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

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Tyson Dwayne Gaffney,

) No. CV 11-0175-PHX-RCB (DKD)

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Plaintiff,

) **ORDER**

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vs.

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Charles L. Ryan, et al.,

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Defendants.

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Plaintiff Tyson Dwayne Gaffney, who is confined in the Arizona State Prison Complex, Special Management Unit I, in Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and two Applications to Proceed *In Forma Pauperis*. (Doc. 1, 5, 7.) The Court will dismiss the Complaint with leave to amend and deny the second *in forma pauperis* application as moot.

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

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Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$32.41. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

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II. Statutory Screening of Prisoner Complaints

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The Court is required to screen complaints brought by prisoners seeking relief against

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

6 A pleading must contain a “short and plain statement of the claim *showing* that the
7 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
8 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
9 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
10 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
11 statements, do not suffice.” Id.

12 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
13 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
14 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
15 that allows the court to draw the reasonable inference that the defendant is liable for the
16 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
17 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
18 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
19 allegations may be consistent with a constitutional claim, a court must assess whether there
20 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

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

26 If the Court determines that a pleading could be cured by the allegation of other facts,
27 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
28 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court

1 should not, however, advise the litigant how to cure the defects. This type of advice “would
2 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,
3 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
4 required to inform a litigant of deficiencies). Plaintiff’s Complaint will be dismissed for
5 failure to state a claim with leave to amend because the Complaint may possibly be saved by
6 amendment.

7 **III. Complaint**

8 Plaintiff alleges four counts for threats to safety, invasion of privacy, and violation of
9 his free speech rights. Plaintiff sues the following employees of the Arizona Department of
10 Corrections (ADC): Director Charles L. Ryan; Warden McWilliams; Corrections Officer
11 (CO) III Pittario; and CO IV Espinoza. Plaintiff seeks injunctive, compensatory, and
12 punitive relief.

13 Plaintiff alleges the following facts in his Complaint: Plaintiff is African-American.
14 On January 4, 2010, Plaintiff was housed in the Central Unit. Plaintiff submitted an inmate
15 letter to Defendant Pittario using the system implemented by Ryan. Plaintiff believed the
16 letter would be treated as confidential under that system. In the inmate letter, Plaintiff
17 reported that he wished to speak to Phoenix Homicide detectives concerning murder
18 investigations and associates. Rather than keeping Plaintiff’s inmate letter confidential,
19 Pittario shared Plaintiff’s inmate letter “with a building full of maximum security inmates”
20 resulting in Plaintiff being identified as a snitch and exposing him to a threat of being killed
21 or assaulted as well as endangering family members outside of prison. After the disclosure,
22 Plaintiff received violent threats.

23 On January 6, 2010, Pittario told Plaintiff that “‘If he [Pittario] didn’t need [protective
24 segregation or PS] than [sic] [Plaintiff] didn’t.’” (Doc. 1 at 3.) Pittario refused to write an
25 incident report despite knowing that Plaintiff was at risk. Defendant Espinoza contacted a
26 “CIU” officer but she did not tell homicide detectives about the disclosure of Plaintiff’s
27 inmate letter or that an investigation was ongoing. Defendants Espinoza, McWilliams, and
28 Ryan, individually or collectively failed to act despite knowledge that Pittario had purposely

1 given Plaintiff's inmate letter to other ethnic groups. Pittario purposely left Plaintiff in
2 Central Unit "to be tormented by inmates for an unreasonable length of time." (Id.) Plaintiff
3 has been permanently moved to protective segregation and is marked for death or injury by
4 Caucasian, African-American, Native American, and Hispanic inmates.

5 Plaintiff contends that the Defendants purposely violated ADC policies concerning
6 "privileged" communications and designed a response with the intention that other inmates
7 would read it, thereby exposing Plaintiff to retaliation by other inmates as a snitch. Although
8 unclear, Plaintiff appears to allege that the response to his inmate letter was given to a
9 Caucasian inmate, who in turn disclosed Plaintiff as an informant. Plaintiff contends that
10 Defendants failed to promptly act in response to an excessive risk to his life. Plaintiff alleges
11 that Espinoza and Pittario conspired to obstruct his incoming mail in retaliation for Plaintiff
12 asking to speak to Phoenix homicide detectives about murder investigations. Plaintiff
13 contends that they singled out his inmate letter for racial reasons, drafted a response, which
14 was intended to expose Plaintiff as an informant to other inmates and to sow dissent among
15 inmates involved in drug activity and corruption of officers. He contends that Pittario was
16 supported by Espinoza through McWilliams and Ryan to sabotage his correspondence and
17 to disregard the clear danger to his safety.

