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

Jason Tyler Elderkin,)	No. CV 09-2042-PHX-DGC (JRI)
Plaintiff,)	ORDER
vs.)	
Joseph Arpaio,)	
Defendant.)	

Plaintiff Jason Tyler Elderkin, who is confined in the Lower Buckeye Jail in Phoenix, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. (Doc.# 1, 3.)¹ The Court will dismiss the Complaint with leave to amend.

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

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 \$2.48. The remainder of the fee will be collected monthly in payments of 20% of the previous month’s income each time the amount

¹ “Doc.#” refers to the docket number of filings in this case.

1 in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate
2 Order requiring the appropriate government agency to collect and forward the fees according
3 to the statutory formula.

4 **II. Statutory Screening of Prisoner Complaints**

5 The Court is required to screen complaints brought by prisoners seeking relief against
6 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
7 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
8 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
9 be granted, or that seek monetary relief from a defendant who is immune from such relief.
10 28 U.S.C. § 1915A(b)(1), (2).

11 A pleading must contain a “short and plain statement of the claim *showing* that the
12 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
13 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
14 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
15 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
16 statements, do not suffice.” Id. Further, “a complaint must contain sufficient factual matter,
17 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Bell
18 Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the
19 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
20 defendant is liable for the misconduct alleged.” Id. “Determining whether a complaint states
21 a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court
22 to draw on its judicial experience and common sense.” Id. at 1950. Thus, although a
23 plaintiff’s specific factual allegations may be consistent with a constitutional claim, a court
24 must assess whether there are other “more likely explanations” for a defendant’s conduct.
25 Id. at 1951.

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 five counts in his Complaint regarding disciplinary proceedings,
9 conditions of confinement, and medical care. Plaintiff sues Maricopa County Sheriff Joseph
10 Arpaio. In each count, he alleges a violation of his Fifth, Eighth, and Fourteenth Amendment
11 rights. Plaintiff seeks injunctive and compensatory relief.

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

13 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
14 conduct about which he complains was committed by a person acting under the color of state
15 law and (2) the conduct deprived him of a federal constitutional or statutory right. Wood v.
16 Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). In addition, a plaintiff must allege that he
17 suffered a specific injury as a result of the conduct of a particular defendant and he must
18 allege an affirmative link between the injury and the conduct of that defendant. Rizzo v.
19 Goode, 423 U.S. 362, 371-72, 377 (1976).

20 **A. Counts I and II**

21 In Counts I and II, Plaintiff alleges that certain conditions of confinement were
22 unconstitutional. A pretrial detainee’s claim for unconstitutional conditions of confinement
23 arises from the Due Process Clause of the Fourteenth Amendment while a convicted inmate’s
24 claims for unconstitutional conditions arises from the Eighth Amendment prohibition against
25 cruel and unusual punishment. Bell v. Wolfish, 441 U.S. 520 (1979). Nevertheless, the
26 analogous standards are applied. See Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).
27 To state a claim for unconstitutional conditions, a plaintiff must allege an objectively
28 “sufficiently serious” deprivation that results in the denial of “the minimal civilized measure

1 of life's necessities." Farmer v. Brennan, 511 U.S. 825, 834 (1994); Allen v. Sakai, 48 F.3d
2 1082, 1087 (9th Cir. 1994); see Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1049-50
3 (9th Cir. 2002). That is, a plaintiff must allege facts supporting that he is incarcerated under
4 conditions posing a substantial risk of harm. Farmer, 511 U.S. at 834. Allegations of
5 overcrowding, alone, are insufficient to state a claim. See Rhodes v. Chapman, 452 U.S.
6 337, 348 (1981). When, however, overcrowding causes an increase in violence or reduces
7 the provision of other constitutionally required services, or reaches a level where the
8 institution is no longer fit for human habitation, the inmate's right against cruel and unusual
9 punishment may be violated. See Balla v. Idaho State Bd. of Corr., 869 F.2d 461, 471 (9th
10 Cir. 1989); Toussaint v. Yockey, 722 F.2d 1490, 1492 (9th Cir. 1984). Further, whether a
11 condition of confinement rises to the level of a constitutional violation may depend, in part,
12 on the duration of an inmate's exposure to that condition. Keenan v. Hall, 83 F.3d 1083,
13 1089 (9th Cir. 1996) (citing Hutto v. Finney, 437 U.S. 678, 686-87 (1978)).

