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

Robert Carrasco Gamez, Jr.,)	No. CV 10-2070-PHX-JWS (MEA)
Plaintiff,)	ORDER
vs.)	
Charles L. Ryan, et al.,)	
Defendants.)	

Plaintiff Robert Carrasco Gamez, Jr., who is confined in the Arizona State Prison Complex, Kasson Unit, in Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and two Applications to Proceed *In Forma Pauperis*. (Doc. 1, 9, 11.) The Court will dismiss the Complaint with leave to amend and deny the second *in forma pauperis* application as moot.

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

Plaintiff’s Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The statutory 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.

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(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 4673711 at *3 (9th Cir. Nov. 19, 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*)).
28

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

10 **III. Complaint**

11 Plaintiff alleges two counts asserting denial of constitutionally adequate medical care,
12 conditions of confinement, and equal protection. Plaintiff sues the following employees of
13 the Arizona Department of Corrections (ADC): Director Charles L. Ryan; Deputy Complex
14 Warden G. Fizer; Facility Health Administrator (FHA) Dr. Dennis Kendall; Corrections
15 Officer III Pittario; and Complex Warden John Doe. Plaintiff seeks declaratory, injunctive,
16 compensatory, and punitive relief.

17 Plaintiff alleges the following facts: Plaintiff arrived at ADC’s Alhambra Reception
18 Center on July 25, 2003. Plaintiff was then transferred to Special Management Unit I (SMU
19 I) and, specifically, the Violence Control Unit (VCU), which housed the violently mentally
20 ill. Plaintiff was “never provided a legitimate reason” for his assignment to the VCU.
21 Plaintiff grieved his placement in VCU but was informed that placement decisions were non-
22 grievable. After four months, Plaintiff was moved to a less-restrictive area in SMU I.
23 According to Plaintiff, Defendants knowingly failed to provide adequate mental health care
24 to maximum custody inmates, which exacerbated their mental illness.

25 On September 6, 2009, Plaintiff grieved “the treatment he was receiving” in supermax
26 facilities, particularly cell confinement for 23 hours a day that exacerbates mental illness of
27 inmates. He submitted his grievance to Defendant Pittario. On September 15, 2009, he was
28 notified that his grievance had been denied. The same day, Plaintiff appealed the denial to

1 Defendant Kendall. On December 2, 2009, Plaintiff received a response from Defendant
2 Fizer denying his appeal. Plaintiff appealed to Defendant Doe, which was denied on January
3 21, 2010. Plaintiff then appealed to Director Ryan, who denied that appeal on February 25,
4 2010.

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

6 Section 1983 provides a cause of action against persons acting under color of state law
7 who have violated rights guaranteed by the United States Constitution and federal law. 42
8 U.S.C. § 1983; see also Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995). To
9 state a claim under § 1983, a plaintiff must allege facts supporting that (1) the conduct about
10 which he complains was committed by a person acting under the color of state law and (2)
11 the conduct deprived him of a federal constitutional or statutory right. Wood v. Ostrander,
12 879 F.2d 583, 587 (9th Cir. 1989). A plaintiff must also allege that he suffered a specific
13 injury as a result of the conduct of a particular defendant and he must allege an affirmative
14 link between the injury and the conduct of that defendant. Rizzo v. Goode, 423 U.S. 362,
15 371-72, 377 (1976).

16 Further, to state a claim, “[a] plaintiff must allege facts, not simply conclusions, that
17 show that an individual was personally involved in the deprivation of his civil rights.”
18 Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). For an individual to be liable in
19 his official capacity, a plaintiff must allege that the official acted as a result of a policy,
20 practice, or custom. See Cortez v. County of Los Angeles, 294 F.3d 1186, 1188 (9th Cir.
21 2001). In addition, there is no *respondeat superior* liability under § 1983, so a defendant’s
22 position as the supervisor of someone who allegedly violated a plaintiff’s constitutional
23 rights does not make him liable. Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 691 (1978);
24 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor in his individual capacity,
25 “is only liable for constitutional violations of his subordinates if the supervisor participated
26 in or directed the violations, or knew of the violations and failed to act to prevent them.”
27 Taylor, 880 F.2d at 1045. Further, where a defendant’s only involvement in allegedly
28 unconstitutional conduct is the denial of administrative grievances, the failure to intervene

