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

Hector Velasquez,  
  
Plaintiff,  
  
vs.  
  
Charles L. Ryan, et al.,  
  
Defendants.

No. CV 14-08136-PCT-SPL (BSB)

**ORDER**

Plaintiff Hector Velasquez, who is confined in the Arizona State Prison Complex-Lewis in Buckeye, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 2). The Court will dismiss the Complaint with leave to amend.

**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 \$37.86. The remainder of the fee will be collected monthly in payments of 20% of the previous month’s income credited to Plaintiff’s trust account 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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1     **II.     Statutory Screening of Prisoner Complaints**

2             The Court is required to screen complaints brought by prisoners seeking relief  
3 against a governmental entity or an officer or an employee of a governmental entity. 28  
4 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff  
5 has raised claims that are legally frivolous or malicious, that fail to state a claim upon  
6 which relief may be granted, or that seek monetary relief from a defendant who is  
7 immune from such relief. 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  
10 does 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). “Threadbare recitals of the elements of a cause of action, supported by mere  
13 conclusory 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  
17 content that allows the court to draw the reasonable inference that the defendant is liable  
18 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible  
19 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw  
20 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s  
21 specific factual allegations may be consistent with a constitutional claim, a court must  
22 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*  
23 at 681.

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

1           If the Court determines that a pleading could be cured by the allegation of other  
2 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal  
3 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*).  
4 Plaintiff's Complaint will be dismissed for failure to state a claim, but because it may  
5 possibly be amended to state a claim, the Court will dismiss it with leave to amend.

### 6 **III. Complaint**

7           In his three-count Complaint, Plaintiff names as Defendants: Charles Ryan, the  
8 Director of the Arizona Department of Corrections ("ADOC"); "John Doe," the Deputy  
9 Warden at the Arizona State Prison Complex-Kingman ("ASPC-Kingman"); and  
10 multiple John/Jane Does, who are described as classification officers at ADOC's Central  
11 Office. For his alleged injuries, Plaintiff seeks injunctive relief in the form of an addition  
12 to his "Do Not House" list, as well as monetary relief and punitive damages.

13           In his Complaint, Plaintiff alleges that on October 2, 2012, he was transferred to  
14 ASPC-Kingman, where, within hours, he was beaten by four or five other inmates. As a  
15 result of the beating, Plaintiff was in a coma for 12 days, suffered brain trauma, has had  
16 to re-learn how to walk and talk, and will require therapy for the remainder of his life.  
17 Plaintiff alleges that the beating occurred because he was placed in a unit with his victim,  
18 and that the victim should have been on Plaintiff's "Do Not House" list. Plaintiff further  
19 alleges that he was "almost" assaulted again while he was in the infirmary.

20           In Count One, Plaintiff alleges that Defendant Ryan is liable because, "even  
21 though [Defendant Ryan] was not told personally [about] the situation," his staff failed to  
22 ensure Plaintiff's safety by allowing Plaintiff to be housed in the same unit as his victim,  
23 in violation of the Eighth Amendment.

24           In Count Two, Plaintiff alleges that Defendant Doe, the Deputy Warden at ASPC-  
25 Kingman, is liable because, "even though [Defendant Doe] was not directly advised," his  
26 staff failed to ensure Plaintiff's safety by allowing Plaintiff to be housed in the same unit  
27 as his victim, in violation of the Eighth Amendment.

1 In Count Three, Plaintiff alleges that the John/Jane Doe Defendant classification  
2 officers are liable because they failed to ensure Plaintiff's safety by allowing Plaintiff to  
3 be housed in the same unit as his victim, in violation of the Eighth Amendment.

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

5 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants  
6 (2) under color of state law (3) deprived him of federal rights, privileges or immunities  
7 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th  
8 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d  
9 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific  
10 injury as a result of the conduct of a particular defendant and he must allege an  
11 affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*,  
12 423 U.S. 362, 371-72, 377 (1976).

