APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16980

LOUIS TAYLOR, a single man,
Plaintiff-Appellee,
v.
COUNTY OF PIMA, a body politic; CITY OF TUCSON, a body politic,
Defendants-Appellants.

D.C. No. 4:15-cv-00152-RM

Appeal from the United States District Court
for the District of Arizona
Rosemary Márquez, District Judge, Presiding

Argued and Submitted August 15, 2018
San Francisco, California

Filed January 17, 2019

Before: Mary M. Schroeder, Eugene E. Siler,[*]
and Susan P. Graber, Circuit Judges.

Opinion by Judge Graber;

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[*] The Honorable Eugene E. Siler, Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Concurrence by Judge Graber;
Dissent by Judge Schroeder

OPINION

GRABER, Circuit Judge:

In 1972, a jury convicted Louis Taylor in Arizona state court of 28 counts of felony murder, on the theory that he had started a deadly fire at a Tucson hotel. In 2012, while still in prison, Taylor filed a state post-conviction petition advancing newly discovered evidence: an expert, using new and more sophisticated investigative techniques, determined that arson did *not* cause the hotel fire. The government disputed Taylor's new theory but nevertheless agreed to the following procedure. The government and Taylor entered into a plea agreement in 2013 under which the original convictions were vacated and, in their place, Taylor pleaded no contest to the same counts, was resentenced to time served, and was released from prison.

Taylor then sued Pima County and the City of Tucson in state court, under 42 U.S.C. § 1983, alleging violations of his constitutional rights to due process and a fair trial. With respect to the County, Taylor alleged unconstitutional practices, policies, and customs regarding criminal prosecutions, including racially motivated prosecutions of African-Americans and a failure to train and supervise deputy prosecutors. The City removed the case to federal court, and the County consented to removal.

The County then moved to dismiss Taylor's operative complaint. Two of the County's arguments are relevant on appeal. First, the County argued that the relevant government officials acted on behalf of the State, not the County; the County asserted that, accordingly, it was entitled to "Eleventh Amendment immunity." Second, the County argued that, because all of Taylor's time in prison was supported by the valid 2013 criminal judgment, Taylor could not recover damages for wrongful incarceration.

The district court granted in part and denied in part the motion to dismiss. The court held that the County was not entitled to Eleventh Amendment immunity. But the court agreed with the County that Taylor could not recover damages for wrongful incarceration. The district court then certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), concluding that resolution of several legal issues "may materially advance the ultimate termination of the litigation."

Both parties applied to this court for permission to appeal. *See* 28 U.S.C. § 1292(b) (permitting an "application for an appeal hereunder"). The County sought permission to appeal the district court's denial of immunity, and Taylor sought permission to appeal the district court's ruling that he may not recover damages for wrongful incarceration.

A motions panel of this court denied both applications to appeal pursuant to § 1292(b). But the motions panel construed the County's application, in part, as a timely notice of appeal from the denial of Eleventh Amendment immunity from suit. *See Cortez v. County of Los Angeles*, 294 F.3d 1186, 1188

(9th Cir. 2002) (holding that we have appellate jurisdiction under the collateral-order doctrine over a denial of Eleventh Amendment immunity from suit (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993))). The motions panel therefore ordered that the appeal proceed under the collateral-order doctrine of 28 U.S.C. § 1291.

In accordance with that order, the parties then filed briefs addressing the issue of the County's asserted immunity under the Eleventh Amendment. At our request, the parties also filed supplemental briefs addressing whether Taylor may recover damages for wrongful incarceration.

A. *Eleventh Amendment Immunity*

The County asserts that we have jurisdiction to review the district court's ruling on Eleventh Amendment immunity under the two jurisdictional provisions noted above: discretionary review under § 1292(b) and the collateral-order doctrine under § 1291.

"When a party seeks a section 1292(b) interlocutory appeal, the court of appeals must undertake a two-step analysis." *Arizona v. Ideal Basic Indus. (In re Cement Antitrust Litig.*), 673 F.2d 1020, 1026 (9th Cir. 1982). First, we determine whether the appeal meets the legal requirements of § 1292(b). *Id.* "If we conclude that the requirements have been met, we may, but need not, exercise jurisdiction. The second step in our analysis is therefore to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction." *Id.*; *see* 28

U.S.C. § 1292(b) ("The Court of Appeals . . . may thereupon, *in its discretion*, permit an appeal to be taken from such order . . . ." (emphasis added)); *see also Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 906 (2015) (stating that a district court's certification under § 1292(b) "may be accepted or rejected in the discretion of the court of appeals"). Where, as here, the motions panel has decided the § 1292(b) issue in the first instance, "we give deference to the ruling of the motions panel." *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 318 (9th Cir. 1996). With respect to the question of Eleventh Amendment immunity, we see no reason to second-guess the motions panel's denial of interlocutory review under § 1292(b).

