

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

<b>JOHN COLASURDO,</b>	)	
<b>#K88438,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>Case No. 17-cv-00424-MJR</b>
	)	
<b>N. WARD,</b>	)	
<b>COWAN,</b>	)	
<b>KIMBERLY BUTLER,</b>	)	
<b>CAMERON WATSON,</b>	)	
<b>JOHN DOE 1,</b>	)	
<b>JOHN DOE 2,</b>	)	
<b>JOHN DOE 3,</b>	)	
<b>and JOHN DOE 4,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM & ORDER**

**REAGAN, Chief District Judge:**

Plaintiff John Colasurdo, an inmate who is currently incarcerated at Pontiac Correctional Center (“Pontiac”), brings this civil rights action pursuant to 42 U.S.C. § 1983 for deprivations of his constitutional rights at Menard Correctional Center (“Menard”). (Doc. 1). According to the Complaint, Plaintiff was repeatedly raped by his cellmate in 2015 and then denied protective custody by Menard officials. (Doc. 1, pp. 8-11). He now sues these officials for violating his rights under the Eighth Amendment. *Id.* Plaintiff seeks declaratory judgment and monetary damages. (Doc. 1, p. 11).

This case is now before the Court for a preliminary review of the Complaint (Doc. 1) pursuant to 28 U.S.C. § 1915A, which provides:

- (a) **Screening** – The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) **Grounds for Dismissal** – On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint–

(1) is frivolous, malicious, or fails to state a claim on which relief may be granted;

or

(2) seeks monetary relief from a defendant who is immune from such relief.

An action or claim is frivolous if “it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Frivolousness is an objective standard that refers to a claim that any reasonable person would find meritless. *Lee v. Clinton*, 209 F.3d 1025, 1026-27 (7th Cir. 2000). An action fails to state a claim upon which relief can be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The claim of entitlement to relief must cross “the line between possibility and plausibility.” *Id.* at 557. At this juncture, the factual allegations of the *pro se* complaint are to be liberally construed. *See Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009). The Complaint survives screening under this standard.

### **The Complaint**

In September 2015, Menard officials made the decision to transfer Inmate Njos into a cell with Plaintiff. (Doc. 1, p. 8). Njos identified himself as the chief of a gang, known as the Latin Folks. *Id.* The Complaint describes Njos as a violent inmate who is “twice the size” of Plaintiff and has a known history of aggression.<sup>1</sup> *Id.* In the three years prior to his transfer, Njos was housed in a single cell in administrative detention. *Id.* Warden Butler, Assistant Warden Watson, John Doe 1 (placement officer), and John Doe 2 (investigative affairs supervisor) allegedly knew about his gang affiliation and history of aggression but declined to conduct an aggression hearing or screening before transferring Njos into a cell with Plaintiff. *Id.*

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<sup>1</sup> Plaintiff describes himself as a non-aggressive inmate with an aggression level of “11 or 13,” in contrast to Njos who has an aggression level of “22 or 23.” (Doc. 1, p. 8).

In October and November 2015, Njos repeatedly raped Plaintiff. (Doc. 1, p. 8). On November 6th, he gave Plaintiff three options: (1) transfer into protective custody; (2) pay a flat fee of \$150 plus twenty percent of Plaintiff's commissary purchases going forward; or (3) endure an attack by a gang member. *Id.* Plaintiff received a call pass and met with a social worker the following day. *Id.* He reported the "issues" with Njos and requested protective custody ("PC"). *Id.* The social worker sent him to "unapproved PC intake right away." *Id.* The same day, Plaintiff submitted all necessary paperwork for protective custody to Counselor Cowan. *Id.*

He appeared at a hearing before Counselor Cowan and John Doe 4 (investigative officer) approximately ten days later. (Doc. 1, p. 8). For reasons unrelated to the inmate attack, they denied his request for protective custody. *Id.* They allegedly focused instead on the fact that Plaintiff had previously received three staff assault tickets and two attempted staff assault tickets. *Id.* Plaintiff insists that all, but one, were false. *Id.* He describes the decision to deny his request for protective custody as "malicious." *Id.*

Plaintiff next asked Officer Ward, an internal affairs officer, for protective custody. (Doc. 1, p. 8). Plaintiff described the "issues" with Njos and claimed him as an enemy. *Id.* Officer Ward told Plaintiff "not to worry" because the two inmates would be separated. *Id.* The officer then spoke with Njos "to see whether or not [the] allegations were true." *Id.* Officer Ward ultimately denied Plaintiff's request for protective custody and his request for a polygraph test. *Id.*