14 In addition to alleging facts to support that he is confined in conditions posing a
15 substantial risk of harm, a plaintiff must also allege facts to support that a defendant had a
16 "sufficiently culpable state of mind," i.e., that the official acted with deliberate indifference
17 to inmate health or safety. See Farmer, 511 U.S. 837. In defining "deliberate indifference"
18 in the jail context, the Supreme Court has imposed a subjective test: "the official must both
19 be aware of the facts from which the inference could be drawn that a substantial risk of
20 serious harm exists, and he must also draw the inference." Id. A plaintiff must also allege
21 how he was injured by the alleged unconstitutional conditions. See, e.g., Lewis v. Casey,
22 518 U.S. 343, 349 (1996) (doctrine of standing requires that claimant have suffered or will
23 imminently suffer actual harm); Caswell v. Calderon, 363 F.3d 832, 836 (9th Cir. 2004)
24 (case-or-controversy requirement means that plaintiff must have an actual or threatened
25 injury traceable to the defendant and likely to be redressed by a favorable judicial decision).

26 1. Count I

27 In Count I, Plaintiff alleges that he was provided only two meals per day rather than
28 three while he was incarcerated in Maricopa County Jails. With respect to meals, "[t]he

1 Eighth Amendment requires only that prisoners receive food that is adequate to maintain
2 health; it need not be tasty or aesthetically pleasing.” LeMaire v. Maass, 121 F.3d 1444,
3 1456 (9th Cir. 1993) (citations omitted); Frost, 152 F.3d at 1128 (applying Eighth
4 Amendment standard to a pretrial detainee’s Fourteenth Amendment claims regarding
5 conditions of confinement). “The fact that the food occasionally contains foreign objects or
6 sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation.”
7 LeMaire at 1456 (quoting Hamm v. Dekalb County, 774 F.2d 1567, 1575 (9th Cir. 1985)).
8 An inmate may, however, state a claim where he alleges that he is served meals with
9 insufficient calories for long periods of time. Id.

10 The provision of only two meals a day, absent more, does not rise to the level of a
11 constitutional violation. Although Plaintiff alleges that he experienced a lack of energy,
12 fever, staph infection, diarrhea, and a spider bite, he does not connect these effects to the
13 provision of two rather than three meals, nor does he allege significant weight loss or facts
14 to support that the meals provided inadequate nutrition. Accordingly, Plaintiff fails to state
15 a claim in Count I.

16 **2. Count II**

17 In Count II, Plaintiff complains of overcrowding when he was going through intake
18 at the Madison Street Jail and at the Fourth Avenue Jail, stating that more than 30 inmates
19 were held in a room intended to hold no more than 10 and that there was standing room only.
20 He also alleges that the rooms were not clean and “we would not be given toilet paper or
21 cleaning supplies.” (Doc.# 1 at 4.) Plaintiff does not allege the duration to which he was
22 held in the alleged conditions or facts to support that his exposure to such conditions rose to
23 the level of a constitutional violation. Plaintiff thus fails to state a claim in Count II.

