No. 07-55871

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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ROBERT J. McCULLOCK,

Plaintiff and Appellant,

v.

LOS ANGELES COUNTY SHERIFF,
SHERIFF L. BACA,

Defendant and Appellee.

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Appeal From The United States District Court
For The Central District of California
Honorable Philip S. Gutierrez, Judge Presiding
USDC No. CV 05-05064-PSG (OP)

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# APPELLEE'S BRIEF

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**Statutes, Rules and Constitutions**

## STATEMENT OF JURISDICTION

Subject matter jurisdiction in the district court was proper under 28 U.S.C. § 1331 for claims pursuant to 42 U.S.C. § 1983.

Judgment following an order granting summary judgment in favor of defendant, the Los Angeles County Sheriff, Leroy D. Baca, was entered on May 24, 2007. (CR 44; 2 SER 182.[1])

Plaintiff Robert McCullock filed a notice of appeal on June 13, 2007. (CR 45; 2 SER 183.) The notice of appeal was timely under Federal Rule of Appellate Procedure 4(a)(1), and this court therefore has jurisdiction under 28 U.S.C. § 1291.

[1] The district court record is cited as "CR" followed by docket number, and Sheriff Baca's supplemental excerpts of record as "SER." The appellant's informal brief is designated "AIB."

## ISSUE PRESENTED

McCullock's opening brief does not specify the grounds on which he challenges the grant of summary judgment. Assuming he intends to assert that all of the district court's reasons for granting summary judgment were wrong, the appeal presents the following issue:

Did the district court correctly grant summary judgment in favor of Sheriff Baca on McCullock's claim, under 42 U.S.C. § 1983, that he was denied constitutionally adequate medical treatment while jailed, because McCullock failed to raise a triable issue of material fact as to (1) whether Baca or anyone in the Sheriff's Department was deliberately indifferent to McCullock's serious medical needs, or (2) whether Baca was personally involved in, or instituted a policy that was the moving force behind, any alleged denial of medical treatment?

## STATEMENT OF THE CASE

McCullock initiated his pro se lawsuit under 42 U.S.C. § 1983 on July 11, 2005. (CR 1.) The district court granted his request to proceed in forma pauperis, and the case was referred to a magistrate judge. (CR 2-4.)

McCullock filed the operative first amended complaint on August 29, 2005, naming the Los Angeles County Sheriff, Leroy D. Baca, in his individual capacity, as the sole defendant. (CR 10; 2 SER 16, 18.) The complaint alleged that Sheriff Baca violated the Eighth Amendment by demonstrating deliberate indifference to McCullock's serious medical needs. (2 SER 18, 20.) Specifically, McCullock alleged that from January 12 through January 16, 2004, Baca failed to treat him with insulin for his diabetes, despite McCullock's complaints on those dates that he needed treatment, and despite a medical order issued by the Los Angeles County Superior Court on January 14, 2004, stating that McCullock "appear[ed] to need . . . insulin treatment for his diabetes." (2 SER 20, 22.) As a result, McCullock alleged he suffered pain, physical injury and emotional distress. (2 SER 20.)

McCullock requested appointment of counsel and attorney's fees, general and special damages, and punitive damages. (2 SER 21.)

On July 3, 2006, Sheriff Baca moved for summary judgment on the grounds that McCullock could not establish that (1) he had been deprived of any

constitutional right, or (2) Baca personally participated in or caused such a deprivation. (CR 30-31; 2 SER 23-32.)

McCullock filed opposition to the summary judgment motion, citing several legal authorities and including various exhibits and declarations. (CR 32; 2 SER 95-132.)

On February 13, 2007, the magistrate judge issued an order allowing McCullock to file a supplemental opposition and Baca to file a supplemental reply thereto. Pursuant to *Rand v. Rowland*, 154 F.3d 952, 960, 961 n.8 (9th Cir. 1998), and *Klingele v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988), the order also spelled out the requirements under Rule 56 of the Federal Rules of Civil Procedure for opposing the motion. (CR 36; 2 SER 138-39.)

McCullock then filed a supplemental opposition, which merely restated his section 1983 claim, added a declaration explaining why he could not submit the number of copies required by the Local Rules, and appended a copy of his original opposition. (CR 38; 2 SER 140-181.) Baca filed a supplemental reply. (CR 42.)