Plaintiff next filed an emergency grievance with Warden Butler and a regular grievance with Counselor Cowan, in which he again requested protective custody. (Doc. 1, p. 8). Both individuals "refused or failed to answer [P]laintiff's grievance." *Id.*

Assistant Warden Watson, Supervisor Doe 2, and Officer Ward refused or failed to treat Plaintiff and Njos as enemies. (Doc. 1, p. 8). Five days later, Officer Doe 1 and Supervisor Doe 2 transferred Njos to 8 Gallery, in close proximity to Plaintiff. *Id.* Njos viciously attacked Plaintiff soon thereafter. (Doc. 1, pp. 8-9). Plaintiff sustained numerous injuries, including a chipped tooth, a sore neck, and a head injury that resulted in an open wound, swelling, bruising, scarring, and headaches. (Doc. 1, p. 9). He received treatment for his injuries in the prison's health care unit the same day and brings no claim against the defendants for the denial of adequate medical care. *Id.*

Plaintiff was then sent to segregation while the matter was investigated. (Doc. 1, p. 9). During the investigation, the two inmates were not properly separated. *Id.* On one occasion, an officer almost placed them together in the same cage. *Id.* Officer Doe 1 and Supervisor Doe 2 moved Njos to segregation in 4 Gallery, where Plaintiff was also housed. *Id.* Njos told everyone that Plaintiff was a "snitch." *Id.*

When Plaintiff filed grievances to complain about safety concerns on February 9, 2016, Counselor Doe 3 failed to respond. (Doc. 1, p. 9). On February 11th, Plaintiff was viciously attacked by Inmate Trig, a member of the Latin Folks gang. *Id.* Plaintiff received multiple bruises, cuts on his face, and a 2" scar on his left hand as a result of this attack. *Id.* He includes no allegations suggesting that treatment for these injuries was denied or delayed by the defendants. *Id.* Supervisor Doe 2, Officer Doe 4, Assistant Warden Watson, and Warden Butler knew of Trig's gang membership. *Id.*

Plaintiff was finally approved for protective custody on March 4, 2016. (Doc. 1, p. 9). Supervisor Doe 2 did not designate Njos as an enemy of Plaintiff until March 10, 2016. (Doc. 1, pp. 9-11). He blames the delay on a general lack of funding for investigations of rape in state

prisons under the Prison Rape Elimination Act (“PREA”). *Id.* Warden Butler refused to conduct an investigation into Plaintiff’s allegations of rape. (Doc. 1, pp. 9-10). Menard allegedly has no PREA office, and Plaintiff’s letters to the Illinois State Police, Warden Butler, Assistant Warden Watson, Supervisor Doe 2, and Officer Ward were never answered. (Doc. 1, p. 10).

Finally, Plaintiff complains that he was placed in “black stripes” for a longer period of time than Njos, which resulting in his restriction to certain areas of the prison, including two galleries used to house weapons violators and staff assaulters. (Doc. 1, p. 9). Assistant Warden Watson “would pick and choose” who received this punishment without conducting a collateral review. (Doc. 1, p. 10).

Plaintiff now sues Warden Butler, Assistant Warden Watson, Counselor Cowan, Officer Ward, Officer Doe 1, Supervisor Doe 2, Counselor Doe 3, and Officer Doe 4 for failing to protect him in violation of the Eighth Amendment. (Doc. 1, pp. 10-11). He seeks declaratory judgment and money damages against all of the defendants. *Id.*

### **Discussion**

To facilitate the orderly management of future proceedings in this case, and in accordance with the objectives of Federal Rules of Civil Procedure 8(e) and 10(b), the Court deems it appropriate to organize the claims in Plaintiff’s *pro se* Complaint (Doc. 1) into the following counts:

- Count 1 -** Eighth Amendment claim against the defendants for failing to protect Plaintiff from the threat to Plaintiff’s safety posed by Njos, Trig, and other members of the Latin Folks from September 2015 until March 2016 at Menard.
  
- Count 2 -** Claim against defendants for violating the Federal Prison Rape Elimination Act.

As discussed in more detail below, Count 1 survives screening and shall receive further review

against all of the defendants. However, Count 2 does not and shall therefore be dismissed. Any other claims not addressed herein are considered dismissed without prejudice from this action.