24 **B. Count III**

25 Plaintiff alleges that he was denied constitutionally adequate medical care after being
26 bitten by an insect. To state a claim for denial of constitutionally adequate medical care, a
27 plaintiff must allege facts to support that he has or had a serious medical need and that a
28 particular defendant acted with deliberate indifference to that need. See Estelle v. Gamble,

1 429 U.S. 97, 104-05 (1976); Lolli v. County of Orange, 351 F.3d 410, 418-19 (9th Cir.
2 2003). To allege a serious medical need, a plaintiff must set forth facts to support that the
3 “failure to treat a prisoner’s condition could result in further significant injury or the
4 ‘unnecessary and wanton infliction of pain.’” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
5 2006) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1991), overruled on other
6 grounds by WMX Techs, Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (*en banc*)). A
7 plaintiff must also allege facts to support that a defendant was deliberately indifferent to a
8 serious medical need. “Deliberate indifference is a high legal standard.” Toguchi v. Chung,
9 391 F.3d 1051, 1060 (9th Cir. 2004). Deliberate indifference may occur if “prison officials
10 deny, delay or intentionally interfere with medical treatment.” Hutchinson v. United States,
11 838 F.2d 390, 394 (9th Cir.1988). Mere negligence, however, “in diagnosing or treating a
12 medical condition, without more, does not violate a prisoner’s Eighth Amendment rights.”
13 Lopez, 203 F.3d at 1132 (quoting Hutchinson, 838 F.2d at 394). Further, a delay in receiving
14 medical care, without more, is insufficient to state a claim against a jailor for deliberate
15 indifference unless the plaintiff can show that the delay in treatment harmed him. Shapley
16 v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985).

17 Plaintiff alleges that he was bitten by an insect, which caused his face to swell.
18 Plaintiff asked more than one detention officer to go to medical, but all refused. Plaintiff did
19 not see a doctor until three days later, when he apparently went to his own physician, who
20 prescribed antibiotics. It took several weeks for Plaintiff to recover from the infection.
21 These allegations are insufficient to state a claim. At most, Plaintiff alleges a delay before
22 seeing a doctor – he does not allege facts to support that the three-day delay in treatment
23 harmed him.

24 Plaintiff also fails to allege facts to support that Defendant Arpaio was in any way
25 involved in the alleged violation. There is no *respondeat superior* liability under § 1983, so
26 a defendant’s position as the supervisor of a someone who allegedly violated a plaintiff’s
27 constitutional rights does not make him liable. Monell v. Dep’t of Soc. Servs., 436 U.S. 658,
28 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his

1 individual capacity, “is only liable for constitutional violations of his subordinates if the
2 supervisor participated in or directed the violations, or knew of the violations and failed to
3 act to prevent them.” Taylor, 880 F.2d at 1045.

4 Plaintiff has not alleged that Arpaio enacted or enforced a policy, custom, or practice
5 that resulted in the denial of Plaintiff’s constitutional rights. Further, Plaintiff has not alleged
6 that Arpaio directly violated his constitutional rights or that he was aware that Plaintiff’s
7 rights were being violated but failed to act. Thus, Plaintiff fails to state a claim against
8 Arpaio in Count III. For these reasons, Count III will be dismissed.

9 **C. Count IV**

10 In Count IV, Plaintiff alleges that Arpaio sets policies that amount to punishment prior
11 to conviction by: forcing Plaintiff to wear pink underwear and socks and black and white
12 striped clothing with the label “unsentenced,” both in jail and in court; and by providing only
13 one blanket and sheet without providing pillows or extra blankets to stay warm. Plaintiff
14 fails to state a claim in Count IV because he fails to allege facts to support the violation of
15 a constitutional right. “It cannot be said that all . . . conditions . . . , even if discomforting
16 or undesirable, amount to deprivations of constitutional dimensions [A] federal court
17 is not the proper forum for challenging or changing every aspect of the harsh realities of
18 confinement unless conditions cannot be tolerated under the Constitution.” Thomas v. Smith,
19 559 F. Supp. 223, 224 (W.D.N.Y. 1983) (citing Griffin v. Smith, 493 F. Supp. 129, 131
20 (W.D.N.Y. 1980)). Being required to wear pink undergarments or clothing labeled
21 “unsentenced” does not rise to the level of a constitutional violation, despite any implication
22 that the wearer has been convicted. Similarly, the provision of limited bedding, absent more,
23 does not rise to the level of a constitutional claim. Count IV will be dismissed for failure to
24 state a claim.