18 **IV. Failure to State a Claim**

19 Section 1983 provides a cause of action against persons acting under color of state law
20 who have violated rights guaranteed by the United States Constitution and federal law. 42
21 U.S.C. § 1983; see also Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995). To
22 state a claim under § 1983, a plaintiff must allege facts supporting that (1) the conduct about
23 which he complains was committed by a person acting under the color of state law and (2)
24 the conduct deprived him of a federal constitutional or statutory right. Wood v. Ostrander,
25 879 F.2d 583, 587 (9th Cir. 1989). A plaintiff must also allege that he suffered a specific
26 injury as a result of the conduct of a particular defendant and he must allege an affirmative
27 link between the injury and the conduct of that defendant. Rizzo v. Goode, 423 U.S. 362,
28 371-72, 377 (1976).

1 Further, to state a claim against a defendant, “[a] plaintiff must allege facts, not simply
2 conclusions, that show that an individual was personally involved in the deprivation of his
3 civil rights.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual
4 to be liable in his official capacity, a plaintiff must allege that the official acted as a result of
5 a policy, practice, or custom. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188
6 (9th Cir. 2001). In addition, there is no *respondeat superior* liability under § 1983, so a
7 defendant’s position as the supervisor of someone who allegedly violated a plaintiff’s
8 constitutional rights does not make him liable. Monell v. Dep’t of Soc. Servs., 436 U.S. 658,
9 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his
10 individual capacity, “is only liable for constitutional violations of his subordinates if the
11 supervisor participated in or directed the violations, or knew of the violations and failed to
12 act to prevent them.” Taylor, 880 F.2d at 1045. Further, where a defendant’s only
13 involvement in allegedly unconstitutional conduct is the denial of administrative grievances,
14 the failure to intervene on a prisoner’s behalf to remedy the alleged unconstitutional behavior
15 does not amount to active unconstitutional behavior for purposes of § 1983. Shehee v.
16 Luttrell, 199 F.3d 295, 300 (6th Cir. 1999); accord Mintun v. Blades, No. CV-06-139-BLW,
17 2008 WL 711636, at *7 (D. Idaho Mar. 14, 2008); Stocker v. Warden, No.
18 1:07-CV-00589LJODLBP, 2009 WL 981323, at *10 (E.D. Cal. Apr. 13, 2009).

19 **A. Vague and Conclusory Allegations**

20 As noted above, Plaintiff alleges claims for threats to safety, invasion of privacy, and
21 violation of his free speech rights. Plaintiff generally alleges that while he was housed in the
22 Central Unit, he submitted an inmate letter to Defendant Pittario. In the inmate letter,
23 Plaintiff asked to contact Phoenix homicide detectives to provide them with information in
24 murder investigations. Although unclear, apparently Defendant Pittario either gave
25 Plaintiff’s inmate letter, or a response to that letter, to a Caucasian inmate rather than giving
26 it to Plaintiff. The Caucasian inmate then revealed to other inmates in the unit that Plaintiff
27 was an informant. As a result, Plaintiff was threatened by other inmates. Eventually Plaintiff
28 was “permanently” transferred to protective segregation for his protection because he had

1 been labeled a snitch.

2 Plaintiff's allegations against each of the Defendants are vague and conclusory.
3 Plaintiff claims that Pittario, Espinoza, McWilliams, and Ryan were motivated by his race
4 to purposely encourage and support the disclosure of Plaintiff's inmate letter to other inmates
5 and that they encouraged, supported, or failed to intervene to promptly protect Plaintiff.
6 Plaintiff fails to allege *facts* to support these assertions or to support that the disclosure of
7 Plaintiff's inmate letter was anything other than inadvertent. Although *pro se* pleadings are
8 liberally construed, Haines v. Kerner, 404 U.S. 519, 520-21 (1972), conclusory and vague
9 allegations will not support a cause of action. Ivey v. Board of Regents of the University of
10 Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Further, a liberal interpretation of a civil rights
11 complaint may not supply essential elements of the claim that were not initially pled. Id. In
12 the following subsections, the Court describes the standard for Plaintiff to sufficiently state
13 a claim for threats to safety and violation of his right to receive mail.