We therefore turn to whether we have appellate jurisdiction under § 1291. On preliminary review, the motions panel concluded that appellate jurisdiction appeared to be proper under the collateral-order doctrine because the County asserted "Eleventh Amendment immunity." "Although we defer to the ruling of the motions panel granting an order for interlocutory appeal, we have an independent duty to confirm that our jurisdiction is proper." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (internal quotation marks omitted). For the reasons stated below, we now conclude that the collateral-order doctrine does not apply here.

In an interlocutory appeal, we have appellate jurisdiction under 28 U.S.C. § 1291 to consider claims of immunity from *suit*, but we lack such appellate jurisdiction to consider claims of immunity from *liability*. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 725 (9th Cir. 2017). Under *Puerto Rico Aqueduct*, 506

U.S. at 144–45, an ordinary claim of Eleventh Amendment immunity encompasses a claim of immunity from suit. The rationale of *Puerto Rico Aqueduct* is that an interlocutory appeal is necessary to vindicate a state entity's entitlement to immunity from suit, which would be lost if a case were permitted to go to trial. *Id.* But an immunity from liability may be vindicated fully after final judgment, so the collateral-order doctrine does not encompass an interlocutory appeal from a denial of immunity from liability. *See SolarCity*, 859 F.3d at 725 ("Unlike immunity from suit, immunity from liability can be protected by a post-judgment appeal. Denials of immunity from liability therefore do not meet the requirements for immediate appeal under the collateral-order doctrine." (citation omitted)).

Before us, Taylor argued that the County, by consenting to removal of the case to federal court, waived Eleventh Amendment immunity. *See Lapides v. Bd. of Regents of Univ. Sys.*, 535 U.S. 613, 624 (2002) (holding that the state's consenting to removal to federal court "waived its Eleventh Amendment immunity" with respect to state law claims); *Embury v. King*, 361 F.3d 562, 566 (9th Cir. 2004) (extending *Lapides* to federal law claims and announcing "a straightforward, easy-to-administer rule in accord with *Lapides*: Removal waives Eleventh Amendment immunity."). In response, the County cited decisions from other circuits that have held that removal waives immunity from suit but does not waive immunity from liability. *See, e.g.*, *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013) ("We hold that although the Board's removal to federal court waived its immunity-based objection to a

federal forum, the Board retained its immunity from liability . . . ."). The County clarified that, in this case, it was asserting *only* immunity from liability. *See, e.g.*, Reply Brief at 17 ("Pima County asserted Eleventh Amendment immunity as a substantive bar to Taylor's claim . . . . In other words, it was asserted as *a bar to liability* rather than a bar to the federal court's ability to hear Taylor's claim." (emphasis added)). The County's asserted immunity from liability can be vindicated fully after final judgment; accordingly, the collateral-order doctrine of § 1291 does not apply here. *SolarCity*, 859 F.3d at 725.

In conclusion, we exercise our discretion under § 1292(b) to deny the County's application for permission to appeal, and we conclude that § 1291's collateral-order doctrine does not apply. We therefore dismiss the County's appeal.

B. *Damages for Wrongful Incarceration*

1. *Appellate Jurisdiction*

Taylor asks us to exercise our discretion under § 1292(b) to reconsider the motions panel's denial of his application for permission to appeal. He asks that we review the district court's ruling that he may not recover compensatory damages for wrongful incarceration. In the highly unusual circumstances of this case, we agree to review that issue.

Taylor seeks other forms of relief, such as nominal damages, so the district court's ruling does not dispose of his case entirely. But Taylor emphasizes the importance of the incarceration-related damages. From a practical standpoint, the district court's ruling likely resolves a substantial portion of his

case. Moreover, if we decline to review this issue now, he will not be able to obtain review until after discovery and, possibly, a trial. That ordinary result from a denial of interlocutory review has, in Taylor's view, uncommon consequences here. Taylor notes that he is in his sixties, having spent most of his life—42 years—in prison. The entire basis of his complaint is that his decades in prison were unconstitutional. He characterizes having to wait additional years before this important issue is resolved as "yet another miscarriage of justice."

