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

8 Joe Newman,
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10 Plaintiff,

11 v.

12 Show Low Police Department; Steve
13 Williams; Officer Spears; Officer
14 Fechtelkotter; Officer Roby; Officer
15 Douglas; Torel Nichols; and Commander
16 McNeil,

Defendants.

No. CV-13-08005-PCT-JAT

ORDER

17 Pending before the Court are (1) Plaintiff's Motion for Extension of Time/Third
18 Motion to Appoint Counsel (Doc. 22), (2) Defendant Torel Nichols' Motion to Dismiss
19 (Doc. 14), (3) Defendants Show Low Police Department, Steven L. Williams, Jason
20 Spear, Shawn T. Roby, Cory L. Fechtelkotter, Kenneth E. Douglass, and Jeff McNeil's
21 Joinder in Defendant Torel Nichols' Motion to Dismiss (Doc. 24), and (4) Defendants'
22 Motion for Hearing or Conference (Doc. 26).

23 **I. BACKGROUND**

24 On January 8, 2013, Plaintiff filed a Complaint against Defendants. In his
25 Complaint, Plaintiff alleges that he was physically injured when Show Low Police
26 officers assaulted him with excessive force on January 27, 2011. (Doc. 1 at 1). Plaintiff
27 also alleges that Steve Williams "along with the other named officers" falsely arrested
28 Plaintiff on January 27, 2011. (*Id.*).

1 Plaintiff also filed a Motion to Appoint Counsel on January 8, 2013. The Court
2 denied the Motion reasoning that:

3 There is no constitutional right to appointment of
4 counsel in a civil case. *Ivey v. Bd. of Regents of Univ. of*
5 *Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). The Court,
6 however, does have the discretion to appoint counsel in
7 “exceptional circumstances.” See 28 U.S.C. § 1915; *Wilborn*
8 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Aldabe v.*
9 *Aldabe*, 616 F.2d 1089 (9th Cir. 1980). In order to determine
10 whether exceptional circumstances exist, the Court evaluates
11 the plaintiff’s “likelihood of success on the merits [and] the
12 ability of the [plaintiff] to articulate his or her claim *pro se* in
13 light of the complexity of the legal issues involved.”
14 *Richard v. Harper*, 864 F.2d 85, 87 (9th Cir. 1988) (quoting
15 *Weygant v. Look*, 718 F.2d 952,954 (9th Cir. 1983)); see also
16 *Wilborn*, 789 F.2d at 1331. Neither factor is determinative,
17 and the Court must consider both factors before reaching a
18 decision on a request for appointment of counsel. See
19 *Wilborn*, 789 F.2d at 1331.

20 At this stage of the litigation, the Court is unable to
21 determine whether Plaintiff will succeed on the merits. The
22 Court has read the complaint and finds that Plaintiff is able to
23 articulate his claims *pro se*, and that the issues presented are
24 not particularly complex.

25 Accordingly, the Court will deny appointment of
26 counsel at this time.

27 Doc. 6.

28 Thereafter, on February 5, 2013, Plaintiff filed another Motion to Appoint
Counsel, apparently seeking reconsideration of the Court’s prior Order denying the
Motion to Appoint Counsel. The Court again denied that request finding that Plaintiff
had provided no reason for the Court to reconsider its prior Order.

Plaintiff has now filed a third Motion to Appoint Counsel. On April 16, 2013,
Defendant Torel Nichols moved to dismiss Plaintiff’s Complaint pursuant to Federal
Rule of Civil Procedure 12(b)(6). Thereafter, on May 7, 2013, Plaintiff filed a

1 “Supplement Amendment to Complaint” (Doc. 23), wherein he attempts to supplement
2 the allegations of his Complaint as alleged against Defendant Torel Nichols. On May 9,
3 2013, the remaining Defendants filed a Motion to Dismiss pursuant to Federal Rule of
4 Civil Procedure 12(b)(6). The Court now rules on the Motions.

5 **II. PLAINTIFF’S MOTION FOR EXTENSION OF TIME/THIRD**
6 **MOTION TO APPOINT COUNSEL (DOC. 22)**

7 In his Motion for Extension of Time/Third Motion to Appoint Counsel, Plaintiff
8 states that he broke his hip on April 27, 2013 and is not to use his leg for 6-8 weeks.
9 (Doc. 22 at 1). Plaintiff also states that he will not know if another procedure is required
10 for another 24 months. (*Id.*). Plaintiff claims that a continuance of this case is required
11 “because the plaintiff is now unable to conduct himself while he is under and in assisted
12 nursing facility for a broken hip and is and will be receiving extended treatment and
13 therapy.” (*Id.* at 1). Plaintiff finally argues that, in light of his “current health obstacles
14 and including the expected kidney cancer surgery and the medical treatment for
15 fibromyalgia[,] the plaintiff needs an appointed counsel.” (*Id.*).