25 **D. Counts V and VI**

26 In Counts V and VI, Plaintiff asserts violation of his rights in connection with alleged
27 disciplinary proceedings. It is unclear whether Plaintiff was a pretrial detainee or a convicted
28 inmate at relevant times.

1 Pretrial detainees have a substantive due process right against restrictions that amount
2 to punishment for criminal offenses. Valdez v. Rosenbaum, 302 F.3d 1039, 1045 (9th Cir.
3 2002) (citing United States v. Salerno, 481 U.S. 739, 746 (1987)); Bell, 441 U.S. at 535;
4 Redman v. County of San Diego, 942 F.2d 1435, 1440-41 (9th Cir.1991) (*en banc*). This
5 right is violated if restrictions are “imposed for the purpose of punishment.” Bell, 441 U.S.
6 at 535. For particular governmental action to constitute punishment, the action must cause
7 the detainee to suffer some harm or disability, and the purpose of the action must be to
8 punish the detainee. Demery v. Arpaio, 378 F.3d 1020,1029 (9th Cir. 2004) (citing Bell, 441
9 U.S. at 538). But jail officials are entitled to impose restrictions to effect confinement, and
10 detention will necessarily affect a detainee’s ability to live as comfortably as he might like;
11 a *de minimis* level of imposition is permissible.² Bell, 441 U.S. at 539 n.21. There is no
12 constitutional infringement, however, if restrictions are “but an incident of some other
13 legitimate government purpose.” Id. In such a circumstance, governmental restrictions are
14 permissible. Salerno, 481 U.S. at 747.

15 Liberty interests which entitle a convicted inmate to due process are “generally limited
16 to freedom from restraint which, while not exceeding the sentence in such an unexpected

17
18 ² Thus:

19 Not every disability imposed during pretrial detention amounts to
20 “punishment” in the constitutional sense, however. Once the Government has
21 exercised its conceded authority to detain a person pending trial, it obviously
22 is entitled to employ devices that are calculated to effectuate this detention.
23 Traditionally, this has meant confinement in a facility which, no matter how
24 modern or how antiquated, results in restricting the movement of a detainee in
25 a manner in which he would not be restricted if he simply were free to walk
26 the streets pending trial. Whether it be called a jail, a prison, or a custodial
27 center, the purpose of the facility is to detain. Loss of freedom of choice and
28 privacy are inherent incidents of confinement in such a facility. And the fact
that such detention interferes with the detainee’s understandable desire to live
as comfortably as possible and with as little restraint as possible during
confinement does not convert the conditions or restrictions of detention into
“punishment.”

Bell, 441 U.S. at 537.

1 manner as to give rise to protection by the Due Process Clause of its own force, nonetheless
2 imposes atypical and significant hardship on the inmate in relation to the ordinary incidents
3 of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995) (internal citations omitted).
4 Thus, a prisoner may challenge a disciplinary action which deprives or restrains a
5 state-created liberty interest in some “unexpected manner.” Ramirez v. Galaza, 334 F.3d
6 850, 860 (9th Cir. 2003) (citing Sandin, 515 U.S. at 483-84)). Second, a prisoner may
7 challenge a state action that does not restrain a protected liberty interest, but that
8 “nonetheless imposes atypical and significant hardship on the inmate in relation to the
9 ordinary incidents of prison life.” Sandin, 515 U.S. at 484. In analyzing whether a hardship
10 is atypical and significant, three guideposts to consider are: (1) the conditions of
11 confinement; (2) the duration of the condition and the degree of restraint imposed; and
12 (3) whether the sanction will affect the duration of the prisoner’s sentence. Ramirez, 334
13 F.3d at 861; Keenan v. Hall, 83 F.3d 1083, 1088-89 (9th Cir. 1996). “Atypicality” requires
14 not merely an empirical comparison, but turns on the importance of the right taken away
15 from the prisoner. See Carlo v. City of Chino, 105 F.3d 493, 499 (9th Cir. 1997); see, e.g.,
16 Sandin, 515 U.S. at 472 (30 days disciplinary segregation is not atypical and significant);
17 Torres v. Fauver, 292 F.3d 141, 151 (3d Cir. 2002) (4 months in administrative segregation
18 is not atypical and significant); Griffin v. Vaughn, 112 F.3d 703, 706-708 (3d Cir. 1997) (15
19 months administrative segregation is not atypical and significant); Beverati v. Smith, 120
20 F.3d 500, 504 (4th Cir. 1997) (6 months of confinement in especially disgusting conditions
21 that were “more burdensome than those imposed on the general prison population were not
22 atypical ... in relation to the ordinary incidents of prison life.”); Jones v. Baker, 155 F.3d 810
23 (6th Cir. 1998) (2 years in administrative segregation is not atypical and significant); Jacks
24 v. Crabtree, 114 F.3d 983 (9th Cir. 1997) (denial of year sentence reduction is not an atypical
25 and significant hardship). “As long as the conditions or degree of confinement to which the
26 prisoner is subjected is within the sentence imposed upon him and is not otherwise violative
27 of the Constitution, the Due Process Clause does not in itself subject an inmate’s treatment
28 by prison authorities to judicial oversight.” Montanye v. Haymes, 427 U.S. 236, 242 (1976).