As noted, we ordinarily do not disturb a motions panel's determination under § 1292(b). *Kuehner*, 84 F.3d at 318. But we agree with Taylor that a departure from our ordinary practice is justified, both because his situation is rare and because our own rulings have added to the delay. We initially denied discretionary review but ordered briefing on the issue of Eleventh Amendment immunity, further forestalling final resolution of this case. We are persuaded to exercise our discretion under § 1292(b) to resolve this issue now.

2. *Discussion*

Taylor seeks damages for wrongful incarceration stemming from the 42 years that he spent in prison. The Supreme Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994), provides an important limitation on Taylor's claims. Under *Heck*, a plaintiff in a § 1983 action may not seek a judgment that would necessarily imply the invalidity of a state-court conviction or sentence unless, for example, the conviction had been vacated by the state court. *Id.* at 486–87. Here, Taylor's 1972 jury conviction has been

vacated by the state court, so *Heck* poses no bar to a challenge to that conviction or the resulting sentence. But Taylor's 2013 conviction, following his plea of no contest, remains valid. Accordingly, Taylor may not state a § 1983 claim if a judgment in his favor "would necessarily imply the invalidity of his [2013] conviction or sentence." *Id.* at 487. As the district court summarized, "*Heck* does not bar [Taylor] from raising claims premised on alleged constitutional violations that affect his 1972 convictions but do not taint his 2013 convictions." Recognizing that limitation, Taylor stresses that "[h]e challenges his 1972 prosecution, convictions and sentence and does not challenge his 2013 'no contest' pleas *or sentence*." (Emphasis added.)

Taylor alleges that his 1972 conviction and resulting sentence were plagued by constitutional violations and that those errors initially caused his incarceration. Critically, however, all of the time that Taylor served in prison is supported by the valid 2013 state-court judgment. The state court accepted the plea agreement and sentenced Taylor to time served. For that reason, even if Taylor proves constitutional violations concerning the 1972 conviction, he cannot establish that the 1972 conviction caused any incarceration-related damages. As a matter of law, the 2013 conviction caused the entire period of his incarceration.

Our decision in *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014), is instructive. A jury originally convicted the plaintiff of rape and murder. *Id.* at 758. His murder conviction—but not his rape conviction—was later vacated. *Id.* at 759 & n.1. He was later convicted, once again, of murder. *Id.* at 759. In his

§ 1983 action, we concluded that he was "not entitled to compensatory damages for any time he spent in prison" because he was "not imprisoned for any additional time as a result of his first, illegal conviction." *Id.* at 762. *Jackson* differs factually from this case in that Jackson's term of incarceration was supported fully by the original rape conviction, which had not been overturned. *Id.* But the general principle applies equally here: when a valid, unchallenged conviction and sentence justify the plaintiff's period of imprisonment, then the plaintiff cannot prove that the challenged conviction and sentence caused his imprisonment and any resulting damages.

The First Circuit reached the same result in a case that is factually indistinguishable from this one. In *Olsen v. Correiro*, 189 F.3d 52, 55 (1st Cir. 1999), a jury found the plaintiff guilty of murder, but the state court later overturned that conviction. The plaintiff then pleaded nolo contendere to manslaughter, and the state court sentenced him to time served. *Id.* In the plaintiff's § 1983 action challenging the constitutionality of the original jury conviction, the First Circuit held that he could not recover incarceration-related damages because he could not establish that the alleged constitutional violations caused his imprisonment. *Id.* at 70. "Olsen's valid manslaughter conviction and sentence are the sole legal cause of his incarceration." *Id.* Similarly here, Taylor's valid 2013 conviction and sentence are the sole legal causes of his incarceration; he cannot recover damages for wrongful incarceration.