On April 3, 2007, the magistrate judge issued a report and recommendation that summary judgment be granted to Baca. (CR 40-41; 1 SER 1-14.) The magistrate judge reasoned that, in response to Baca's showing the absence of a triable issue of material fact, McCullock had failed to raise a triable issue as to (1) whether any alleged denial of, or delay in providing, medical treatment caused him

substantial harm, or (2) whether Baca was personally involved in the purported constitutional violation. (1 SER 5-12.)

On May 23, 2007, the district court adopted the magistrate judge's report and recommendation, and granted summary judgment to Baca. (CR 43; 1 SER 14.) Judgment was entered on May 24, 2007. (CR 44; 2 SER 182.) McCullock filed a timely notice of appeal on June 13, 2007. (CR 45; 2 SER 183.)

## STATEMENT OF FACTS

### A. McCullock's Medical Treatment.

McCullock is a prisoner in custody of the State of California. During the period in question, he was in custody of the County of Los Angeles, at the Los Angeles County Jail. (2 SER 16, 48-49.)

McCullock is a Type II, non-insulin-dependent diabetic. (2 SER 49, 52-53].) At the jail, he had been prescribed Glyburide, 5 mg each morning; Lisinopril, 10 mg each morning; and Glucophage (also known as Metformin), 1000 mg twice daily. (2 SER 49, 52-53.) He also had an order for blood sugar checks three days a week, which was later changed to once a week at his own request. (2 SER 49, 53, 55, 72, 74-75, 80-82.[2])

From January 12 to January 16, 2004, when McCullock claims he was denied "insulin" for his diabetes (2 SER 20; *see* AIB 1-2), he continued to receive his morning doses of Glyburide, Lisinopril, and Glucophage. However, he missed

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[2] The computer program used for keeping jail medical records was not designed to print out medical orders; when such orders are printed, they appear on three pages. To read them, the three pages must be placed side by side and viewed as one continuous page or screen. (2 SER 49.)

The "status" on the orders reflects the *present* status. Thus, an order that shows a "discontinued" status does not mean that the order was discontinued on the date shown, but rather that the order has since been discontinued (i.e., due to entry of a different order or release of the inmate). (2 SER 49.)

his evening doses of Glucophage on January 9, 13, 14, and 16 because he was in court. (2 SER 49, 66-69.)

On January 14, 2004, during his court proceedings, McCullock obtained a medical order from the Los Angeles County Superior Court stating that he "appear[ed] to need . . . insulin treatment for his diabetes." (2 SER 22.) The Sheriff's Department's Medical Services Bureau received the order at 9:40 a.m. on January 15, 2004. (2 SER 59.) Following Sheriff's Department custom, a nurse promptly reviewed McCullock's chart. The nurse determined that McCullock was not insulin-dependent; that he was already under a physician's care and had been prescribed medication for his diabetes; that he had been receiving the medication regularly; and that his blood sugar had been well-controlled. Based on that information, the nurse concluded that McCullock did not need further evaluation by a physician. Had the court order stated that McCullock should be examined by a physician, the nurse would have made arrangements accordingly. (2 SER 58-59.)

McCullock's medical records show that, throughout his incarceration, his blood sugar was being well-maintained on the medications he was receiving. (2 SER 59.) His blood glucose levels were checked on January 7, 2004 and January 21, 2004, and were within the normal range. (2 SER 50, 53, 56, 74.) There is no evidence that the isolated missed medications disturbed McCullock's medical condition, increased his risk for diabetic complications, or had any discernible

effect on him – including his ability to understand the court proceedings. (2 SER 53-54.) In addition, the treatment McCullock received for his diabetes was within the standard of care at all times. (2 SER 52.)

### B. The Sheriff's Department's Provision of Medical Care.

Sheriff Baca has overall responsibility for the operations of the Sheriff's Department, which is responsible for maintaining the Los Angeles County jail system and the custody of its prisoners. Baca delegates the day-to-day supervision and administration of the County jail system to the Sheriff's Custody Division and the Correctional Services Division; the latter includes the Medical Services Bureau, through which physicians, nurses, and other medical staff provide medical care to inmates. (2 SER 38-39.)