1 Therefore, to determine whether an inmate is entitled to the procedural protections afforded
2 by the Due Process Clause, the Court must look to the particular restrictions imposed and ask
3 whether they “‘present the type of atypical, significant deprivation in which a state might
4 conceivably create a liberty interest.’” Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995)
5 (quoting Sandin, 515 U.S. at 486).

6 **1. Count V**

7 In Count V, Plaintiff alleges that he was randomly chosen to be taken from the
8 Estrella “N” yard and locked down in the Towers Jail “for no reason.” (Doc.# 1 at Count V.)
9 Plaintiff was informed that he was on “Administrative No work status.” (Id.) At the Towers
10 Jail, Plaintiff was confined to a two-person cell with two other inmates and allowed only an
11 hour out per day. While he was held at the Towers Jail, the toilets “went out” for three days
12 and he and his cell-mates had to endure fecal odors because “they” refused to move them to
13 another facility.

14 Plaintiff acknowledges that he was not moved to the Towers Jail as a result of
15 disciplinary charges; rather, he was randomly chosen and placed on administrative no work
16 status. Plaintiff fails to allege facts to support that he was transferred to the Towers Jail to
17 punish him for any disciplinary offense or based upon his criminal charges. Further, albeit
18 less than ideal conditions while held in the Towers Jail, Plaintiff does not allege sufficient
19 facts to support that these conditions rose to an unconstitutional level. Moreover, Plaintiff
20 fails to allege facts to support that Arpaio was involved in the alleged violation. Plaintiff has
21 not alleged that Arpaio enacted or enforced a policy, custom, or practice that resulted in the
22 denial of Plaintiff’s constitutional rights, that Arpaio directly violated Plaintiff’s rights, or
23 that Arpaio was aware that Plaintiff’s rights were being violated but failed to act. Plaintiff
24 therefore fails to state a claim in Count V.

25 **2. Count VI**

26 In Count VI, Plaintiff alleges violation of his rights in connection with disciplinary
27 procedures based on the following facts: Plaintiff was in a work furlough program when he
28 was ordered to provide a urine sample for drug testing. Plaintiff was suffering from a kidney

1 infection at the time and was unable to provide a urine sample within the allotted time, 30
2 minutes. Plaintiff was taken to Estrella lock-down. Plaintiff filed many grievances
3 requesting another drug test. A few days later, Plaintiff was seen by medical, which
4 confirmed that he had a urinary tract infection. Two weeks later, Plaintiff was taken to the
5 hospital because he needed a catheter. Thus, Plaintiff appears to contend that he was placed
6 on lock-down after he was unable to provide a urine sample due to a medical condition and
7 that he lost his work furlough job. Although it appears that Plaintiff was in work furlough
8 status as probation for a criminal offense, Plaintiff indicates in another count that he was a
9 pretrial detainee. Whether a pretrial detainee or a convicted inmate, the alleged facts are
10 insufficient to state a constitutional violation.

