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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Robert Mendez,

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No. CV 10-1235-PHX-MHM (ECV)

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Plaintiff,

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ORDER

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vs.

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Arizona Department of Corrections, et al.,

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Defendants.

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On June 10, 2010, Plaintiff Robert Mendez, who is confined in the Arizona State Prison Complex-Florence in Florence, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1). In a June 22, 2010 Order, the Court noted that Plaintiff had not paid the filing fee or filed an Application to Proceed *In Forma Pauperis*. The Court gave Plaintiff 30 days to either pay the fee or file a complete Application to Proceed.

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On July 12, 2010, Plaintiff filed a Letter seeking an extension of time to comply with the June 22nd Order. In a July 27, 2010 Order, the Court granted Plaintiff an additional 30 days to comply with the June 22nd Order.

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On August 9, 2010, Plaintiff filed an Application to Proceed *In Forma Pauperis* (Doc. 8). The Court will grant the Application to Proceed and will dismiss the Complaint with leave to amend.

26

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

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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).

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1 The Court will assess an initial partial filing fee of \$8.70. The remainder of the fee will be
2 collected monthly in payments of 20% of the previous month's income each time the amount
3 in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate
4 Order requiring the appropriate government agency to collect and forward the fees according
5 to the statutory formula.

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

7 The Court is required to screen complaints brought by prisoners seeking relief against
8 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
9 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
10 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
11 be granted, or that seek monetary relief from a defendant who is immune from such relief.
12 28 U.S.C. § 1915A(b)(1), (2).

13 A pleading must contain a "short and plain statement of the claim *showing* that the
14 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not
15 demand detailed factual allegations, "it demands more than an unadorned, the-defendant-
16 unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
17 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory
18 statements, do not suffice." Id.

19 "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a
20 claim to relief that is plausible on its face.'" Id. (quoting Bell Atlantic Corp. v. Twombly,
21 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content
22 that allows the court to draw the reasonable inference that the defendant is liable for the
23 misconduct alleged." Id. "Determining whether a complaint states a plausible claim for
24 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
25 experience and common sense." Id. at 1950. Thus, although a plaintiff's specific factual
26 allegations may be consistent with a constitutional claim, a court must assess whether there
27 are other "more likely explanations" for a defendant's conduct. Id. at 1951.

1 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
2 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, No. 07-17265, 2010 WL
3 2947323, at *3 (9th Cir. Jul. 29, 2010). A “complaint [filed by a *pro se* prisoner] ‘must be
4 held to less stringent standards than formal pleadings drafted by lawyers.’” Id. (quoting
5 Erickson v. Pardus, 551 U.S. 89, 94 (2007) (*per curiam*)).

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

15 **III. Complaint**

16 In his one-count Complaint, Plaintiff sues the following Defendants: the Arizona
17 Department of Corrections, Warden Trujillo, Correctional Officer IV E. Sheridan, “Head of
18 Health Unit” Grant, and Correctional Officer III Panne.

19 Plaintiff alleges a “lack of medical attention,” claiming that he has a medical
20 condition, he has attempted to get treatment for the condition, he keeps getting the
21 “runaround,” and the State does not want to incur the costs of treating the condition. In his
22 Request for Relief, Plaintiff seeks treatment for his condition and all costs and rehabilitation.

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

24 **A. Improper Defendant**

25 The Arizona Department of Corrections is not a proper Defendant. Under the
26 Eleventh Amendment to the Constitution of the United States, a state or state agency may not
27 be sued in federal court without its consent. Pennhurst State Sch. & Hosp. v. Halderman, 465
28 U.S. 89, 100 (1984); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Furthermore, “a

1 state is not a ‘person’ for purposes of section 1983. Likewise ‘arms of the State’ such as the
2 Arizona Department of Corrections are not ‘persons’ under section 1983.” Gilbreath v.
3 Cutter Biological, Inc., 931 F.2d 1320, 1327 (9th Cir. 1991) (citation omitted). Therefore,
4 the Court will dismiss Defendant Arizona Department of Corrections.

5 **B. Failure to Link Defendants with Injuries**

6 Although *pro se* pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519,
7 520-21 (1972), conclusory and vague allegations will not support a cause of action. Ivey v.
8 Board of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Further,
9 a liberal interpretation of a civil rights complaint may not supply essential elements of the
10 claim that were not initially pled. Id.

