in conduct protected under the First Amendment. *See Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012*); Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009).

EIGHTH AMENDMENT/USE OF FORCE

In Count II, Plaintiff avers that he was having a nervous breakdown on January 30, 2020, when he repeatedly asked to speak to "Mental Health" for what seemed to him "like hours." ECF No. 28 at 6. He admits that he smashed his television, thinking this would cause officials to "take [him] seriously." *Id.*

In response to this behavior, Defendant Sergeant Jamie Torrescano and several Correctional Officers in "riot gear" came to Plaintiff's single person cell and Defendant Torrescano demanded that Plaintiff "cuff up!" *Id.* Plaintiff avers that when he questioned this command, he was told, "If you don't cuff up, we're going to spray you." ECF No. 28 at 6. Plaintiff then argued why he should not be sprayed.

Id.

Plaintiff contends that a prior medical authorization, presumably for the use of OC spray, was invalid because it "lacks the required Provider typed name/stamp, signature, and name of the sergeant this authorization was relayed to." ECF No. 28 at 6. He also asserts that his Albuterol Inhaler was sitting on the table. *Id.* Plaintiff claims that Defendant Torrescano became "very angry," and Defendant C/O Ryan Farrow began spraying "OC" under Plaintiff's door. *Id.* at 6. Elsewhere, Plaintiff asserts that he "did not disobey or resist." *Id.* at 20. Yet, he admits that he did not immediately comply with the directive to "cuff up," but rather chose to argue. *Id.* at 6.

Plaintiff asserts that because he was unfamiliar with the procedures at WSP, he knelt with his hands behind his back, expecting an officer to enter the cell and cuff him. ECF No. 28 at 7. Instead, Defendant C/O Robert Smith opened the electrical port and sprayed high velocity spray on Plaintiff's head and back for two seconds, then for three seconds, and then for one second. ECF No. 28 at 7 and 18. Plaintiff contends this was a "deadly amount" dispersed into his single person cell for "no penological reason." *Id.* at 18.

Plaintiff asserts that when he realized the officers were not entering his cell after the third spray, he blindly found the door, walking over sharp pieces of plastic and being further deprived of oxygen. ECF No. 28 at 18. He states that he blacked out periodically after being cuffed. *Id.* He states that there was a delay before the

door was opened and he was told to kneel. *Id.* He states that leg irons were placed on him inside the cell, and he remained in the cell "for what seemed . . . like ten minutes," when he gasped, "I can't breathe!" *Id.* He asserts that he was still held in the threshold. *Id.*

Plaintiff states that he kept his eyes closed to avoid excess physical pain, and while being transported to "facial decontamination," one of the officers, believed to be Defendant C/O Robert Smith, taunted Plaintiff by stating, "If you keep kicking your door, I'll burn your skin like last time." *Id.* at 18–19. To the extent Defendant Smith threatened to again use OC spray on Plaintiff (i.e., inflict the ordinary burning sensation of capsaicin), if Plaintiff kicked a door, this assertion does not state a claim upon which relief may be granted. *See Keenan v. Hall,* 83 F.3d 1083, 1092 (9th Cir.1996), *as amended at* 135 F.3d 1318 (9th Cir. 1998) (holding that verbal threats and harassment do not state an Eighth Amendment claim); *see also Oltarzewski v. Ruggiero,* 830 F.2d 136, 139 (9th Cir.1987) (directing vulgar language at an inmate does not state a constitutional claim).

Plaintiff claims that Defendant Torrescano insulted him by asking, "Griepsma, do you have any problem with use of force?" ECF No. 28 at 19. Plaintiff claims that staff were ordered to "get their masks" after spraying began and they were heard coughing outside his cell. *Id.* at 19. Accepting these assertions as true, the Court is unable to infer that a constitutional violation occurred. *See Keenan,* 83 F.3d at 1092.

Plaintiff's contention that a "deadly amount" of OC spray was used without a

"penological reason" is disingenuous. Plaintiff admits that he did not comply with a directive to cuff up after he was warned that he would be sprayed if he did not comply. His understanding of procedures is irrelevant to whether Defendants' actions constituted the "unnecessary and wanton infliction of pain." *See Whitley v. Albers,* 475 U.S. 312, 318-21 (1986).