1 on a prisoner's behalf to remedy the alleged unconstitutional behavior does not amount to
2 active unconstitutional behavior for purposes of § 1983. Shehee v. Luttrell, 199 F.3d 295,
3 300 (6th Cir. 1999); accord Mintun v. Blades, No. CV-06-139-BLW, 2008 WL 711636 at
4 *7 (D. Idaho Mar. 14, 2008); Stocker v. Warden No. 1:07-CV-00589LJODLBP, 2009 WL
5 981323 at *10 (E.D. Cal. Apr. 13, 2009).

6 **A. Third Party Allegations**

7 In his Complaint, Plaintiff appears to be seeking im proved mental health care for
8 mentally ill inmates confined in supermax units. Plaintiff does not allege that *he* is mentally
9 ill or that *he* has been denied constitutionally necessary mental health care. A “plaintiff
10 generally must assert his own legal rights and interests, and cannot assert the legal rights or
11 interests of third parties.” Mothershed v. Justices of the Supreme Court, 410 F.3d 602, 610
12 (9th Cir. 2005) (quoting Warth v. Seldin 422 U.S. 490, 499 (1975)). Therefore, to the extent
13 that Plaintiff seeks to relief on behalf of other inmates, Plaintiff fails to state a claim.

14 **B. Negligence**

15 Plaintiff in part alleges that Defenda nts acted negligently by failing to provide
16 adequate mental health care to inmates. Mere negligence by a defendant acting under color
17 of state law is not sufficient to state a claim under § 1983. Daniels v. Williams, 474 U.S.
18 327, 330-31 (1986) (plaintiff must plead more than mere negligence in a § 1983 action); see
19 Alfrey v. United States, 276 F.3d 557, 568 (9th Cir. 2002). Therefore, to the extent that
20 Plaintiff asserts that any Defendant negligently failed to provide him mental health care, he
21 fails to state a claim.

22 **C. Medical Care**

23 Plaintiff asserts in part that he has been denied constitutionally adequate medical care.
24 Not every claim by a prisoner relating to inadequate medical treatment states a violation of
25 the Eighth Amendment. To state a § 1983 medical claim, a plaintiff must show that the
26 defendants acted with “deliberate indifference to serious medical needs.” Jett v. Penner 439
27 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A
28 plaintiff must show (1) a “serious medical need” by demonstrating that failure to treat the

1 condition could result in further significant injury or the unnecessary and wanton infliction
2 of pain and (2) the defendant's response was deliberately indifferent. Jett 439 F.3d at 1096
3 (quotations omitted).

4 "Deliberate indifference is a high legal standard." Toguchi v. Chung 391 F.3d 1051,
5 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both know
6 of and disregard an excessive risk to inmate health; "the official must both be aware of facts
7 from which the inference could be drawn that a substantial risk of serious harm exists, and
8 he must also draw the inference." Farrar v. Brennan, 511 U.S. 825, 837 (1994). Deliberate
9 indifference in the medical context may be shown by a purposeful act or failure to respond
10 to a prisoner's pain or possible medical need and harm caused by the indifference. Jett, 439
11 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally
12 denies, delays, or interferes with medical treatment or by the way prison doctors respond to
13 the prisoner's medical needs. Estelle, 429 U.S. at 104-05; Jett, 439 F.3d at 1096.

14 Deliberate indifference is a higher standard than negligence or lack of ordinary due
15 care for the prisoner's safety. Farrar, 511 U.S. at 835. "Neither negligence nor gross
16 negligence will constitute deliberate indifference." Clement v. California Dep't of Corr., 220
17 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter Labs., 622 F.2d 458,
18 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or "medical malpractice"
19 do not support a claim under § 1983). "A difference of opinion does not amount to deliberate
20 indifference to [a plaintiff's] serious medical needs." Sanchez v. Vild, 891 F.2d 240, 242
21 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim
22 against prison officials for deliberate indifference. See Shapley v. Nevada Bd. of State
23 Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial.
24 The action must rise to a level of "unnecessary and wanton infliction of pain." Estelle 429
25 U.S. at 105.