16 With regard to Plaintiff’s Third Request for Appointed Counsel, Plaintiff has again
17 failed to meet the standard for appointing counsel as specified in the Court’s prior two
18 Orders denying Plaintiff counsel. Accordingly, Plaintiff’s Third Motion to Appoint
19 Counsel is denied.

20 With regard to Plaintiff’s request for continuance, it is not clear what Plaintiff is
21 seeking to continue. To the extent Plaintiff’s Motion is attempting to request a stay of
22 this entire case for an unspecified period of time, that request is denied. To the extent
23 that Plaintiff is unable to meet deadlines in this case and seeks extensions of time for
24 particular matters, he may move for extensions on those particular matters as needed.
25 Accordingly, Plaintiff’s Motion for Extension of Time is denied.

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1 **III. DEFENDANT TOREL NICHOLS’ MOTION TO DISMISS (DOC.**
2 **14) AND DEFENDANTS SHOW LOW POLICE DEPARTMENT,**
3 **STEVEN L. WILLIAMS, JASON O. SPEAR, SHAWN T. ROBY,**
4 **CORY L. FECHTELKOTTER, KENNETH E. DOUGLASS, AND**
5 **JEFF MCNEIL’S JOINDER IN DEFENDANT TOREL NICHOLS’**
6 **MOTION TO DISMISS (DOC. 24)**

7 Defendants argue that Plaintiff’s Complaint must be dismissed because: (1)
8 Plaintiff has failed to state a claim upon which relief can be granted pursuant to Federal
9 Rule of Civil Procedure 12(b)(6), (2) the individual Defendants are entitled to absolute or
10 qualified immunity, and (3) Defendant Show Low Police Department is a non-jural
11 entity. Plaintiff did not respond to either Motion to Dismiss. However, after Defendant
12 Nichols filed a Motion to Dismiss, Plaintiff filed a “supplement” to his Complaint, in an
13 attempt to assert additional facts against Defendant Nichols.

14 The Court may dismiss a complaint for failure to state a claim under 12(b)(6) for
15 two reasons: 1) lack of a cognizable legal theory and 2) insufficient facts alleged under a
16 cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
17 1990). To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must
18 meet the requirements of Rule 8. Rule 8(a)(2) requires a “short and plain statement of the
19 claim showing that the pleader is entitled to relief,” so that the defendant has “fair notice
20 of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,
21 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957)).

22 A complaint must contain sufficient factual matter, which, if accepted as true,
23 states a claim to relief that is “plausible on its face.” *Id.* Facial plausibility exists if the
24 pleader pleads factual content that allows the court to draw the reasonable inference that
25 the defendant is liable for the misconduct alleged. *Id.* Plausibility does not equal
26 “probability,” but plausibility requires more than a sheer possibility that a defendant has
27 acted unlawfully. *Id.*

28 In deciding a motion to dismiss under Rule 12(b)(6), the Court must construe the
 facts alleged in a complaint in the light most favorable to the drafter of the complaint, and

1 the Court must accept all well-pleaded factual allegations as true. *Shwarz v. United*
2 *States*, 234 F.3d 428, 435 (9th Cir. 2000).

3 In his Complaint, it appears that Plaintiff is attempting to assert a claim pursuant
4 to 42 U.S.C. section 1983. *See* Doc. 1 (the court can “hear and decide [this] case under
5 42 U.S.C. [§] 1983 statute”). Although Plaintiff alleges that his civil rights were violated,
6 Plaintiff does not specifically identify the basis of his section 1983 claim.

7 Section 1983 is not a source of substantive rights on its own. *Graham v. Connor*,
8 490 U.S. 386, 393–394 (1989). Section 1983 “merely provides ‘a method for vindicating
9 federal rights elsewhere conferred.’” *Id.* at 394 (quoting *Baker v. McCollan*, 443 U.S.
10 137, 144 n. 3 (1979)). “To make out a cause of action under section 1983, plaintiffs must
11 plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of
12 rights secured by the Constitution or federal statutes.” *Gibson v. United States*, 781 F.2d
13 1334, 1338 (9th Cir. 1986) (citing *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962)).
14 “The first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a
15 right ‘secured by the Constitution and laws.’” *Baker*, 443 U.S. at 140.

