

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 4 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

IKEMEFULA CHARLES IBEABUCHI,
AKA Charles Ikemefula Ibeabuchi,

Plaintiff-Appellant,

v.

PAUL PENZONE, Sheriff; et al.,

Defendants-Appellees.

No. 18-16655

D.C. No. 2:17-cv-03154-JAT-JZB
District of Arizona,
Phoenix

ORDER

Before: CANBY, TASHIMA, and FRIEDLAND, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On September 27, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, responses to the court's September 27, 2018 order, and opening brief received on September 27, 2018, we conclude this appeal is frivolous.

We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 3) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

APPENDIX A

All other pending motions are denied as moot.

DISMISSED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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9 Ikemefula Charles Ibeabuchi,
10 Plaintiff,

11 v.

12 Paul Penzone,

13 Defendant.

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No. CV 17-03154-PHX-PGR (JZB)

ORDER

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16 Plaintiff Ikemefula Charles Ibeabuchi, #A70675261, who was then confined in a
17 Maricopa County Jail, filed a Complaint in Maricopa County Superior Court, case#
18 CV2017-011691.¹ (Doc. 1-1, Ex. A.). On September 13, 2017, Defendant removed the
19 case to federal court based on federal question subject matter jurisdiction. The Court
20 dismissed the Complaint because Plaintiff failed to state a claim with leave to amend
21 (Doc. 5). Plaintiff then filed a First Amended Complaint (Doc. 6), which the Court
22 dismissed because it failed to state a claim, with leave to amend (Doc. 11).

23

24 Plaintiff has filed a Second Amended Complaint (Docs. 12, 15).² The Court will
25 dismiss the Second Amended Complaint and this action for failure to state a claim.

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I. Statutory Screening of Prisoner Complaints

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28 The Court is required to screen complaints brought by prisoners seeking relief

¹ Plaintiff is now confined in the Arizona State Prison Complex-Eyman. (Doc. 13.)

² For reasons that are unclear, Plaintiff filed two copies of his Second Amended Complaint.

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

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

12 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
13 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
14 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
15 content that allows the court to draw the reasonable inference that the defendant is liable
16 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
17 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
18 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
19 specific factual allegations may be consistent with a constitutional claim, a court must
20 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
21 at 681.

22 But as the United States Court of Appeals for the Ninth Circuit has instructed,
✓ 23 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
✓ 24 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
25 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*
26 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

27 **II. Second Amended Complaint**

28 In his three-count Second Amended Complaint, Plaintiff alleges violations of his

1 First Amendment mail rights, as well as his Fourth and Sixth Amendment rights.³
2 Plaintiff sues Maricopa County Sheriff Penzone, Shift Commander Lieutenant Alcala,
3 and Officer Perez. Plaintiff seeks declaratory and compensatory relief.

4 In Count I, Plaintiff alleges the following:

5 Defendant Penzone did not return Plaintiff's property "as a good faith remedy"
6 and thereby violated Plaintiff's rights, privileges, and immunities, and his Sixth
7 Amendment right to counsel.⁴ (Doc. 15 at 3.)⁵ Plaintiff also asserts that Penzone's action
8 denied him due process and caused the loss of property.

9 In Count II, Plaintiff alleges the following:

10 Defendant Alcala is a *Bivens* defendant who "may be held liable on a substantive
11 due process claim to reasonable safety."⁶ (*Id.* at 4.) Alcala "under color of state law
12 caused Plaintiff the loss of property," specifically "Inmate's Legal Mail Envelope, which
13 was deliberately stripped, to intimidate Inmate" (*Id.*) "The evisceration of
14 Plaintiff's confidential mail was a deprivation of federal rights, privileges, and
15 immunities, and which caused Plaintiff's damage of loss of property." (*Id.*)

16 In Count III, Plaintiff alleges that:

17 Defendant Perez failed to forward a mail rejection notice to Plaintiff's former
18 appellate attorney. Plaintiff cites a July 26, 2017 letter from his appellate attorney sent in
19 response to a letter from Plaintiff regarding previous legal mail from the attorney to
20 Plaintiff. In the letter, Plaintiff's then-attorney states that he had "not yet received a mail
21 rejection notification" regarding the attorney's previous letter. (*Id.* at 7.) Plaintiff

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23 ³ Plaintiff purports to seek relief pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, Plaintiff fails to name as a Defendant any person who acted under color of federal law. Therefore, Plaintiff's claims are considered under 42 U.S.C. § 1983.