13 Although *pro se* pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519,  
14 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey*  
15 *v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a  
16 liberal interpretation of a civil rights complaint may not supply essential elements of the  
17 claim that were not initially pled. *Id.*

18 Additionally, to state a valid claim under § 1983, plaintiffs must allege that they  
19 suffered a specific injury as a result of specific conduct of a defendant and show an  
20 affirmative link between the injury and the conduct of that defendant. *See Rizzo v.*  
21 *Goode*, 423 U.S. 362, 371-72, 377 (1976). There is no *respondeat superior* liability  
22 under § 1983, and therefore, a defendant's position as the supervisor of persons who  
23 allegedly violated Plaintiff's constitutional rights does not impose liability. *Monell v.*  
24 *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691-92 (1978); *Hamilton v. Endell*,  
25 981 F.2d 1062, 1067 (9th Cir. 1992); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).  
26 "Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must  
27 plead that each Government-official defendant, through the official's own individual  
28 actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676.

1 An Eighth Amendment threat-to-safety claim for requires a sufficiently culpable  
2 state of mind by the Defendants, known as “deliberate indifference.” *Farmer v. Brennan*,  
3 511 U.S. 825, 834 (1994). Deliberate indifference is a higher standard than negligence or  
4 lack of ordinary due care for the prisoner’s safety. *Id.* at 835. To state a claim of  
5 deliberate indifference, plaintiffs must meet a two-part test. “First, the alleged  
6 constitutional deprivation must be, objectively, sufficiently serious”; and the “official’s  
7 act or omission must result in the denial of the minimal civilized measure of life’s  
8 necessities.” *Id.* at 834 (internal quotations omitted). Second, the prison official must  
9 have a “sufficiently culpable state of mind,” i.e., he must act with “deliberate indifference  
10 to inmate health or safety.” *Id.* (internal quotations omitted). In defining “deliberate  
11 indifference” in this context, the Supreme Court has imposed a subjective test: “the  
12 official must both be aware of facts from which the inference could be drawn that a  
13 substantial risk of serious harm exists, *and* he must also draw the inference.” *Id.* at 837  
14 (emphasis added).

15 **A. Defendants Ryan and Doe (Deputy Warden)**

16 As stated above, a vicarious liability or *respondeat superior* theory is not a  
17 cognizable § 1983 claim. However, Plaintiff’s claims against both Defendant Ryan and  
18 Defendant Doe are based on a *respondeat superior* theory. Accordingly, Plaintiff has  
19 failed to state a claim against these defendants for which relief could be granted.

20 **B. Defendants John/Jane Doe (Classification Officers)**

21 Generally, the use of anonymous type appellations to identify defendants is not  
22 favored. Rule 10(a) of the Federal Rules of Civil Procedure requires the plaintiff to  
23 include the names of the parties in the action. As a practical matter, it is impossible in  
24 most instances for the United States Marshal or his designee to serve a summons and  
25 complaint or amended complaint upon an anonymous defendant.

26 The Ninth Circuit has held that where identity is unknown prior to the filing of a  
27 complaint, the plaintiff should be given an opportunity through discovery to identify the  
28 unknown defendants, unless it is clear that discovery would not uncover the identities, or

1 that the complaint would be dismissed on other grounds. *Wakefield v. Thompson*, 177  
2 F.3d 1160, 1163 (9th Cir. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.  
3 1980)). However, the plaintiff must still plead facts sufficient to demonstrate that the  
4 unknown defendants have violated the plaintiff's rights.

5 Here, Plaintiff has failed to state a claim against the John/Jane Doe classification  
6 officer defendants. Plaintiff has not alleged that these defendants were, for instance,  
7 aware that Plaintiff's victim was on his "Do Not House" list (indeed, it is unclear whether  
8 the victim was on Plaintiff's "Do Not House" list, or whether ADOC officials were even  
9 aware who Plaintiff's victim was). Plaintiff has not indicated what information, if any,  
10 these defendants were aware of, when they became aware of that information, and why  
11 their responses (or lack of responses) to that information constitutes "deliberate  
12 indifference." Accordingly, Plaintiff has failed to state a claim against these defendants  
13 for which relief could be granted.