The Sheriff's Department's policy is to provide medical care to its inmate population to the best of its ability. (2 SER 39-42, 46.)

## SUMMARY OF ARGUMENT

In this action under 42 U.S.C. § 1983, McCullock contends that Sheriff Baca violated the Eighth Amendment by denying him medication for his diabetes. On appeal, McCullock does not specify on what grounds he challenges the district court's grant of summary judgment to Sheriff Baca. Assuming McCullock means to challenge all of the district court's reasons – in other words, assuming he intends to argue that somehow he raised a triable issue of fact to defeat summary judgment – he is wrong on two independent grounds.

First, the district court correctly found that McCullock failed to raise a triable issue of fact as to whether Sheriff Baca, or anyone in the Sheriff's Department, was deliberately indifferent to his serious medical needs, as required for an Eighth Amendment violation based on denial of prisoner medical care. It is undisputed that McCullock was a non-insulin-dependent diabetic and was being treated with oral medications that adequately controlled his blood sugar. Although he missed a few non-consecutive doses of one of his medications because he was in court, the missed doses did not cause him any harm or increase his risk for diabetic complications. McCullock faults Baca for failing to follow a court order that purportedly required Baca to treat McCullock with insulin, but that order cannot create a triable issue of fact because McCullock did not need insulin. McCullock also criticizes the jail for failing to adhere to its written policy regarding location,

manner and time of administering medications to prisoners before their court attendances, and for failing to monitor his blood glucose during the week he was in court, but these criticisms also fail to show that Baca or anyone else deliberately disregarded a serious medical need.

Second, Sheriff Baca could not be held liable on a supervisory liability theory because there was no evidence that he was personally involved in any purported delay or denial of medical care, or that he instituted a constitutionally deficient policy that caused such a denial. As McCullock himself pointed out, Baca delegates the day-to-day supervision and administration of the Los Angeles County jail system, including its system for providing medical care to prisoners, and there is no evidence that he participated in withholding insulin or other medication from McCullock. Moreover, there is no evidence that Baca implemented a policy of denying legitimate medical treatment to prisoners; rather, the Sheriff's Department's policy is to maintain a medical services system that will provide medical care to its inmate population to the best of its ability.

The summary judgment should be affirmed.

## STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. That burden may be met "merely by 'showing' – that is, pointing out to the district court through argument" – that there is an absence of evidence to support an essential element of the nonmoving party's case. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531-32 (9th Cir. 2000); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265(1986). Once the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and identify facts showing an issue for trial. *See Celotex*, 477 U.S. at 322-23, 106 S. Ct. at 2552-53. To meet this burden, the nonmoving party must offer more than a mere scintilla of evidence; he must show that the evidence "is such that a reasonable jury could return a verdict in his or her favor." *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998); *see also Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) ("Summary judgment may be granted if 'the evidence is merely colorable . . . or is not significantly probative'"). Summary judgment "cannot be

avoided by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

This court reviews the grant of summary judgment *de novo* and "must determine whether the district court correctly applied the law and if, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact." *Margolis*, 140 F.3d at 852. The court may affirm on any ground supported by the record, whether or not the district court relied on it. *E.g.*, *First Pac. Bank v. Gilleran*, 40 F.3d 1023, 1024-25 (9th Cir. 1994).

Moreover, the district court's decision is presumed correct. *Parke v. Raley*, 506 U.S. 20, 29, 113 S. Ct. 517, 523, 121 L. Ed. 2d 391 (1992); *Purcell v. Gonzalez*, __ U.S. __, 127 S.Ct. 5, 7-8, 166 L. Ed. 2d 1 (2006). Thus, this court reviews "only issues which are argued specifically and distinctly in a party's opening brief" and "will not manufacture arguments for an appellant." *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1176 (9th Cir. 1996 (pro se appellant).

## LEGAL ARGUMENT

### THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SHERIFF BACA BECAUSE McCULLOCK FAILED TO RAISE A TRIABLE ISSUE OF MATERIAL FACT AS TO HIS SECTION 1983 CLAIM.