26 Plaintiff's allegations concerning the denial of constitutionally adequate mental health
27 care are vague and conclusory. Although *pro se* pleadings are liberally construed, Haines
28 v. Kerner, 404 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support

1 a cause of action. Ivey v. Board of Regents of the University of Alaska 673 F.2d 266, 268
2 (9th Cir. 1982). Further, a liberal interpretation of a civil rights complaint may not supply
3 essential elements of the claim that were not initially pled. Id. Plaintiff fails to allege facts
4 to support that *he* has or had a serious mental health care need. He also fails to allege facts
5 to support that any Defendant acted with deliberate indifference to *this* serious mental health
6 care needs, including who, when, and how. For these reasons, Plaintiff fails to state a
7 constitutional claim for denial of medical care.

8 **D. Equal Protection**

9 Plaintiff also asserts a denial of equal protection. The Equal Protection Clause of the
10 Fourteenth Amendment provides that a state may not “deny to any person within its
11 jurisdiction the equal protection of the laws,” which is essentially a direction that all persons
12 similarly situated should be treated alike. U.S. Const., amend. XIV; see City of Cleburne v.
13 Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). A state practice that interferes with a
14 fundamental right or that discriminates against a suspect class of individuals is subject to
15 strict scrutiny. Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976); City of
16 Cleburne, 473 U.S. at 441. Absent allegations that he is a member of a suspect class, or that
17 a fundamental right has been violated, a plaintiff must allege facts to support that he has been
18 intentionally treated differently from others who are similarly situated without a reasonable
19 basis therefor. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Conclusory
20 allegations do not suffice. See Village of Arlington Heights v. Metropolitan Hous. Dev.
21 Corp., 429 U.S. 252, 265 (1977).

22 Plaintiff has not alleged facts to support that he is a member of a suspect class or the
23 violation of a fundamental right. He also fails to allege facts to support that he has
24 intentionally been treated differently than others who are similarly situated without a
25 reasonable basis therefor. Accordingly, Plaintiff fails to state an equal protection claim.

26 **E. Due Process**

27 Plaintiff also appears to be assert that his due process rights have been violated based
28 on his assignment to SMU I and the conditions in there. There is no constitutional right to

1 a particular classification. Vignolo v. Miller, 120 F.3d 1075 (9th Cir. 1997); Baum ann v.
2 Arizona Dep't. of Corr., 754 F.2d 841,846 (9th Cir. 1985). Further, inmates have no liberty
3 interest in remaining in a particular facility; they may be transferred for any constitutionally
4 permissible reason or for no reason at all. Meachum v. Fano, 427 U.S. 215, 225 (1976);
5 Ward v. Dyke, 58 F.3d 271, 274 (6th Cir. 1995); Shango v. Jurich, 681 F.2d 1091, 1100 (7th
6 Cir.1982); Rizzo v. Dawson, 778 F.2d 527, 530-31 (9th Cir. 1985). Liberty interests that
7 entitle an inmate to due process are “generally limited to freedom from restraint which, while
8 not exceeding the sentence in such an unexpected manner as to give rise to protection by the
9 Due Process Clause of its own force, nonetheless imposes atypical and significant hardship
10 on the inmate in relation to the ordinary incidents of prison life.” Sandin v. Conner, 515 U.S.
11 472, 484 (1995) (internal citations omitted). In analyzing whether a hardship is atypical and
12 significant, three guideposts to consider are: (1) the conditions of confinement; (2) the
13 duration of the condition and the degree of restraint imposed; and (3) whether the
14 disciplinary sanction will affect the duration of the prisoner’s sentence. Ramirez v. Galaza,
15 334 F.3d 850, 861 (9th Cir. 2003); Keenan v. Hall, 83 F.3d 1083, 1088-89 (9th Cir. 1996).
16 Courts have found the existence of atypical and significant hardships in a very limited
17 circumstances. See, e.g., Wilkinson v. Austin, 545 U.S. 209, 221-24 (2005) (holding
18 inmates’ liberty interests were implicated by their indefinite confinement in highly restrictive
19 “supermax” prison, where the inmates were deprived of almost all human contact and were
20 disqualified from parole consideration); Serrano v. Francis, 345 F.3d 1071, 1078-79 (9th
21 Cir.2003) (placing disabled inmate, without his wheelchair, in segregation unit not equipped
22 for disabled persons gave rise to a liberty interest); Ramirez, 334 F.3d at 861 (directing
23 district court to consider two-year duration of administrative segregation in determining
24 whether placement imposed atypical and significant burden). “As long as the conditions or
25 degree of confinement to which the prisoner is subjected is within the sentence imposed upon
26 him and is not otherwise violative of the Constitution, the Due Process Clause does not in
27 itself subject an inmate’s treatment by prison authorities to judicial oversight.” Montanye
28 v. Haymes, 427 U.S. 236, 242 (1976). Thus, a claim that prison officials “added things” to

