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2 NOT FOR PUBLICATION

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

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9 Rev. Richard Arno Lee, deceased,
10 represented by Wanda Lee, wife and
Personal Representative,

No. CV-10-0066-PHX-GMS

ORDER

11 Plaintiff,

12 vs.

13 State of Arizona, et al.,

14 Defendants.
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17 Two motions to dismiss are pending before the Court: one filed by the State of
18 Arizona (the “State” or “Arizona”) (Doc. 34) and one filed by Defendants Maricopa County
19 (the “County”), Detective Brian Mackiewicz, #1227 (“Det. Mackiewicz”), and Sheriff Joseph
20 Arpaio (“Sheriff Arpaio”) (collectively the “County Defendants”) (Doc. 25). The Court
21 grants the State’s motion and denies the County Defendants’ motion.

22 **BACKGROUND**

23 The Amended Complaint alleges the following. On April 24, 2008, Plaintiff’s
24 decedent, Reverend Richard Arno Lee (“Lee”) was arrested for the murder of Douglas
25 Spencer. At the time of his arrest, Lee was seventy-four years old. He wore dentures and
26 suffered from a number of other health issues, including diabetes. Det. Mackiewicz, who
27 interviewed Lee for the Maricopa County Sheriff’s Office (“MCSO”), received a kit
28 containing Lee’s medications and false teeth. While in custody with Det. Mackiewicz, Lee

1 mentioned that he was in pain and requested his false teeth and an examination of his blood
2 sugar levels. After several more complaints, Det. Mackiewicz stated that he had the
3 medications and the dentures and promised to talk to the nurse about Lee's condition. Lee,
4 however, never received his dentures or other requested medical care. Lee was processed
5 into the general population of the Maricopa County Towers Jail and shared a cell with two
6 other inmates. The next day, the State filed criminal charges against Lee.

7 Several days later, Lee received a visit from Ms. Lee, the Plaintiff in this action. They
8 filled out the necessary forms to receive a breathing machine and heart pills. Lee never
9 received a breathing machine, heart pills, his false teeth, or a diabetes examination, even after
10 his family made subsequent inquiries about his healthcare. On August 16, 2008, Lee was
11 released from MCSO custody on bail. Lee died on June 21, 2009, without being prosecuted
12 for murder.

13 Plaintiff initiated the instant action. Many of Plaintiff's nine counts are redundant,
14 but the Amended Complaint appears to allege two types of federal claims under 42 U.S.C.
15 § 1983: (1) violation of Lee's federal constitutional protection against cruel and unusual
16 punishment based on Defendants' failure to provide adequate medical care, (2) violation of
17 Lee's federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments based
18 on the officers' failure to provide Lee with *Miranda* warnings prior to his questioning and
19 the right provided to victims under the Arizona law permitting victims to address the Court
20 in proceedings related to Douglas Spencer's death. In addition to the federal claims, the
21 Complaint raises state law claims based on wrongful death and the unconstitutionality of
22 Arizona's victims' rights laws. On July 1, 2010, Plaintiff provided documentary evidence
23 that she is the personal representative of the estate (Doc. 48). The Court now considers the
24 motions to dismiss.

25 LEGAL STANDARD

26 To survive a motion to dismiss for failure to state a claim pursuant to Federal Rule of
27 Civil Procedure 12(b)(6), a complaint must contain more than "labels and conclusions" or
28 a "formulaic recitation of the elements of a cause of action[;]" it must contain factual

1 conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*,
2 443 U.S. 137, 144 n. 3 (1979)). “It is well settled that section 1983 ‘imposes liability for
3 violations of rights protected by the Constitution, not for violations of duties of care arising
4 out of tort law.” *Johnson v. Barker*, 799 F.2d 1396, 1399 (9th Cir. 1986) (quoting *Baker*,
5 443 U.S. at 146).

6 **I. The Eleventh Amendment Bars Claims Against the State.**

7 “Under the Eleventh Amendment, a state is immune from suit under state or federal
8 law by private parties in federal court absent a valid abrogation of that immunity or an
9 express waiver by the state.” *In re Mitchell*, 209 F.3d 1111, 1115–16 (9th Cir. 2000)
10 (footnote omitted), *overruled in part on other grounds by Kimel v. Fla. Bd. of Regents*, 528
11 U.S. 62 (2000). States retain their immunity against suits by private parties under the
12 Eleventh Amendment, “regardless of the relief sought.” *P.R. Aqueduct & Sewer Auth. v.*
13 *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

