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

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Howard Cochran,

No. CV 11-2538-PHX-RCB(JFM)

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Plaintiff,

**ORDER**

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vs.

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Mark Wardian, et al.,

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Defendants.

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Plaintiff Howard Cochran filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983, which the Court dismissed with leave to amend. (Doc. 6.) Plaintiff has filed a First Amended Complaint. (Doc. 9.) The Court will order Defendant Wardian to answer Count II of the First Amended Complaint and will dismiss the remaining claims and Defendants without prejudice.

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**I. Statutory Screening of Prisoner Complaints**

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

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A pleading must contain a “short and plain statement of the claim *showing* that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not

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1 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-  
2 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).  
3 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
4 statements, do not suffice.” Id.

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

14 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts  
15 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th  
16 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards  
17 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,  
18 94 (2007) (*per curiam*)).

## 19 **II. First Amended Complaint**

20 Plaintiff alleges three counts for violation of his Fourth Amendment rights, excessive  
21 use of force, and selective prosecution. Plaintiff sues the following Defendants: Phoenix  
22 Police Department Officers Mark Wardian, Todd Everett, Robert Ramsey, Michael Hiatt, and  
23 Christopher Smith. He also sues Phoenix Police Sergeant John Doe and Detective Michael  
24 Caggiano. Plaintiff seeks compensatory and punitive relief.

25 Plaintiff alleges the following facts: on October 29, 2010, on Camelback Road in  
26 Phoenix, police officers lacked probable cause to arrest him. Plaintiff denies that he  
27 possessed drugs or that he threw down drugs and claims that an unidentified witness is  
28 willing to testify to those facts. Two other men, named Brian and Will, who Plaintiff

1 describes as similarly-situated to him, were not prosecuted. However, Plaintiff also notes  
2 that unlike Plaintiff, Brian and Will had not been previously imprisoned and were not then  
3 on parole. Brian told police officers about “his involvement and his possession of the gun.”  
4 (Doc. 9 at 5.) Defendants Wardian, Everett, Caggiano, Ramsey, Hiatt, Smith, and Doe were  
5 all informed “about this matter”. (Id.)

### 6 **Background**

7 Plaintiff was charged in two cases in Maricopa County Superior Court, case#  
8 CR2010-161733 and CR2011-101847. In the former case, on October 11, 2011, Plaintiff  
9 pleaded guilty to misconduct involving weapons, pursuant to a plea agreement; Plaintiff’s  
10 motion to dismiss a second count for a narcotic drug violation<sup>1</sup> and allegations of prior felony  
11 convictions and being on parole at the time of the offense, were to be deemed submitted at  
12 the time of sentencing.<sup>2</sup> Also on October 11, 2011, Plaintiff pleaded guilty to second degree  
13 burglary pursuant to a plea agreement.<sup>3</sup> Plaintiff has not yet been sentenced in either case.<sup>4</sup>

### 14 **III. Failure to State a Claim**

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

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22 <sup>1</sup> See [http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/case](http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2010-161733)  
23 [Info.asp?caseNumber=CR2010-161733](http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2010-161733) (last visited Jan. 30, 2012).

24 <sup>2</sup> See <http://www.courtminutes.maricopa.gov/docs/Criminal/102011/m4932987.pdf>  
25 (last visited Jan. 30, 2012).

26 <sup>3</sup> See <http://www.courtminutes.maricopa.gov/docs/Criminal/102011/m4932988.pdf>  
27 (last visited Jan. 30, 2012).

28 <sup>4</sup> See <http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2011-101847> and <http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2010-161733> (last visited Apr. 3, 2012).

1 Goode, 423 U.S. 362, 371-72, 377 (1976).

2 Further, to state a claim against a defendant, “[a] plaintiff must allege facts, not simply  
3 conclusions, that show that an individual was personally involved in the deprivation of his  
4 civil rights.” Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual  
5 to be liable in his official capacity, a plaintiff must allege that the official acted as a result of  
6 a policy, practice, or custom. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188  
7 (9th Cir. 2001). Further, there is no *respondeat superior* liability under § 1983, so a  
8 defendant’s position as the supervisor of someone who allegedly violated a plaintiff’s  
9 constitutional rights does not make him liable. Monell v. Dep’t of Soc. Servs., 436 U.S. 658,  
10 691 (1978); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his  
11 individual capacity, “is only liable for constitutional violations of his subordinates if the  
12 supervisor participated in or directed the violations, or knew of the violations and failed to  
13 act to prevent them.” Taylor, 880 F.2d at 1045.

14 **A. Count I.**

15 Plaintiff labels Count I as a claim for violation of his Fourth Amendment rights.  
16 Although unclear, Plaintiff appears to be attempting to allege a claim for false arrest. To  
17 state a § 1983 claim for false arrest and imprisonment, a plaintiff must allege that there was  
18 no probable cause for his arrest. See Cabrera v. City of Huntingdon Park, 159 F.3d 374, 380  
19 (9th Cir. 1998) (citing George v. City of Long Beach, 973 F.2d 706, 710 (9th Cir.1992)).  
20 Probable cause “exists when under the totality of the circumstances known to the arresting  
21 officers, a prudent person would have concluded that there was a fair probability that [the  
22 person arrested] had committed a crime.” Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir.  
23 1991). The Fourth Amendment requirement that arrest warrants be based upon probable  
24 cause may be satisfied by an indictment returned by a grand jury. See Kalina v. Fletcher, 522  
25 U.S. 118, (1997).