In his informal brief, McCullock simply restates – as the issue he raises on appeal – the claim he asserted under section 1983 in the district court: he contends, without further explanation, that "the Los Angeles County Sheriff's [Department] deliberately, in a timely [sic] manner, discontinued medication, beginning on the first day of trial." (AIB 2; *see also* AIB 1.) McCullock does not specify on what basis he asserts the district court erred. To the extent he means to contend that he raised a triable issue of material fact, he is wrong. As explained below, the district court properly concluded that there was no genuine issue of fact warranting a trial.

#### A. Summary Judgment Was Appropriate on McCullock's Eighth Amendment Claim Because He Failed to Raise a Triable Issue As to Whether Sheriff Baca or Any Other Sheriff's Department Official Was Deliberately Indifferent to His Serious Medical Needs.

To state a claim for relief under section 1983, a plaintiff must establish that he was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999). McCullock alleges that Sheriff Baca violated the Eighth

Amendment, which bans "cruel and unusual punishments." U.S. Const. amend. VIII.[3]

To prove an Eighth Amendment violation in the context of prisoner medical care, a plaintiff must prove "deliberate indifference to [his] serious medical needs," that is, the conduct alleged must amount to "the 'unnecessary and wanton infliction of pain.'" *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976). Specifically, an inmate must establish two elements: (1) there was a risk of "'objectively "sufficiently serious"'" harm, and (2) the prison official had a "'sufficiently culpable state of mind'" in denying adequate care. *Wallis v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir. 1995); *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002).

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[3] McCullock may have been a pretrial detainee, since it appears that he attended his criminal trial while he was incarcerated at the Los Angeles County jail. (2 SER 22, 48-49, 52; AIB 2.) The rights of a pretrial detainee, who is not yet convicted of a crime and so cannot be "punished," are analyzed under the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 99 S. Ct. 1861, 1872 n.16, 60 L. Ed. 2d 447 (1979). However, in the context of claims based on inadequate medical care, this court has applied the same standard to pretrial detainee claims that it applies to prisoner claims. *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998) (pretrial detainee's rights under the Fourteenth Amendment are comparable to prisoner's rights under the Eighth Amendment, and so the same standards apply); *see also Redman v. County of San Diego*, 942 F.2d 1435, 1442-43 (9th Cir. 1991) ("deliberate indifference" standard applies to pretrial detainees).

A serious medical condition or need exists when the "'failure to treat [it] could result in further significant injury or the "unnecessary and wanton infliction of pain."'" *Clement*, 298 F.3d at 904. To meet the state of mind requirement, a plaintiff must prove that the prison official "*knows of and disregards* an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811 (1994) (emphasis added).

Deliberate indifference may be manifest "when prison officials deny, delay or intentionally interfere with medical treatment," or it may be shown "by the way in which prison physicians provide medical care." *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988). But an inadvertent failure to provide adequate medical care, mere negligence or medical malpractice, or a difference of opinion over proper medical treatment, are all insufficient to constitute an Eighth Amendment violation. *Estelle*, 429 U.S. at 105-06; 97 S. Ct. at 291-92; *Sanchez v.Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Hutchinson*, 838 F.2d at 394. Rather, a plaintiff "must show that the course of treatment the doctors chose was *medically unacceptable* under the circumstances." *Jackson v. Macintosh*, 90 F.3d 330, 332 (9th Cir. 1996) (emphasis added).

Moreover, a mere delay in treatment is not culpable conduct unless the delay itself caused "substantial harm." *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir. 1990) ("nor does the delay in treatment . . . constitute an eighth amendment violation; the delay must have caused substantial harm"; such harm was not present where prisoner's condition "did not require emergency attention. . . . [n]or did the delay substantially harm [the prisoner's] treatment"); *Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) ("mere delay of surgery, without more, is insufficient to state a claim of deliberate medical indifference"; plaintiff "would have had no claim for deliberate medical indifference unless the denial was harmful"); *see also Frost*, 152 F.3d at 1130 (alleged delay in administering pain medication, treating a broken nose and providing prisoner with replacement crutch did not constitute deliberate indifference); *Wood v. Sunn*, 865 F.2d 982, 989 (9th Cir. 1989) ("[i]solated occurrences of neglect do not amount to deliberate indifference").