11 To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific
12 injury as a result of specific conduct of a defendant and show an affirmative link between the
13 injury and the conduct of that defendant. See Rizzo v. Goode, 423 U.S. 362, 371-72, 377
14 (1976). There is no *respondeat superior* liability under § 1983, and therefore, a defendant’s
15 position as the supervisor of persons who allegedly violated Plaintiff’s constitutional rights
16 does not impose liability. Monell v. New York City Department of Social Services, 436 U.S.
17 658, 691-92 (1978); Hamilton v. Endell, 981 F.2d 1062, 1067 (9th Cir. 1992); Taylor v. List,
18 880 F.2d 1040, 1045 (9th Cir. 1989). “Because vicarious liability is inapplicable to Bivens
19 and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the
20 official’s own individual actions, has violated the Constitution.” Iqbal, 129 S. Ct. at 1948.

21 Plaintiff has not alleged that any Defendant personally participated in a deprivation
22 of Plaintiff’s constitutional rights, was aware of a deprivation and failed to act, or formed
23 policies that resulted in Plaintiff’s injuries. Thus, the Court will dismiss without prejudice
24 Defendants Trujillo, Sheridan, Grant, and Panne.

25 **C. Failure to Allege a Violation of a Constitutional Right**

26 Section 1983 provides a cause of action against persons acting under color of state law
27 who have violated rights guaranteed by the United States Constitution and federal law. 42
28 U.S.C. § 1983; see also Buckley v. City of Redding, 66 F.3d 188, 190 (9th Cir. 1995).

1 Plaintiff has failed to allege any constitutional or federal-law violations. Thus, the Court will
2 dismiss without prejudice Plaintiff's Complaint because it fails to state a claim.

3 **V. Leave to Amend**

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

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

14 If Plaintiff files an amended complaint, Plaintiff must write short, plain statements
15 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name of
16 the Defendant who violated the right; (3) exactly what that Defendant did or failed to do;
17 (4) how the action or inaction of that Defendant is connected to the violation of Plaintiff's
18 constitutional right; and (5) what specific injury Plaintiff suffered because of that
19 Defendant's conduct. See Rizzo, 423 U.S. at 371-72.

20 Plaintiff must repeat this process for each person he names as a Defendant. If Plaintiff
21 fails to affirmatively link the conduct of each named Defendant with the specific injury
22 suffered by Plaintiff, the allegations against that Defendant will be dismissed for failure to
23 state a claim. **Conclusory allegations that a Defendant or group of Defendants have
24 violated a constitutional right are not acceptable and will be dismissed.**

25 Plaintiff should take note that a prisoner's claims regarding medical care arise under
26 the Eighth Amendment prohibition against cruel and unusual punishment. However, not
27 every claim by a prisoner relating to inadequate medical treatment states a violation of the
28 Eighth Amendment. To state a § 1983 medical claim, a plaintiff must show that the

1 defendants acted with “deliberate indifference to serious medical needs.” Jett v. Penner, 439
2 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A
3 plaintiff must show (1) a “serious medical need” by demonstrating that failure to treat the
4 condition could result in further significant injury or the unnecessary and wanton infliction
5 of pain and (2) the defendant’s response was deliberately indifferent. Jett, 439 F.3d at 1096
6 (quotations omitted).

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

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

1 A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963
2 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542,
3 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as
4 nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original
5 complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d
6 565, 567 (9th Cir. 1987).

7 **VI. Warnings**

8 **A. Release**

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

13 **B. Address Changes**

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

18 **C. Copies**

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

22 **D. Possible “Strike”**

23 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails
24 to file an amended complaint correcting the deficiencies identified in this Order, the
25 dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).
26 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil
27 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior
28 occasions, while incarcerated or detained in any facility, brought an action or appeal in a

1 court of the United States that was dismissed on the grounds that it is frivolous, malicious,
2 or fails to state a claim upon which relief may be granted, unless the prisoner is under
3 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

4 **E. Possible Dismissal**

5 If Plaintiff fails to timely comply with every provision of this Order, including these
6 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
7 1260-61 (a district court may dismiss an action for failure to comply with any order of the
8 Court).

9 **IT IS ORDERED:**

10 (1) Plaintiff’s Application to Proceed *In Forma Pauperis* (Doc. 8) is **granted**.

11 (2) As required by the accompanying Order to the appropriate government agency,
12 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$8.70.

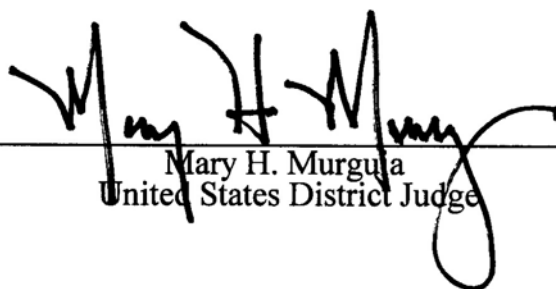
13 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim. Plaintiff has
14 **30 days** from the date this Order is filed to file a first amended complaint in compliance with
15 this Order.

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

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

21 DATED this 24th day of August, 2010.

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Mary H. Murgula
United States District Judge