16 Plaintiff alleges that Show Low Police officers assaulted him with excessive force
17 and falsely arrested him. While the Court and Defendants may be able to guess at what
18 constitutional rights Plaintiff believes have been violated based on these facts, Plaintiff
19 has not identified the basis of his legal causes of action. Plaintiff’s “supplement” to his
20 Complaint¹ purports to state additional factual bases for his claims against Defendant
21 Nichols. (Doc. 23 at 1). However, Plaintiff’s supplement is largely incoherent. For
22 instance, Plaintiff alleges that Defendant Nichols repeatedly dismissed charges for lack of
23 evidence and that Defendant Nichols acknowledges that plaintiff was falsely arrested and
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25 ¹ While a Plaintiff is permitted to file an Amended Complaint within 21 days of
26 service of a motion made under Federal Rule of Civil Procedure 12(b) without seeking
27 leave of Court, the Court is not aware of any rule allowing Plaintiff to file the type of
28 supplement to a Complaint that he filed in this case. Nonetheless, the Court has
considered the additional factual allegations in the supplement for the purposes of
deciding the motions to dismiss.

1 imprisoned. (*Id.*). Plaintiff then alleges that a video used as evidence has been tampered
2 with and altered by a video software company and that all of the officers' sworn
3 statements at the time of Plaintiff's arrest were never heard. (*Id.*). Finally Plaintiff
4 concludes that, "[a]fter the hearing Judge Price had resigned, though Mr. Torel Nichols
5 ignored the facts in order to convict the plaintiff as a criminal abusing his public position
6 in order to try to clear the police department of any responsibility while betray [sic] the
7 publics [sic] trust to be fair[.]" (*Id.*). Due to their incoherent nature, these additional
8 factual allegations do not aid the Court in determining what Plaintiff's legal claims are
9 against any Defendants, nor do the factual allegations appear to give rise to any legal
10 claim.

11 Further, although Plaintiff alleges in a conclusory manner that he was assaulted
12 with excessive force and that Steve Williams, along with other Defendants, falsely
13 arrested him, Plaintiff has failed to plead enough facts to state a claim upon which relief
14 can be granted.

15 Plaintiff alleges in a conclusory manner that he was "falsely arrested." However,
16 that is a legal conclusion. Plaintiff has provided no facts that, if accepted as true, would
17 lead the Court to conclude that Plaintiff was arrested without probable cause in violation
18 of his Fourth Amendment right to be free from unreasonable searches and seizures. *See*
19 *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). Plaintiff next alleges
20 that unspecified Show Low Police Officers used a Taser on him and beat him, which
21 Plaintiff concludes resulted in excessive force. Plaintiff has failed to identify which
22 Defendants, if any, used a Taser on him or beat him and has failed to plead any of the
23 facts surrounding these events. Accordingly, Plaintiff has failed to put the individual
24 Defendants on notice of the claims against them and has, thus, failed to state claim for
25 relief upon which relief can be granted pursuant to Federal Rule of Civil Procedure
26 12(b)(6). Accordingly, Defendants' Motions to Dismiss pursuant to Federal Rule of Civil
27 Procedure 12(b)(6) are granted.

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1 Defendant Nichols argues that the claims in the Complaint must be dismissed
2 against him because he is entitled to absolute immunity for his actions as a Deputy
3 Navajo County Attorney in prosecuting Plaintiff. While Defendant Nichols may indeed
4 be entitled to absolute immunity based on any claims that Plaintiff may have against him,
5 as discussed above, the Court is unable to ascertain the nature of the claims asserted
6 against Defendant Nichols and, thus, cannot determine whether Defendant Nichols is
7 entitled to absolute immunity on those claims.

8 The remaining individual Defendant police officers also move for dismissal
9 claiming they are entitled to qualified immunity on Plaintiff's claims against them.²

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11 ² Defendants assert that the state court already determined that Plaintiff was
12 resisting arrest and using physical force against the Officers and, thus, any claim of
13 excessive force is not subject to reasonable dispute.

14 The Court cannot take evidence on a motion pursuant to Federal Rule of Civil
15 Procedure 12(b)(6) and must accept Plaintiff's version of the facts as true. Nonetheless,
16 Defendants argue that the Court can take judicial notice of the state court's
17 determinations in Plaintiff's state court case for the purpose of determining whether
18 qualified immunity is appropriate. The Court does not agree that the facts in the state
19 court's opinion are a proper subject of judicial notice.