Here, in moving for summary judgment, Sheriff Baca presented admissible evidence showing that there was no triable issue of material fact regarding either whether any alleged delay or denial of medical treatment caused McCullock harm, or whether Baca (or any prison official) knowingly disregarded a serious risk to McCullock's health. Specifically, Baca presented the following evidence:

- McCullock is a Type II, non-insulin-dependent diabetic – in other words, he did not require insulin. (2 SER 49, 52-54.)

- McCullock was receiving medical care for his diabetes. Specifically, he was being treated with oral medications, which adequately controlled his blood sugar throughout his incarceration. (2 SER 49-50, 52-53; *see also* 2 SER 54-56, 74 [McCullock's jail medical record, indicating blood glucose test results of 89 mg/dl on January 7, 2004, and 107 mg/dl on January 21, 2004 – i.e., within normal limits as described in declaration by Baca's expert at 2 SER 53, ¶ 8], 72, 74-75, 80-82 [order for blood sugar checks three days per week, later changed to once per week at McCullock's request].)

- Although McCullock missed his evening dose of one of his medications (Glucophage) on four non-consecutive days because he was in court during pill call, those isolated instances did not cause him any harm, affect his ability to understand the court proceedings, or increase his risk for diabetic complications. (2 SER 53-54.)

- McCullock's treatment for diabetes was within the standard of care at all times. (2 SER 52.)

- In response to the Los Angeles County Superior Court's order stating that McCullock "appear[ed] to need . . . [i]nsulin treatment for his diabetes," a nurse, following Sheriff's Department custom, promptly reviewed McCullock's

chart, and determined that: he was not insulin-dependent; he was already under a physician's care; he had been prescribed diabetes medication, which he had been receiving regularly; and his blood sugar had been well controlled on this regimen. Based on that information, the nurse concluded that McCullock did not need further evaluation by a physician. Had the court order stated that McCullock was to be examined by a physician, the nurse would have made arrangements accordingly. (2 SER 58-59.)

This evidence established that McCullock did not need insulin, that he was receiving adequate medical care for his diabetes, and that any isolated missed medications did not harm him – in short, his serious medical needs were not ignored. The evidence also established that neither Baca nor anyone else in the Sheriff's Department was aware of a serious risk – since none existed – yet disregarded it; to the contrary, a nurse properly determined that McCullock did not need insulin or other treatment in addition to the treatment he was already receiving. Thus, Sheriff Baca met his burden to show that there was no triable issue of material fact as to whether he was deliberately indifferent to McCullock's serious medical needs, and the burden shifted to McCullock to identify facts demonstrating a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986).

In response to summary judgment, McCullock presented several items of evidence, none of which raised a triable issue of material fact:

1. *Medical order*. McCullock submitted a copy of the Los Angeles County Superior Court court's medical order stating: "[McCullock] appears to need the following: . . . insulin treatment for his diabetes." (2 SER 143.) This order did not raise a triable issue of material fact because, as discussed above, McCullock is a non-insulin-dependent diabetic and does not require insulin. (2 SER 49, 52-54.)

2. *Evidence regarding the jail's medication policy*. McCullock also submitted (1) a written "Policy #403" of the Sheriff's Department's Medical Services Bureau, regarding procedures for administering medication to prisoners before their court attendances; and (2) what appear to be five declarations signed by inmates, including McCullock, housed at the County Jail between January 12 and January 16, 2004, stating that "Policy #403 does [NOT] reflect the truth of location, administering prescribed medication, or and [sic] time administered." (2 SER 158-165.) Again, these documents failed to raise a triable issue. The fact that the jail did not adhere to its policy regarding location, manner or time of administering medication does not show deliberate indifference to a serious medical need – rather, since McCullock asserted a mere delay in treatment (i.e., four missed doses of Glucophage) as the alleged constitutional violation, he was

required to present, at a minimum, admissible evidence of substantial harm resulting from the delay. *Wood v. Housewright*, 900 F.2d at 1335; *Shapley*, 766 F.2d at 407.

