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

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Harvey Deon Kendrick,

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No. CV 10-2799-PHX-RCB (LOA)

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Plaintiff,

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ORDER

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vs.

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Sheriff Joseph Arpaio, et al.,

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Defendants.

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On December 28, 2010, Plaintiff Harvey Deon Kendrick, who is confined in the Arizona State Prison Complex-Tucson in Tucson, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. On February 2, 2011, Plaintiff a First Amended Complaint. In a February 28, 2011 Order, the Court denied the deficient Application to Proceed and gave Plaintiff 30 days to file a complete Application to Proceed *In Forma Pauperis*.

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On March 21, 2011, Plaintiff filed a second Application to Proceed *In Forma Pauperis*. In a March 25, 2011 Order, the Court granted the second Application to Proceed and dismissed the First Amended Complaint for failure to comply with Local Rule of Civil Procedure 3.4(a). The Court gave Plaintiff 30 days to file a second amended complaint that cured the deficiencies identified in the Order.

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On April 11, 2011, Plaintiff filed a Second Amended Complaint (Doc. 11).

TERMPSPREF 28

1 **I. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief against
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.
7 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 does not
10 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-
11 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
12 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
13 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 content
17 that allows the court to draw the reasonable inference that the defendant is liable for the
18 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
19 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
20 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
21 allegations may be consistent with a constitutional claim, a court must assess whether there
22 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

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

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1 **II. Second Amended Complaint**

2 Plaintiff should take note that all causes of action alleged in his original Complaint
3 and First Amended Complaint that are not alleged in his Second Amended Complaint are
4 waived. Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990)
5 (“an amended pleading supersedes the original”); King v. Atiyeh, 814 F.2d 565 (9th Cir.
6 1987). Accordingly, the Court will consider only those claims and facts specifically asserted
7 in Plaintiff’s Second Amended Complaint with respect to only those Defendants specifically
8 named in the Second Amended Complaint.

9 In his eight-count Second Amended Complaint, Plaintiff sues the following
10 Defendants: Maricopa County Sheriff Joseph M. Arpaio; Maricopa County/Maricopa County
11 Supervisors, Correctional Health Services (CHS); Documents and Records Officer John Doe
12 One; CHS employees John Does Two, Three, and Four; Visitation Floor Officer John Doe
13 Five; and Booth Officer John Doe Six.

14 In Counts Two, Three, Four, Five, and Seven, Plaintiff alleges violations of the Eighth
15 Amendment prohibition against cruel and unusual punishment as it relates to his medical
16 care. In Counts One, Six, and Eight, Plaintiff invokes the Court’s supplemental jurisdiction
17 and asserts state law negligence claims.

18 In his Request for Relief, Plaintiff seeks monetary damages, court costs, fees, and
19 interest.

20 **III. Federal Claims - Counts Two, Three, Four, Five, and Seven**

21 **A. Allegations**

22 Plaintiff alleges that he was assaulted at the Maricopa County Fourth Avenue Jail and
23 was “slammed to the ground on his head.”

24 In Count Two, Plaintiff contends that Defendant John Doe Two was deliberately
25 indifferent to Plaintiff’s medical needs because he failed to refer Plaintiff to a neurologist or
26 for neuropsychological testing. Plaintiff alleges that he was not checked for a concussion or
27 provided with a brain scan or magnetic resonance imaging scan. Plaintiff alleges that
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1 Defendant John Doe Two claimed that “there were budgetary restrictions by the County on
2 inmate medical care.”

3 In Count Three, Plaintiff contends that Defendant John Doe Two informed Plaintiff
4 that Plaintiff need surgery to repair the third-degree shoulder separation that occurred as a
5 result of the assault, but that surgery would not be performed and Plaintiff would remain in
6 permanent pain and would have limited mobility. Plaintiff alleges that Defendant John Doe
7 Two was deliberately indifferent because he failed to schedule, prescribe, or order the
8 necessary surgery. Plaintiff asserts that Defendant John Doe Two claimed that surgery was
9 not being ordered because of “budgetary restrictions by the County Supervisors.”

