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

Byron Murphy,	)	No. CV 06-1732-PHX-PGR (MEA)
Plaintiff,	)	<b>ORDER</b>
vs.	)	
Joe Gordwin, et al.,	)	
Defendants.	)	

Plaintiff Byron Murphy, confined in Cook Unit of the Arizona State Prison Complex in Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983. The Court will dismiss the Complaint with leave to amend.

**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 for this action. The Court will assess an initial partial filing fee of \$49.17. The remainder of the fee will be collected monthly in payments of 20% of the previous month’s income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2).The Court will enter a separate Order requiring the appropriate government agency to collect the fees according to the statutory formula.

**II. Statutory Screening of Prisoner Complaints**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.

1 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised  
2 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may  
3 be granted, or that seek monetary relief from a defendant who is immune from such relief.  
4 28 U.S.C. § 1915A(b)(1),(2). If the Court determines that a pleading could be cured by the  
5 allegation of other facts, a *pro se* litigant is entitled to an opportunity to amend a complaint  
6 before dismissal of the action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000)  
7 (*en banc*). The Court is required to grant leave to amend “if a complaint can possibly be  
8 saved” but not if a complaint “lacks merit entirely.” Id. at 1129. The Court therefore should  
9 grant leave to amend if the pleading could be cured by the allegation of other facts or if it  
10 appears at all possible that the defect can be corrected. Id. at 1130.

11 The Court should not, however, advise the litigant how to cure the defects. This type  
12 of advice “would undermine the district judges’ role as impartial decisionmakers.” Pliler v.  
13 Ford, 542 U.S. 225, 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide  
14 whether the court was required to inform a litigant of deficiencies). Plaintiff’s Complaint  
15 will be dismissed for failure to state a claim, with leave to amend because the Complaint may  
16 possibly be saved by amendment.

### 17 **III. Complaint**

18 Plaintiff’s complaint names two Defendants and presents one claim for relief: that  
19 Plaintiff’s First, Eighth, and Fourteenth Amendment rights were violated when FBI Agent  
20 Gordwin visited Plaintiff and threatened his life, threatened Plaintiff’s wife’s life, and  
21 threatened to kill himself. Plaintiff further avers that Defendant Gordwin refused to end his  
22 affair with Plaintiff’s wife and refused to stop visiting Plaintiff until the prosecutor asked him  
23 to stop. Plaintiff names Defendant Gordwin and the FBI as Defendants. Plaintiff seeks  
24 injunctive relief and monetary damages in the amount \$15,000,000.

### 25 **IV. Failure to State a Claim**

26 Plaintiff has named FBI Agent Joe Gordwin and the Federal Bureau of Investigation  
27 as Defendants in this action. Because all Defendants in this action are federal government  
28 agencies or federal officials, the Court will construe Plaintiff’s claims as brought pursuant

1 to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91  
2 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

3 **A. Failure to Set Forth Sufficient Facts to Support a Civil Rights Violation**

4 Plaintiff articulates that on March 17 Defendant Joe Gordwin visited Plaintiff while  
5 he was incarcerated in the Maricopa County Jail system and threatened the lives of Plaintiff,  
6 Plaintiff's wife, and threatened to kill himself. Plaintiff further states that "he also had an  
7 affair with my wife and refused to call it off when she requested. He threatened me with  
8 false accusations that lead [sic] to surveillance" (Doc. # 1 at 4).

9 Plaintiff's claim that Defendant Gordwin threatened the lives of Plaintiff and his wife  
10 fails because Plaintiff does not allege sufficient facts to support a cognizable claim of a civil  
11 rights violation. It is wholly unclear under what capacity Defendant visited Plaintiff or for  
12 what purpose. Plaintiff has not alleged that Defendant was acting within the scope of his  
13 employment as a federal employee when he made these threats. For this reason, the Court  
14 must dismiss the claim with leave to amend.

