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

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Johnny Gabriel Valenzuela,

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Plaintiff,

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vs.

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Officer D. Hurley, et al.,

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Defendants.

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No. CV 11-0268-PHX-RCB (JRI)

ORDER

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Plaintiff Johnny Gabriel Valenzuela, who is confined in Maricopa County’s Fourth Avenue Jail in Phoenix, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. (Doc. 1, 3.) The Court will order Defendants Hurley and Cervantes to answer Count I of the Complaint.

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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). The Court will assess an initial partial filing fee of \$12.00. 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 and forward the fees according to the statutory formula.

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II. Statutory Screening of Prisoner Complaints

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

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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).

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

11 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
12 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
13 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
14 that allows the court to draw the reasonable inference that the defendant is liable for the
15 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
16 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
17 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
18 allegations may be consistent with a constitutional claim, a court must assess whether there
19 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

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

25 **III. Complaint**

26 Plaintiff alleges one count for excessive use of force against him. Plaintiff sues Mesa
27 Police Officers D. Hurley and S. Cervantes. Plaintiff seeks compensatory relief.

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1 **IV. Claim for Which an Answer Will be Required**

2 Plaintiff alleges that on January 2, 2011, when the car in which he was riding was
3 ostensibly stopped for having a broken taillight. Plaintiff was ordered out of the car. As
4 Plaintiff stepped out of the car on the passenger side, he was tazed in the upper thigh and
5 immediately forced face down onto the ground. While lying face down on the ground,
6 Officers Hurley and Cervantes punched, kicked, and kned him in the upper back and the
7 back and side of his head nearly rendering him unconscious and resulting in paramedics be
8 summoned. Plaintiff sufficiently states a claim for excessive use of force against Defendants
9 Hurley and Cervantes and they will be required to respond to the Complaint.

10 **V. Warnings**

11 **A. Release**

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

16 **B. Address Changes**

17 Plaintiff must file and serve a notice of a change of address in accordance with Rule
18 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
19 relief with a notice of change of address. Failure to comply may result in dismissal of this
20 action.

21 **C. Copies**

22 Plaintiff must serve Defendants, or counsel if an appearance has been entered, a copy
23 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
24 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
25 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
26 may result in the filing being stricken without further notice to Plaintiff.

27 **D. Possible Dismissal**

28 If Plaintiff fails to timely comply with every provision of this Order, including these

1 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
2 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
3 comply with any order of the Court).

4 **IT IS ORDERED:**

5 (1) Plaintiff's Application to Proceed *In Forma Pauperis* is **granted**. (Doc. 3.)

6 (2) As required by the accompanying Order to the appropriate government agency,
7 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$12.00.

8 (3) Defendants Hurley and Cervantes must answer Count I.

9 (4) The Clerk of Court must send Plaintiff a service packet including the
10 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
11 Defendants Hurley and Cervantes.

12 (5) Plaintiff must complete and return the service packet to the Clerk of Court
13 within 21 days of the date of filing of this Order. The United States Marshal will not provide
14 service of process if Plaintiff fails to comply with this Order.

15 (6) If Plaintiff does not either obtain a waiver of service of the summons or
16 complete service of the Summons and Complaint on a Defendant within 120 days of the
17 filing of the Complaint or within 60 days of the filing of this Order, whichever is later, the
18 action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m); LRCiv
19 16.2(b)(2)(B)(I).

20 (7) The United States Marshal must retain the Summons, a copy of the Complaint,
21 and a copy of this Order for future use.

22 (8) The United States Marshal must notify Defendants of the commencement of
23 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
24 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. The
25 Marshal must immediately file requests for waivers that were returned as undeliverable and
26 waivers of service of the summons. If a waiver of service of summons is not returned by a
27 Defendant within 30 days from the date the request for waiver was sent by the Marshal, the
28 Marshal must:

1 (a) personally serve copies of the Summons, Complaint, and this Order upon
2 Defendant pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and

3 (b) within 10 days after personal service is effected, file the return of service
4 for Defendant, along with evidence of the attempt to secure a waiver of service of the
5 summons and of the costs subsequently incurred in effecting service upon Defendant.
6 The costs of service must be enumerated on the return of service form (USM-285) and
7 must include the costs incurred by the Marshal for photocopying additional copies of
8 the Summons, Complaint, or this Order and for preparing new process receipt and
9 return forms (USM-285), if required. Costs of service will be taxed against the
10 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
11 Procedure, unless otherwise ordered by the Court.


12 (9) **A Defendant who agrees to waive service of the Summons and Complaint**
13 **must return the signed waiver forms to the United States Marshal, not the Plaintiff.**

14 (10) Defendant must answer the Complaint or otherwise respond by appropriate
15 motion within the time provided by the applicable provisions of Rule 12(a) of the Federal
16 Rules of Civil Procedure.

17 (11) Any answer or response must state the specific Defendant by name on whose
18 behalf it is filed. The Court may strike any answer, response, or other motion or paper that
19 does not identify the specific Defendant by name on whose behalf it is filed.

20 (12) This matter is referred to Magistrate Judge Jay R. Irwin pursuant to Rules 72.1
21 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized
22 under 28 U.S.C. § 636(b)(1).

23 DATED this 17th day of March, 2011.

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Robert C. Broomfield
Senior United States District Judge