

1 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
2 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
3 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
4 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
5 statements, do not suffice.” Id.

6 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
7 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
8 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
9 that allows the court to draw the reasonable inference that the defendant is liable for the
10 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
11 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
12 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
13 allegations may be consistent with a constitutional claim, a court must assess whether there
14 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

15 If the Court determines that a pleading could be cured by the allegation of other facts,
16 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
17 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
18 should not, however, advise the litigant how to cure the defects. This type of advice “would
19 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,
20 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
21 required to inform a litigant of deficiencies). Plaintiff’s First Amended Complaint will be
22 dismissed for failure to state a claim with leave to amend because it may possibly be saved
23 by amendment.

24 **II. First Amended Complaint**

25 Plaintiff alleges two counts of violation of due process and threat to safety. Plaintiff
26 sues the following employees of the Arizona Department of Corrections (ADC): Protective
27 Segregation (PS) Administrators Hugh Matson, Audrey Burke, and Jeff Branch;
28 Classification Administrator Juanita Baca; Assistant Deputy Warden Stephen Morris; and

1 Rast Unit Deputy Warden Quincy Owens. Plaintiff seeks compensatory and injunctive relief.

2 Plaintiff alleges the following facts in his First Amended Complaint: On September
3 4, 2007, Plaintiff was designated a member of a Security Threat Group (STG) making him
4 ineligible for custody level reductions and housing changes. Plaintiff renounced his STG
5 membership and was moved from the Bachman Detention Unit to the Browning Unit, a
6 super-maximum unit, to begin the debriefing process. Plaintiff successfully completed the
7 lengthy debriefing process, including administration of a polygraph, and was recommended
8 for placement in the Rast Unit, the only closed custody unit for debriefed former STG
9 members in Arizona. However, one or more of the Defendants prevented Plaintiff's transfer
10 to the lower-custody Rast Unit because Plaintiff's brother—who had previously renounced
11 his own STG membership—was already housed in Rast and pursuant to a prison restriction
12 on housing siblings in the same unit. The Defendants caused Plaintiff and his brother to be
13 placed on one another's "Do Not House With" (DNHW) list. Plaintiff alleges that
14 Defendants have thereby violated his Fourteenth Amendment due process rights by depriving
15 him of a state-created liberty interest and are subjecting him to unconstitutional conditions
16 of confinement by prolonging his confinement in SMU I in violation of the Eighth
17 Amendment.

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

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

26 **A. Count I**

27 In Count I, Plaintiff alleges that Defendants have violated his Fourteenth Amendment
28 due process rights by depriving him of a state-created liberty interest to confinement in a

1 lower custody unit following successful completion of the debriefing process. As the Court
2 previously informed Plaintiff, there is no constitutional right to a particular classification.
3 Vignolo v. Miller, 120 F.3d 1075 (9th Cir. 1997); Baumann v. Arizona Dep't. of Corr., 754
4 F.2d 841,846 (9th Cir. 1985). Further, inmates have no liberty interest in remaining in a
5 particular institution; they may be transferred for any constitutionally permissible reason or
6 for no reason at all. Meachum v. Fano, 427 U.S. 215, 225 (1976); Ward v. Dyke, 58 F.3d
7 271, 274 (6th Cir. 1995); Shango v. Jurich, 681 F.2d 1091, 1100 (7th Cir.1982); Rizzo v.
8 Dawson, 778 F.2d 527, 530-31 (9th Cir. 1985).

9 In Count I, Plaintiff again alleges that prison authorities have refused to transfer him
10 to the Rast Unit while his brother is there or to transfer him to a closed custody unit out of
11 state. Plaintiff contends that the failure to do so violates prison regulations. However, it is
12 the nature of a deprivation, rather than the language of particular prison regulations, that is
13 determinative of whether a deprivation rises to the level of a constitutional violation. As
14 explained by the Supreme Court,

15 Sandin [v. Conner, 515 U.S. 472, 484 (1995)] involved prisoners'
16 claims to procedural due process protection before placement in segregated
17 confinement for 30 days, imposed as discipline for disruptive behavior. Sandin observed that some of our earlier cases, Hewitt v. Helms, 459 U.S. 460,
18 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), in particular, had employed a
19 methodology for identifying state-created liberty interests that emphasized "the
20 language of a particular [prison] regulation" instead of "the nature of the
21 deprivation." Sandin, 515 U.S., at 481, 115 S.Ct. 2293. In Sandin, we
criticized this methodology as creating a disincentive for States to promulgate
procedures for prison management, and as involving the federal courts in the
day-to-day management of prisons. Id., at 482-483, 115 S.Ct. 2293. For these
reasons, we abrogated the methodology of parsing the language of particular
regulations.

