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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
89 Manuel Luis Medina,
10 Plaintiff,

No. CV 13-0572-PHX-DGC (JFM)

11 vs.

ORDER12 Joseph M. Arpaio, et al.,
13 Defendants.
14

15 Plaintiff Manuel Luis Medina, who is now confined in the Arizona State Prison
16 Complex, Alhambra Unit, in Phoenix, Arizona, has filed a *pro se* civil rights Complaint
17 pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*.¹
18 (Doc. 1, 2.) Plaintiff has also filed two motions for appointment of counsel. (Doc. 5, 6.)
19 The Court will dismiss the Complaint with leave to amend and deny the motions.

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

20
21 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
22 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
23 The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The
24 statutory fee will be collected monthly in payments of 20% of the previous month's
25 income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2).
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¹ Plaintiff was incarcerated in Maricopa County's Fourth Avenue Jail when he
commenced this case.

1 The Court will enter a separate Order requiring the appropriate government agency to
2 collect and forward the fees according to the statutory formula.

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

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

10 A pleading must contain a “short and plain statement of the claim *showing* that the
11 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
12 does not demand detailed factual allegations, “it demands more than an unadorned, the-
13 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
14 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” *Id.*

16 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
17 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
18 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
19 content that allows the court to draw the reasonable inference that the defendant is liable
20 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
21 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
22 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
23 specific factual allegations may be consistent with a constitutional claim, a court must
24 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
25 at 681.

26 But as the United States Court of Appeals for the Ninth Circuit has instructed,
27 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
28 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less

1 stringent standards than formal pleadings drafted by lawyers.” *Id.* (quoting *Erickson v.*
2 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

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

13 **III. Complaint**

14 Plaintiff alleges two counts for threat to safety and denial of due process in
15 connection with disciplinary proceedings. Plaintiff sues Maricopa County Sheriff Joseph
16 M. Arpaio and the following current or former employees of the Sheriff’s Office:
17 Captain/Jail Commander Harmon; Head of Classification Personnel Rick Bailey; and
18 Detention Officer Burke. Plaintiff seeks injunctive, compensatory, and punitive relief.

19 Plaintiff alleges the following facts: on March 2, 2012, Plaintiff was booked into
20 the Fourth Avenue Jail and was initially housed on the Fourth Floor. Plaintiff worked his
21 way down to an “(8) Hour Pod,” i.e., a pod in which pretrial detainees are allowed out of
22 their cells for eight hours a day.

23 On or about January 17, 2013, after Plaintiff had been in an 8-hour pod for more
24 than ten months, Jail Intelligence Unit staff informed Plaintiff that they had a recording
25 of known Mexican Mafia gang members ordering a “hit” on Plaintiff’s life. Plaintiff
26 requested Protective Segregation (PS) status for his safety. Although the Lower Buckeye
27 Jail (LBJ), had a PS unit where pretrial detainees were held and had the same privileges
28 as General Population (GP) inmates, Plaintiff was told that he did not qualify for

1 placement at LBJ due to his past history. Instead, Plaintiff was classified as a close
2 custody (CC) inmate and housed on the Fourth Floor, Fox Run, Pod 1, cell 28 (4F1-28)
3 of the Fourth Avenue Jail.

4 As a CC inmate at the Fourth Avenue Jail, Plaintiff was housed alone and allowed
5 to leave his cell, alone, for an hour each day to clean, use the phone, shower, etc.
6 Further, as a CC inmate at the Fourth Avenue Jail, Plaintiff lacked access to the
7 privileges available to GP inmates at the Jail, including television and the ability to attend
8 religious services. According to Plaintiff, the “mixture of people [in Pod 1 of Fox Run]
9 consisted of GP pretrial detainees, GP gang-affiliated pretrial detainees, gang-affiliated
10 ADC inmates, and mentally ill inmates. At least two inmates from the Arizona
11 Department of Corrections (ADC), whom ADC had labeled as Security Threat Group
12 members affiliated with the Mexican Mafia, were housed in Pod 1 of Fox Run. These
13 ADC inmates, named Cruz and Lechuga, were thus members of the very gang that had
14 ordered a hit on Plaintiff. These inmates barraged Plaintiff with constant verbal threats
15 and abuse. In addition to the ADC inmates in Pod 1 of Fox Run, inmates being punished
16 for disciplinary infractions and mentally ill inmates were also held in the Pod. The
17 mentally ill inmates defecated or urinated in the hallways, which Jail staff left for days
18 without having the hallways cleaned. Plaintiff and other inmates in the Pod had to endure
19 the odor and walk through the uncleaned hallways on the way to shower.

