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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Joseph Eldridge,

10 Plaintiff,

11 v.

12 J.D. Schroeder, et al.,

13 Defendants.

No. CV-14-01325-PHX-DLR (ESW)

ORDER

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15 Plaintiff is a prisoner confined in the Arizona State Prison Complex-Eyman in
16 Florence, Arizona. He filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983
17 on June 13, 2014 (Doc. 1). Pursuant to 28 U.S.C. § 1915(A), the Court screened
18 Plaintiff's Complaint (Doc. 1) to determine its legal sufficiency. In its November 25,
19 2014 Order (Doc. 14), the Court required Defendant Schroeder to answer the Complaint
20 (Doc. 1). On February 20, 2015, Plaintiff filed a "Complaint for Negligence" (Doc. 21).
21 The Court deems the "Complaint for Negligence" (Doc. 21) to be an amended complaint,
22 hereinafter referred to as the "First Amended Complaint."

23 Pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure, a party may
24 amend his complaint once as a matter of course within: "(A) 21 days after serving it, or
25 (B) if the pleading is one to which a responsive pleading is required, 21 days after service
26 of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e) or (f),
27 whichever is earlier." Proof of service has not been filed in this matter. Nor has a motion
28 under Rule 12(b), (e), or (f) of the Federal Rules of Civil Procedure been filed. Under

1 Rule 15(a)(1), Plaintiff is therefore entitled to amend his Complaint (Doc. 1) as a matter
2 of right.

3 The Court, however, must screen civil complaints brought by prisoners who seek
4 redress from a governmental entity or officer or employee of a governmental entity. 28
5 U.S.C. § 1915(a). The Court must dismiss a complaint or portion thereof that is legally
6 frivolous, fails to state a claim upon which relief may be granted, or seeks monetary relief
7 from a defendant who is immune from suit. 28 U.S.C. § 1915(A)(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
10 not demand detailed factual allegations, “it demands more than an unadorned, the
11 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
12 (2009). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state
13 a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v.*
14 *Twombly*, 550 U.S. 544, 570 (2007)). To present a plausible claim, a plaintiff must plead
15 “factual content that allows the court to draw the reasonable inference that the defendant
16 is liable for the misconduct alleged.” *Id.* “Determining whether a complaint states a
17 plausible claim for relief [is] . . . a context-specific task that requires the reviewing court
18 to draw on its judicial experience and common sense.” *Id.* at 679. Thus, although a
19 plaintiff’s specific factual allegations may be consistent with a constitutional claim, a
20 court must assess whether there are other “more likely explanations” for a defendant’s
21 conduct. *Id.* at 681. However, a complaint filed by a pro se prisoner “must be held to
22 less stringent standards than formal pleadings drafted by lawyers.” *Id.* (quoting *Erickson*
23 *v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)); *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th
24 Cir. 2010) (instructing courts to construe pro se filings liberally).

25 Finally, a first amended complaint supersedes the original complaint. *See Ferdik*
26 *v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner &*
27 *Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat an
28 original complaint as nonexistent. *Ferdik*, 963 F.2d at 1262 (“after amendment the

1 original pleading no longer performs any function and is treated thereafter as non-
2 existent”) (internal quotation marks and citation omitted). Any cause of action that was
3 raised in the original complaint and that was voluntarily dismissed or was dismissed
4 without prejudice is waived if it is not alleged in a proposed amended complaint. *Lacey*
5 *v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

6 **I. Statutory Screening of the First Amended Complaint¹**

7 Plaintiff alleges one count in his First Amended Complaint (Doc. 21). That count
8 asserts that Plaintiff’s Eighth Amendment rights were violated when Defendant
9 Correctional Officer J.D. Schroeder allegedly used excessive physical force against
10 Plaintiff. This claim is contained in Plaintiff’s original Complaint (Doc. 1), and the First
11 Amended Complaint (Doc. 21) reiterates the supporting factual allegations made in the
12 original Complaint.