14 **B. Threats to Safety**

15 Plaintiff appears to be attempting to allege threats to his safety. Prison officials are
16 required to take reasonable measures to guarantee the safety of prisoners. Farmer v.
17 Brennan, 511 U.S. 825, 832-33 (1994). To state a claim for threats to safety, an inmate must
18 allege facts to support that he was incarcerated under conditions posing a substantial risk of
19 harm and that prison officials were "deliberately indifferent" to those risks. Id. To
20 adequately allege deliberate indifference, a plaintiff must set forth facts to support that a
21 defendant knew of, but disregarded, an excessive risk to inmate safety. Farmer, 511 U.S. at
22 837. That is, "the official must both [have been] aware of facts from which the inference
23 could be drawn that a substantial risk of serious harm exist[ed], and he must also [have]
24 draw[n] the inference." Farmer, 511 U.S. at 837.

25 **C. Retaliation**

26 Plaintiff appears in part to be attempting to allege retaliation. To state a constitutional
27 claim for retaliation, a plaintiff must allege that a defendant acting under color of state law
28 took adverse action against him because the plaintiff engaged in protected conduct, the

1 adverse action was not narrowly tailored to advance legitimate goals, and the adverse action
2 chilled the plaintiff's exercise of his First Amendment rights or caused him to suffer more
3 than minimal harm. Rhodes v. Robinson, 408 F.3d 559, 567-58 (9th Cir. 2005); see also
4 Hines v. Gomez, 108 F.3d 265, 267 (9th Cir. 1997) (retaliation claims requires an inmate
5 must show (1) that the prison official acted in retaliation for the exercise of a
6 constitutionally-protected right, and (2) that the action "advanced no legitimate penological
7 interest").

8 **D. Mail**

9 Plaintiff also appears to be attempting to allege a violation of his First Amendment
10 right. Inmates retain First Amendment rights not inconsistent with their status as prisoners,
11 or with legitimate penological objectives of the corrections system. See Shaw v. Murphy,
12 532 U.S. 223, 231 (2001); Clement v. California Dep't of Corr., 364 F.3d 1148, 1151 (9th
13 Cir. 2004). Inmates retain a First Amendment right to send and receive mail. Witherow v.
14 Paff, 52 F.3d 264, 265 (9th Cir. 1999). However, that "right is subject to 'substantial
15 limitations and restrictions in order to allow prison officials to achieve legitimate correctional
16 goals and maintain institutional security.'" Prison Legal News v. Lehman, 397 F.3d 692, 699
17 (9th Cir. 2005); Morrison v. Hall, 261 F.3d 896 (9th Cir. 2001); Prison Legal News v. Cook,
18 238 F.3d 1145 (9th Cir. 2001). Prison officials may examine a prisoner's communications
19 without infringing upon his rights. United States v. Wilson, 447 F.2d 1, 8 n. 4 (9th
20 Cir.1971). Thus, courts have upheld policies that call for inspection of non-legal mail for
21 contraband. Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir.1991); Witherow v. Paff, 52 F.3d
22 264 (9th Cir. 1995); Gaines v. Lane, 790 F.2d 1299, 1304 (7th Cir.1986). Nevertheless, a
23 prisoner has a Fourteenth Amendment due process liberty interest in receiving notice that his
24 incoming mail is being withheld by prison authorities. Frost v. Symington, 197 F.3d 348,
25 353 (9th Cir. 1999). Further, while prison personnel may regulate speech if such restriction
26 is reasonably related to legitimate penological interests, an inmate cannot be deprived of all
27 means of expression. Valdez v. Rosenbaum, 302 F.3d 1039, 1048 (9th Cir. 2002) (citing
28 Turner v. Safley, 482 U.S. 78, 92 (1986)).

1 **V. Leave to Amend**

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

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

12 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
13 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
14 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
15 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
16 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
17 565, 567 (9th Cir. 1987).

18 **VI. Warnings**

19 **A. Release**

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

24 **B. Address Changes**

25 Plaintiff must file and serve a notice of a change of address in accordance with Rule
26 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
27 relief with a notice of change of address. Failure to comply may result in dismissal of this
28 action.

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C. Copies

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

D. Possible “Strike”

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

E. Possible Dismissal

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


IT IS ORDERED:

- (1) Plaintiff’s Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 5.)
- (2) As required by the accompanying Order to the appropriate government agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$32.41.
- (3) Plaintiff’s second *in forma pauperis* application is **denied** as moot. (Doc. 7.)
- (4) The Complaint is **dismissed** for failure to state a claim. (Doc. 1.) Plaintiff has **30 days** from the date this Order is filed to file a first amended complaint in compliance with this Order.
- (5) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of

1 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
2 that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

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

5 DATED this 8th day of April, 2011.

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10 Robert C. Broomfield
11 Senior United States District Judge
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