20 On January 31, 2013, the doors in a pod were inadvertently opened, although it is
21 unclear whether it was Plaintiff’s pod. As a consequence, Mexican Mafia associates
22 were able to attack Inmate Anthony German and injure him.

23 The week of February 3, 2013, ADC inmate Cruz was housed in 4F1-22, i.e., in
24 Plaintiff’s pod. In addition to being an STG member at ADC, Cruz had been housed in
25 ADC’s Security Management Unit, i.e., a maximum security unit. On February 11, 2013,
26 an unidentified Jail detention officer told Plaintiff that Cruz was supposed to be housed
27 behind “double doors” and not with CC inmates, but that Jail classification staff had
28

1 failed to ensure that Cruz was properly classified. In cell 4F1-30, ADC inmate Lechuga,
2 another Mexican Mafia affiliate, was housed Plaintiff's pod.

3 On February 11, 2013, after officers had passed out meal trays to those in
4 Plaintiff's pod, the doors for every cell in the pod simultaneously opened. Plaintiff, not
5 realizing that all of the doors had opened, stepped out of his cell believing that the control
6 room had mistakenly opened his door for time out of his cell. When Plaintiff realized
7 that all of the doors in the pod had been opened, he looked towards the control room and
8 saw that Defendant Detention Officer (DO) Burke, in the control room, was seated with
9 his back to Plaintiff's pod. When Plaintiff looked to his right, he saw Cruz approaching
10 an inmate and pushing other inmates out of his way. As Cruz attacked the inmate he had
11 been approaching, Lechuga, two cells down from Plaintiff, came out of his cell and
12 joined in an attack on a different inmate. After spotting Plaintiff, Lechuga rushed
13 towards Plaintiff and hit him in the mouth. Plaintiff hurt his back and shoulder in
14 attempting to defend himself. Other inmates then joined in the melee, which continued
15 for five minutes before Defendant Burke noticed what was happening and summoned
16 assistance. After assistance arrived, all of the inmates were ordered to return to their
17 cells. All did so except for Lechuga and Cruz.²

18 Sometime later, nurses arrived to document injuries. Plaintiff told them about the
19 injuries to his mouth, back, and shoulder and was given Ibuprofen. After medical staff
20 left, a few officers waited while Cruz packed his belongings and was taken to a more
21 secure location. Plaintiff's back and shoulder continued to be painful. Plaintiff contends
22 that he was injured after being forced to defend himself from the very types of inmates
23 from whom he was supposed to be segregated. He contends that Jail detention and
24 classification staff acted negligently. Because a similar incident had occurred on
25 January 31, 2013, Plaintiff contends that Fourth Avenue Jail officers were complicit in
26 facilitating access by gang-members to PS inmates. Plaintiff contends that the Jail failed
27 to segregate PS inmates from GP and STG inmates and that Fourth Avenue Jail

28 ² Plaintiff does not allege whether or how they were forced to comply.

1 administrative staff refused to send PS inmates to the Lower Buckeye Jail, which has a
2 separate PS pretrial detainee pod that affords PS inmates the same privileges afforded to
3 GP inmates. Plaintiff indicates that Fourth Avenue staff has stated that it is not feasible
4 to move PS inmates to LBJ. Further, he contends that despite occasional instances of cell
5 doors in the Close Custody pods being inadvertently opened, “they” still mix non-PS
6 inmates with PS pretrial detainees.