15 Plaintiff has also named the Federal Bureau of Investigation as a Defendant.  
16 However, there are no allegations regarding the FBI or its responsibility for Plaintiff's claims.  
17 Moreover, allegations of *respondeat superior* are not cognizable in a Bivens action. Terrell  
18 v. Brewer, 935 F.3d 1015, 1018 (9th Cir. 1991); accord Dalrymple v. Reno, 334 F.3d 991  
19 (11th Cir. 2003); Risley v. Hawk, 108 F.3d 1396, 1396-97 (D.C. 1997); Abate v. Southern  
20 Pacific Transp. Co., 993 F.3d 107, 109 (5th Cir. 1993). Accordingly, the Federal Bureau of  
21 Investigation will be dismissed as an improper Defendant.

22 **V. Leave to Amend**

23 For the foregoing reasons, Plaintiff's Complaint will be dismissed for failure to state  
24 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first  
25 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail  
26 Plaintiff a court-approved form to use for a first amended complaint. If Plaintiff fails to use  
27 the court-approved form, the Court may strike the Amended Complaint and dismiss this  
28 action without further notice to Plaintiff.

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

5 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963  
6 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,  
7 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as  
8 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original  
9 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d  
10 565, 567 (9th Cir. 1987).

## 11 **VI. Warnings**

### 12 **A. Release**

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

### 17 **B. Address Changes**

18 Plaintiff must file and serve a notice of a change of address 10 days before the move  
19 is effective, if practicable. See LRCiv 83.3(d). Plaintiff must not include a motion for other  
20 relief with a notice of change of address. Failure to comply may result in dismissal.

### 21 **C. Copies**

22 Plaintiff must submit an additional copy of every document that he files for use by the  
23 Court. See LRCiv 5.4. Failure to comply may result in the filing being stricken without  
24 further notice to Plaintiff.

### 25 **D. Possible “Strike”**

26 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails  
27 to file an amended complaint correcting the deficiencies identified in this Order, the  
28 dismissal will count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).

1 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil  
2 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior  
3 occasions, while incarcerated or detained in any facility, brought an action or appeal in a  
4 court of the United States that was dismissed on the grounds that it is frivolous, malicious,  
5 or fails to state a claim upon which relief may be granted, unless the prisoner is under  
6 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

7 **E. Possible Dismissal**

8 Plaintiff is warned that failure to timely comply with every provision of this Order,  
9 including these warnings, may result in dismissal of this action without further notice. See  
10 Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an  
11 action for failure to comply with any order of the Court).

12 **IT IS ORDERED:**

13 (1) Plaintiff’s Application to Proceed *In Forma Pauperis*, filed with the Complaint,  
14 is **granted**.

15 (2) As required by the accompanying Order to the appropriate government agency,  
16 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$49.17.

17 (3) The Complaint ( Doc. #1) is **dismissed** for failure to state a claim. Plaintiff has  
18 **30 days** from the date this Order is filed to file a first amended complaint in compliance with  
19 this Order.

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

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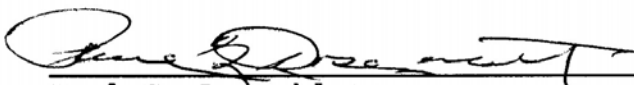
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(5) The Clerk of Court must mail Plaintiff the court-approved form for filing a civil rights complaint by a prisoner.

DATED this 15<sup>th</sup> day of August, 2006.

  
\_\_\_\_\_  
Paul G. Rosenblatt  
United States District Judge

**INFORMATION AND INSTRUCTIONS FOR A  
PRISONER FILING CIVIL RIGHTS COMPLAINT  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

**I. General Information About the Civil Rights Complaint Form:**

A. The Form. The civil rights complaint form is designed to help prisoners prepare a complaint seeking relief for a violation of their federal civil rights. Local Rule of Civil Procedure 3.4(a) requires that prisoner civil rights complaints be filed on the court-approved form. Your complaint must be typewritten or legibly handwritten. All information must be clearly and concisely written, **only in the space provided on the form**. If needed, you may attach no more than fifteen additional pages of standard letter size paper to continue any part of the complaint. You must identify which part of the complaint is being continued and number all pages.