Our decision also accords with the Second Circuit's decision in *Poventud v. City of New York*, 750 F.3d 121 (2d Cir. 2014) (en banc). A jury convicted the plaintiff of serious crimes but, seven years later, a state court vacated the conviction and sentence. *Id.* at 124. The plaintiff then pleaded guilty to a lesser crime, and a state court imposed a one-year sentence. *Id.* In the plaintiff's § 1983 action, the Second Circuit held that he could seek damages for wrongful incarceration for the years he spent in prison, *except for the one year that was supported by the valid criminal judgment*: "Poventud cannot seek to collect damages for the time that he served pursuant to his plea agreement (that is, for the year-long term of imprisonment)." *Id.* at 136 (citing *Olsen*, 189 F.3d at 55). Applying the same principle here, Taylor cannot seek to collect damages for the time that he served pursuant to his plea agreement.

We agree with the analyses and conclusions of our sister circuits. A plaintiff in a § 1983 action may not recover incarceration-related damages for any period of incarceration supported by a valid, unchallenged conviction and sentence. We take no pleasure in reaching this unfortunate result, given Taylor's serious allegations of unconstitutional actions by the County. But we cannot disregard the limitations imposed by Congress and the Supreme Court on the scope of § 1983 actions.

DISMISSED in part and AFFIRMED in part. The parties shall bear their own costs on appeal.

GRABER, Circuit Judge, concurring:

I join the opinion in full. I write separately to explain my view that, in *Cortez v. County of Los Angeles*, 294 F.3d 1186 (9th Cir. 2002), we wrongly exercised jurisdiction over an interlocutory appeal in circumstances similar to those we face here and that, in an appropriate case, we should overrule *Cortez* in our en banc capacity.

"[O]nly States and arms of the State possess immunity from suits authorized by federal law." *N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193 (2006). Counties do not. *Lincoln County v. Luning*, 133 U.S. 529 (1890). Here, the only appellant is Pima County. The County plainly is not a State, and it has not asserted that it is an "arm of the State." *See Mitchell v. L.A. Cty. Cmty. Coll. Dist.*, 861 F.2d 198, 201–02 (9th Cir. 1989) (describing the factors to consider when deciding whether a governmental entity is an "arm of the state"). Accordingly, the County is not entitled to Eleventh Amendment immunity. The analysis is truly that simple. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 756 (1999) ("[Sovereign] immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) ("States are protected by the Eleventh Amendment while municipalities are not[.]"); *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 729 (9th Cir. 2017) ("[M]unicipalities . . . may not rely on . . . Eleventh Amendment immunity."); *Eason v. Clark Cty. Sch. Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2002)

("[T]he Eleventh Amendment does not extend to counties and municipal corporations.").

The County nevertheless seeks to assert Eleventh Amendment immunity and thereby to invoke our jurisdiction over this interlocutory appeal under the collateral-order doctrine. The County's attempt requires some explanation.

Plaintiff Louis Taylor has asserted claims against the County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which requires proof of a policy, practice, or custom by the County. He asserts that the actions of certain government officials amounted to a practice or custom by the County. The County's sole argument on appeal is that the relevant officials were, in fact, working on behalf of the State, so the County cannot be liable.

The Supreme Court has recognized the viability of that argument: if the relevant officials were working on behalf of the State, then any practice or custom was a *State* practice or custom, not a *municipal* practice or custom. *McMillian v. Monroe County*, 520 U.S. 781 (1997). But that argument does *not* bear on whether the municipality has Eleventh Amendment immunity. Proof that the relevant officials did not work for the municipality defeats the plaintiff's case but by virtue of an ordinary failure to prove an element of a claim—here, the existence of a *municipal* policy, practice, or custom. If the defendant municipality is correct that the relevant official was a State official, then the plaintiff has failed to state a claim against the municipality. Eleventh Amendment immunity plays no role.

Nowhere in *McMillian* does the Supreme Court mention the Eleventh Amendment or immunity from suit. (Nor had the circuit court of appeals mentioned those doctrines. *McMillian v. Johnson*, 88 F.3d 1573 (11th Cir. 1996).) Not surprisingly, our cases, too, describe this doctrine in terms of whether the municipality was the actor, rather than in terms of sovereign immunity and the Eleventh Amendment. *See, e.g.*, *Weiner v. San Diego County*, 210 F.3d 1025, 1031 (9th Cir. 2000) ("[T]he San Diego County district attorney was acting as a state official in deciding to proceed with Weiner's criminal prosecution. Weiner's § 1983 claim against the County, therefore, fails. *The County was not the actor; the state was*." (emphasis added)); *Jackson v. Barnes*, 749 F.3d 755, 767 (9th Cir. 2014) ("Jackson alleges, in effect, that the District Attorney's Office is liable for Murphy's unlawful prosecutorial conduct. The District Attorney's Office, however, acts as a state office with regard to actions taken in its prosecutorial capacity, and is not subject to suit under § 1983. *Weiner*, 210 F.3d at 1030.")[1]; *United States v. County of Maricopa*, 889 F.3d 648, 651 (9th Cir. 2018) ("Because the traffic-stop policies at issue fall within the scope of a sheriff's law-enforcement duties, we conclude that Arpaio acted as a final policymaker for Maricopa County when he instituted those policies."); *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013) (lengthy analysis with no mention of the Eleventh Amendment or sovereign

