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

Cleveland Yarrow Cook,	)	No. CV 11-2410-PHX-DGC (MEA)
Plaintiff,	)	<b>ORDER</b>
vs.	)	
State of Arizona, et al.,	)	
Defendants.	)	

On December 7, 2011, Plaintiff Cleveland Yarrow Cook, who is confined in the Arizona State Prison Complex-Eyman, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. In a December 19, 2011 Order, the Court denied the Application to Proceed with leave to re-file. On January 9, 2012, Plaintiff filed a new Application to Proceed and a First Amended Complaint (Doc. 8). The Court will order Defendants Hawthorne, Nygren, Ellis, Perry, Lopez, and Kindle to answer the First Amended Complaint and will dismiss the remaining Defendants without prejudice.

**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. 28 U.S.C. § 1915(b)(1). The Court will assess an initial partial filing fee of \$33.14. The remainder of the fee will be collected monthly in payments of 20% of the previous month's income each time the amount

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1 in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate  
2 Order requiring the appropriate government agency to collect and forward the fees according  
3 to the statutory formula

## 4 **II. Statutory Screening of Prisoner Complaints**

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

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

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

26 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts  
27 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th  
28 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards

1 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,  
2 94 (2007) (*per curiam*)).

### 3 **III. First Amended Complaint**

4 In his one-count First Amended Complaint, Plaintiff sues the following Defendants:  
5 State of Arizona, Arizona Department of Corrections Director Charles L. Ryan, Sergeant  
6 Hawthorne, Sergeant Lopez, Criminal Investigator Elizabeth Ellis, Sergeant Kindle, C.O.  
7 III Nygren, and C.O. II Perry.

8 Plaintiff raises one claim for relief in which he alleges that his Seventh, Eighth, and  
9 Fourteenth Amendment rights were violated when he was forced to be housed in a yard  
10 where other inmates were attempting to kill him. Plaintiff states that he informed Defendants  
11 Hawthorne, Nygren, Ellis, Perry, Lopez, and Kindle of his security and safety concerns, but  
12 that each Defendant acted with deliberate indifference to his safety and forced him to be  
13 housed in the yard. Plaintiff states that he fears for his safety and suffers mental breakdowns  
14 and PTSD. Plaintiff seeks injunctive relief and money damages.

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

#### 16 **A. Defendant State of Arizona**

17 Under the Eleventh Amendment to the Constitution of the United States, a state or  
18 state agency may not be sued in federal court without its consent. Pennhurst State Sch. &  
19 Hosp. v. Halderman, 465 U.S. 89, 100 (1984); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.  
20 1989). Furthermore, “a state is not a ‘person’ for purposes of section 1983. Likewise ‘arms  
21 of the State’ such as the Arizona Department of Corrections are not ‘persons’ under section  
22 1983.” Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1327 (9th Cir. 1991) (citation  
23 omitted). Therefore, the Court will dismiss Defendant State of Arizona.

#### 24 **B. Defendant Ryan**

25 To state a valid claim under § 1983, plaintiffs must allege that they suffered a specific  
26 injury as a result of specific conduct of a defendant and show an affirmative link between the  
27 injury and the conduct of that defendant. See Rizzo v. Goode, 423 U.S. 362, 371-72, 377  
28 (1976). There is no *respondeat superior* liability under § 1983, and a defendant’s position

1 as the supervisor of persons who allegedly violated Plaintiff's constitutional rights therefore  
2 does not impose liability. Monell v. New York City Department of Social Services, 436 U.S.  
3 658, 691-92 (1978); Hamilton v. Endell, 981 F.2d 1062, 1067 (9th Cir. 1992); Taylor v. List,  
4 880 F.2d 1040, 1045 (9th Cir. 1989). "Because vicarious liability is inapplicable to Bivens  
5 and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the  
6 official's own individual actions, has violated the Constitution." Iqbal, 129 S. Ct. at 1948.

7 Plaintiff has not alleged that Defendant Ryan personally participated in a deprivation  
8 of Plaintiff's constitutional rights, was aware of a deprivation and failed to act, or formed  
9 policies that resulted in Plaintiff's injuries. The Court will therefore dismiss without  
10 prejudice Defendant Ryan.

#### 11 **V. Claims for Which an Answer Will be Required**

12 Plaintiff has not explained how his claims arise under the Seventh or Fourteenth  
13 Amendments. The Court will therefore treat Plaintiff's allegations as an Eighth Amendment  
14 claim. Liberally construed, Plaintiff has adequately stated an Eighth Amendment failure-to-  
15 protect claim against Defendants Hawthorne, Nygren, Ellis, Perry, Lopez, and Kindle, and  
16 the Court will require these Defendants to answer the First Amended Complaint.

#### 17 **VI. Motions**

##### 18 **A. Motions for Leave to Proceed without Administrative Remedies and for** 19 **Temporary Restraining Order**

20 On December 7, 2011, and January 9, 2012, Plaintiff filed Motions requesting that he  
21 be allowed to proceed without exhausting administrative remedies and that the Court issue  
22 a temporary restraining order requiring that Plaintiff be housed in federal custody for the  
23 duration of this action.