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

8 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
9 conduct about which he complains was committed by a person acting under the color of
10 state law and (2) the conduct deprived him of a federal constitutional or statutory right.
11 *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). Negligence is not sufficient to
12 state a claim under § 1983. *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986). In
13 addition, a plaintiff must allege that he suffered a specific injury as a result of the conduct
14 of a particular defendant and he must allege an affirmative link between the injury and
15 the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

16 **A. Defendants Arpaio, Harmon, and Bailey**

17 Plaintiff seeks relief against Sheriff Arpaio, Captain Harmon, and Classification
18 Head Bailey. While each of them may be sued under § 1983, Plaintiff fails to state a
19 claim against any of them.

20 To state a claim against a defendant, “[a] plaintiff must allege facts, not simply
21 conclusions, that show that an individual was personally involved in the deprivation of
22 his civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). For an
23 individual to be liable in his official capacity, a plaintiff must allege that the official acted
24 as a result of a policy, practice, or custom. *See Cortez v. County of Los Angeles*, 294 F.3d
25 1186, 1188 (9th Cir. 2001). Further, there is no *respondeat superior* liability under
26 §1983, so a defendant’s position as the supervisor of someone who allegedly violated a
27 plaintiff’s constitutional rights does not make him liable. *Monell v. Dep’t of Soc. Servs.*,
28 436 U.S. 658, 691 (1978); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A

1 supervisor in his individual capacity, “is only liable for constitutional violations of his
2 subordinates if the supervisor participated in or directed the violations, or knew of the
3 violations and failed to act to prevent them.” *Taylor*, 880 F.2d at 1045. In addition,
4 where a defendant’s only involvement in allegedly unconstitutional conduct is the denial
5 of administrative grievances, the failure to intervene on a prisoner’s behalf to remedy the
6 alleged unconstitutional behavior does not amount to active unconstitutional behavior for
7 purposes of § 1983. *See Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999); accord
8 *Proctor v. Applegate*, 661 F.Supp.2d 743, 765 (W.D. Mich. 2009); *Stocker v. Warden*,
9 No. 1:07-CV-00589, 2009 WL 981323, at *10 (E.D. Cal. Apr. 13, 2009); *Mintun v.*
10 *Blades*, No. CV-06-139, 2008 WL 711636, at *7 (D. Idaho Mar. 14, 2008); *see also*
11 *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006) (a plaintiff must allege
12 that a supervisor defendant did more than play a passive role in an alleged violation or
13 mere tacit approval thereof; a plaintiff must allege that the supervisor defendant somehow
14 encouraged or condoned the actions of their subordinates).

15 Plaintiff predicates liability against Arpaio based solely on *respondeat superior*.
16 That is not a basis for liability under § 1983. Plaintiff also predicates liability against
17 Bailey on his position as head of classification at the Fourth Avenue Jail and asserts that
18 Bailey was aware of classification problems, and potential risks to inmates, but failed to
19 act to alleviate those risks. Plaintiff fails to set forth facts to support either of these
20 assertions. Plaintiff fails to allege any facts against Harmon. Because Plaintiff fails to
21 allege facts to support that any of these Defendants directly violated his constitutional
22 rights or facts to support that any of them promulgated, endorsed, or condoned a policy
23 resulting in violations of Plaintiff’s constitutional rights, Plaintiff fails to state a claim
24 against any of them and they will be dismissed.

25 **B. Count I**

26 Plaintiff designates Count I as a claim for threat to safety. To state a claim under
27 § 1983 for failure to protect or threats to safety, an inmate must allege facts to support
28 that he was incarcerated under conditions posing a substantial risk of harm and that jail

1 officials were “deliberately indifferent” to those risks. *Farmer v. Brennan*, 511 U.S. 825,
2 832-33 (1994). To adequately allege deliberate indifference, a plaintiff must allege facts
3 to support that a defendant knew of, but disregarded, an excessive risk to inmate safety.
4 *Id.* at 837. That is, “the official must both [have been] aware of facts from which the
5 inference could be drawn that a substantial risk of serious harm exist[ed], and he must
6 also [have] draw[n] the inference.” *Id.*

7 Plaintiff alleges that Defendant Burke negligently, or perhaps intentionally, caused
8 all of the doors in Plaintiff’s pod to open at once and that he was injured as a
9 consequence. To the extent Burke acted negligently, Plaintiff fails to state a claim under
10 § 1983 against Burke for threat to safety. Plaintiff otherwise fails to allege facts to
11 support that Burke opened all of the doors in the pod despite knowledge that doing so
12 posed an substantial threat to Plaintiff’s safety. That is, Plaintiff fails to allege facts to
13 support that Burke acted with deliberate indifference.

