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

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10 Johnny Gabriel Valenzuela,

11 Plaintiff,

12 vs.

13 D. Hurley, et al.,

14 Defendants.

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) No. CV 11-0268-PHX-RCB (JFM)

) **ORDER TO SHOW CAUSE**

16 Plaintiff Johnny Gabriel Valenzuela brought this civil rights action pro se under 42
17 U.S.C. § 1983 against Mesa Police Officers D. Hurley and S. Cervantes for alleged excessive
18 force (Doc. 1). Plaintiff is now represented by counsel (Doc. 8). Before the Court is
19 Defendants’ Motion for Summary Judgment (Doc. 15). Despite service of the motion on
20 Plaintiff’s counsel, Plaintiff’s counsel has not responded to the motion. However, Plaintiff’s
21 counsel has filed discovery requests.

22 The Court will order Plaintiff to show cause why Defendants’ motion should not be
23 treated as unopposed.

24 **I. Background**

25 Plaintiff’s claim arose on January 2, 2011, when Defendants stopped the car in which
26 he was riding and ordered him out of the car (Doc. 1). Plaintiff alleged that when he stepped
27 out of the car, Defendants tazored him in the thigh; immediately forced him face down onto
28 the ground; and punched, kicked, and kned him in the back and head nearly rendering him

1 unconscious (id.).

2 On September 15, 2011, Defendants filed a Motion for Summary Judgment seeking
3 judgment on the ground that Plaintiff's claim is barred under Heck v. Humphrey, 512 U.S.
4 477, 486-87 (1994) (Doc. 15). The motion is supported by affidavits from each Defendant,
5 who attest that they observed Plaintiff with a substance consistent with methamphetamine,
6 that he did not comply with commands to exit the car, that he was combative and punched
7 officers, and that they used only the amount of force necessary to remove him from the car
8 and secure him in handcuffs (Doc. 16, Ex. 1, Cervantes Aff. ¶¶ 5-7; Ex. 2, Hurley Aff. ¶¶ 4-
9 8). Defendants also submit copies of state court documents showing that Plaintiff pled guilty
10 to possession of dangerous drugs and aggravated assault (id., Exs. 5-6). Based on this
11 evidence, Defendants argue that Plaintiff's excessive-force claim is barred because it stems
12 from the same facts that led to his guilty plea and success in this action would necessarily
13 imply the invalidity of his aggravated assault conviction (Doc. 15 at 5-7).

14 As stated, Plaintiff did not file a response to the motion.

15 **II. Order to Show Cause**

16 Under the Federal and Local Rules of Civil Procedure, service may be made by
17 electronic means using the court's transmission facilities, in this case, the Court's Case
18 Management/Electronic Case Filing (CM/ECF) system. Fed. R. Civ. P. 5(b)(2)(E) and
19 5(b)(3); LRCiv. 5.5 (incorporating the District of Arizona's Electronic Case Filing
20 Administrative Policies and Procedure Manual, § 2(D)(2) & (3), which provides that service
21 is accomplished through the Notice of Electronic Filings (NEFs) generated upon filings made
22 through CM/ECF).

23 The certificate of service accompanying Defendants' Motion for Summary Judgment
24 indicates that service was made electronically pursuant to Rule 5(b)(2)(E) and 5(b)(3), i.e.,
25 the motion was transmitted using CM/ECF (Doc. 15 at 7). On the Court's docket, the
26 electronic receipt for the summary judgment motion reflects that it was electronically mailed
27 to Plaintiff's counsel at bob@dosseylaw.com and alyssa@dosseylaw.com on September 15,
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1 2011 (Doc. 15). Thus, the record shows that Plaintiff received a copy of the motion but
2 failed to file a response.

3 Since the filing of Defendants' motion, however, Plaintiff filed a Joint Discovery Plan
4 and, on January 4, 2011, submitted a Notice of Service of Plaintiff's Request for Production
5 of Documents (Docs. 17, 31). These filings demonstrate Plaintiff's intent to litigate this
6 action. Under these circumstances, the Court hesitates in granting the dispositive motion
7 base on the failure to oppose it.

8 Plaintiff will be ordered to (1) explain why an opposition brief was not filed and
9 (2) show cause why Defendants' Motion for Summary Judgment should not be treated as
10 unopposed. Plaintiff must respond to this Order to Show Cause within 10 days.

11 **IT IS ORDERED that** within **10 days** from the date of this Order, Plaintiff must
12 explain why an opposition brief was not filed and show cause why Defendants' motion
13 should not be treated as unopposed.

14 DATED this 7th day of February, 2012.

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18 Robert C. Broomfield
19 Senior United States District Judge
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