14 Plaintiff has brought three claims against the State pursuant to 42 U.S.C. § 1983,
15 alleging that the State violated Lee’s civil rights protected by the Fifth, Sixth, and Fourteenth
16 Amendments to the U.S. Constitution by implementing the “Victims Bill of Rights” of the
17 Arizona Constitution. Plaintiff asks the Court to declare the “Victims Bill of Rights” invalid.
18 Plaintiff concedes Arizona has not waived its right to immunity, but contends that section
19 1983 abrogates the State’s immunity to be sued. By its terms, section 1983 applies only to
20 a “person” acting under color of state law. 42 U.S.C. § 1983. The United States Supreme
21 Court has held “that neither a State nor its officials acting in their official capacities are
22 ‘persons’ under [section] 1983.” *Will v. Mich. Dep’t of State Police* 491 U.S. 58, 71 (1989).
23 Although, “[s]ection 1983 provides a federal forum to remedy many deprivations of civil
24 liberties, . . . it does not provide a federal forum for litigants who seek a remedy against a
25 State for alleged deprivations of civil liberties. *Id.* at 66. Because the State is not a person
26 under section 1983, Plaintiff’s claims pursuant to that provision must fail as a matter of law.
27 Therefore, as section 1983 does not abrogate the State’s immunity, the Court does not
28 address the merits of Plaintiff’s claims against Arizona. *See Will*, 491 U.S. at 66 (“Congress,

1 in passing [section] 1983, had no intention to disturb the States’ Eleventh Amendment
2 immunity.”); *Mitchell*, 209 F.3d at 1115–16 (barring actions against states absent a waiver
3 of sovereign immunity).

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5 **II. Plaintiff Has Stated a Claim Against Det. Mackiewicz Based Only on the**
6 **Deprivation of Plaintiff’s Serious Medical Needs.**

7 An individual acting under color of state law is personally liable under section 1983
8 “only upon a showing of personal participation” in the deprivation of a right secured by the
9 Constitution or laws of the United States. *Id.* Plaintiff alleges that Det. Mackiewicz violated
10 Lee’s constitutional rights by forcing him to incriminate himself and by being deliberately
11 indifferent to his serious medical needs. Although Plaintiff does not state a claim based on
12 the alleged self-incrimination, Plaintiff adequately states a claim based on the deprivation of
13 Lee’s medical needs.

14 **A. Self-Incrimination**

15 Plaintiff alleges that Lee was compelled to be a witness against himself in violation
16 of the Fifth Amendment because Det. Mackiewicz failed to read Lee his *Miranda* rights prior
17 to questioning and because Lee was required to attend court hearings where Douglas
18 Spencer’s family was allowed to speak pursuant to the “Victim’s Bill of Rights” provided
19 under Arizona law. “Statements compelled by police interrogations of course may not be
20 used against a defendant at trial, . . . but it is not until their use in a criminal case that a
21 violation of the Self-Incrimination Clause occurs[.]” *Chavez v. Martinez*, 538 U.S. 760, 767
22 (2003). “[Plaintiff] was never made to be a ‘witness’ against himself in violation of the Fifth
23 Amendment’s Self-Incrimination Clause because his statements were never admitted as
24 testimony against him in a criminal case. Nor was he ever placed under oath and exposed
25 to the cruel trilemma of self-accusation, perjury or contempt.” *Id.* (internal quotations
26 omitted).¹ To the contrary, the Amended Complaint alleges that Lee died before the

27 ¹ To the extent Plaintiff raises a claim based on the Confrontation Clause, this claim
28 fails for the same reason, as Plaintiff was never prosecuted for Douglas Spencer’s murder.

1 government could complete its criminal prosecution. Likewise, even if the fact that Douglas
2 Spencer's family spoke about the murder somehow would have violated Lee's Fifth
3 Amendment rights under normal circumstances (and Plaintiff cites no authority to suggest
4 that it would have), no constitutional violation could have occurred here because the
5 allegedly self-incriminating circumstances were never used against Lee in a criminal case.
6 *Cf. Chavez*, 538 U.S. at 767. Accordingly, Plaintiff has failed to allege that Det. Mackiewicz
7 violated Lee's Fifth Amendment rights.