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25 ⁴ In his original Complaint, Plaintiff stated that Perez confiscated the "legal mail envelope" after opening the envelope in Plaintiff's presence and finding no contraband. (Doc. 1-1 at 4.)

26
27 ⁵ Plaintiff states that his alien registration number, A70675261, has changed to "A.R.C. No. 54-108362." This allegation appears irrelevant to his claim.

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29 ⁶ See n.3, *supra*.

1 contends that Perez's alleged failure to send a mail rejection notice to Plaintiff's then-
2 attorney "confirms an intent to deprive Plaintiff, his federal rights, privileges and
3 immunities" and is an affirmative link to Perez for the "injury of the loss of property,"
4 specifically a legal mail envelope. (*Id.* at 5).

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

6 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
7 under color of state law (3) deprived him of federal rights, privileges or immunities
8 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th
9 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d
10 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific
11 injury as a result of the conduct of a particular defendant and he must allege an
12 affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*,
13 423 U.S. 362, 371-72, 377 (1976).

14 **A. Legal Mail**

15 Plaintiff asserts that his First Amendment mail rights were violated. Prisoners
16 have a constitutional right to have their legal mail delivered to them uncensored and
17 unread. *Lemon v. Dugger*, 931 F.2d 1465 (11th Cir. 1991). And the opening of legal
18 mail outside a prisoner's presence may state a claim. *See Hayes v. Idaho Corr Ctr.*, 849
19 F.3d 1204 (9th Cir. 2017) (allegation that legal mail opened outside prisoner's presence
20 on two occasions stated a claim); *see also Jones v. Brown*, 461 F.3d 353, 359 (3d Cir.
21 2006) (pattern or practice of opening properly marked legal mail may violate the First
22 Amendment). Only mail from an inmate's attorney, or prospective attorney, constitutes
23 "legal mail" that, when appropriately labeled, is entitled to greater protection than other
24 mail. *See Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) (stating that legal mail must be
25 specifically marked as originating from an attorney); *accord Packnett v. Wingo*, No.
26 09cv00327, 2015 WL 1478597, at *7 (N.D. Cal. Mar. 31, 2015); *see also Schoppe-Rico*
27 v. *Rupert*, No. C11-4283, 2012 WL 4497794, at *5 (N.D. Cal. Sept. 28, 2012) (incoming
28 confidential legal mail must contain both the name and title of the sender attorney, citing

✓ 1 *Wolff).*

2 Plaintiff appears to allege that on one occasion, Defendant Perez confiscated an
3 envelope that had contained correspondence from Plaintiff's appellate attorney. Plaintiff
4 does *not* allege that Perez confiscated the contents of the envelope, or that Perez or
5 anyone else opened the envelope outside his presence or read the contents of the
6 envelope.⁷ Rather, he alleges that the failure to give him the empty envelope somehow
7 violated his legal mail rights. The alleged failure to give Plaintiff an empty envelope,
8 absent more, does not rise to the level of a constitutional violation. Accordingly, Plaintiff
9 fails to state a First Amendment violation of his mail rights.

10 **B. Petition for Redress of Grievances**

11 Plaintiff also asserts that Alcala and Penzone violated his rights by failing to return
12 the empty envelope to Plaintiff as a remedy for the allegedly wrongful deprivation of the
13 envelope. "The right to petition the government for redress of grievances . . . does not
14 guarantee a favorable response, or indeed any response, from state officials. Moreover,
15 the First Amendment's right to redress of grievances is satisfied by the availability of a
16 judicial remedy." *Baltoski v. Pretorius*, 291 F. Supp. 2d 807, 811 (N.D. Ind. 2003); *see also* *Ashann-Ra v. Virginia*, 112 F. Supp. 2d 559, 569 (W.D. Va. 2000) (failure to comply
17 with state's grievance procedure is not actionable under § 1983 and does not compromise
18 an inmate's right of access to the courts). Further, although prisoners have a First
19 Amendment right to file grievances, *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir.
20 2005), "[t]here is no legitimate claim of entitlement to a grievance procedure," *Mann v.*
21 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988), and the failure to follow grievance procedures
22 does not give rise to a due process claim. *See Flournoy v. Fairman*, 897 F. Supp. 350,
23 354 (N.D. Ill. 1995) (jail grievance procedures did not create a substantive right
24 enforceable under § 1983); *Spencer v. Moore*, 638 F. Supp. 315, 316 (E.D. Mo. 1986)
25 (violations of grievance system procedures do not deprive inmates of constitutional
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27