14 Plaintiff also alleges that classification staff erred in classifying ADC inmates,
15 who were affiliated with the Mexican Mafia, to be held in a CC pod. Plaintiff does not
16 identify the classification staff involved in Count I. Moreover, Plaintiff fails to allege
17 facts to support that any classification staff member knew or should have known that
18 classifying gang members to close custody was likely to pose a *substantial* threat to
19 Plaintiff’s safety. Accordingly, Plaintiff also fails to state a claim on this basis.

20 Plaintiff otherwise fails to allege facts against any other named Defendant in
21 Count I. Accordingly, Count I will be dismissed as to all the Defendants.

22 **C. Count II**

23 Plaintiff designates Count II as a claim for denial of due process in connection
24 with disciplinary proceedings. Pretrial detainees have a substantive due process right
25 against restrictions that amount to punishment for criminal offenses. *Valdez v.*
26 *Rosenbaum*, 302 F.3d 1039, 1045 (9th Cir. 2002) (citing *United States v. Salerno*, 481
27 U.S. 739, 746 (1987)); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Redman v. County of*
28 *San Diego*, 942 F.2d 1435, 1440-41 (9th Cir.1991) (*en banc*)). This right is violated if

1 restrictions are “imposed for the purpose of punishment.” *Bell*, 441 U.S. at 535. For
2 particular governmental action to constitute punishment, the action must cause the
3 detainee to suffer some harm or disability, and the purpose of the action must be to
4 punish the detainee. *Demery v. Arpaio*, 378 F.3d 1020,1029 (9th Cir. 2004) (citing *Bell*,
5 441 U.S. at 538). Jail officials are entitled to impose restrictions to effect confinement,
6 and detention will necessarily affect a detainee’s ability to live as comfortably as he
7 might like. A *de minimis* level of imposition is permissible.³ *Bell*, 441 U.S. at 539 n.21.
8 There is no constitutional infringement if restrictions are “but an incident of some other
9 legitimate government purpose.” *Id.* In such a circumstance, governmental restrictions
10 are permissible. *Salerno*, 481 U.S. at 747.

11 Plaintiff fails to allege facts to support that his confinement in CC was without
12 some legitimate government purpose other than as punishment for the criminal offenses
13 with which he is charged. Indeed, he acknowledges that he requested more secure
14 housing after being informed of threats made against him. He also fails to allege facts to
15 support that placement in CC constituted punishment for a disciplinary infraction or facts
16 to support that his placement in CC was intended to punish him. Rather, he was placed in
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19 ³ As *Bell* explained:

20 Not every disability imposed during pretrial detention amounts to
21 “punishment” in the constitutional sense, however. Once the Government
22 has exercised its conceded authority to detain a person pending trial, it
23 obviously is entitled to employ devices that are calculated to effectuate this
24 detention. Traditionally, this has meant confinement in a facility which, no
25 matter how modern or how antiquated, results in restricting the movement
26 of a detainee in a manner in which he would not be restricted if he simply
27 were free to walk the streets pending trial. Whether it be called a jail, a
28 prison, or a custodial center, the purpose of the facility is to detain. Loss of
freedom of choice and 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.”

441 U.S. at 537.

1 CC for his protection. Accordingly, Plaintiff fails to state a claim for denial of due
2 process based on his placement in a CC pod.

3 Plaintiff also appears to be attempting to assert a claim for denial of
4 constitutionally adequate conditions of confinement and violation of equal protection
5 where PS inmates at the Fourth Avenue Jail are treated differently and have fewer
6 privileges than PS inmates at the LBJ Jail.