### **Count 1**

The Eighth Amendment to the United States Constitution protects prisoners from cruel and unusual punishment. U.S. CONST., amend. VIII. Prison officials have a duty under the Eighth Amendment to protect prisoners from violence at the hands of other prisoners. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (internal citations omitted); *Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2006). However, prison officials are not constitutionally liable for every harm that befalls an inmate. *Farmer*, 511 U.S. at 834. To articulate a claim against a prison official who has denied a request for protective custody, a plaintiff must allege that (1) the denial of his request for protective custody posed a substantial risk of serious harm to the plaintiff; and (2) the prison official acted with deliberate indifference to that risk. *Hoban v. Godinez*, 502 F. App'x 574, 578 (7th Cir. 2012) (citing *Farmer*, 511 U.S. at 834, 837; *Dale v. Poston*, 548 F.3d 563, 569 (7th Cir. 2008)).

Deliberate indifference is shown when a prison official is aware of a specific, impending, and substantial threat to the plaintiff's safety, often by showing that he complained to prison officials about a *specific* threat to his safety. *Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996). *See, e.g., Wright v. Miller*, 561 F. App'x 551, 555 (7th Cir. 2014) ("Even without an actual injury, the mere probability of the harm to which [an inmate is exposed] can be sufficient to create liability."). A prison official who intentionally and with reckless disregard exposes an inmate to even a "heightened risk of future injury" may be liable for deliberate indifference. *Id.* (citing *Budd v. Motley*, 711 F.3d 840, 843 (7th Cir. 2013); *Thomas v. Illinois*, 697 F.3d 612, 614-16 (7th Cir. 2012) ("hazard, or probabilistic harm" could allow recovery); *Irving v. Dormire*, 519 F.3d

441, 449 (8th Cir. 2008) (guard's alleged attempts to induce other inmates to assault plaintiff "posed a substantial risk of serious harm to [the prisoner's] future health").

The allegations in the Complaint suggest that each defendant had knowledge of the risks posed to Plaintiff's health and safety by Njos. Plaintiff claims that the defendants placed him in a cell with Njos, despite their knowledge that he was a violent and aggressive inmate and a gang leader. Even after Plaintiff reported being raped, these defendants would not entertain his request for placement in protective custody. They failed or refused to investigate his claims and did not list Njos as Plaintiff's enemy until almost seven months after the two inmates were initially housed together. As a result of this delay, Plaintiff was attack again by Inmate Trig, another member of the Latin Folks. These allegations suggest that each of the named defendants acted or failed to act despite knowing that Plaintiff faced a substantial risk of serious harm. *Farmer*, 511 U.S. at 843-44. Of course, whether each of the defendants actually responded to Plaintiff's requests for protective custody, investigation of his claims, and placement of Njos on his enemy's list with deliberate indifference remains to be determined. At this early stage, the Court cannot dismiss Count 1 against these defendants.

## **Count 2**

The Complaint fails to articulate a viable claim against the defendants under the Prison Rape Elimination Act ("PREA"), 42 U.S.C. § 15607. The PREA was intended to "increase the accountability of prison officials" and "protect the Eighth Amendment rights of Federal, State, and local prisoners," among other things. *Id.* However, federal courts have consistently found that the language of the statute gives rise to no private right of action. *See Ross v. Gossett*, 2016 WL 335991, at \*4 (S.D. Ill. 2016) (surveying cases and holding that PREA does not include a privation right of action) (citing *Amaker v. Fischer*, 2014 WL 4772202, at \*14 (W.D.N.Y. Sept.

24, 2014); *Krieg v. Steele*, 599 F. App'x 231, 232 (5th Cir. 2015) (citing cases); *Collen v. Yamaoka*, 2015 WL 793085, at \*3 (D. Haw. Feb. 25, 2015) (citing cases); *Porter v. Jennings*, 2012 WL 1434986, at \*1 (E.D. Cal. Apr. 25, 2012) (citing cases)). *See also Amaya v. Butler*, 2017 WL 2255607, at \*5 (S.D. Ill. May 23, 2017) (same); *Ephrain v. Gossett*, 2016 WL 3390659, at \*5 (C.D. Ill. June 17, 2016) (same). This Court also finds no private right of action that arises under PREA. Count 2 shall therefore be dismissed with prejudice.

### **Identification of Unknown Defendants**

Plaintiff shall be allowed to proceed with Count 1 against Defendants John Doe 1 (placement officer), John Doe 2 (investigative affairs supervisor), John Doe 3 (counselor), and John Doe 4 (investigative officer). Before service of the Complaint can be made on these defendants, each must be identified with specificity. The Seventh Circuit has recognized that a plaintiff should have the opportunity to engage in limited discovery to ascertain the identity of unknown defendants when a complaint states specific allegations describing conduct of individual prison officials sufficient to raise a constitutional claim. *Rodriguez*, 577 F.3d at 832. Discovery aimed at identifying the unknown defendants is properly directed to the prison warden. In this case, Warden Butler and Assistant Warden Watson are already named as defendants. They shall both be responsible for responding to discovery, informal or otherwise, aimed at identifying the four unknown defendants (*i.e.*, John Doe ##1-4). Guidelines for discovery will be set by the United States Magistrate Judge. Once the names of these defendants are discovered, Plaintiff shall file a motion to substitute each newly identified defendant in place of the generic designation in the case caption and throughout the Complaint.

### **Disposition**

**IT IS HEREBY ORDERED** that **COUNT 2** is **DISMISSED** with prejudice for failure



to state a claim upon which relief may be granted.

**IT IS ORDERED** that **COUNT 1** is subject to further review against Defendants **N. WARD, COWAN, KIMBERLY BUTLER, CAMERON WATSON, JOHN DOE 1** (Placement Officer), **JOHN DOE 2** (Investigative Affairs Supervisor), **JOHN DOE 3** (Counselor), and **JOHN DOE 4** (Investigative Officer).

As to **COUNT 1**, the Clerk of Court shall prepare for Defendants **WARD, COWAN, BUTLER, and WATSON** and, once identified, **JOHN DOE ##1-4**: (1) Form 5 (Notice of a Lawsuit and Request to Waive Service of a Summons), and (2) Form 6 (Waiver of Service of Summons). The Clerk is **DIRECTED** to mail these forms, a copy of the Complaint (Doc. 1), and this Memorandum and Order to each Defendant's place of employment as identified by Plaintiff. If a Defendant fails to sign and return the Waiver of Service of Summons (Form 6) to the Clerk within 30 days from the date the forms were sent, the Clerk shall take appropriate steps to effect formal service on that Defendant, and the Court will require that Defendant to pay the full costs of formal service, to the extent authorized by the Federal Rules of Civil Procedure.

**IT IS FURTHER ORDERED** that service shall not be made on Defendants **JOHN DOE ##1-4** until such time as Plaintiff has identified these defendants by name in a properly filed Motion for Substitution. Plaintiff is **ADVISED** that it is his responsibility to provide the Court with the names and service addresses for these individuals.

With respect to a Defendant who no longer can be found at the work address provided by Plaintiff, the employer shall furnish the Clerk with the Defendant's current work address, or, if not known, the Defendant's last-known address. This information shall be used only for sending the forms as directed above or for formally effecting service. Any documentation of the address shall be retained only by the Clerk. Address information shall not be maintained in the court file

or disclosed by the Clerk.

Plaintiff shall serve upon Defendants (or upon defense counsel once an appearance is entered), a copy of every pleading or other document submitted for consideration by the Court. Plaintiff shall include with the original paper to be filed a certificate stating the date on which a true and correct copy of the document was served on Defendants or counsel. Any paper received by a district judge or magistrate judge that has not been filed with the Clerk or that fails to include a certificate of service will be disregarded by the Court.

Defendants are **ORDERED** to timely file an appropriate responsive pleading to the Complaint and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

Pursuant to Local Rule 72.1(a)(2), this action is **REFERRED** to United States Magistrate Judge **Stephen C. Williams** for further pre-trial proceedings, including a plan for discovery aimed at identifying the unknown defendants.

Further, this entire matter shall be **REFERRED** to United States Magistrate Judge **Williams** for disposition, pursuant to Local Rule 72.2(b)(2) and 28 U.S.C. § 636(c), *if all parties consent to such a referral*.

If judgment is rendered against Plaintiff, and the judgment includes the payment of costs under § 1915, Plaintiff will be required to pay the full amount of the costs, despite the fact that his application to proceed *in forma pauperis* was granted. *See* 28 U.S.C. § 1915(f)(2)(A).

Plaintiff is **ADVISED** that at the time application was made under 28 U.S.C. § 1915 for leave to commence this civil action without being required to prepay fees and costs or give security for the same, the applicant and his or her attorney were deemed to have entered into a stipulation that the recovery, if any, secured in the action shall be paid to the Clerk of the Court, who shall pay therefrom all unpaid costs taxed against plaintiff and remit the balance to plaintiff.

Local Rule 3.1(c)(1).

Finally, Plaintiff is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than **7 days** after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* FED. R. CIV. P. 41(b).

**IT IS SO ORDERED.**

**DATED: July 25, 2017**

**s/ Michael J. Reagan**  
**Chief Judge**  
**United States District Court**