B. Your Signature. You must sign the complaint. Your signature constitutes a certificate that: 1) you have read the complaint; 2) to the best of your knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and law; and 3) it is not being filed for any improper purpose. Please review Rule 11 of the Federal Rules of Civil Procedure. Rule 11 provides for the imposition of sanctions if the complaint is signed in violation of the Rule.

C. The Filing Fee. You must pay the \$350.00 filing fee. If you are unable to pay the filing fee when the complaint is filed, 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 more information.

D. Court Divisions. If you resided in Maricopa, Pinal, Yuma, La Paz, or Gila county when your rights were allegedly violated, you should file your complaint in the Phoenix Division of the court. If you resided in Apache, Navajo, Coconino, Mohave, or Yavapai county when your rights were allegedly violated, you should file your complaint in the Prescott Division of the court. If you resided in Pima, Cochise, Santa Cruz, Graham, or Greenlee county when your rights were allegedly violated, you should file your complaint in the Tucson Division of the court. See LRCiv 5.1(a) and 77.1(a).

You should mail THE ORIGINAL AND ONE COPY of your complaint with the \$350.00 filing fee or the application to proceed *in forma pauperis* to:

Phoenix & Prescott Divisions:

**OR**

Tucson Division:

U.S. District Court Clerk  
U.S. Courthouse, Suite 321  
401 West Washington Street, SPC 10  
Phoenix, Arizona 85003-2119

U.S. District Court Clerk  
U.S. Courthouse, Suite 1500  
405 West Congress Street  
Tucson, Arizona 85701-5010

E. Certificate of Service on Defendants. You must furnish the opposing party or their attorney with a copy of any document you submit to the court (except the initial complaint and application to proceed *in forma pauperis*). Pursuant to Rules 5(a) and (d) of the Federal Rules of Civil Procedure, each original document (except the initial complaint and application for leave 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 opposing party or their attorney and the address to which it was mailed. Any document received by the court which 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 \_\_\_ day of \_\_\_ (month) \_\_\_, (year) \_\_\_, to:  
Name: \_\_\_\_\_  
Address: \_\_\_\_\_  
Attorney for Defendant(s)/Respondent(s)

\_\_\_\_\_  
(Signature)

F. Original and Judge's Copy. You must furnish an original and one copy of any document submitted to the court. You must furnish one additional copy to the clerk if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original.

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

H. Change of Address. You must immediately notify the clerk and the opposing party or their attorney 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.

I. 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. Rule 15(a) of the Federal Rules of Civil Procedure allows you to file one amended complaint prior to any defendant filing an answer. After any defendant has filed an answer, you must file a motion for leave to amend and lodge a proposed amended complaint. Local Rule of Civil Procedure 15.1(a)(2) prohibits any amended pleading from referencing any prior pleading. Further, any allegations or defendants not included in the amended complaint are considered dismissed.

J. Letters and Motions. It is generally inappropriate to write a letter to any of the District Judges, Magistrates Judges, or the staff of any of the judicial officers. The appropriate way to communicate with these persons is by filing a written pleading or motion.

## **II. Completing the Civil Rights Complaint Form:**

### **HEADING:**

1. Your Name. Print your name, prison or jail inmate number, and mailing address on the lines provided.
2. Defendants. Print the names of each of your defendants. If you name more than **four** defendants, you should print the name of one defendant and "see additional page for defendants" in the space provided. On the additional page you must list the names of **all** of the defendants. This additional page should be inserted after page 1 and numbered as page "1-A" at the bottom of the page. The initial complaint must contain the names of **all** of the parties (plaintiffs as well as defendants) in the heading (or on the additional page if more than four defendants). See Rule 10(a) of the Federal Rules of Civil Procedure.
3. Jury Demand. If you want a jury trial, you must write "JURY TRIAL DEMANDED" on the line below "CIVIL RIGHTS COMPLAINT BY A PRISONER." Failure to do so will 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. Plaintiff. Print all of the requested information on the spaces provided. 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 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 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 the defendant(s) 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 RIGHTS CLAIM 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 in the space provided.