7 A pretrial detainee's claim for unconstitutional conditions of confinement arises
8 under the Fourteenth Amendment Due Process Clause rather than the Eighth
9 Amendment's prohibition against cruel and unusual punishment. *Bell v. Wolfish*, 441
10 U.S. 520, 535 and n.16 (1979). Nevertheless, the same standards are applied. *See Frost*
11 *v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

12 To state a claim for unconstitutional conditions of confinement, a plaintiff must
13 allege that a defendant's acts or omissions have deprived the inmate of "the minimal
14 civilized measure of life's necessities" and that the defendant acted with deliberate
15 indifference to an excessive risk to inmate health or safety. *Allen v. Sakai*, 48 F.3d 1082,
16 1087 (9th Cir. 1994) (citing *Farmer*, 511 U.S. at 834); *see Estate of Ford v. Ramirez-*
17 *Palmer*, 301 F.3d 1043, 1049-50 (9th Cir. 2002). That is, a plaintiff must allege a
18 constitutional deprivation that is objectively "sufficiently serious" to result in the denial
19 of "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834.
20 Whether conditions of confinement rise to the level of a constitutional violation may
21 depend, in part, on the duration of an inmate's exposure to those conditions. *Keenan v.*
22 *Hall*, 83 F.3d 1083, 1089, 1091 (9th Cir. 1996) (citing *Hutto v. Finney*, 437 U.S. 678,
23 686-87 (1978)).

24 A plaintiff must also allege facts supporting that the jail official had a "sufficiently
25 culpable state of mind," i.e., that the official acted with deliberate indifference to inmate
26 health or safety. *Farmer*, 511 U.S. at 834. As already noted, deliberate indifference is a
27 higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Id.*
28 at 835. In addition, "[t]he circumstances, nature, and duration of a deprivation . . . must

1 be considered in determining whether a constitutional violation has occurred.” *Hearns*
2 *v. Terhune*, 413, F.3d 1036, 1042 (9th Cir. 2005) (quoting *Johnson v. Lewis*, 217 F.3d
3 726, 731 (9th Cir. 2000)).

4 Plaintiff alleges that he was held in a cell by himself, but that he was able to leave
5 his cell for an hour each day to shower, clean his cell, make telephone calls and the like.
6 He complains that mentally ill inmates sometimes defecated or urinated in the hallways
7 and that it took days for staff to clean the hallways. Plaintiff does not allege how
8 frequently such issues arose, nor does he allege that he brought the issue to the attention
9 of any jail staff member. Plaintiff also complains of the noise caused by mentally ill
10 inmates, but does not describe the frequency or duration of such noise. Assuming such
11 conditions rose to the level of being unconstitutional, Plaintiff fails to allege facts to
12 support that any named Defendant knew that such conditions posed an excessive risk to
13 Plaintiff and that such Defendant nevertheless failed to act to alleviate the problem.
14 Plaintiff thus fails to state a claim for unconstitutional conditions of confinement against
15 any Defendant.

16 Plaintiff contends that PS inmates at the Fourth Avenue Jail were treated
17 differently than PS inmates at the LBJ Jail, where PS inmates were afforded more
18 privileges, which the Court construes as an attempt to allege an equal protection claim.
19 Generally, “[t]o state a claim . . . for a violation of the Equal Protection Clause . . . [,] a
20 plaintiff must show that the defendants acted with an intent or purpose to discriminate
21 against the plaintiff based upon membership in a protected class.” *Barren v. Harrington*,
22 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiff has not alleged he is a member of a
23 protected class.

24 The United States Supreme Court has also recognized “successful equal protection
25 claims brought by a ‘class of one,’ where the plaintiff alleges that [he] has been
26 intentionally treated differently from others similarly situated and that there is no rational
27 basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562,
28 564 (2000); *see also SeaRiver Maritime Financial Holdings, Inc. v. Mineta*, 309 F.3d

1 662, 679 (9th Cir. 2002). Plaintiff also fails to state a claim under this standard. Plaintiff
2 has failed to allege that he was treated differently than other similarly-situated individuals
3 or that there was no rational basis for treating him differently. Plaintiff alleges that other
4 PS pretrial detainees at the Fourth Avenue Jail were treated as he was. Further, Plaintiff
5 acknowledges that he was ineligible for transfer to LBJ because of his own prior history,
6 i.e., there was a rational basis for not transferring him to the PS unit at LBJ. Accordingly,
7 Plaintiff also fails to state an equal protection claim.