10 In Count Four, Plaintiff contends that Defendant John Doe Three examined Plaintiff,
11 informed Plaintiff that he needed shoulder surgery, told Plaintiff that he would recommend
12 surgery, but explained that “surgery is a money issue.” Plaintiff claims that Defendant John
13 Doe Three was deliberately indifferent because he did not recommend or perform the surgery
14 because “it was ‘a money issue.’”

15 In Count Five, Plaintiff alleges that he was examined by Defendant John Doe Four,
16 who agreed with the need for shoulder surgery, but explained that “Maricopa County will not
17 provide your needed surgery. The only surgeries performed for inmates are for life
18 threatening issues, not life changing issues.” Plaintiff alleges that Defendant John Doe Four
19 was deliberately indifferent because he failed to provide the surgery due to budgetary
20 restrictions.

21 In Count Seven, Plaintiff asserts that Defendant CHS is a subdivision of Defendant
22 Maricopa County/Maricopa County Supervisors and is deliberately indifferent to Plaintiff’s
23 serious medical needs because it intentionally denied Plaintiff’s surgery for budgetary
24 reasons.

25 **B. Discussion**

26 A pretrial detainee’s claim for unconstitutional conditions of confinement arises from
27 the Fourteenth Amendment Due Process Clause rather than from the Eighth Amendment
28 prohibition against cruel and unusual punishment. Bell v. Wolfish, 441 U.S. 520, 535 and

1 n.16 (1979). Nevertheless, the same standards are applied, requiring proof that the defendant
2 acted with deliberate indifference. See Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

3 Not every claim by a prisoner relating to inadequate medical treatment states a
4 violation of the Eighth or Fourteenth Amendment. To state a § 1983 medical claim, a
5 plaintiff must show that the defendants acted with “deliberate indifference to serious medical
6 needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429
7 U.S. 97, 104 (1976)). A plaintiff must show (1) a “serious medical need” by demonstrating
8 that failure to treat the condition could result in further significant injury or the unnecessary
9 and wanton infliction of pain and (2) the defendant’s response was deliberately indifferent.
10 Jett, 439 F.3d at 1096 (quotations omitted).

11 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
12 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both know
13 of and disregard an excessive risk to inmate health; “the official must both be aware of facts
14 from which the inference could be drawn that a substantial risk of serious harm exists, and
15 he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate
16 indifference in the medical context may be shown by a purposeful act or failure to respond
17 to a prisoner’s pain or possible medical need and harm caused by the indifference. Jett, 439
18 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally
19 denies, delays, or interferes with medical treatment or by the way prison doctors respond to
20 the prisoner’s medical needs. Estelle, 429 U.S. at 104-05; Jett, 439 F.3d at 1096.

21 Liberally construed, Plaintiff has stated a Fourteenth Amendment deliberate-
22 indifference claim in Count Seven against Defendant Maricopa County/Maricopa County
23 Supervisors regarding its policy of restricting necessary medical procedures based on
24 budgetary restrictions. The Court will require Defendant Maricopa County/Maricopa County
25 Supervisors to answer Count Seven of the Second Amended Complaint.

26 As to Defendants John Does Two, Three, and Four, Plaintiff has failed to state
27 deliberate-indifference claims. Plaintiff only alleges that these Defendants were acting
28 pursuant to Defendant Maricopa County’s policy; Plaintiff has not shown that these

1 Defendants were responsible for the policy or had the authority to change the policy. Thus,
2 the Court will dismiss without prejudice Defendants John Does Two, Three, and Four, and
3 Counts Two, Three, Four, and Five.

4 In addition, Defendant Correctional Health Services is an improper Defendant.
5 Municipalities and other local governing bodies are included among those “persons” who
6 may be sued under § 1983. Monell v. Department of Social Services of New York, 436 U.S.
7 658, 690-91 (1978). Because Defendant Correctional Health Services is an administrative
8 subdivision of Maricopa County and not a municipal corporation, a local governing body or
9 a private corporation, it is not a “person” amenable to suit under § 1983. Maricopa County
10 is responsible for providing medical care to county jail inmates. See Ariz. Rev. Stat. § 11-
11 291(A). Any actions concerning a county policy must be brought against the county itself
12 and not against an administrative subdivision of the county. Thus, Defendant Correctional
13 Health Services is an improper defendant and will be dismissed from this action.