The Court cannot infer that three separate bursts of OC spray, lasting no more than three seconds each, constitute deadly, let alone excessive, force. *See Spain v. Procunier,* 600 F.2d 189, 195 (9th Cir. 1979) (finding in the Eighth Amendment context that the use of tear gas in small amounts "may be a necessary prison technique if a prisoner refuses after adequate warning to move from a cell or upon other provocation presenting a reasonable possibility that slight force will be required. In these circumstances the substance may be a legitimate means for preventing small disturbances from becoming dangerous to other inmates or the prison personnel."). Here, Plaintiff's ability to ambulate from his cell for "face decontamination" following the deployment, belies his assertion that a "deadly amount" of OC spray was used on January 30, 2020. Furthermore, Plaintiff presents no facts from which the Court could infer that he was treated differently that similarly situated prisoners. *See Cleburne*., 473 U.S. at, 439; *Fraley*, 1 F.3d at 926.

EIGHTH AMENDMENT/MEDICAL TREATMENT

In Count III, Plaintiff again claims that he was approved for orthopedic/thoracic surgery as confirmed in a Level 3 response to a grievance. ECF

No. 28 at 7. He does not state the date of this grievance response or provide any factual allegations from which the Court could infer that any of the named Defendants denied him access to a scheduled surgery.

Plaintiff states that on August 24, 2019, he self-reported "diagnosed medical conditions, pain, disability and popping of [his] sternum." *Id.* at 7. He contends that on August 26, 2019, he provided the names of all the facilities where he had been seen to Defendant PA-C Jo Ella Phillips so that she could request his medical records. *Id.* at 7–8. He asserts that Defendant Phillips did not send a Request of Information ("ROI") to a hospital and a chiropractic facility until July 22, 2020. *Id.* at 8. Thus, Plaintiff concludes that he has been denied treatment for his "ribs, xiphoid, back, and (Rt) dominant hand, only minimal pain relief has been prescribed, x-ray results are compromised by D.O.C. contractual Radiologist and readings are falsified by PA-C Phillips." *Id.* at 8.

Plaintiff argues that Defendant Phillips relied on x-rays taken in 2018 and read by someone else concerning Plaintiff's right hand and lumbar spine. ECF No. 28 at 8. He asserts that she stated, "No significant deformity or joint abnormality," regarding his right hand. *Id.* at 8. Plaintiff reports that in September 2018, a physical therapist had opined, "MCP joints of the 4th and fifth metacarpals appear slightly deformed," and did not schedule "follow up PT." *Id.* at 20–21. The Court cannot infer deliberate indifference to a serious medical need from the act of reporting "no significant deformity" in reliance on another medical provider's

description of the metacarpals as "slightly deformed."

Regardless, the Court addressed Plaintiff's assertions regarding his right hand in the prior Order to Amend or Voluntarily Dismiss, ECF No. 27 at 39–40. The Court noted that Defendant Phillips sent Plaintiff for x-rays on August 26, 2019, after advising him that the Department of Corrections would not perform elective amputations. *Id.* at 39. Again, Plaintiff has presented no facts from which the Court could infer that any further treatment for his right hand was deemed medically necessary under the circumstances or was denied to him with deliberate indifference to his suffering.

Plaintiff avers that Defendant Phillips made the following statements on unspecified dates: "He states that he has a bone (xiphoid process) that is sticking out of his chest and causing him pain. He states that he cannot lay on his sides because of pain but at times he has to due to his back pain." "Attempted to explain to pt that I can't just refer him to an outside doctor unless I have a reason to do so, and I currently do not have a reason to send him to an outside doctor." *Id.* at 21. Plaintiff does not provide the context for these statements. Based on Plaintiff's assertions above and those made in Count I, the Court is unable to infer that Defendant Phillips acted with deliberate indifference to Plaintiff's serious medical needs regarding his xiphoid process.