1 an appeal to mask procedural errors does not, for example, meet this standard because
2 inmates lack a separate constitutional entitlement to a specific prison grievance procedure.
3 Ramirez, 334 F.3d at 860 (citing Mann, 855 F.2d at 640).

4 1. VCU Confinement

5 To the extent that Plaintiff complains of his confinement in the VCU in 2003, his
6 claims are facially time-barred. The failure to state a claim includes circumstances where a
7 defense is complete and obvious from the face of the pleadings. Franklin v. Murphy, 745
8 F.2d 1221, 1228 (9th Cir. 1984) (applying former § 1915(d) now codified at 28 U.S.C.
9 § 1915(e)(2)(B)). Further, a court may raise the defense of statute of limitations *sua sponte*.
10 See Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993); see also Hughes
11 v. Lott, 350 F.3d 1157, 1163 (11th Cir. 2003) (appropriate to dismiss prisoner's complaint
12 *sua sponte* as time-barred under § 1915(e)(2)(B)); Nasim v. Warden, Maryland House of
13 Corr., 64 F.3d 951, 956 (4th Cir. 1995) (*en banc*) (same); Pino v. Ryan, 49 F.3d 51, 53 (2d
14 Cir. 1995) (same); Moore v. McDonald, 30 F.3d 616, 620 (5th Cir. 1994) (same); Johnson
15 v. Rodriguez, 943 F.2d 104, 107-08 (1st Cir. 1991) (same).

16 In § 1983 actions, the Court applies the statute of limitations of the forum state for
17 personal injury actions. Wilson v. Garcia, 471 U.S. 261, 266, 274-76 (1985); Two Rivers v.
18 Lewis, 174 F.3d 987, 991 (9th Cir. 1999); Vaughan v. Grijalva, 927 F.2d 476, 478 (9th Cir.
19 1991). The Arizona statute of limitations for personal injury actions is two years. See A.R.S.
20 § 12-542(1); Madden-Tyler v. Maricopa County, 943 P.2d 822, 824 (Ariz. Ct. App. 1997);
21 Vaughan, 927 F.2d at 478. The Court must also apply any state rule for tolling to actions
22 brought under § 1983. Hardin v. Straub, 490 U.S. 536, 544 (1989); Two Rivers, 174 F.3d at
23 992. Arizona provides for tolling of the statute of limitation after a cause of action accrues
24 for the period during which a plaintiff was less than 18 years old or of unsound mind. A.R.S.
25 § 12-502.

26 Plaintiff alleges that he was confined in the VCU for four months in 2003. Plaintiff
27 did not file his Complaint in this case until September 27, 2010, or some seven years later.
28 Plaintiff has not alleged facts to support that the statute of limitations is subject to tolling.

1 Absent such allegations, any due process allegation concerning his VCU confinement is
2 facially untimely and will be dismissed as time-barred.