11 Assuming Plaintiff was a pretrial detainee at the relevant time, he fails to allege facts
12 to support that he was locked down absent a legitimate government purpose or to punish him
13 for the offenses with which he was charged. He also fails to allege facts to support that he
14 was locked down to punish him for disciplinary infractions. Assuming Plaintiff was a
15 convicted inmate, he fails to allege facts to support that his inability to promptly provide a
16 urine sample resulted in disciplinary sanction that rose to the level of an atypical and
17 significant hardship in relation to the ordinary incidents of incarceration. He merely alleges
18 that he was locked down. That, absent more, is not sufficient to state a claim.

19 Moreover, regardless whether Plaintiff was a pretrial detainee or a convicted inmate,
20 he fails to allege facts to support Arpaio's involvement in an alleged violation of his due
21 process rights. He has not alleged that Arpaio enacted or enforced a policy, custom, or
22 practice that resulted in the denial of his constitutional rights, that Arpaio directly violated
23 Plaintiff's rights, or that Arpaio was aware that Plaintiff's rights were being violated but
24 failed to act. For the reasons discussed, Plaintiff fails to state a claim in Count VI.

25 **V. Leave to Amend**

26 For the foregoing reasons, Plaintiff's Complaint will be dismissed for failure to state
27 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
28 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail

1 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
2 to use the court-approved form, the Court may strike the amended complaint and dismiss this
3 action without further notice to Plaintiff.

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

8 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
9 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
10 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
11 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
12 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
13 565, 567 (9th Cir. 1987).

14 **VI. Warnings**

15 **A. Release**

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

20 **B. Address Changes**

21 Plaintiff must file and serve a notice of a change of address in accordance with Rule
22 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
23 relief with a notice of change of address. Failure to comply may result in dismissal of this
24 action.

25 **C. Copies**

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

1 **D. Possible “Strike”**

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

11 **E. Possible Dismissal**

12 If Plaintiff fails to timely comply with every provision of this Order, including these
13 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
14 1260-61 (a district court may dismiss an action for failure to comply with any order of the
15 Court).

16 **IT IS ORDERED:**

17 (1) Plaintiff’s Application to Proceed *In Forma Pauperis*, filed with the Complaint,
18 is **granted**. (Doc.# 3.)

19 (2) As required by the accompanying Order to the appropriate government agency,
20 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$2.48.

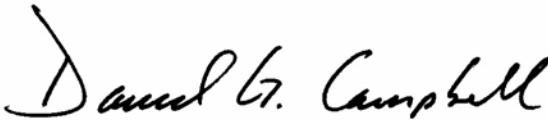
21 (3) The Complaint (doc.# 1) is **dismissed** for failure to state a claim. Plaintiff has
22 30 days from the date this Order is filed to file a first amended complaint in compliance with
23 this Order.

24 (4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of
25 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
26 that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

27 (5) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
28 rights complaint by a prisoner.

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DATED this 27th day of November, 2009.



David G. Campbell
United States District Judge

**Instructions for a Prisoner Filing a Civil Rights Complaint
in the United States District Court for the District of Arizona**

1. Who May Use This Form. The civil rights complaint form is designed to help incarcerated persons prepare a complaint seeking relief for a violation of their federal civil rights. These complaints typically concern, but are not limited to, conditions of confinement. **This form should not be used to challenge your conviction or sentence.** If you want to challenge a state conviction or sentence, you should file a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment.

2. The Form. **Local Rule of Civil Procedure (LRCiv) 3.4(a) provides that complaints by incarcerated persons must be filed on the court-approved form.** The form must be typed or neatly handwritten. The form must be completely filled in to the extent applicable. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages, **but no more than fifteen additional pages**, of standard letter-sized paper. You must identify which part of the complaint is being continued and number all pages. If you do not fill out the form properly, you will be asked to submit additional or corrected information, which may delay the processing of your action. You do not need to cite law.