20 While the Court can take judicial notice of the
21 existence of those opinions as they are public records, whose
22 accuracy cannot reasonably be questioned, the Court cannot
23 take judicial notice of the facts in those opinions for their
24 truth. *See, e.g., U.S. v. Ritchie*, 342 F.3d 903, 908–909 (9th
25 Cir. 2003) (Pursuant to Federal Rule of Evidence 201(b),
26 “[f]acts are indisputable, and thus subject to judicial notice,
27 only if they are either ‘generally known’ under Rule
28 201(b)(1) or ‘capable of accurate and ready determination by
resort to sources whose accuracy cannot be reasonably
questioned’ under Rule 201(b)(2).”).

This Court can take notice that other courts stated
certain facts, but cannot take judicial notice of the facts
themselves.

Cooke v. Town of Colorado City, ___F.Supp.2d___, 2013 WL 1189687, at *25 n.4 (D.
Ariz. 2013).

1 While the remaining individual Defendants may indeed be entitled to qualified immunity
2 based on any claims that Plaintiff may have against them, as discussed above, the Court
3 is unable to ascertain the nature of the claims asserted against those Defendants and, thus,
4 cannot determine whether they are entitled to qualified immunity on those claims.

5 Finally, Defendants argue that Defendant Show Low Police Department must be
6 dismissed because it is a non-jural entity. Defendants argue that no statute gives the
7 Show Low Police Department the power to sue or be sued and, thus, it should be
8 dismissed because it is not an entity subject to suit. Plaintiff has not pointed to any
9 authority giving the Show Low Police Department the power to sue or be sued.
10 Accordingly, the Show Low Police Department is a non-jural entity and is dismissed
11 from this case with prejudice.

12 The Court will allow Plaintiff to file an amended complaint. If Plaintiff chooses to
13 file an amended complaint, Plaintiff must identify which Defendant is responsible for
14 which wrongs to adequately put the individual Defendants on notice of the claims against
15 them. *See McHenry v. Renne*, 84 F.3d 1172, 1176, 1178 (9th Cir. 1996) (where
16 complaint links plaintiffs' fact allegations to specific defendants, it [must also] inform
17 defendants of the *legal* claims being asserted.") (emphasis in original). Moreover,
18 Plaintiff must clearly identify his legal theories in separate causes of action. The
19 Complaint must set forth "who is being sued, for what relief, and on what theory, with
20 enough detail to guide discovery." *Id.* at 1177. Further, any amended complaint will
21 serve as the operative pleading in this case, so Plaintiff must include all of his legal
22 theories and the entire factual basis for those theories in the amended complaint. Finally,
23 Plaintiff shall not reassert any legal theories against the Show Low Police Department as
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26 Thus, the Court will not take judicial notice of the state court's factual findings
27 for the purpose of determining qualified immunity. Alternatively, it is unclear whether
28 Defendants intended to argue that *Heck v. Humphrey*, 512 U.S. 477 (1994) somehow bars
Plaintiff's claims in this case or that Plaintiff's claims might otherwise be barred by res
judicata and/or collateral estoppel. As a result, the Court will not address these theories.

1 it has been dismissed with prejudice.

2 Plaintiff is further warned that if he fails to file responses to any future motions
3 filed by Defendants, the Court will deem Plaintiff's failure to respond to be consent to
4 granting the motion. *See* LRCiv 7.2(i).

5 **IV. CONCLUSION**

6 Based on the foregoing,

7 **IT IS ORDERED** that Plaintiff's Motion for Extension of Time/Third Motion to
8 Appoint Counsel (Doc. 22) is denied.

9 **IT IS FURTHER ORDERED** that Defendants' Motion for Hearing or
10 Conference (Doc. 26) is denied as moot.


11 **IT IS FURTHER ORDERED** that Defendant Torel Nichols' Motion to Dismiss
12 (Doc. 14) is denied in part and granted in part.

13 **IT IS FURTHER ORDERED** that Defendants Show Low Police Department,
14 Steven L. Williams, Jason O Spear, Shawn T. Roby, Cory L. Fechtelkotter, Kenneth E.
15 Douglas, and Jeff McNeil's Joinder in Defendant Torel Nichols' Motion to Dismiss (Doc.
16 24) is denied in part and granted in part.

17 **IT IS FURTHER ORDERED** that Defendant Show Low Police Department is
18 dismissed without prejudice because it is a non-jural entity.

19 Pursuant to Federal Rules of Civil Procedure 12(b)(6), Plaintiff's Complaint is
20 dismissed. **IT IS ORDERED** that Plaintiff shall file an amended complaint in
21 compliance with the parameters set forth in this Order within 20 days of the date of this
22 Order. If Plaintiff fails to file an amended complaint within 20 days of the date of this
23 Order, this case will be dismissed with prejudice without further notice.

24 Dated this 10th day of June, 2013.

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James A. Teillborg
Senior United States District Judge