22 "[T]he search for a negative implication from mandatory
23 language in prisoner regulations has strayed from the real
24 concerns undergirding the liberty protected by the Due Process
25 Clause. The time has come to return to the due process
26 principles we believe were correctly established and applied in
27 Wolff and Meachum. Following Wolff, we recognize that
28 States may under certain circumstances create liberty interests
which are protected by the Due Process Clause. But these
interests will generally be limited to freedom from restraint
which, while not exceeding the sentence in such an unexpected
manner as to give rise to protection by the Due Process Clause
of its own force, nonetheless imposes atypical and significant
hardship on the inmate in relation to the ordinary incidents of

1 prison life. Id., at 483-484, 115 S.Ct. 2293 (citations and
2 footnote omitted).

3 After Sandin, it is clear that the touchstone of the inquiry into existence
4 of a protected, state-created liberty interest in avoiding restrictive conditions
5 of confinement **is not the language of regulations regarding those
6 conditions but the nature of the conditions themselves** “in relation to the
7 ordinary incidents of prison life.” Id., at 484, 115 S.Ct. 2293.

8 Wilkinson v. Austin, 545 U.S. 209, 222-23 (2005) (emphasis added).

9 In short, the failure to comply with prison regulations, absent more, does not violate
10 a protected liberty interest. Defendants’ failure or refusal to move Plaintiff to a lower
11 custody unit or acts resulting in his continued confinement in an SMU following successful
12 debriefing does not, absent more, violate a protected liberty interest. Accordingly, Plaintiff
13 fails to state a claim in Count I.

14 **B. Count II**

15 Plaintiff designates Count II as claim for threats to his safety posed by his continued
16 confinement to the conditions in SMU I, which Plaintiff anticipates will be until his brother
17 is released from the Rast Unit (and prison) in three years. Plaintiff alleges that his conditions
18 of confinement in the SMU for an additional three years, after having already been confined
19 to an SMU for two years, constitutes cruel and unusual punishment. Specifically, Plaintiff
20 alleges he will continue to be subjected to florescent lights that are on 16 to 18 hours a day
21 and intermittently the balance of the time; continuous excessive noise from inmates and
22 officers; constant confinement to his cell with virtually no contact or interaction with others;
23 and recreation in a concrete enclosure without exposure to sunlight. As a result of his
24 confinement in these conditions for an extended period, Plaintiff suffers from headaches,
25 mental and emotional distress, and lack of meaningful sleep.

26 In addressing a similar claim in the Complaint, the Court previously stated:

27 Under the Eighth Amendment, punishment may not be “barbarous” and
28 may not contravene society’s “evolving standards of decency.” Rhodes v.
Chapman, 452 U.S. 337, 346 (1981). To state a claim under the Eighth
Amendment, an inmate must allege facts to support that he was incarcerated
under conditions posing a substantial risk of harm and that prison officials
were “deliberately indifferent” to those risks. Farmer v. Brennan, 511 U.S.
825, 832-33 (1994); Redman v. County of Los Angeles, 942 F.2d 1435, 1443

1 (9th Cir. 1991) (*en banc*). Only deprivations denying the minimal civilized
2 measure of life's necessities are sufficiently grave to state an Eighth
3 Amendment violation. Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000)
4 (quotation omitted). These are "deprivations of essential food, medical care,
5 or sanitation" or "other conditions intolerable for prison confinement."
6 Rhodes, 452 U.S. at 348. To determine whether a violation has occurred, a
7 Court should consider the circumstances, nature and duration of a deprivation
8 of these necessities. Johnson, 217 F.3d at 731. "The more basic the need, the
9 shorter the time it can be withheld." Hoptowit v. Ray, 682 F.2d 1287, 1259
10 (9th Cir. 1982). In addition to alleging facts to support that he has been
11 subjected to conditions that pose an excessive risk of harm to the inmate, a
12 plaintiff must also allege facts to support that a given defendant knew of, but
13 disregarded, that risk of harm. Farmer, 511 U.S. at 837. That is, "the official
14 must both [have been] aware of facts from which the inference could be drawn
15 that a substantial risk of serious harm exist[ed], and he must also [have]
16 draw[n] the inference." Farmer, 511 U.S. at 837; Redman, 942 F.2d at 1442.