14 **IV. State Law Claims**

15 **A. Allegations**

16 In Count One, Plaintiff alleges that Defendant John Doe One negligently released
17 Plaintiff despite the trial court finding Plaintiff to be “non-bondable.” Plaintiff claims that
18 the negligent release “caused California authorities to contact [the Maricopa County Sheriff’s
19 Office, which] negligently informed Calif. authorities that Plaintiff had not been released but
20 that Plaintiff had ‘escaped’ from work furlough [. . . T]his false information caused
21 California authorities to file an arrest warrant with the U.S. Marshal[’]s Office.” Plaintiff
22 alleges that the United States Marshal “hunted Plaintiff as an armed and dangerous escapee.”
23 Plaintiff contends that the negligent acts of Defendant John Doe One and the Maricopa
24 County Sheriff’s Office caused Plaintiff to miss court and trial dates and changed Plaintiff’s
25 plea agreement offers.

26 In Count Six, Plaintiff alleges that Defendant Arpaio “is responsible for any and all
27 claims for damages occurring to the inmate to whom hospital or medical services [are]
28 required on account of injuries that give rise to the claims” and that Plaintiff was denied

1 medical treatment for financial and economic reasons. Plaintiff alleges that this violated
2 Arizona Revised Statutes § 31-161 and constitutes a breach of Defendant Arpaio’s duty of
3 care.

4 In Count Eight, Plaintiff alleges that Defendants John Doe Five and Six negligently
5 breached security protocol procedure and that Plaintiff was assaulted as a result of their
6 negligence.

7 **B. Discussion**

8 Plaintiff has failed to state a claim in Count Six because Maricopa County, not
9 Defendant Arpaio, is responsible for providing medical care to county jail inmates. See Ariz.
10 Rev. Stat. § 11-291(A).¹ Thus, the Court will dismiss without prejudice Count Six and
11 Defendant Arpaio.

12 Liberally construed, Plaintiff has stated negligence claims in Counts One and Eight
13 against the named Defendants—John Does One, Five, and Six. However, the Court will not
14 direct that service be made at this time on these fictitiously named defendants. The Court is
15 unable to identify these individuals, and, as a practical matter, it is virtually impossible for
16 the United States Marshal to serve a summons and complaint upon unknown persons.
17 However, the Court will not dismiss any viable claims against fictitiously named defendants
18 at this time. See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999) (where
19 identity of defendants is unknown prior to filing of complaint, plaintiff should be given an
20 opportunity through discovery to identify the unknown defendants, unless it is clear that
21 discovery would not uncover the identities or that the complaint would be dismissed on other
22 grounds). Plaintiff may use the discovery process to obtain the names of the fictitiously
23 named defendants against whom he has stated viable claims. If Plaintiff later discovers the

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25 ¹Although Arizona Revised Statutes § 31-161 provides that “[a]n inmate shall not be
26 refused health services for financial reasons,” this does not impose a duty of care on
27 Defendant Arpaio. The statute concerns a sheriff’s ability to assess a reasonable fee or co-
28 payment “for each inmate initiated health service that is provided, for each medical visit to
a physician that is referred by a physician, a physician assistant or nurse practitioner or for
prescription drugs that a county jail health services agency dispenses to an inmate.” Ariz.
Rev. Stat. § 31-161(A).

1 identity of these fictitiously named defendants, Plaintiff should seek to amend his Second
2 Amended Complaint to name them, in compliance with Rule 15 of the Federal Rules of Civil
3 Procedure.

4 **V. Warnings**

5 **A. Release**

6 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.
7 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay
8 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result
9 in dismissal of this action.

10 **B. Address Changes**

11 Plaintiff must file and serve a notice of a change of address in accordance with Rule
12 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
13 relief with a notice of change of address. Failure to comply may result in dismissal of this
14 action.