8 **V. Leave to Amend**

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

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

19 A first amended complaint supersedes the original complaint. *Ferdik v. Bonzelet*,
20 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896
21 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat an original
22 complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised
23 in the original complaint is waived if it is not raised in a first amended complaint. *King v.*
24 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

25 **VI. Motions for Appointment of Counsel**

26 As noted above, Plaintiff has filed two motions for the appointment of counsel due
27 to his indigence, lack of legal training, inability to investigate, unfamiliarity with Latin,
28 the importance of cross-examination, and the complexity of this case. There is no

1 constitutional right to the appointment of counsel in a civil case. *See Ivey v. Bd. of*
2 *Regents of the Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). In proceedings *in*
3 *forma pauperis*, the court may request an attorney to represent any person unable to
4 afford one. 28 U.S.C. § 1915(e)(1). Appointment of counsel under 28 U.S.C.
5 § 1915(e)(1) is required only when “exceptional circumstances” are present. *Terrell v.*
6 *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A determination with respect to
7 exceptional circumstances requires an evaluation of the likelihood of success on the
8 merits as well as the ability of Plaintiff to articulate his claims *pro se* in light of the
9 complexity of the legal issue involved. *Id.* “Neither of these factors is dispositive and
10 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v.*
11 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

12 Having considered both elements, it does not appear at this time that exceptional
13 circumstances are present that would require the appointment of counsel in this case.
14 Plaintiff is in no different position than many *pro se* prisoner litigants. Thus, the Court
15 will deny without prejudice Plaintiff’s motions for appointment of counsel.

16 **VII. Warnings**

17 **A. Release**

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

22 **B. Address Changes**

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

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C. Copies

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

D. Possible “Strike”

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

E. Possible Dismissal

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

IT IS ORDERED:

- (1) Plaintiff’s Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 2.)
- (2) As required by the accompanying Order to the appropriate government agency, Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.
- (3) The Complaint is **dismissed** for failure to state a claim. (Doc. 1.) Plaintiff has **30 days** from the date this Order is filed to file a first amended complaint in compliance with this Order.

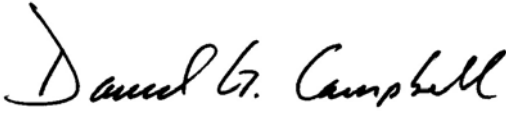
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(4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of Court must, without further notice, enter a judgment of dismissal of this action with prejudice that states that the dismissal may count as a “strike” under 28 U.S.C.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

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

(6) Plaintiff’s motions for appointment of counsel are **denied**. (Doc. 5, 6.)

Dated this 13th day of August, 2013.



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.

- | | | | |
|--|---|---|---------------------------------------|
| <input type="checkbox"/> Basic necessities | <input type="checkbox"/> Mail | <input type="checkbox"/> Access to the court | <input type="checkbox"/> Medical care |
| <input type="checkbox"/> Disciplinary proceedings | <input type="checkbox"/> Property | <input type="checkbox"/> Exercise of religion | <input type="checkbox"/> Retaliation |
| <input type="checkbox"/> Excessive force by an officer | <input type="checkbox"/> Threat to safety | <input type="checkbox"/> 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.

<input type="checkbox"/> Basic necessities	<input type="checkbox"/> Mail	<input type="checkbox"/> Access to the court	<input type="checkbox"/> Medical care
<input type="checkbox"/> Disciplinary proceedings	<input type="checkbox"/> Property	<input type="checkbox"/> Exercise of religion	<input type="checkbox"/> Retaliation
<input type="checkbox"/> Excessive force by an officer	<input type="checkbox"/> Threat to safety	<input type="checkbox"/> 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.