13 To support his claim, Plaintiff alleges that while Plaintiff was in his cell doing
14 legal work and getting ready to go out for recreation, Defendant Schroeder came to
15 Plaintiff’s cell door and asked Plaintiff if he wanted to “talk that ‘shit’ [Plaintiff] was
16 talking in the Mental Health Watch Pod.” (Doc. 21 at 2). Plaintiff then alleges that
17 Defendant Schroeder entered Plaintiff’s cell and pushed Plaintiff onto Plaintiff’s bed,
18 then hit Plaintiff several times in the face, upper body, and upper legs and arms.
19 Defendant Schroeder also allegedly dumped the contents of Plaintiff’s legal and property
20 boxes on the floor and stepped on the boxes and then kicked and hit Plaintiff until he lost
21 consciousness. Plaintiff further alleges that he “did not do or say anything to cause
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23 ¹ Local Rule of Civil Procedure 3.4 requires that “[a]ll complaints . . . by incarcerated
24 persons shall be signed and legibly written or typewritten on forms approved by the Court
25 and in accordance with the instructions provided with the forms.” The Court may, in its
26 discretion, forgo the requirement that a plaintiff use a court-approved form. *See* LRCiv
27 3.4. Plaintiff’s First Amended Complaint (Doc. 21) is not written on the court-approved
28 form. The Court, however, finds that the First Amended Complaint (Doc. 21)
substantially complies with the court-approved form. In the interest of judicial economy,
the Court will screen the First Amended Complaint (Doc. 21) as submitted.

1 [Defendant] Schroeder to beat and kick him.” (Doc. 21 at 2).

2 The Court finds that Plaintiff sufficiently alleges facts in the First Amended
3 Complaint (Doc. 21) to support Plaintiff’s claim that Defendant Schroeder used excessive
4 force against Plaintiff. The Court therefore orders Defendant Schroeder to answer
5 Plaintiff’s excessive force claim contained in the First Amended Complaint (Doc. 21).

6 **II. Motion for Appointment of Counsel (Doc. 24)**

7 Also pending before the Court is Plaintiff’s Motion for Appointment of Counsel
8 (Doc. 24). There is no constitutional right to the appointment of counsel in a civil case.
9 *See Johnson v. U.S. Dep’t of Treasury*, 939 F.2d 820, 824 (9th Cir. 1991); *Ivey v. Bd of*
10 *Regents of the Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). If “exceptional
11 circumstances” exist, however, a court may appoint counsel for indigent civil litigants
12 pursuant to 28 U.S.C. § 1915(e)(1). *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009).
13 A court must consider two factors when determining whether “exceptional
14 circumstances” exist: (i) the likelihood the plaintiff will succeed on the merits of his or
15 her claims and (ii) the plaintiff’s ability to articulate his or her “claims *pro se* in light of
16 the complexity of the legal issues involved.” *Palmer*, 560 F.3d at 970 (quoting *Weygandt*
17 *v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)); *see also Terrell v. Brewer*, 935 F.2d 1015,
18 1017 (9th Cir. 1991). These two factors must be considered together, and neither factor
19 is dispositive. *Palmer*, 560 F3.d at 970 (citing *Wilborn v. Escalderon*, 789 F.2d 1328,
20 1331 (9th Cir. 1986)).

21 In his Motion for Appointment of Counsel (Doc. 24), Plaintiff states that his
22 “imprisonment will greatly limit his ability to litigate.” Plaintiff also states that he has a
23 medical disorder that impacts his ability to litigate. But Petitioner has not shown a
24 likelihood that his claim will succeed on the merits. Petitioner also has not shown a
25 difficulty in articulating his claim in light of the complexity of the legal issues involved.
26 Petitioner’s pleadings indicate that Petitioner is able to conduct legal research and
27 articulate his legal arguments to the Court. *See Wilborn*, 789 F.2d at 1331 (“If all that
28 was required to establish successfully the complexity of the relevant issues was a

1 demonstration of the need for development of further facts, practically all cases would
2 involve complex legal issues.”). As Petitioner has failed to show that exceptional
3 circumstances are present, Petitioner’s Motion for Appointment of Counsel (Doc. 24) is
4 denied.

