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

John Wayne Warden,
Plaintiff,

vs.

Sergeant Robbert Harris, et al.,
Defendants.

) No. CV 11-1461-PHX-DGC (JRI)

) **ORDER**

On July 22, 2011, Plaintiff John Wayne Warden, who is confined in the Arizona State Prison Complex-Yuma (ASPC-Yuma) in San Luis, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983, an Application to Proceed *In Forma Pauperis*, and a Request for Appointment of U.S. Marshall to Effect Service. In a July 29, 2011 Order, the Court denied the deficient Application to Proceed and denied as premature the Request for Appointment. The Court gave Plaintiff 30 days to pay the fee or file a complete Application to Proceed *In Forma Pauperis*.

On August 10, 2011, Plaintiff filed a second Application to Proceed *In Forma Pauperis*. In an August 25, 2011 Order, the Court granted the second Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

TERMPSPREF

1 On September 14, 2011, Plaintiff filed his First Amended Complaint (Doc. 11) and
2 a Motion for Appointment of Counsel (Doc. 12). The Court will order Defendants Barrigan,
3 Spencer, and Barklay to answer Counts Two, Three, and Five of the First Amended
4 Complaint and will dismiss the remaining claims and Defendants without prejudice. The
5 Court will deny without prejudice the Motion for Appointment of Counsel.

6 **I. 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.

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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, 627 F.3d 338, 342 (9th
3 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
4 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
5 94 (2007) (*per curiam*)).

6 **II. First Amended Complaint**

7 In his five-count First Amended Complaint, Plaintiff sues the following Defendants
8 at ASPC-Yuma: Sergeant/Transportation Officer Robbert Harris, Registered Nurses Nayelie
9 Barrigan and Helen Spencer, Facility Health Administrator Carrie Feehan, and Facility
10 Health Provider Karen Barklay. In each count, Plaintiff alleges that a particular Defendant
11 was deliberately indifferent to Plaintiff’s medical needs in violation of the Eighth
12 Amendment. In his Request for Relief, Plaintiff seeks a jury trial, monetary damages, and
13 his costs of suit.

14 In Count One, Plaintiff alleges that Defendant Harris failed to exercise good
15 professional judgment and failed to follow Arizona Department of Corrections (ADOC)
16 procedures because he failed to escort Plaintiff to the health unit and failed to ensure that
17 Plaintiff’s post-surgery instructions and prescriptions were transferred to the health unit staff
18 after Plaintiff returned from surgery and from his follow-up appointment with the
19 ophthalmologist. Plaintiff contends that as a result of Defendant Harris’s failures, Plaintiff was
20 unable to receive his post-surgery medications in time to prevent his surgically repaired eye
21 from rupturing.

22 In Count Two, Plaintiff claims that Defendant Barrigan failed to follow ADOC
23 procedures because she failed to take Plaintiff’s “vitals” and failed to take possession of
24 Plaintiff’s post-surgery instructions and prescriptions after Plaintiff returned from his surgery
25 and from his post-surgery follow-up appointment. Plaintiff also contends that he went to the
26 health unit and requested his prescribed medication, but Defendant Barrigan informed him
27 that no post-surgery instructions had been sent and that he should check back in the evening.
28 Plaintiff states that the medication was not there when he returned, that he suffered without

1 the medication for several days, and that Defendant Barrigan made no efforts to obtain the
2 medication by calling the Facility Health Administrator or the ophthalmologist despite
3 observing Plaintiff in pain and despite Plaintiff and ADOC staff members making numerous
4 attempts to obtain the medication from Defendant Barrigan.

5 In Count Three, Plaintiff alleges that he informed Defendant Spencer that he was
6 suffering pain from pressure building up inside his surgically repaired eye and that he was
7 in serious need of his prescribed medication. Plaintiff asserts that Defendant Spencer looked
8 at Plaintiff's eye, informed him that "complications are to be expected," refused to contact
9 the Facility Health Administrator or the ophthalmologist to obtain the prescription, and told
10 Plaintiff to leave the health unit. Plaintiff asserts his eye ruptured later that day.

