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

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Arthur L. Vitasek,

No. CV 10-1777-PHX-RCB (JRI)

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Plaintiff,

**ORDER**

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vs.

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Maricopa County Sheriff's Office, et al.,

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Defendants.

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Plaintiff Arthur L. Vitasek, who is confined in the Maricopa County Fourth Avenue Jail, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 3). The Court will order Defendants Gilbert and Lopez to answer the Complaint and will dismiss Defendant Maricopa County Sheriff's Office without prejudice.

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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 \$5.67. 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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1 **II. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief against  
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.  
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised  
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may  
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.  
7 28 U.S.C. § 1915A(b)(1), (2).

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

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

23 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts  
24 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, No. 07-17265, 2010 WL  
25 2947323, at \*3 (9th Cir. Jul. 29, 2010). A “complaint [filed by a *pro se* prisoner] ‘must be  
26 held to less stringent standards than formal pleadings drafted by lawyers.’” Id. (quoting  
27 Erickson v. Pardus, 551 U.S. 89, 94 (2007) (*per curiam*)).

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1 **III. Complaint**

2 In his two-count Complaint, Plaintiff sues Defendants Maricopa County Sheriff's  
3 Office, Detention Officer R. Gilbert, and Transportation Officer Deana Lopez.

4 In Count One, Plaintiff alleges a violation of his First Amendment right of free speech  
5 and the Fourth Amendment prohibition against unreasonable searches and seizures. He  
6 alleges that Defendant Gilbert delivered to Plaintiff two pieces of mail that were clearly  
7 marked as "legal mail" and were from individuals on Plaintiff's court-approved witness list.  
8 Plaintiff contends that Defendant Gilbert opened one letter, read it, told Plaintiff that it was  
9 not legal mail, responded that he could do whatever he wanted when Plaintiff informed him  
10 that he was not supposed to read legal mail, and left without giving Plaintiff either piece of  
11 mail. Plaintiff claims that Defendant Gilbert returned later and stated that he had read both  
12 letters and was going to read all of Plaintiff's mail in the future. Plaintiff asserts that  
13 Defendant Gilbert had no reason to read the mail other than to harass Plaintiff and that  
14 Plaintiff was unable to communicate privately with his witnesses for several months, until  
15 the trial court judge issued an order regarding Plaintiff's mail.

16 In Count Two, Plaintiff alleges a violation of his Fourteenth Amendment right of  
17 access to the courts. Plaintiff asserts that he was being escorted by a detention officer in  
18 order to be transported to court for a hearing. He claims that he was talking to the detention  
19 officer about being transported to court at 5:00 a.m. for a 1:00 p.m. hearing when Defendant  
20 Lopez came up, told Plaintiff to shut up, searched Plaintiff, and then asked the detention  
21 officer for a pair of handcuffs. Plaintiff claims that, when Plaintiff informed her that he  
22 could not carry his box of legal materials while handcuffed, Defendant Lopez responded that  
23 this was Plaintiff's problem and that he could figure it out. Defendant Lopez refused  
24 Plaintiff's request for a sergeant and said that she "would come back later, if I decide to come  
25 back at all." She did not return, and Plaintiff was not transported to his hearing. Plaintiff  
26 contends that Defendant Lopez claimed that Plaintiff refused to be transported, but, after  
27 Plaintiff filed a grievance and a motion with the trial court, Defendant Lopez claimed that  
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1 Plaintiff was being disruptive. Plaintiff alleges that the trial court judge issued an order  
2 requiring Plaintiff to be transported in the future.

3 Plaintiff contends that both issues have caused him or will cause him to obtain  
4 continuances in his criminal case and that this will require him to remain in jail for a longer  
5 period of time. In his Request for Relief, Plaintiff seeks monetary damages.

6 **IV. Improper Defendant**

7 The Maricopa County Sheriff's Department is not a proper defendant. In Arizona, the  
8 responsibility of operating jails and caring for prisoners is placed by law upon the sheriff.  
9 See Ariz. Rev. Stat. § 11-441(A)(5); Ariz. Rev. Stat. § 31-101. A sheriff's office is simply  
10 an administrative creation of the county sheriff to allow him to carry out his statutory duties  
11 and not a "person" amenable to suit pursuant to § 1983. Accordingly, the Maricopa County  
12 Sheriff's Department will be dismissed from this action.

13 **V. Claims for Which an Answer Will be Required**

14 Liberally construed, Plaintiff has stated a First Amendment claim in Count One  
15 against Defendant Gilbert and an access-to-the-courts claim in Count Two against Defendant  
16 Lopez. The Court will require Defendants Gilbert and Lopez to answer the Complaint.

17 **VI. Warnings**

18 **A. Release**

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

23 **B. Address Changes**

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

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**C. Copies**

Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, 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 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 v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (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* (Doc. 3) is **granted**.
- (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 \$5.67.
- (3) Defendant Maricopa County Sheriff's Office is **dismissed** without prejudice.
- (4) Defendant Gilbert must answer Count One of the Complaint and Defendant Lopez must answer Count Two of the Complaint.
- (5) The Clerk of Court must send Plaintiff a service packet including the Complaint (Doc. 1), this Order, and both summons and request for waiver forms for Defendants Gilbert and Lopez.
- (6) Plaintiff must complete and return the service packet to the Clerk of Court within 21 days of the date of filing of this Order. The United States Marshal will not provide service of process if Plaintiff fails to comply with this Order.
- (7) If Plaintiff does not either obtain a waiver of service of the summons or complete service of the Summons and Complaint on a Defendant within 120 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the

1 action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(i).

2 (8) The United States Marshal must retain the Summons, a copy of the Complaint,  
3 and a copy of this Order for future use.

4 (9) The United States Marshal must notify Defendants of the commencement of  
5 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal  
6 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. The  
7 Marshal must immediately file requests for waivers that were returned as undeliverable and  
8 waivers of service of the summons. If a waiver of service of summons is not returned by a  
9 Defendant within 30 days from the date the request for waiver was sent by the Marshal, the  
10 Marshal must:

11 (a) personally serve copies of the Summons, Complaint, and this Order upon  
12 Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

13 (b) within 10 days after personal service is effected, file the return of service  
14 for Defendant, along with evidence of the attempt to secure a waiver of service of the  
15 summons and of the costs subsequently incurred in effecting service upon Defendant.  
16 The costs of service must be enumerated on the return of service form (USM-285) and  
17 must include the costs incurred by the Marshal for photocopying additional copies of  
18 the Summons, Complaint, or this Order and for preparing new process receipt and  
19 return forms (USM-285), if required. Costs of service will be taxed against the  
20 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil  
21 Procedure, unless otherwise ordered by the Court.

22 (10) **A Defendant who agrees to waive service of the Summons and Complaint**  
23 **must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

24 (11) Defendants must answer the Complaint or otherwise respond by appropriate  
25 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal  
26 Rules of Civil Procedure.

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1 (12) Any answer or response must state the specific Defendant by name on whose  
2 behalf it is filed. The Court may strike any answer, response, or other motion or paper that  
3 does not identify the specific Defendant by name on whose behalf it is filed.

4 (13) This matter is referred to Magistrate Judge Jay R. Irwin pursuant to Rules 72.1  
5 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized  
6 under 28 U.S.C. § 636(b)(1).

7 DATED this 31<sup>st</sup> day of August, 2010.

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11 Robert C. Broomfield  
12 Senior United States District Judge  
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