3. Your Signature. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

4. The Filing Fee. The filing fee for this action is \$350.00. If you are unable to immediately pay the filing fee, you may request leave to proceed *in forma pauperis*. Please review the “Information for Prisoners Seeking Leave to Proceed with a (Non-Habeas) Civil Action in Federal Court *In Forma Pauperis* Pursuant to 28 U.S.C. § 1915” for additional instructions.

5. Original and Judge’s Copy. You must send an **original plus one copy** of your complaint and of any other documents submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.

6. Where to File. You should file your complaint in the division **where you were confined when your rights were allegedly violated.** See LRCiv 5.1(a) and 77.1(a). If you were confined in Maricopa, Pinal, Yuma, La Paz, or Gila County, file in the Phoenix Division. If you were confined in Apache, Navajo, Coconino, Mohave, or Yavapai County, file in the Prescott Division. If you were confined in Pima, Cochise, Santa Cruz, Graham, or Greenlee County, file in the Tucson Division. **Mail the original and one copy of the complaint with the \$350 filing fee or the application to proceed *in forma pauperis* to:**

Phoenix & Prescott Divisions:
U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:
U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. Change of Address. You must immediately notify the Court and the defendants in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. Certificate of Service. You must furnish the defendants with a copy of any document you submit to the Court (except the initial complaint and application to proceed *in forma pauperis*). Each original document (except the initial complaint and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the defendants and the address to which it was mailed. See Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Defendant(s)

(Signature)

9. Amended Complaint. If you need to change any of the information in the initial complaint, you must file an amended complaint. The amended complaint must be written on the court-approved civil rights complaint form. You may file one amended complaint without leave (permission) of Court before any defendant has answered your original complaint. See Fed. R. Civ. P. 15(a). After any defendant has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended complaint. LRCiv 15.1. In addition, an amended complaint may not incorporate by reference any part of your prior complaint. LRCiv 15.1(a)(2). **Any allegations or defendants not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

10. Exhibits. You should not submit exhibits with the complaint or amended complaint. Instead, the relevant information should be paraphrased. You should keep the exhibits to use to support or oppose a motion to dismiss, a motion for summary judgment, or at trial.

11. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

12. Completing the Civil Rights Complaint Form.

HEADING:

1. Your Name. Print your name, prison or inmate number, and institutional mailing address on the lines provided.
2. Defendants. If there are **four or fewer** defendants, print the name of each. If you name **more than four** defendants, print the name of the first defendant on the first line, write the words “and others” on the second line, and attach an additional page listing the names of **all** of the defendants. Insert the additional page after page 1 and number it “1-A” at the bottom.
3. Jury Demand. If you want a jury trial, you must write “JURY TRIAL DEMANDED” in the space below “CIVIL RIGHTS COMPLAINT BY A PRISONER.” Failure to do so may result in the loss of the right to a jury trial. A jury trial is not available if you are seeking only injunctive relief.

Part A. JURISDICTION:

1. Nature of Suit. Mark whether you are filing the complaint pursuant to 42 U.S.C. § 1983 for state, county, or city defendants; “Bivens v. Six Unknown Federal Narcotics Agents” for federal defendants; or “other.” If you mark “other,” identify the source of that authority.
2. Location. Identify the institution and city where the alleged violation of your rights occurred.
3. Defendants. Print all of the requested information about each of the defendants in the spaces provided. If you are naming more than four defendants, you must provide the necessary information about each additional defendant on separate pages labeled “2-A,” “2-B,” etc., at the bottom. Insert the additional page(s) immediately behind page 2.

Part B. PREVIOUS LAWSUITS:

You must identify any other lawsuit you have filed in either state or federal court while you were a prisoner. Print all of the requested information about each lawsuit in the spaces provided. If you have filed more than three lawsuits, you must provide the necessary information about each additional lawsuit on a separate page. Label the page(s) as “2-A,” “2-B,” etc., at the bottom of the page and insert the additional page(s) immediately behind page 2.