11 In Count Four, Plaintiff alleges that Defendant Feehan was aware of the surgery, was
12 responsible for coordinating and ensuring that the post-surgery instructions were transmitted
13 from the ophthalmologist to the health unit staff, but failed to "coordinat[e] and maintain[]
14 management of Plaintiff's surgery."

15 In Count Five, Plaintiff asserts that after his eye ruptured, Defendant Barklay
16 examined his eye and stated that she would request an "A.S.A.P." appointment with the
17 ophthalmologist and that Plaintiff would be seen within the week. Plaintiff contends that
18 Defendant Barklay informed him that the ophthalmologist had denied the request because it
19 was not an emergency and indicated that he would see Plaintiff in three weeks. Plaintiff
20 asserts that Defendant Barklay knew Plaintiff was in pain, but never checked on his condition
21 after she examined him. Plaintiff claims that when he saw the ophthalmologist three weeks
22 later, the ophthalmologist told Plaintiff that he had never been informed that Plaintiff's eye had
23 ruptured, that Defendant Barklay had not requested an "A.S.A.P." appointment, and that he
24 would not have turned down such a request.

25 **III. Claims for Which an Answer Will be Required**

26 Liberally construed, Plaintiff has stated deliberate-indifference claims against
27 Defendants Barrigan, Spencer, and Barklay. The Court will require Defendant Barrigan,
28

1 Spencer, and Barklay to answer Counts Two, Three, and Five of the First Amended
2 Complaint.

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

4 Not every claim by a prisoner relating to inadequate medical treatment states a
5 violation of the Eighth or Fourteenth Amendment. To state a § 1983 medical claim, a
6 plaintiff must show that the defendants acted with “deliberate indifference to serious medical
7 needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429
8 U.S. 97, 104 (1976)). A plaintiff must show (1) a “serious medical need” by demonstrating
9 that failure to treat the condition could result in further significant injury or the unnecessary
10 and wanton infliction of pain and (2) the defendant’s response was deliberately indifferent.
11 Jett, 439 F.3d at 1096 (quotations omitted).

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

22 Deliberate indifference is a higher standard than negligence or lack of ordinary due
23 care for the prisoner’s safety. Farmer, 511 U.S. at 835. “Neither negligence nor gross
24 negligence will constitute deliberate indifference.” Clement v. California Dep’t of
25 Corrections, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter
26 Labs., 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or
27 “medical malpractice” do not support a claim under § 1983). “A difference of opinion does
28 not amount to deliberate indifference to [a plaintiff’s] serious medical needs.” Sanchez v.

1 Vild, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is
2 insufficient to state a claim against prison officials for deliberate indifference. See Shapley
3 v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985). The indifference
4 must be substantial. The action must rise to a level of “unnecessary and wanton infliction
5 of pain.” Estelle, 429 U.S. at 105.

6 Plaintiff’s allegations in Counts One and Four support, at best, a claim that Defendants
7 Harris and Feehan may have acted negligently or committed medical malpractice. His
8 allegations do not support a claim that either Defendant acted with deliberate indifference.
9 Thus, the Court will dismiss without prejudice Defendants Harris and Feehan and Counts
10 One and Four of the First Amended Complaint.

11 **V. Motion for Appointment of Counsel**

12 There is no constitutional right to the appointment of counsel in a civil case. See Ivey
13 v. Board of Regents of the University of Alaska, 673 F.2d 266, 269 (9th Cir. 1982). In
14 proceedings *in forma pauperis*, the court may request an attorney to represent any person
15 unable to afford one. 28 U.S.C. § 1915(e)(1). Appointment of counsel under 28 U.S.C.
16 § 1915(e)(1) is required only when “exceptional circumstances” are present. Terrell v.
17 Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). A determination with respect to exceptional
18 circumstances requires an evaluation of the likelihood of success on the merits as well as the
19 ability of Plaintiff to articulate his claims *pro se* in light of the complexity of the legal issue
20 involved. Id. “Neither of these factors is dispositive and both must be viewed together
21 before reaching a decision.” Id. (quoting Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th
22 Cir. 1986)).