24 Exhaustion is an affirmative defense. Brown v. Valoff, 422 F.3d 926, 936 (9th Cir.  
25 Sept. 6, 2005) (citing Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.)). Defendants have  
26 the burden of raising and proving the absence of exhaustion. Wyatt, 315 F.3d at 1119.  
27 Accordingly, while Plaintiff's case will be allowed to proceed at this point in time, the Court  
28 will not decide the issue of exhaustion of administrative remedies unless Defendants raise  
it as an affirmative defense.

1 With respect to Plaintiff's request for a temporary restraining order, temporary  
2 restraining orders are governed by Rule 65(b) of the Federal Rules of Civil Procedure. The  
3 mailing certificate on Plaintiff's motion for a temporary restraining order does not indicate  
4 that the motion was served on Defendants. As a result, Plaintiff appears to seek a temporary  
5 restraining order without notice under Rule 65(b) of the Federal Rules of Civil Procedure.  
6 The Court may *not* grant a temporary restraining order without notice unless the applicant  
7 certifies to the court in writing the efforts, if any, which have been made to give notice and  
8 the reasons that notice should not be required. Fed. R. Civ.P. 65(b). Plaintiff has not  
9 satisfied this requirement. No reason has been offered by Plaintiff to forgo notice to the  
10 adverse party.

11 Accordingly, Plaintiff's Motions to Proceed without Administrative Remedies and for  
12 a Temporary Restraining Order will be denied.

13 **B. Motion for Appointment of Counsel**

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

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

1           **C.     Motion for Status**

2           On January 27, 2012, Plaintiff filed a letter to the Clerk of Court inquiring whether  
3 the Court had received his new Application to Proceed. Plaintiff should note that it is  
4 improper for a party to communicate directly with court personnel. Simply mailing a letter  
5 to the Clerk of Court, the judge, or any court personnel is unacceptable. Any request for  
6 action by the Court must be in the form of a motion that complies with the Rules of Practice  
7 of the United States District Court for the District of Arizona (the Local Rules). Any future  
8 letters directed to the Clerk of Court, the judge, or any court personnel will not be filed, will  
9 be stricken from the record, and will be returned to Plaintiff. The Court will construe  
10 Plaintiff's letter as a Motion for Status and will grant it to the extent that this Order informs  
11 Plaintiff that the Court has received his completed Application to Proceed.

12       **VII.   Warnings**

13           **A.     Release**

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

18           **B.     Address Changes**

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

23           **C.     Copies**

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

1           **D.     Possible Dismissal**

2           If Plaintiff fails to timely comply with every provision of this Order, including these  
3 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,  
4 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to  
5 comply with any order of the Court).

6           **IT IS ORDERED:**

- 7           (1)     Plaintiff’s Application to Proceed *In Forma Pauperis* (Doc. 6) is **granted**.
- 8           (2)     As required by the accompanying Order to the appropriate government agency,  
9 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$33.14.
- 10          (3)     Plaintiff’s December 7, 2011 and January 9, 2012 Motions to Proceed without  
11 Administrative Remedies and for Temporary Restraining Order (Docs. 3 and 9) are **denied**.
- 12          (4)     Plaintiff’s January 9, 2012 Motion for Appointment of Counsel (Doc. 10) is  
13 **denied**.
- 14          (5)     Plaintiff’s Motion for Status of Application to Proceed *In Forma Pauperis*  
15 (Doc. 12) is **granted** to the extent this Order informs Plaintiff of the status of his Application  
16 to Proceed.
- 17          (6)     Defendants State of Arizona and Ryan are **dismissed** without prejudice.
- 18          (7)     Defendants Hawthorne, Nygren, Ellis, Perry, Lopez, and Kindle must answer  
19 the First Amended Complaint.
- 20          (8)     The Clerk of Court must send Plaintiff a service packet including the First  
21 Amended Complaint (Doc. 8), this Order, and both summons and request for waiver forms  
22 for Defendants Hawthorne, Nygren, Ellis, Perry, Lopez, and Kindle.
- 23          (9)     Plaintiff must complete<sup>1</sup> and return the service packet to the Clerk of Court  
24 within 21 days of the date of filing of this Order. The United States Marshal will not provide  
25 service of process if Plaintiff fails to comply with this Order.

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28           <sup>1</sup>If a Defendant is an officer or employee of the Arizona Department of Corrections,  
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 (10) If Plaintiff does not either obtain a waiver of service of the summons or  
2 complete service of the Summons and First Amended Complaint on a Defendant within 120  
3 days of the filing of the Complaint or within 60 days of the filing of this Order, whichever  
4 is later, the action may be dismissed as to each Defendant not served. Fed. R. Civ. P. 4(m);  
5 LRCiv 16.2(b)(2)(B)(i).

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

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

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

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



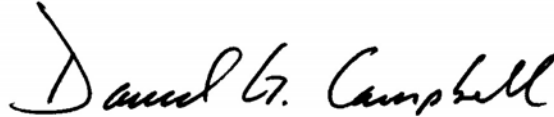
1           (13) **A Defendant who agrees to waive service of the Summons and First**  
2 **Amended Complaint must return the signed waiver forms to the United States Marshal,**  
3 **not the Plaintiff.**

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

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

10          (16) This matter is referred to Magistrate Judge Mark E. Aspey pursuant to Rules  
11 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized  
12 under 28 U.S.C. § 636(b)(1).

13           DATED this 27<sup>th</sup> day of February, 2012.

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17           David G. Campbell  
18           United States District Judge