3 **2. SMU I Confinement**

4 Plaintiff also asserts that the conditions of confinement in SMU I violate due process.
5 However, the only facts alleged in support of this claim is that mentally ill inmates are
6 confined 23 hours a day. That, absent more, does not rise to the level of an atypical and
7 significant hardship in relation to the ordinary incidents of prison life. As noted above,
8 Plaintiff does not allege that *he* is or was mentally ill while confined in SMU I. While
9 Plaintiff asserts the conditions in SMU I were punitive, he does not allege facts to support
10 that his confinement in SMU I was intended as punishment, rather than merely as a
11 classification and housing decision. He also does not allege facts to support that the duration
12 of his confinement was affected. For these reasons, Plaintiff fails to state a due process claim
13 based on his confinement in SMU I.

14 **V. Leave to Amend**

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

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

25 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
26 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
27 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
28 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original

1 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
2 565, 567 (9th Cir. 1987).

3 **VI. Warnings**

4 **A. Release**

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

9 **B. Address Changes**

10 Plaintiff must file and serve a notice of a change of address in accordance with Rule
11 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
12 relief with a notice of change of address. Failure to comply may result in dismissal of this
13 action.

14 **C. Copies**

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

18 **D. Possible “Strike”**

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

1 **E. Possible Dismissal**

2 If Plaintiff fails to timely comply with every provision of this Order, including these
3 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
4 1260-61 (a district court may dismiss an action for failure to comply with any order of the
5 Court).

6 **IT IS ORDERED:**

- 7 (1) Plaintiff’s Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 9.)
- 8 (2) As required by the accompanying Order to the appropriate government agency,
9 Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing fee.
- 10 (3) Plaintiff’s second *in forma pauperis* application is **denied** as moot. (Doc. 11.)
- 11 (4) The Complaint is **dismissed** for failure to state a claim (Doc. 1.) Plaintiff has
12 **30 days** from the date this Order is filed to file a first amended complaint in compliance with
13 this Order.
- 14 (5) If Plaintiff fails to file an am ended complaint within 30 days, the Clerk of
15 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
16 that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).
- 17 (6) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
18 rights complaint by a prisoner.

19 DATED this 26th day of January 2011.

20
21 /s/ JOHN W. SEDWICK
22 UNITED STATES DISTRICT JUDGE
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**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 defendant s not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

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

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

12. Completing the Civil Rights Complaint Form.

HEADING:

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

Part A. JURISDICTION:

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

Part B. PREVIOUS LAWSUITS:

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

Part C. CAUSE OF ACTION:

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

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

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

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

FINAL NOTE

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

Name and Prisoner/Booking Number

Place of Confinement

Mailing Address

City, State, Zip Code

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

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

(Full Name of Plaintiff) Plaintiff,

vs.

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

(1) _____
(Full Name of Defendant)

(2) _____

(3) _____

(4) _____

Defendant(s).

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

**CIVIL RIGHTS COMPLAINT
BY A PRISONER**

- Original Complaint
- First Amended Complaint
- Second Amended Complaint

A. JURISDICTION

1. This Court has jurisdiction over this action pursuant to:

- 28 U.S.C. § 1343(a); 42 U.S.C. § 1983
- 28 U.S.C. § 1331; Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).
- Other: _____

2. Institution/city where violation occurred: _____

B. DEFENDANTS

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

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

C. PREVIOUS LAWSUITS

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

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

D. CAUSE OF ACTION

COUNT I

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

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

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

_____.

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

_____.

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

COUNT II

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

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

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

_____.

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

_____.

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

COUNT III

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

2. **Count III.** Identify the issue involved. Check **only one**. State additional issues in separate counts.

Basic necessities Mail Access to the court Medical care

Disciplinary proceedings Property Exercise of religion Retaliation

Excessive force by an officer Threat to safety Other: _____

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

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

5. **Administrative Remedies.**

a. Are there any administrative remedies (grievance procedures or administrative appeals) available at your institution? Yes No

b. Did you submit a request for administrative relief on Count III? Yes No

c. Did you appeal your request for relief on Count III to the highest level? Yes No

d. If you did not submit or appeal a request for administrative relief at any level, briefly explain why you did not. _____

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

E. REQUEST FOR RELIEF

State the relief you are seeking:

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

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

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

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

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