Plaintiff asserts that Defendant Phillips stated: "Explained that []his thyroid labs are normal." *Id.* at 21. He asserts that Defendant Phillips "waited until I ended

up in the ER before I was prescribed Levothyroxine 25 mcg for my Hypothyroidism." *Id.* Plaintiff avers that Defendant Phillips made the following statements on unspecified dates: "will continue thyroid medication at current dose. Will repeat test in 3 months" and "will continue current dose of levothyroxine." *Id.* at 21. Plaintiff does not provide the dates of these interactions. Plaintiff's presented facts indicate that he receives periodic testing and has been provided medication for his thyroid condition. The Court is unable to infer from Plaintiff's factual statements that Defendant Phillips was deliberately indifferent to a known serious medical condition.

Plaintiff states that Defendant Phillips reviewed a computed tomography scan ("CT scan") of a "single 6 mm calcified [thyroid] nodule in the right lobe" and relayed to Plaintiff that "it would be very unusual for a 6 mm thyroid nodule to effect [sic] breathing." ECF No. 28 at 22. Plaintiff provides additional statements of "a benign 8 mm left lateral mid thyroid lobe cyst as well as 5 mm medial right thyroid lobe calcification," and "Left lateral mid thyroid anechoic cyst measures 8x5x4 mm, without internal vascular flow on color Doppler interrogation." *Id.* Plaintiff does not identify the significance of these findings or state when they occurred. At worst, he is alleging that Defendant Phillips may have failed to detect thyroid cysts, which may state, at most, negligence or medical malpractice. This is insufficient to support a claim of deliberate indifference to a serious medical need under the Eighth Amendment. *See Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir.

2004).

Plaintiff refers the Court to Count I for "details" of how Defendants PA-C Jennifer Meyers, RN Carleen Grimes and Superintendent Donald Holbrook "are responsible for Deprivation of Adequate and Reasonable Medical care for my Serious Medical Needs." ECF No. 28 at 22. Having failed to present factual allegations in Count I to support a claim that any of these Defendants were deliberately indifferent to Plaintiff's serious medical needs, the Court finds that Plaintiff has failed to state a claim upon which this Court may grant relief.

Plaintiff accuses Defendants Phillips and Meyers of using "Wanton infliction of pain and suffering by fabricating their medial responses/reports to deny me treatment," and of "falsification of what the reports say, of what D.O.C. policy requires of them to authorize Use of Force." ECF No. 28 at 22. Apart from his conclusory assertions, Plaintiff again presents no facts supporting a claim of deliberate indifference to his serious medical needs. *See Farmer*, 511 U.S. at 837; *Jett*, 439 F.3d at 1096; *Hamby*, 821 F.3d at 1092. Indeed, Plaintiff indicates that he has received various testing and treatment, including x-rays, scans, and medications. The Court cannot infer a constitutional deprivation from the facts presented in the Second Amended Complaint.

Although granted the opportunity to do so, Plaintiff has failed to state a claim upon which relief may be granted. Accordingly, **IT IS ORDERED** that this action is **DISMISSED WITH PREJUDICE** for failure to state a claim upon which relief

may be granted under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

Pursuant to 28 U.S.C. § 1915(g) a prisoner who brings three or more civil actions or appeals which are dismissed as frivolous or for failure to state a claim will be precluded from bringing any other civil action or appeal *in forma pauperis* "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). **Plaintiff is advised to read the statutory provisions of 28 U.S.C. § 1915. This dismissal of Plaintiff's complaint may count as one of the three dismissals allowed by 28 U.S.C. § 1915(g) and may adversely affect his ability to file future claims *in forma pauperis*. IT IS FURTHER ORDERED** that all pending motions are **DENIED AS MOOT.**

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order, enter Judgment, provide copies to Plaintiff, and **CLOSE** the file. The District Court Clerk is further directed to provide a copy of this Order to the Office of the Attorney General of Washington, Corrections Division. The Court certifies that any appeal of this dismissal would not be taken in good faith.

DATED April 26, 2021.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge