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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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JAMES ATKINS,  
  
v.  
BRIAN E. WILLIAMS, SR. *et al.*,  
  
Plaintiff,  
  
Defendants.

Case No. 3:12-cv-00288-MMD-WGC

ORDER

This is a *pro se* prisoner civil rights action filed pursuant to 42 U.S.C. § 1983.

**I. PROCEDURAL HISTORY**

Plaintiff was incarcerated when he initiated this action, but has since been released from custody. On June 8, 2012, the Court entered an order screening the original complaint, dismissing certain claims with prejudice, and dismissing certain claims with leave to amend. (Dkt. no. 3.) Plaintiff filed a first amended complaint on July 9, 2012. (Dkt. no. 5.) On September 26, 2012, the Court entered an order screening the first amended complaint. (Dkt. no. 6.) The order allowed plaintiff's Eighth Amendment claim against John Doe defendant #1 to proceed, and dismissed all other claims against all named defendants. (*Id.*) The screening order of September 26, 2012, directed plaintiff to conduct limited discovery to ascertain the identity of John Doe defendant #1, as referenced in the amended complaint, and then to file a second amended complaint naming that defendant. (*Id.*) The Court's screening order directed the Nevada Attorney General to make a limited notice of appearance for the purpose of responding to plaintiff's interrogatories regarding the identity of the Doe defendant. (*Id.*)

1 On October 5, 2012, Deputy Attorney General Steven D. Quinn entered a limited notice  
2 of appearance on behalf of defendants. (Dkt. no. 8.)

3 Instead of complying with this Court's order, plaintiff filed a motion for the  
4 appointment of counsel (dkt. no. 10) and a notice of appeal (dkt. no. 9) of the Court's  
5 screening order of September 26, 2012. On November 9, 2012, the Ninth Circuit Court  
6 of Appeals dismissed the appeal for lack of jurisdiction. (Dkt. no. 12.)

7 By order filed January 28, 2013, the Court denied plaintiff's motion for the  
8 appointment of counsel. (Dkt. no. 15.) In that order, the Court again directed plaintiff to  
9 serve limited discovery requests on defendants in accordance with the Court's  
10 screening order, within thirty (30) days of the entry of the order. (*Id.*) The Court further  
11 directed plaintiff to file a second amended complaint within thirty (30) days of the date  
12 he was served with defendants' responses to interrogatories regarding the identities of  
13 any Doe defendants. (*Id.*) Plaintiff failed to respond to the Court's order.

14 Plaintiff secured counsel on his own. On April 3, 2013, attorney Karlon J. Kidder  
15 filed a notice of appearance on behalf of plaintiff. (Dkt. no. 16.) On July 30, 2013, the  
16 Court directed plaintiff to file a status report apprising the Court of the status of this  
17 action, and in particular, whether any interrogatories had been served and whether any  
18 responses had been received from defendants to ascertain the identity of Doe  
19 defendants. (Dkt. no. 17.)

20 Plaintiff's counsel filed a status report on August 12, 2013, indicating that he had  
21 made contact with counsel for defendants. (Dkt. no. 20.) A status conference was held  
22 before the Magistrate Judge on August 21, 2013. (Dkt. no. 19.) In the status report,  
23 plaintiff's counsel indicated that two persons were named by the Attorney General as  
24 possible John Doe defendant #1 in the amended complaint. Counsel further indicated  
25 that he was unable to contact plaintiff to confirm the names of the defendants and to  
26 proceed with the filing of the second amended complaint. Counsel advised the Court  
27 that numerous attempts to contact plaintiff were made via phone and mail, but failed. At

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1 the status hearing, counsel advised the Court that, in his written communication to  
2 plaintiff, he advised plaintiff of the possible identities of the Doe defendants.

3 Concurrent with the filing of the status report, plaintiff's counsel filed a motion to  
4 withdraw as plaintiff's attorney of record. (Dkt. no. 21.) Counsel cited irreconcilable  
5 differences between he and plaintiff, specifically, plaintiff's failure to communicate with  
6 counsel, failure to cooperate with counsel, and failure to follow counsel's legal advice.  
7 (*Id.*) In light of counsel's motion to withdraw, the Magistrate Judge directed plaintiff to  
8 personally appear at the status conference held on August 21, 2013. (Dkt. no. 22.)  
9 Although counsel for both parties appeared telephonically at the status conference,  
10 plaintiff did not appear. (Dkt. no. 25.) By order filed August 21, 2013, the Magistrate  
11 Judge granted counsel's motion to withdraw as plaintiff's counsel of record. (Dkt. no.  
12 26.) In the same order, plaintiff was ordered to file a second amended complaint within  
13 forty-five (45) days, naming any and all Doe defendants referred to in the first amended  
14 complaint. (*Id.*, at pp. 3-4.) Pursuant to the order of August 21, 2013, the Clerk of Court  
15 served plaintiff with the court-approved form for filing a section 1983 action, along with  
16 instructions, a copy of the first amended complaint, and a copy of the order itself. (*Id.*,  
17 at p. 4.) Plaintiff was cautioned that the second amended complaint must be a complete  
18 document in and of itself, and that the second amended complaint would supercede the  
19 first amended complaint in its entirety. (*Id.*, at p. 4.)

20 On October 4, 2013, plaintiff filed a motion for an extension of time in which to file  
21 a second amended complaint. (Dkt. no. 27.) By order filed October 7, 2013, the  
22 Magistrate Judge granted plaintiff a sixty-day extension of time in which to file a second  
23 amended complaint. (Dkt. no. 28.) On December 10, 2013, plaintiff filed the second  
24 amended complaint. (Dkt. no. 29.) This Court now reviews the second amended  
25 complaint.

## 26 **II. MOTION FOR APPOINTMENT OF COUNSEL**

27 Within his second amended complaint, plaintiff seeks the appointment of  
28 counsel. (Dkt. no. 29, at pp. 5-6.) A litigant in a civil rights action does not have a Sixth

1 Amendment right to appointed counsel. *Storseth v. Spellman*, 654 F.2d 1349, 13253  
2 (9<sup>th</sup> Cir. 1981). In very limited circumstances, federal courts are empowered to request  
3 an attorney to represent an indigent civil litigant. The circumstances in which a court  
4 will make such a request, however, are exceedingly rare, and the court will make the  
5 request under only extraordinary circumstances. *United States v. 30.64 Acres of Land*,  
6 795 F.2d 796, 799-800 (9<sup>th</sup> Cir. 1986); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9<sup>th</sup>  
7 Cir. 1986). A finding of such exceptional circumstances requires that the court evaluate  
8 both the likelihood of success on the merits and the plaintiff's ability to articulate his  
9 claims in pro se in light of the complexity of the legal issues involved. *Id.*; *Terrell v.*  
10 *Brewer*, 935 F.2d 1015, 1017 (9<sup>th</sup> Cir. 1991). Neither of those factors is dispositive and  
11 both must be reviewed together in reaching a decision. *Terrell*, 935 F.3d at 1017. In  
12 the instant case, this Court has previously denied plaintiff's request for the appointment  
13 of counsel. (Dkt. no. 15.) The Court does not find exceptional circumstances that  
14 warrant the appointment of counsel. The request for the appointment of counsel is  
15 denied.

### 16 **III. SCREENING STANDARD**

17 Federal courts must conduct a preliminary screening in any case in which a  
18 prisoner seeks redress from a governmental entity or officer or employee of a  
19 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify  
20 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a  
21 claim upon which relief may be granted or seek monetary relief from a defendant who is  
22 immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however,  
23 must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th  
24 Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
25 elements: (1) that a right secured by the Constitution or laws of the United States was  
26 violated, and (2) that the alleged violation was committed by a person acting under color  
27 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

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1           In addition to the screening requirements under § 1915A, pursuant to the Prison  
2 Litigation Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if  
3 the allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state  
4 a claim on which relief may be granted, or seeks monetary relief against a defendant  
5 who is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for  
6 failure to state a claim upon which relief can be granted is provided for in Federal Rule  
7 of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when  
8 reviewing the adequacy of a complaint or an amended complaint. When a court  
9 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the  
10 complaint with directions as to curing its deficiencies, unless it is clear from the face of  
11 the complaint that the deficiencies could not be cured by amendment. *See Cato v.*  
12 *United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

13           Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See*  
14 *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal  
15 for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any  
16 set of facts in support of the claim that would entitle him or her to relief. *See Morley v.*  
17 *Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes  
18 as true all allegations of material fact stated in the complaint, and the court construes  
19 them in the light most favorable to the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d  
20 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent  
21 standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5,  
22 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard  
23 under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide  
24 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,  
25 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient.  
26 *Id.*; *see Papasan v. Allain*, 478 U.S. 265, 286 (1986).

27           Additionally, a reviewing court should "begin by identifying pleadings [allegations]  
28 that, because they are no more than mere conclusions, are not entitled to the

1 assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "While legal  
2 conclusions can provide the framework of a complaint, they must be supported with  
3 factual allegations." *Id.* "When there are well-pleaded factual allegations, a court should  
4 assume their veracity and then determine whether they plausibly give rise to an  
5 entitlement to relief." *Id.* "Determining whether a complaint states a plausible claim for  
6 relief [is] a context-specific task that requires the reviewing court to draw on its judicial  
7 experience and common sense." *Id.*

8 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed  
9 *sua sponte* if the prisoner's claims lack an arguable basis either in law or in fact. This  
10 includes claims based on legal conclusions that are untenable (e.g., claims against  
11 defendants who are immune from suit or claims of infringement of a legal interest which  
12 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,  
13 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28  
14 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

#### 15 **IV. SCREENING OF THE SECOND AMENDED COMPLAINT**

16 The Court initially notes that plaintiff failed to use the court-approved civil rights  
17 complaint form for filing his second amended complaint, as directed in the order of  
18 August 21, 2013. (Dkt. no. 29; Order at dkt. no. 26.) Plaintiff names Cheryl Burson,  
19 Lloyd Brewster, and Adrian Guerrero as defendants in the caption of the second  
20 amended complaint. (Dkt. no. 29.) Plaintiff brings action based on events alleged to  
21 have occurred on dates in June 2010 at the Southern Desert Correctional Center  
22 (SDCC). Plaintiff fails to name any other persons as defendants, but states within the  
23 second amended complaint: "This also includes any date unknown at this time and  
24 includes anyone and any dates and action in the first amended complaints." (Dkt. no.  
25 29, at p. 5.) In the order of August 21, 2013, plaintiff was specifically cautioned that:  
26 "The second amended complaint must be a complete document in and of itself, and it  
27 will supercede the first amended complaint in its entirety." (Dkt. no. 26, at p. 4.) This  
28 means that plaintiff may not incorporate defendants, dates, or factual allegations by

1 reference to prior complaints filed in this action. Therefore, this Court will not look to the  
2 original or first amended complaint to fill in the deficiencies of the second amended  
3 complaint.

4 Plaintiff alleges that an unnamed correctional officer had him beaten and raped  
5 by another inmate because plaintiff made a rude gesture toward him. (Dkt. no. 29, at p.  
6 2.) Pursuant to the Eighth Amendment, prison officials have a duty to take reasonable  
7 steps to protect inmates from physical abuse. *Hoptowit v. Ray*, 682 F.2d 1237, 1246  
8 (9<sup>th</sup> Cir. 1982); *see also Farmer v. Brennan*, 511 U.S. 825, 833 (1994). To demonstrate  
9 that a prison official was deliberately indifferent to a serious threat to the inmate's  
10 safety, the prisoner must show that "the official [knew] of and disregard[ed] an  
11 excessive risk to inmate safety." *Farmer*, 511 U.S. at 837. In the instant case, plaintiff  
12 has not alleged that any named defendant knew of and disregarded a risk to his safety  
13 that resulted in his being beaten and raped. Plaintiff fails to make any factual allegations  
14 against defendants Cheryl Burson, Lloyd Brewster, and Adrian Guerrero, and therefore,  
15 plaintiff fails to state a cognizable claim against the named defendants. Additionally,  
16 although plaintiff states that he "feels his life is in danger" (dkt. no. 29, at pp. 3-4), this  
17 allegation fails to state a claim because plaintiff is no longer incarcerated and therefore  
18 is no longer under the authority of prison staff whom he allegedly fears.

19 The Court will grant plaintiff one final opportunity to file a third amended  
20 complaint, to correct the deficiencies in the second amended complaint. Plaintiff is  
21 advised that a third amended complaint will supercede the original complaint, as well as  
22 the first and second amended complaints. The third amended complaint must be  
23 complete in itself, and plaintiff may not incorporate by reference to prior complaints filed  
24 in this action. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542,  
25 1546 (9<sup>th</sup> Cir. 1989) (holding that "[t]he fact that a party was named in the original  
26 complaint is irrelevant; an amended pleading supersedes the original"). Plaintiff's third  
27 amended complaint must contain all claims, defendants, and factual allegations that  
28 plaintiff wishes to pursue in this lawsuit. Plaintiff must name the identities of any Doe

1 defendants and must make specific factual allegations as to each defendant he names  
2 in the third amended complaint. Moreover, plaintiff must file the third amended  
3 complaint on this Court's approved civil rights complaint form and must be entitled  
4 "Third Amended Complaint."

5 **V. CONCLUSION**

6 It is therefore ordered that the second amended complaint (dkt. no. 29) is  
7 dismissed with leave to amend.


8 It is further ordered that the Clerk of Court shall send to plaintiff the court-  
9 approved blank form for filing a § 1983 complaint, instructions for the same, and a copy  
10 of plaintiff's second amended complaint (dkt. no. 29). Plaintiff shall use the court-  
11 approved complaint form and he shall write the words "Third Amended" above the  
12 words "Civil Rights Complaint" in the caption on page 1 of the complaint form. The third  
13 amended complaint must be a complete document in and of itself, and it will supercede  
14 all previously filed complaints in this action.

15 It is further ordered that within thirty (30) days from the date of entry of this order,  
16 plaintiff shall file a third amended complaint, identifying any and all Doe defendants  
17 referred to in his prior complaints and alleging specific factual allegations as to each  
18 defendant.

19 It is further ordered that plaintiff's failure to file a third amended complaint in full  
20 compliance with this order will result in the dismissal of this action.

21 It is further ordered that plaintiff's request for the appointment of counsel is  
22 denied.

23 DATED THIS 13<sup>th</sup> day of February 2014.

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27 MIRANDA M. DU  
28 UNITED STATES DISTRICT JUDGE