23 Having considered both elements, it does not appear at this time that exceptional
24 circumstances are present that would require the appointment of counsel in this case.
25 Plaintiff is in no different position than many *pro se* prisoner litigants. Thus, the Court will
26 deny without prejudice Plaintiff’s Motion for Appointment of Counsel.

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1 **VI. Warnings**

2 **A. Release**

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

7 **B. Address Changes**

8 Plaintiff must file and serve a notice of a change of address in accordance with Rule
9 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
10 relief with a notice of change of address. Failure to comply may result in dismissal of this
11 action.

12 **C. Copies**

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

18 **D. Possible Dismissal**

19 If Plaintiff fails to timely comply with every provision of this Order, including these
20 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
21 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
22 comply with any order of the Court).

23 **IT IS ORDERED:**

- 24 (1) Counts One and Four are **dismissed** without prejudice.
25 (2) Defendants Harris and Feehan are **dismissed** without prejudice.
26 (3) Defendants Barrigan, Spencer, and Barklay must answer Counts Two, Three,
27 and Five of the First Amended Complaint.
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1 (4) Plaintiff's Motion for Appointment of Counsel (Doc. 12) is **denied** without
2 prejudice.

3 (5) The Clerk of Court must send Plaintiff a service packet including the First
4 Amended Complaint (Doc. 11), this Order, and both summons and request for waiver forms
5 for Defendants Barrigan, Spencer, and Barklay.

6 (6) Plaintiff must complete¹ and return the service packet to the Clerk of Court
7 within 21 days of the date of filing of this Order. The United States Marshal will not provide
8 service of process if Plaintiff fails to comply with this Order.

9 (7) If Plaintiff does not either obtain a waiver of service of the summons or
10 complete service of the Summons and First Amended Complaint on a Defendant within 120
11 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever
12 is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m);
13 LRCiv 16.2(b)(2)(B)(i).

14 (8) The United States Marshal must retain the Summons, a copy of the First
15 Amended Complaint, and a copy of this Order for future use.

16 (9) The United States Marshal must notify Defendants of the commencement of
17 this action and request waiver of service of the summons pursuant to Rule 4(d) of the Federal
18 Rules of Civil Procedure. The notice to Defendants must include a copy of this Order. **The**
19 **Marshal must immediately file signed waivers of service of the summons. If a waiver**
20 **of service of summons is returned as undeliverable or is not returned by a Defendant**
21 **within 30 days from the date the request for waiver was sent by the Marshal, the**
22 **Marshal must:**

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

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27 ¹If a Defendant is an officer or employee of the Arizona Department of Corrections,
28 Plaintiff must list the address of the specific institution where the officer or employee works.
Service cannot be effected on an officer or employee at the Central Office of the Arizona
Department of Corrections unless the officer or employee works there.

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

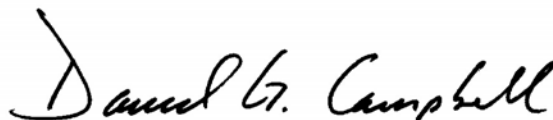
10 (10) **A Defendant who agrees to waive service of the Summons and First**
11 **Amended Complaint must return the signed waiver forms to the United States Marshal,**
12 **not the Plaintiff.**

13 (11) Defendants must answer the First Amended Complaint or otherwise respond
14 by appropriate motion within the time provided by the applicable provisions of Rule 12(a)
15 of the Federal Rules of Civil Procedure.

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

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

22 DATED this 29th day of September, 2011.

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David G. Campbell
United States District Judge