15 **C. Copies**

16 Plaintiff must serve Defendant Maricopa County/Maricopa County Supervisors, or
17 counsel if an appearance has been entered, a copy of every document that he files. Fed. R.
18 Civ. P. 5(a). Each filing must include a certificate stating that a copy of the filing was
19 served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit an additional copy of every filing
20 for use by the Court. See LRCiv 5.4. Failure to comply may result in the filing being
21 stricken without further notice to Plaintiff.

22 **D. Possible Dismissal**

23 If Plaintiff fails to timely comply with every provision of this Order, including these
24 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
25 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
26 comply with any order of the Court).

27 **IT IS ORDERED:**

28 (1) Counts Two through Six are **dismissed** without prejudice.

1 (2) Defendants Arpaio, Correctional Health Services, and John Does Two, Three,
2 and Four are **dismissed** without prejudice.

3 (3) Defendant Maricopa County/Maricopa County Supervisors must answer Count
4 Seven.

5 (4) The Clerk of Court must send Plaintiff a service packet including the Second
6 Amended Complaint (Doc. 11), this Order, and both summons and request for waiver forms
7 for Defendant Maricopa County/Maricopa County Supervisors.

8 (5) Plaintiff must complete and return the service packet to the Clerk of Court
9 within 21 days of the date of filing of this Order. The United States Marshal will not provide
10 service of process if Plaintiff fails to comply with this Order.

11 (6) If Plaintiff does not either obtain a waiver of service of the summons or
12 complete service of the Summons and Second Amended Complaint on Defendant Maricopa
13 County/Maricopa County Supervisors within 120 days of the filing of the Complaint or
14 within 60 days of the filing of this Order, whichever is later, the action may be dismissed.
15 Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(I).

16 (7) The United States Marshal must retain the Summons, a copy of the Second
17 Amended Complaint, and a copy of this Order for future use.

18 (8) The United States Marshal must notify Defendant Maricopa County/Maricopa
19 County Supervisors of the commencement of this action and request waiver of service of the
20 summons pursuant to Rule 4(j)(2) of the Federal Rules of Civil Procedure and Rule 4.1(c)
21 of the Arizona Rules of Civil Procedure. The notice to Defendant must include a copy of this
22 Order. **The Marshal must immediately file signed waivers of service of the summons.**
23 **If a waiver of service of summons is returned as undeliverable or is not returned by**
24 **Defendant within 30 days from the date the request for waiver was sent by the Marshal,**
25 **the Marshal must:**

26 (a) personally serve copies of the Summons, Second Amended Complaint,
27 and this Order upon Defendant pursuant to Rule 4(j)(2) of the Federal Rules of Civil
28 Procedure; and


1 (b) within 10 days after personal service is effected, file the return of service
2 for Defendant, along with evidence of the attempt to secure a waiver of service of the
3 summons and of the costs subsequently incurred in effecting service upon Defendant.
4 The costs of service must be enumerated on the return of service form (USM-285) and
5 must include the costs incurred by the Marshal for photocopying additional copies of
6 the Summons, Second Amended Complaint, or this Order and for preparing new
7 process receipt and return forms (USM-285), if required. Costs of service will be
8 taxed against the personally served Defendant pursuant to Rule 4(d)(2) of the Federal
9 Rules of Civil Procedure, unless otherwise ordered by the Court.

10 (9) **If Defendant Maricopa County/Maricopa County Supervisors agrees to**
11 **waive service of the Summons and Second Amended Complaint, Defendant Maricopa**
12 **County/Maricopa County Supervisors must return the signed waiver forms to the**
13 **United States Marshal, not the Plaintiff.**

14 (10) Defendant Maricopa County/Maricopa County Supervisors must answer Count
15 Seven of the Second Amended Complaint or otherwise respond by appropriate motion within
16 the time provided by the applicable provisions of Rule 12(a) of the Federal Rules of Civil
17 Procedure.

18 (11) This matter is referred to Magistrate Judge Lawrence O. Anderson pursuant to
19 Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as
20 authorized under 28 U.S.C. § 636(b)(1).

21 DATED this 20th day of April, 2011.

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25 Robert C. Broomfield
26 Senior United States District Judge
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