3. Supporting Facts. After you have identified which civil right was violated, you need to 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 need to identify which defendant did what act. You also need to 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. Exhaustion of administrative remedies is a prerequisite to filing a civil rights complaint. 42 U.S.C. § 1997e requires prisoners to exhaust the available administrative remedies before being allowed to file a civil rights action. Consequently, you must disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If one of your counts is exempt from the grievance procedures or administrative appeals, fully explain the exemption 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. Your signature must be an original signature, not a photocopy.

**FINAL NOTE**

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed by the court. All questions must be answered concisely in the proper space on the form. If needed, you may attach no more than fifteen additional pages. The form, however, 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.



3. Name of first Defendant: \_\_\_\_\_ . The first Defendant is employed as:  
\_\_\_\_\_ at \_\_\_\_\_ .  
(Position and Title) (Institution)

The first Defendant is sued in his/her:  individual capacity  official capacity (check one or both).  
Explain how the first Defendant was acting under color of law: \_\_\_\_\_  
\_\_\_\_\_

4. Name of second Defendant: \_\_\_\_\_ . The second Defendant is employed as:  
\_\_\_\_\_ at \_\_\_\_\_ .  
(Position and Title) (Institution)

The second Defendant is sued in his/her:  individual capacity  official capacity (check one or both).  
Explain how the second Defendant was acting under color of law: \_\_\_\_\_  
\_\_\_\_\_

5. Name of third Defendant: \_\_\_\_\_ . The third Defendant is employed as:  
\_\_\_\_\_ at \_\_\_\_\_ .  
(Position and Title) (Institution)

The third Defendant is sued in his/her:  individual capacity  official capacity (check one or both).  
Explain how the third Defendant was acting under color of law: \_\_\_\_\_  
\_\_\_\_\_

6. Name of fourth Defendant: \_\_\_\_\_ . The fourth Defendant is employed as:  
\_\_\_\_\_ at \_\_\_\_\_ .  
(Position and Title) (Institution)

The fourth Defendant is sued in his/her:  individual capacity  official capacity (check one or both).  
Explain how the fourth Defendant was acting under color of law: \_\_\_\_\_  
\_\_\_\_\_

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

### B. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner?  Yes  No

2. If your answer is "yes," how many lawsuits have you filed? \_\_\_\_\_. Describe the previous lawsuits in the spaces provided below.

3. First prior lawsuit:

a. Parties to previous lawsuit:

Plaintiff: \_\_\_\_\_

Defendants: \_\_\_\_\_  
\_\_\_\_\_

- b. Court: (If federal court, identify the district; if state court, identify the county.) \_\_\_\_\_
- c. Case or docket number: \_\_\_\_\_
- d. Claims raised: \_\_\_\_\_
- e. Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?) \_\_\_\_\_
- f. Approximate date lawsuit was filed: \_\_\_\_\_
- g. Approximate date of disposition: \_\_\_\_\_

4. Second prior lawsuit:

- a. Parties to previous lawsuit:  
 Plaintiff: \_\_\_\_\_  
 Defendants: \_\_\_\_\_
- b. Court: (If federal court, identify the district; if state court, identify the county.) \_\_\_\_\_
- c. Case or docket number: \_\_\_\_\_
- d. Claims raised: \_\_\_\_\_
- e. Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?) \_\_\_\_\_
- f. Approximate date lawsuit was filed: \_\_\_\_\_
- g. Approximate date of disposition: \_\_\_\_\_

5. Third prior lawsuit:

- a. Parties to previous lawsuit:  
 Plaintiff: \_\_\_\_\_  
 Defendants: \_\_\_\_\_
- b. Court: (If federal court, identify the district; if state court, identify the county.) \_\_\_\_\_
- c. Case or docket number: \_\_\_\_\_
- d. Claims raised: \_\_\_\_\_
- e. Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?) \_\_\_\_\_
- f. Approximate date lawsuit was filed: \_\_\_\_\_
- g. Approximate date of disposition: \_\_\_\_\_

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







