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

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10	James Jackson Ellsworth,)	No. CV 11-2554-PHX-RCB (MEA)
11	Plaintiff,)	ORDER
12	vs.)	
13	Nurse Rose, et al.,)	
14)	
15	Defendants.)	
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17 Plaintiff James Jackson Ellsworth, who is confined in the Arizona State Prison
18 Complex-Florence in Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant
19 to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 2).
20 The Court will order Defendants to answer the Complaint.

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

22 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
23 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
24 The Court will assess an initial partial filing fee of \$15.30. The remainder of the fee will be
25 collected monthly in payments of 20% of the previous month's income each time the amount
26 in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate
27 Order requiring the appropriate government agency to collect and forward the fees according
28 to the statutory formula.

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

2 The Court is required to screen complaints brought by prisoners seeking relief against
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.
7 28 U.S.C. § 1915A(b)(1), (2).

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

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

23 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
24 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
25 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
26 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
27 94 (2007) (*per curiam*)).

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1 **III. Complaint**

2 In his three-count Complaint, Plaintiff sues the following Defendants: Nurse Rose,
3 Nurse Judy, and Facility Health Administrator Dennis Kendall.

4 Plaintiff alleges that he suffers from multiple sclerosis and, in October 2010, a doctor
5 prescribed the use of a cane to assist with Plaintiff's mobility. He contends that he repeatedly
6 requested a cane from Defendants, but Defendants would not follow the doctor's instructions
7 and did not provide a cane. Plaintiff asserts that he fell in December 2010, split his head
8 open, and had to be transported to the hospital for stitches.

9 In each count, Plaintiff alleges a violation of the Eighth Amendment as it relates to
10 his medical care. In Counts One and Two, Plaintiff contends that he submitted five requests
11 for a cane and repeatedly spoke to Defendants Rose (Count One) and Judy (Count Two)
12 about it, but Defendants Rose and Judy would not follow the doctor's instructions and told
13 Plaintiff that there was nothing they could do. Plaintiff asserts that Defendant Rose told
14 Plaintiff that he would have to wait because the Arizona Department of Corrections (ADOC)
15 "did not have any canes." Plaintiff contends that Defendant Judy became belligerent and told
16 Plaintiff to "quit asking."

17 In Count Three, Plaintiff asserts that he submitted three health needs requests to
18 Defendant Kendall, informing Defendant Kendall that the medical staff was not following
19 the doctor's orders. Plaintiff alleges that he received no response to these requests, but that
20 Defendant Kendall personally informed Plaintiff that "there were no canes available and
21 [Plaintiff] would just have to wait until one was available."

22 Plaintiff has attached to his Complaint a grievance appeal response from the ADOC
23 Director that upholds Plaintiff's grievance appeal. In the response, the Director indicates that
24 Plaintiff submitted multiple health needs requests for a cane because of problems with
25 balance and walking due to multiple sclerosis, that Plaintiff was not issued a cane until "after
26 [he] sustained injuries from a fall," and that "[t]here is no documentation that medical staff
27 offered [him] any ambulatory assistive device before [the fall] despite [his] repeated requests
28 for a cane."

1 In his Request for Relief, Plaintiff seeks monetary damages and his costs of suit.
2 Liberally construed, Plaintiff has stated Eighth Amendment deliberate indifference
3 claims against Defendants. The Court will require Defendants to answer the Complaint.

4 **IV. Warnings**

5 **A. Release**

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

10 **B. Address Changes**

11 Plaintiff must file and serve a notice of a change of address in accordance with Rule
12 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
13 relief with a notice of change of address. Failure to comply may result in dismissal of this
14 action.

15 **C. Copies**

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

21 **D. Possible Dismissal**

22 If Plaintiff fails to timely comply with every provision of this Order, including these
23 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
24 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
25 comply with any order of the Court).

26 **IT IS ORDERED:**

- 27 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 2) is **granted**.
28 (2) As required by the accompanying Order to the appropriate government agency,

1 Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$15.30.

2 (3) The Clerk of Court must send Plaintiff a service packet including the
3 Complaint (Doc. 1), this Order, and both summons and request for waiver forms for
4 Defendants Nurse Rose, Nurse Judy, and Kendall.

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

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

13 (6) The United States Marshal must retain the Summons, a copy of the Complaint,
14 and a copy of this Order for future use.

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

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

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


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

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

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

17 (11) This matter is referred to Magistrate Judge Mark E. Aspey pursuant to Rules
18 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized
19 under 28 U.S.C. § 636(b)(1).

20 DATED this 10th day of January, 2012.

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24 Robert C. Broomfield
25 Senior United States District Judge
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