5 **III. Warnings**

6 **A. Address Changes**

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

11 **B. Copies**

12 Because Plaintiff is currently confined in an Arizona Department of Corrections
13 unit subject to General Order 14-17, Plaintiff is not required to serve Defendant
14 Schroeder with a copy of every document he filed or to submit an additional copy of
15 every filing for use by the Court, as would ordinarily be required by Federal Rule of Civil
16 Procedure 5 and Local Rule of Civil Procedure 5.4. If Plaintiff is transferred to a unit
17 other than one subject to General Order 14-17, he will be notified of the requirements for
18 service and copies for the Court that are required for inmates whose cases are not subject
19 to General Order 14-17.

20 **C. Possible Dismissal**

21 If Plaintiff fails to timely comply with every provision of the Court’s Order,
22 including these warnings, the Court may dismiss this action without further notice. *See*
23 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss
24 an action for failure to comply with any order of the Court). If Plaintiff does not either
25 obtain a waiver of service of the summons or complete service of the Summons and First
26 Amended Complaint (Doc. 21) on Defendant Schroeder within 120 days of the filing of
27 the First Amended Complaint (Doc. 21) or within 60 days of the filing of this Order,
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1 whichever is later, the action may be dismissed. Fed. R. Civ. P. 4(m); LRCiv
2 16.2(b)(2)(B)(i).

3 **IV. CONCLUSION**

4 Based on the foregoing, **IT IS ORDERED** that:

5 1. Service of Plaintiff's original Complaint (Doc. 1) is stayed.

6 2. The Clerk of the Court shall forward copies of this Order to the United States
7 Marshals Service.

8 3. The United States Marshal shall retain the Summons, a copy of the First
9 Amended Complaint (Doc. 21), and a copy of this Order for future use.

10 4. The United States Marshal shall notify Defendant Schroeder of the
11 commencement of this action and request waiver of service of the summons pursuant to
12 Rule 4(d) of the Federal Rules of Civil Procedure. The notice to Defendant Schroeder
13 shall include a copy of this Order. The Marshall shall file waivers of service of the
14 summons or requests for waivers that were returned as undeliverable as soon as they are
15 received. If a waiver of service of summons is returned as undeliverable or is not
16 returned by Defendant Schroeder within thirty days from the date the request for waiver
17 was sent by the Marshal, the Marshal must:

18 (a) Personally serve copies of the Summons, First Amended Complaint
19 (Doc. 21), and this Order upon Defendant Schroeder pursuant to Rule 4(e)(2) of the
20 Federal Rules of Civil Procedure; and

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

1 of the Federal Rules of Civil Procedure, unless otherwise ordered by the Court.

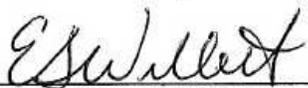
2 **5. If Plaintiff does not either obtain a waiver of service of the summons or**
3 **complete service of the Summons and First Amended Complaint (Doc. 21) on**
4 **Defendant Schroeder within 120 days of the filing of the First Amended Complaint**
5 **(Doc. 21) or within 60 days of the filing of this Order, whichever is later, the action**
6 **may be dismissed. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(ii).**

7 6. If Defendant Schroeder agrees to waive service of the Summons and First
8 Amended Complaint (Doc. 21), he must **return the signed waiver forms to the United**
9 **States Marshal, not the Plaintiff.**

10 7. Defendant Schroeder must answer the First Amended Complaint (Doc. 21) or
11 otherwise respond by appropriate motion within the time provided by applicable
12 provisions of Rule 12(a) of the Federal Rules of Civil Procedure.

13 8. Plaintiff's Motion for Appointment of Counsel (Doc. 24) is denied.

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15 Dated this 22nd day of April, 2015.

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19 Eileen S. Willett
20 United States Magistrate Judge
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