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[1] The district court in *Jackson* had dismissed the case on the ground of the Eleventh Amendment, but we did not adopt that formulation; instead, we cited *Weiner*, which did not mention the Eleventh Amendment.

immunity); *Botello v. Gammick*, 413 F.3d 971 (9th Cir. 2005) (same); *Brewster v. Shasta County*, 275 F.3d 803, 805 (9th Cir. 2001) ("The question is whether he is a policymaker on behalf of the state or the county; if he is a policymaker for the state, then the county cannot be liable for his actions.").

Most importantly, precisely the same issue as decided in *McMillian*—whether Alabama sheriffs act for the state or the county—arose in a case before the Supreme Court in 1995, two years before *McMillian*. In *Swint v. Chambers County Commission*, 514 U.S. 35, 41 (1995), the Supreme Court "granted certiorari to review the Court of Appeals' decision that Sheriff Morgan is not a policymaker for Chambers County." But the Court then ordered supplemental briefing on the issue of appellate jurisdiction. *Id.* In its opinion, the Supreme Court unanimously held that the court of appeals lacked appellate jurisdiction:

> The commission's assertion that Sheriff Morgan is not its policymaker does not rank, under our decisions, as an immunity from suit. Instead, the plea ranks as a "mere defense to liability." An erroneous ruling on liability may be reviewed effectively on appeal from final judgment. Therefore, the order denying the county commission's summary judgment motion was not an appealable collateral order.

Id. at 43 (citation omitted).

There is no doubt that the underlying substantive issue—whether the sheriff acted for the county or the state—was precisely the same two years later in *McMillian*, because the Court in *McMillian* noted

that the Eleventh Circuit in *Swint* had reached the issue but that the Supreme Court had vacated the Eleventh Circuit's decision for lack of appellate jurisdiction. *McMillian*, 520 U.S. at 786 n.3 (citing "*Swint v. Wadley*, 5 F.3d 1435, 1450–51 (1993), *vacated for lack of appellate jurisdiction*, 514 U.S. 35 (1995)" (emphasis added)). Applying *Swint*, other circuit courts have held, unambiguously, that "[w]hen a county appeals asserting that a sheriff is not a county policymaker under § 1983, that presents a defense to liability issue for the county over which we do not have interlocutory jurisdiction." *Manders v. Lee*, 338 F.3d 1304, 1307 n.6 (11th Cir. 2003) (en banc); *see also Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) ("[T]he determination of which entity a defendant serves as policy maker presents a *liability* issue, not an *immunity* issue."); *accord Hunter v. Town of Mocksville*, 789 F.3d 389, 403 n.4 (4th Cir. 2015). Applying *Swint*'s rule here, we lack jurisdiction over the County's interlocutory appeal because the County argues solely that the relevant officials were not County policymakers.

Our decision in *Cortez* overlooked this fundamental jurisdictional defect. *Cortez*, like this case, was an interlocutory appeal by a county from the denial of Eleventh Amendment immunity. 294 F.3d at 1188. We stated, correctly, that we had jurisdiction over the denial of Eleventh Amendment immunity, but we then reached the issue whether the sheriff acted on behalf of the county or the state, incorrectly characterizing that issue as pertaining to the Eleventh Amendment. *Id.* at 1188–89. We did not cite *Swint*. Accordingly, the rule in our circuit, unlike the rule in every other circuit, is that interlocutory

appeals may be taken from a district court's rejection of a municipality's argument that the relevant government officials acted on behalf of the State and not the municipality.

We plainly erred in *Cortez*. In an appropriate case, we should undo this error in our en banc capacity.