14 **V. Leave to Amend**

15 Because Plaintiff has failed to state a claim against any named Defendant for  
16 which relief could be granted, the Complaint will be dismissed. Within 30 days, Plaintiff  
17 may submit a first amended complaint to cure the deficiencies outlined above. The Clerk  
18 of Court will mail Plaintiff a court-approved form to use for filing a first amended  
19 complaint. If Plaintiff fails to use the court-approved form, the Court may strike the  
20 amended complaint and dismiss this action without further notice to Plaintiff.

21 Plaintiff must clearly designate on the face of the document that it is the "First  
22 Amended Complaint." The first amended complaint must be retyped or rewritten in its  
23 entirety on the court-approved form and may not incorporate any part of the original  
24 Complaint by reference. Plaintiff may include only one claim per count.

25 A first amended complaint supersedes the original complaint. *Ferdik v. Bonzelet*,  
26 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896  
27 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat an original  
28 complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised

1 in the original complaint and that was voluntarily dismissed or was dismissed without  
2 prejudice is waived if it is not alleged in a first amended complaint. *Lacey v. Maricopa*  
3 *County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

4 If Plaintiff files an amended complaint, Plaintiff must write short, plain statements  
5 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name  
6 of the Defendant who violated the right; (3) exactly what that Defendant did or failed to  
7 do; (4) how the action or inaction of that Defendant is connected to the violation of  
8 Plaintiff's constitutional right; and (5) what specific injury Plaintiff suffered because of  
9 that Defendant's conduct. *See Rizzo*, 423 U.S. at 371-72, 377.

10 Plaintiff must repeat this process for each person he names as a Defendant. If  
11 Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific  
12 injury suffered by Plaintiff, the allegations against that Defendant will be dismissed for  
13 failure to state a claim. **Conclusory allegations that a Defendant or group of**  
14 **Defendants has violated a constitutional right are not acceptable and will be**  
15 **dismissed.**

## 16 **VI. Warnings**

### 17 **A. Release**

18 If released from custody, Plaintiff must pay the unpaid balance of the filing fee  
19 within 120 days of his release. Also, within 30 days of his release, he must either (1)  
20 notify the Court that he intends to pay the balance or (2) show good cause, in writing,  
21 why he cannot. Failure to comply may result in dismissal of this action.

### 22 **B. Address Changes**

23 If Plaintiff's address changes, Plaintiff must file and serve a notice of a change of  
24 address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff  
25 must not include a motion for other relief with a notice of change of address. Failure to  
26 comply may result in dismissal of this action.

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**C. Copies**

Because Plaintiff is currently confined in an Arizona Department of Corrections unit subject to General Order 14-17, Plaintiff is not required to submit an additional copy of every filing for use by the Court, as would ordinarily be required by Local Rule of Civil Procedure 5.4. If Plaintiff is transferred to a unit other than one subject to General Order 14-17, he will be notified of the requirements regarding copies for the Court that are required for inmates whose cases are not subject to General Order 14-17.

**D. Possible “Strike”**

Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails to file an amended complaint correcting the deficiencies identified in this Order, the dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

**E. Possible Dismissal**

If Plaintiff fails to timely comply with every provision of this Order, including these warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963 F.2d at 1260-61 (a district court may dismiss an action for failure to comply with any order of the Court).

**IT IS ORDERED:**

- (1) Plaintiff’s Application to Proceed *In Forma Pauperis* (Doc. 2) is **granted**.
- (2) As required by the accompanying Order to the appropriate government agency, Plaintiff must pay the \$350.00 filing fee and is assessed an initial partial filing fee of \$37.86.

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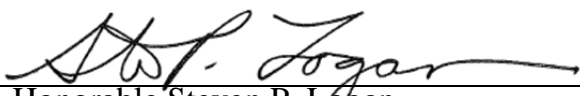
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(3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim. Plaintiff has **30 days** from the date this Order is filed to file a first amended complaint in compliance with this Order.

(4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of Court must, without further notice, enter a judgment of dismissal of this action with prejudice that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

(5) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil rights complaint by a prisoner.

Dated this 5th day of September, 2014.

  
Honorable Steven P. Logan  
United States District Judge