8 **B. Serious Medical Needs**

9 The remainder of Plaintiff's claims focus on the lack of medical care provided to Lee.
10 Although Plaintiff has brought a claim for a violation of the Eighth Amendment's protection
11 against cruel and unusual punishment and the Fifth Amendment's guarantee of due process,
12 the Court construes the Amended Complaint as asserting a Fourteenth Amendment due
13 process claim. "Claims by pretrial detainees are analyzed under the Fourteenth Amendment
14 Due Process Clause, rather than under the Eighth Amendment." *Frost v. Agnos*, 152 F.3d
15 1124, 1128 (9th Cir. 1998). "Because pretrial detainees' rights under the Fourteenth
16 Amendment are comparable to prisoners' rights under the Eighth Amendment, however,
17 [courts] apply the same standards." *Id.*

18 A violation of the right to adequate medical care requires alleging "that the officials
19 acted with deliberate indifference in failing to respond to a serious medical need." *Id.* at
20 1130. In other words, a plaintiff must show (1) a serious medical need and (2) that the
21 defendant's response was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
22 Cir. 2006). This second prong is satisfied by showing a purposeful act or failure to respond
23 and harm caused by the indifference. *Id.* Deliberate indifference "may appear when prison
24 officials deny, delay, or intentionally interfere with medical treatment, or it may be shown
25 by the way in which prison physicians provide medical care." *Hutchinson v. United States*,
26 838 F.2d 390, 394 (9th Cir. 1988) (citing *Estelle v. Gamble*, 429 U.S. at 97, 104-05 (1976)).
27 The indifference to medical needs, however, "must be substantial; a constitutional violation
28 is not established by negligence or 'an inadvertent failure to provide adequate medical care.'"

1 *Anderson v. County of Kern*, 45 F.3d at 1310, 1316 (quoting *Estelle*, 429 U.S. at 105–06).

2 Defendants do not appear to dispute that the Amended Complaint sufficiently alleges
3 that Lee had a serious medical need for his medicine, breathing treatment, and dentures.
4 Therefore, the only remaining issue is whether Det. Mackiewicz acted with deliberate
5 indifference. The Amended Complaint alleges that Lee informed Det. Mackiewicz about the
6 kit containing his pills and dentures, that Lee needed and requested various types of medical
7 care, that his family inquired about the medical care multiple times, and that he ultimately
8 did not receive the medical care he requested. Because the Court must construe the
9 Amended Complaint broadly, *see Hughes*, 449 U.S. at 9, a plausible inference is that Det.
10 Mackiewicz was aware of Lee’s serious medical need for pills, dentures, and other medical
11 care, but nonetheless refused to take the actions needed to ensure that adequate medical care
12 was actually provided. Therefore, Plaintiff adequately alleges that Det. Mackiewicz
13 purposely failed to respond to Lee’s need for medical care, thus causing Lee further injury.²

14 **C. Qualified Immunity**

15 The Court further rejects Defendants’ assertion that qualified immunity warrants
16 dismissal of any claims against Det. Mackiewicz. Qualified immunity will shield a defendant
17 from liability if the plaintiff cannot make a prima facie showing of a constitutional violation
18 or if, notwithstanding a constitutional violation, the constitutional right was not clearly
19 established at the time of the violation. *See Orin v. Barclay*, 272 F.3d 1207, 1214 (9th Cir.
20 2001) (citing *Saucier v. Katz*, 533 U.S. 194, 201–05 (2001)). “If a public official could
21 reasonably have believed that his [or her] actions were legal in light of clearly established
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24 ² It is unclear whether Plaintiff intends to raise a claim based on non-medical
25 conditions of confinement, as the Amended Complaint pleads facts relating to the number
26 of people sharing Lee’s cell. Such an argument would fail, however. Confinement
27 conditions are unconstitutional only where there is an “objectively, sufficiently serious”
28 deprivation and the prison official acts with deliberate indifference. *Farmer v. Brennan*,
511 U.S. 825, 834 (1994) (internal quotations omitted). Lee apparently shared his cell with
two other individuals, and Plaintiff offers no legal or factual argument why this would
constitute an “objectively, sufficiently serious” condition.

1 law and the information he [or she] possessed at the time, then his [or her] conduct falls
2 within the protective sanctuary of qualified immunity.” *Orin*, 272 F.3d at 1214. As Plaintiff
3 has adequately pled a constitutional violation, qualified immunity would apply only if the
4 constitutional right was not clearly established at the time. As described above, however, it
5 is settled law that public officials cannot be deliberately indifferent to a prisoner’s serious
6 medical needs by purposely denying treatment. *See Estelle*, 429 U.S. at 97, 104–05, *Jett*, 439
7 F.3d at 1096, *Hutchinson*, 838 F.2d at 394. The Amended Complaint, read fairly to the *pro*
8 *se* Plaintiff, alleges that Det. Mackiewicz was aware of medical treatment that Lee required,
9 yet prevented him from receiving it. If true, these facts could constitute a denial of a clearly-
10 established constitutional right. Although qualified immunity ultimately may bar claims
11 against Det. Mackiewicz depending on the facts available at the summary judgment stage,
12 the Amended Complaint has alleged facts sufficient to avoid dismissal.