26 The dockets for both cases reflect that Plaintiff was indicted by a grand jury.<sup>5</sup> A grand  
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28 <sup>5</sup> See <http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR2010-161733> and <http://www.superiorcourt.maricopa.gov/docket/>

1 jury indictment establishes the existence of probable cause for Plaintiff's arrests. Plaintiff  
2 does not otherwise allege facts to support that any Defendant in violated his constitutional  
3 rights. Accordingly, Count I will be dismissed for failure to state a claim.

4 **B. Count III**

5 Plaintiff designates Count III as a claim for violation of equal protection or for  
6 selective prosecution. Claims of selective prosecution are judged according to equal  
7 protection standards. Wayte v. United States, 470 U.S. 598, 608 (1985); see Rosenbaum v.  
8 City and County of San Francisco, 484 F.3d 1142, 1152-53 (9th Cir. 2007); Ortega  
9 Melendres v. Arpaio, 598 F. Supp.2d 1025, 1037 (D. Ariz. 2009); Sherman v. Brown, No.  
10 2:06-cv-00911-JKS, 2009 WL 2190074, at \*9 (E.D. Cal. July 22, 1009). To state a selective  
11 prosecution claim under the Equal Protection Clause, a defendant must allege that others who  
12 were similarly situated were not prosecuted and that his prosecution was based on an  
13 impermissible motive, such as race or religion. Wayte, 470 U.S. at 608; United States v.  
14 Dumas, 64 F.3d 1427, 1431 (9th Cir. 1995); Dal Molin v. County of Napa, 266 Fed. Appx.  
15 585 (9th Cir. 2008) ("to maintain a claim of selective prosecution, a plaintiff must show that  
16 similarly situated individuals were not prosecuted unless they were members of a targeted  
17 class.").

18 Plaintiff alleges that Brian and Will were similarly-situated to him, although he also  
19 alleges that they were not on parole, but that only Plaintiff was prosecuted on weapons  
20 charges. Plaintiff does not allege facts to support that he was prosecuted on weapons charges  
21 for an impermissible reason, such as his race or religion, while others were not. Instead,  
22 Plaintiff implies that he was singled out because he had a criminal record and was still on  
23 parole. Even if true, those facts do not rise to the level of a violation of equal protection or  
24 constitute selective prosecution. For that reason, Plaintiff fails to state a claim for selective  
25 prosecution or violation of equal protection and Count III will be dismissed.

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1 **IV. Claim for Which an Answer Will be Required**

2 Plaintiff designates Count II as a claim for excessive use of force by Defendant  
3 Wardian. Plaintiff alleges that Wardian ordered Plaintiff to lay on the ground and then got  
4 on top of Plaintiff and ground his face into the concrete. Plaintiff sufficiently alleges that  
5 Wardian used excessive force in Count II. Accordingly, Wardian will be required to respond  
6 to Count II of the First Amended Complaint.

7 **V. Warnings**

8 **A. Release**

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

13 **B. Address Changes**

14 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
15 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other  
16 relief with a notice of change of address. Failure to comply may result in dismissal of this  
17 action.

18 **C. Copies**

19 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy  
20 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate  
21 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit  
22 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply  
23 may result in the filing being stricken without further notice to Plaintiff.

24 **D. Possible Dismissal**

25 If Plaintiff fails to timely comply with every provision of this Order, including these  
26 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,  
27 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to  
28 comply with any order of the Court).

1 **IT IS ORDERED:**

2 (1) Counts I and III are **dismissed** without prejudice. (Doc. 9.)

3 (2) Defendants Caggiano, Everett, Doe, Ramsey, Hiatt, and Smith are **dismissed**  
4 without prejudice. (Doc. 9.)

5 (3) Defendant Wardian must answer Count II.

6 (4) The Clerk of Court must send Plaintiff a service packet including the First  
7 Amended Complaint (Doc. 9), this Order, and both summons and request for waiver forms  
8 for Defendant Wardian.

9 (5) Plaintiff must complete and return the service packet to the Clerk of Court  
10 within 21 days of the date of filing of this Order. The United States Marshal will not provide  
11 service of process if Plaintiff fails to comply with this Order.

12 (6) If Plaintiff does not either obtain a waiver of service of the summons or  
13 complete service of the Summons and First Amended Complaint on a Defendant within 120  
14 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever  
15 is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m);  
16 LRCiv 16.2(b)(2)(B)(i).

17 (7) The United States Marshal must retain the Summons, a copy of the First  
18 Amended Complaint, and a copy of this Order for future use.

19 (8) The United States Marshal must notify Defendants of the commencement of  
20 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal  
21 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. **The**  
22 **Marshal must immediately file signed waivers of service of the summons. If a waiver**  
23 **of service of summons is returned as undeliverable or is not returned by a Defendant**  
24 **within 30 days from the date the request for waiver was sent by the Marshal, the**  
25 **Marshal must:**

26 (a) personally serve copies of the Summons, First Amended Complaint, and  
27 this Order upon Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil  
28 Procedure; and

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


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

13 (10) Defendant must answer the First Amended Complaint or otherwise respond by  
14 appropriate motion within the time provided by the applicable provisions of Rule 12(a) of  
15 the Federal Rules of Civil Procedure.

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

19 (12) This matter is referred to Magistrate Judge James F. Metcalf pursuant to Rules  
20 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized  
21 under 28 U.S.C. § 636(b)(1).

22 DATED this 4th day of April, 2012.

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26 Robert C. Broomfield  
27 Senior United States District Judge  
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