3. *McCullock's jail medical record.* McCullock submitted portions of his jail medical records indicating a one-week gap in the blood glucose tests administered to him from January 7 to January 21, 2004. (Specifically, the records show that his blood glucose had not been monitored on January 14, 2004, while he was in court.) (2 SER 169.) Since this document failed to contradict Baca's evidence that McCullock's blood sugar was well maintained at all times, that the few instances of missed medications did not cause him any harm, and that his treatment was within the standard of care, it too could not defeat summary judgment. *Wood v. Housewright*, 900 F.2d at 1335; *Shapley*, 766 F.2d at 407; *see Jackson*, 90 F.3d at 332 (to establish deliberate medical indifference, plaintiff must show that his treatment was "medically unacceptable").

4. *Newspaper article.* Finally, McCullock submitted a newspaper article from USA Today entitled "Diabetes Warnings Often Go Unheeded," describing the possible consequences of failing to treat diabetes promptly. (2 SER 166-168.) The district court granted Sheriff Baca's objection to the article on the ground that it was irrelevant. (1 SER 9; 2 SER 134.) McCullock has not challenged this ruling, thus waiving that argument on appeal. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th

Cir. 1994); *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1176 (9th Cir. 1996). In any case, the district court correctly reasoned that the facts described in the article, which pertained to non-incarcerated persons, were not analogous to McCullock's situation as a prisoner who was in fact receiving ongoing, adequate treatment for his diabetes. (1 SER 9.)[4]

In short, McCullock presented evidence only that there were a few isolated delays in receiving his medication, but not that the delays caused him any harm. Thus, he failed to raise a triable issue of material fact as to whether Sheriff Baca (or anyone else) was deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment, and summary judgment for Baca was proper.

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[4] The district court correctly noted that McCullock's response to Sheriff Baca's interrogatories (submitted by Baca on summary judgment) failed to raise a triable issue as to whether the delay in providing McCullock's Glucophage caused him substantial harm. (1 SER 8-9, n.2; 2 SER 90.) Specifically, Baca's Interrogatory No. 15 asked: "Please describe each injury you claim you suffered as a result of any failure to provide you with medical care between January 12, 2004, and January 16, 2004." McCullock responded: "Plaintiff has suffered physical health problems associated with diabetes to wit loss of vision in eyes, loss of hearing, severe migraine headaches, mental and emotional stress, high blood pressure, swollen feet, and nervousness." (2 SER 90.)

McCullock's response failed to draw a causal connection between the four missed doses of Glucophage and the asserted injuries. See *Wood v. Housewright*, 900 F.2d at 1335 (to constitute an Eighth Amendment violation, "the delay must have *caused* substantial harm") (emphasis added). Instead, as the district court found, McCullock's answer was "a generalized, non-responsive litany of his diabetes[-]related maladies – maladies which [he did] not ascribe to the denial of medical care on the relevant dates." (1 SER 8-9 n.2.) Thus, it did not create a triable issue of fact as to whether the delay caused substantial harm.

As explained next, even if McCullock had raised a triable issue as to whether a constitutional deprivation occurred, summary judgment was also appropriate on the independent ground that there was no triable issue of material fact regarding whether Sheriff Baca personally participated in such a deprivation.

### B. Summary Judgment Was Also Appropriate Because There Was No Triable Issue of Material Fact Regarding Whether Sheriff Baca Personally Participated in Any Constitutional Violation.

A supervisor may not be held individually under section 1983 on a theory of *respondeat superior* or vicarious liability absent a state law imposing such liability. *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991); *see also Jones v. Williams*, 297 F.3d 930, 934-35 (9th Cir. 2002). Rather, a supervisor may be liable only if (1) he was personally involved in the constitutional deprivation – i.e., if he "participated in or directed the violations, or knew of the violations and failed to act to prevent them," or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Redman*, 942 F.2d at 1446. A sufficient causal connection exists if the supervisory official "implement[ed] a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'" *Redman*, 942 F.2d at 1446-47.

In moving for summary judgment, Sheriff Baca pointed out that there was no evidence either that he was personally involved in any alleged delay or denial of medication to McCullock, or that he implemented an unconstitutional policy that was the moving force behind such conduct.