13 **III. Plaintiff Has Stated a Claim Against the County and Sheriff Arpaio.**

14 “[A] municipality can be found liable under [section] 1983 only where the
15 municipality itself causes the constitutional violation at issue. Respondeat Superior or
16 vicarious liability will not attach under [section] 1983.” *City of Canton v. Harris*, 489 U.S.
17 378, 385 (1989) (citing *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658, 694–95
18 (1978) (emphasis deleted)). Liability may attach against a municipality in two ways. First,
19 the municipality itself may violate an individual’s rights through a policy, ordinance,
20 regulation, or other formal decision. *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th
21 Cir. 2002). Second, in certain circumstances, a municipality may be liable based on its
22 omissions if its employee commits a constitutional violation, even if the municipality did not
23 formally direct the employee to do so. *Id.* at 1185. Meanwhile, “[a] supervisor is only liable
24 for constitutional violations of his subordinates if the supervisor participated in or directed
25 the violations, or knew of the violations and failed to act to prevent them.” *Taylor v. List*,
26 880 F.2d 1040, 1045 (9th Cir. 1989).

27 Plaintiff alleges that the County and Sheriff Arpaio failed to train officers in
28 administering medical care, resulting in Det. Mackiewicz and other MCSO employees

1 denying Lee certain medical care. “[T]he inadequacy of police training may serve as the
2 basis for [section] 1983 liability only where the failure to train amounts to deliberate
3 indifference to the rights of persons with whom the police come into contact.” *City of*
4 *Canton*, 489 U.S. at 388. The Amended Complaint alleges that Sheriff Arpaio, acting as the
5 final decision maker for Maricopa County, had a policy and practice of failing to teach
6 officers to recognize when the sick and elderly required certain medical care and how to
7 administer it properly. As training regarding the health needs of prisoners is inherent in
8 creating a well-functioning correctional facility, the Amended Complaint fairly alleges that
9 Sheriff Arpaio and the County were deliberately indifferent to Lee’s medical needs. A
10 plausible inference further arises that some level of training beyond what was given was
11 required given Plaintiff’s allegations that repeated requests for medical care were followed
12 only by repeated failures to provide medical care. The policy of a lack of training may have
13 manifested itself in Det. Mackiewicz’s alleged failure to ensure that Lee received the medical
14 care he needed and in other MCSO employees ignoring repeated inquiries from the Lees
15 regarding medical care. The County Defendants repeatedly assert that Plaintiff must plead
16 more facts surrounding the training policy, but they do not suggest what additional level of
17 detail this *pro se* litigant must allege, at this early stage of litigation, to put the County
18 Defendants fairly on notice of the claims against them. Accordingly, the Court denies the
19 County Defendants’ motion regarding Sheriff Arpaio and the County.

20 **IV. Plaintiff May Not Seek Pain and Suffering Damages**

21 Although Section 1983 does not contain a survivorship provision, Section 1988 of the
22 Civil Rights Act provides that with regard to any matter on which the Act is silent, the
23 applicable law is the law of the state where the district court is located. *See* 42 U.S.C. § 1988.
24 Arizona law disallows pain and suffering damages to survive the death of the person entitled
25 to those damages. *See* Ariz. Rev. Stat. Ann. § 14-3110. Therefore, with respect to Plaintiff’s
26 federal and state claims, Plaintiff has not pled a claim to receive pain and suffering damages,
27 but may seek all other damages allowed by law.

28 **IT IS THEREFORE ORDERED** that the Motion to Dismiss filed by Arizona (Doc.

1 34) is **GRANTED** with prejudice.

2 **IT IS FURTHER ORDERED** that the Motion to Dismiss filed by the County
3 Defendants (Doc. 25) is **GRANTED-IN-PART** and **DENIED-IN-PART**. The Motion is
4 granted only to the extent that (1) Plaintiff alleges a violation of Lee's right against self-
5 incrimination, and to the extent that (2) Plaintiff seeks damages based on Lee's pain and
6 suffering. The Motion is denied in all other respects.

7 DATED this 6th day of October, 2010.

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11 G. Murray Snow
12 United States District Judge
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