✓ 28 ⁷ As noted above, in his original Complaint, Plaintiff alleged that Perez confiscated the "legal mail envelope" after opening the envelope in Plaintiff's presence and finding no contraband. (Doc. 1-1 at 4.)

1 rights). “[N]o constitutional right was violated by the defendants’ failure, if any, to
2 process all of the grievances [plaintiff] submitted for consideration.” *Buckley v. Barlow*,
3 997 F.2d 494, 495 (8th Cir. 1993). Accordingly, the alleged failure to remedy the
4 allegedly wrongful deprivation of the empty envelope does not rise to the level of a
5 constitutional violation and this claim will be dismissed.

6 **C. Remaining Allegations**

7 Plaintiff asserts violations of his Fourth and Sixth Amendment rights. Although
8 vague, Plaintiff appears to assert that the deprivation of the empty envelope somehow
9 denied him the effective assistance of counsel. However, a prisoner’s claim for damages
10 cannot be brought under 42 U.S.C. § 1983 if “a judgment in favor of the plaintiff would
11 necessarily imply the invalidity of his conviction or sentence,” unless the prisoner
12 demonstrates that the conviction or sentence has previously been reversed, expunged, or
13 otherwise invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). To the extent
14 that Plaintiff claims that the deprivation of the empty envelope deprived him of the
15 effective assistance of counsel, Plaintiff’s claim would necessarily imply the invalidity of
16 his conviction, and his claim is therefore barred by *Heck*.

17 Plaintiff’s remaining allegations are vague and conclusory and will be dismissed.
18 Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520-
19 21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey v.*
20 *Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a
21 liberal interpretation of a civil rights complaint may not supply essential elements of the
22 claim that were not initially pleaded. *Id.*

23 **IV. Dismissal without Leave to Amend**

24 Because Plaintiff has failed to state a claim in his Second Amended Complaint, the
25 Court will dismiss his Second Amended Complaint. “Leave to amend need not be given
26 if a complaint, as amended, is subject to dismissal.” *Moore v. Kayport Package Express,*
27 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court’s discretion to deny leave to amend is
28 particularly broad where Plaintiff has previously been permitted to amend his complaint.

1 *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).
2 Repeated failure to cure deficiencies is one of the factors to be considered in deciding
3 whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

4 Plaintiff has made three efforts at crafting a viable complaint and appears unable
5 to do so despite specific instructions from the Court. The Court finds that further
6 opportunities to amend would be futile. Therefore, the Court, in its discretion, will
7 dismiss Plaintiff's Second Amended Complaint without leave to amend.

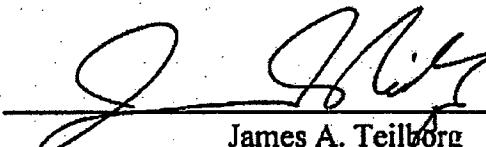
8 **IT IS ORDERED:**

9 (1) Plaintiff's Second Amended Complaint (Doc. 15) and this action are
10 dismissed for failure to state a claim, and the Clerk of Court must enter judgment
11 accordingly.

12 (2) The Clerk of Court must make an entry on the docket stating that the
13 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

14 (3) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3)
15 and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal
16 of this decision would be taken in good faith and certifies that an appeal would not be
17 taken in good faith for the reasons stated in the Order and because there is no arguable
18 factual or legal basis for an appeal.

19 Dated this 29th day of August, 2018.

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24 James A. Teilborg
25 Senior United States District Judge
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