Part C. CAUSE OF ACTION:

You must identify what rights each defendant violated. The form provides space to allege three separate counts (**one violation per count**). If you are alleging more than three counts, you must provide the necessary information about each additional count on a separate page. Number the additional pages “5-A,” “5-B,” etc., and insert them immediately behind page 5. Remember that you are limited to a total of fifteen additional pages.

1. Counts. You must identify which civil right was violated. **You may allege the violation of only one civil right per count.**
2. Issue Involved. Check the box that most closely identifies the issue involved in your claim. **You may check only one box per count.** If you check the box marked “Other,” you must identify the specific issue involved.
3. Supporting Facts. After you have identified which civil right was violated, you must state the supporting facts. Be as specific as possible. You must state what each individual defendant did to violate your rights. If there is more than one defendant, you must identify which defendant did what act. You also should state the date(s) on which the act(s) occurred, if possible.
4. Injury. State precisely how you were injured by the alleged violation of your rights.
5. Administrative Remedies. You must exhaust any available administrative remedies before you file a civil rights complaint. See 42 U.S.C. § 1997e. Consequently, you should disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided.

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

You must sign your name and print the date you signed the complaint. Failure to sign the complaint will delay the processing of your action. Unless you are an attorney, you may not bring an action on behalf of anyone but yourself.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number the pages.

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

(Failure to notify the Court of your change of address may result in dismissal of this action.)

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

(Full Name of Plaintiff) Plaintiff,

vs.

CASE NO. _____
(To be supplied by the Clerk)

(1) _____
(Full Name of Defendant)

(2) _____

(3) _____

(4) _____

Defendant(s).

Check if there are additional Defendants and attach page 1-A listing them.

**CIVIL RIGHTS COMPLAINT
BY A PRISONER**

- Original Complaint
- First Amended Complaint
- Second Amended Complaint

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:
 - 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
 - 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
 - Other: _____
2. Institution/city where violation occurred: _____

B. DEFENDANTS

1. Name of first Defendant: _____ . The first Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
2. Name of second Defendant: _____ . The second Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
3. Name of third Defendant: _____ . The third Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)
4. Name of fourth Defendant: _____ . The fourth Defendant is employed as:
_____ at _____ .
(Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner? Yes No
2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:
 - a. First prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - b. Second prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - c. Third prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

D. CAUSE OF ACTION

COUNT I

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count I.** Identify the issue involved. Check **only one**. State additional issues in separate counts.
 Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count I. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies:**
a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
b. Did you submit a request for administrative relief on Count I? Yes No
c. Did you appeal your request for relief on Count I to the highest level? Yes No
d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

COUNT II

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count II.** Identify the issue involved. Check **only one**. State additional issues in separate counts.
 Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count II. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies.**
a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
b. Did you submit a request for administrative relief on Count II? Yes No
c. Did you appeal your request for relief on Count II to the highest level? Yes No
d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

COUNT III

1. State the constitutional or other federal civil right that was violated: _____
_____.

2. **Count III.** Identify the issue involved. Check **only one**. State additional issues in separate counts.
 Basic necessities Mail Access to the court Medical care
 Disciplinary proceedings Property Exercise of religion Retaliation
 Excessive force by an officer Threat to safety Other: _____.

3. **Supporting Facts.** State as briefly as possible the FACTS supporting Count III. Describe exactly what **each Defendant** did or did not do that violated your rights. State the facts clearly in your own words without citing legal authority or arguments.

_____.

4. **Injury.** State how you were injured by the actions or inactions of the Defendant(s).

_____.

5. **Administrative Remedies.**
a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No
b. Did you submit a request for administrative relief on Count III? Yes No
c. Did you appeal your request for relief on Count III to the highest level? Yes No
d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____
_____.

If you assert more than three Counts, answer the questions listed above for each additional Count on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.