First, as to Baca's personal involvement, McCullock's only basis for claiming that Baca knew of his need for medical care was the fact that McCullock had obtained a court order that supposedly required Baca "to treat plaintiff with insulin for his diabetes," the fact that McCullock had served Baca with the complaint, and the doctrine of *respondeat superior*. (2 SER 20, 22, 88.)[5]

In addition, Sheriff Baca presented evidence that he did not participate in the decision to deny McCullock insulin despite the Superior Court's medical order. Specifically, Baca's evidence established that he delegates the day-to-day

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[5] Sheriff Baca's Interrogatory No. 4 asked: "If it is your contention that Sheriff Leroy Baca personally denied or refused you insulin at any time between January 12, 2004 and January 16, 2004, please state all facts upon which you base this contention." McCullock responded, "Leroy Baca was served with a written complaint apprising him of denial of medical attention and under respondeat superior vicarious liability, he knew and his held liable." (2 SER 88.)

Baca's Interrogatory No. 5 asked: "If it is your contention that Sheriff Leroy Baca did anything to cause you to be denied or refused medical care at any time between January 12, 2004 and January 16, 2004, please state what Sheriff Baca did to cause that denial or refusal." McCullock answered, "Under respondeat superior vicarious liability when Baca was served with my written letters and complaints to him personally and he personally did nothing, he was apprised and held liable." (2 SER 88.)

supervision and administration of the County jail system to the Sheriff's Custody and Correctional Services Divisions; the latter division includes the Medical Services Bureau, through which physicians, nurses and other medical staff provide medical care to prisoners. (2 SER 38-39.) As mentioned above, per custom, the medical order was received by the Medical Services Bureau and was handled by a registered nurse. (2 SER 58-59.) The nurse reviewed McCullock's chart and determined that he was not insulin-dependent, that he was already under a physician's care for his diabetes, that he had been receiving his medication regularly, and that his blood sugar had been well controlled. Thus, the nurse determined that no further action was warranted, and none was taken. (2 SER 59, 84.)

Second, Sheriff Baca showed that McCullock could not establish that he was deprived of medical care because of an official, constitutionally defective policy implemented by Baca. McCullock's complaint nowhere alleged that Baca instituted a policy of denying legitimate medical treatment to prisoners housed at the Los Angeles County jail. (*See* 2 SER 20.) In response to an interrogatory asking McCullock to identify any "official policy created, adopted or maintained" by Baca that "caused [him] to be denied or refused medical care," McCullock responded: "Official policy is the US Constitution 8th Amendment." (2 SER 88.) Moreover, Baca presented evidence that the Sheriff's Department's policy is to

maintain a medical services system that will provide medical care to its inmate population to the best of its ability. (2 SER 39-46 [describing jail's medical services system].)

Since Baca again showed that "there was an absence of evidence to support the non-moving party's case," the burden was on McCullock to raise a triable issue of material fact as to Baca's involvement in the alleged constitutional violation. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986).

McCullock failed to do so. In opposition to summary judgment, he cited the declaration of the Captain of the Correctional Services Division's Medical Services Bureau. Far from demonstrating a triable issue of fact, the declaration reiterated that Sheriff Baca "delegates the day-to-day supervision and administration of the County jail system," including its system for providing medical care through the Medical Services Bureau. (2 SER 38.) Thus, it confirmed that Sheriff Baca did not personally participate in any denial or delay in providing McCullock's diabetes medication.

In short, McCullock failed to raise a triable issue of material fact as to Sheriff Baca's involvement in any alleged constitutional violation. Summary judgment was proper.

## CONCLUSION

In moving for summary judgment, Sheriff Baca showed that there was no triable issue of material fact as to whether McCullock suffered an Eighth Amendment violation in the form of deliberate indifference to his serious medical needs, or whether Sheriff Baca was personally involved in any such violation. McCullock failed to contradict this showing. Accordingly, Sheriff Baca respectfully requests that this court affirm the district court's grant of summary judgment.

DATED: September 28, 2007

Respectfully submitted,

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## STATEMENT OF RELATED CASES

(9th Cir. Rule 28-2.6)

Appellees know of no pending cases related to this case.

DATED: September 28, 2007

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## CERTIFICATE OF COMPLIANCE

## PROPORTIONATE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Appellee's Brief is proportionately spaced, has a typeface of 14 points or more, and contains 5550 words.

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