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18 Plaintiff alleges that his *continued* confinement in SMU I will subject
19 him to unconstitutional conditions. While Plaintiff ostensibly alleges facts to
20 support that the conditions of confinement in SMU I may rise to the level of
21 unconstitutionality, **he fails to allege facts to support that any named**
22 **Defendant acted with deliberate indifference to those conditions.** Rather,
23 in Count II, Plaintiff is essentially seeking relief against the named Defendants
24 for impeding his transfer to a lower custody unit. **If Plaintiff seeks relief as**
25 **to his conditions of confinement, Plaintiff must allege facts to support that**
26 **a particular Defendant knew of but disregarded conditions posing an**
27 **excessive risk to Plaintiff's safety.** A Defendant's mere involvement in
28 classification or housing assignments is not sufficient to support that the
defendant acted with deliberate indifference to allegedly unconstitutional
conditions. Because Plaintiff fails to allege facts to support that any named
Defendant acted with deliberate indifference to his conditions of confinement,
he fails to state a claim in Count II.

(Doc.# 4 at 10-11) (emphasis added).

In his First Amended Complaint, Plaintiff sufficiently alleges facts to support that the
conditions in SMU I may be unconstitutional. Plaintiff also asserts that he informed the
Defendants that their actions will result in him continuing to be held in more restrictive
conditions of SMU I. However, Plaintiff does not specifically allege facts to support that the
Defendants know that they are causing him to be subjected to the particular allegedly
unconstitutional conditions in SMU. For example, Plaintiff does not specifically allege when
or how he informed the Defendants that their actions were subjecting him to unconstitutional
conditions of confinement or what those conditions were. Plaintiff thus fails to sufficiently
allege facts to support that the Defendants have acted with deliberate indifference to his
allegedly unconstitutional conditions by preventing his transfer to the Rast Unit. Because

1 Plaintiff may be able to amend his First Amended Complaint to correct this deficiency, he
2 will be granted leave to amend.

3 **IV. Leave to Amend**

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

10 Plaintiff must clearly designate on the face of the document that it is the "Second
11 Amended Complaint." The second amended complaint must be retyped or rewritten in its
12 entirety on the court-approved form and may not incorporate any part of any prior complaint
13 by reference. Plaintiff may include only one claim per count.

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

20 **V. Warnings**

21 **A. Release**

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

26 **B. Address Changes**

27 Plaintiff must file and serve a notice of a change of address in accordance with Rule
28 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other

1 relief with a notice of change of address. Failure to comply may result in dismissal of this
2 action.

3 **C. Copies**

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

7 **D. Possible “Strike”**

8 Because the Complaint and First Amended Complaint have been dismissed for failure
9 to state a claim, if Plaintiff fails to file an amended complaint correcting the deficiencies
10 identified in this Order, the dismissal may count as a “strike” under the “3-strikes” provision
11 of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring a civil action
12 or appeal a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on
13 3 or more prior occasions, while incarcerated or detained in any facility, brought an action
14 or appeal in a court of the United States that was dismissed on the grounds that it is frivolous,
15 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is
16 under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

17 **E. Possible Dismissal**

18 If Plaintiff fails to timely comply with every provision of this Order, including these
19 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
20 1260-61 (a district court may dismiss an action for failure to comply with any order of the
21 Court).

22 **IT IS ORDERED:**

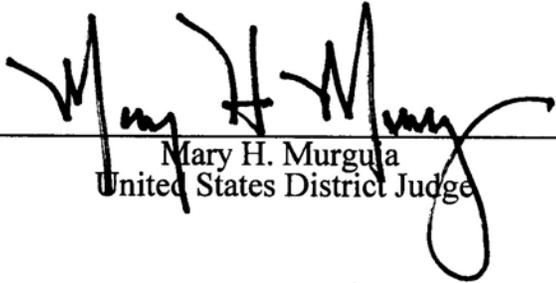
23 (1) The First Amended Complaint is **dismissed** for failure to state a claim. (Doc.#
24 6.) Plaintiff has **30 days** from the date this Order is filed to file a second amended complaint
25 in compliance with this Order.

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

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

DATED this 16th day of April, 2010.



Mary H. Murgula
United States District Judge