SCHROEDER, Circuit Judge, dissenting as to Part B.2:

This decision magnifies an already tragic injustice. At the time of Tucson's Pioneer Hotel fire in 1972, Louis Taylor was an African American male of sixteen. Arrested near the hotel, he was convicted on the basis of little more than that proximity and trial evidence that "black boys" like to set fires. He has spent a lifetime of 42 years in prison following his wrongful conviction.

When he filed his state court petition the county that had prosecuted him did not even respond to his allegations of grievous deprivations of civil rights, including the withholding of evidence that the fire was not caused by arson at all, and the indicia of racial bias underlying the entire prosecution. Instead of responding, the county offered Taylor his immediate freedom in return for his pleading no contest to the original charges and agreeing to a sentence of time served.

He accepted the offer, since his only alternative was to stay in prison and wait for his petition for collateral relief to wend its way through the courts, a process that could take years. Because his original conviction had been vacated and all of the prison time he had served was as a result of that invalid conviction, he filed this action to recover damages for his wrongful incarceration.

Yet the majority holds that he can recover nothing. Why? Because it interprets the few cases with circumstances remotely similar to this one to require the admittedly unfair holding that his plea

agreement somehow validates or justifies the original sentence that deprived Taylor of a meaningful life.

In my view our law is not that unjust.

Our Circuit law actually supports the award of damages for the time Taylor served in prison as a result of an unlawful, and now vacated conviction. Our leading case is *Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014), where, as here, the plaintiff's original conviction was vacated on habeas review. Hence, a claim for damages resulting from wrongful incarceration was not barred by *Heck v. Humphrey*. *Jackson*, 749 F.3d at 760–61. The majority acknowledges the same is true here.

In Jackson the plaintiff could not recover damages, however, because the wrongful conviction had not yet resulted in any wrongful incarceration. This was because he was still serving other, earlier imposed sentences and never began serving the term imposed as a result of the unlawful conviction. In other words, there was a lack of causation. *Id.* at 762. Taylor, by contrast, served decades of imprisonment as a result of his first, vacated conviction, so there is no lack of causation here. Under *Jackson*, he should recover. That Taylor later, in order to gain prompt release, pleaded no contest to the charges and to a sentence of time served, does not undo the causal sentencing chain set in motion after the original, invalid conviction. The majority's discussion is not consistent with *Jackson*.

The Second Circuit's decision in *Poventud* also supports reversal. *Poventud v. City of N.Y.*, 750 F.3d

121 (2d Cir. 2014) (en banc). Poventud's conviction was vacated on collateral attack, on the basis of a *Brady* violation, and a new trial was ordered. *Id.* at 124. He then pleaded guilty to a lesser charge, pursuant to a plea agreement that dismissed all other charges and stipulated to a one-year sentence, with time already served. *Id.* The Second Circuit held that Poventud's *Brady*-based claim was not *Heck*-barred insofar as it related to his first conviction. *Id.* at 124–25, 134–36. As the en banc court explained, were Poventud to win at trial in his civil rights suit, "the legal status of his [second conviction] would remain preserved." *Id.* at 138 (*quoted by Jackson*, 749 F.3d at 761). He was permitted to pursue a claim of damages for the time he served beyond the one year plea agreement stipulation. Judge Lynch's concurrence is also instructive, as it focuses on the injustice of relying on the subsequent guilty plea to deny Poventud a remedy for the unfairness of the first trial. *Id.* at 138–47. The majority's decision ignores such injustice in this case.

Taylor's case is even more compelling than those of *Jackson* and *Poventud* because his first conviction was so deeply tainted that we now know the disastrous fire may not have been set by anyone, and the prosecution was without adequate foundation from the beginning. He won more than a new trial, but virtual exoneration. His situation is therefore also different from the situation in *Olsen v. Correiro*, 189 F.3d 52 (1st Cir. 1999), where the plaintiff's murder conviction was overturned but he was subsequently convicted of manslaughter.

Far from being the product of a new, constitutionally-conducted second trial, Taylor's second conviction was the product of his desperate circumstances. In his 60's, he faced acceptance of the plea offer or waiting years for a habeas petition to work its way through the courts. We should not tolerate such coercive tactics to deprive persons of a remedy for violations of their constitutional rights. To say such a plea justifies the loss of 42 years, as the majority asserts, is to deny the reality of this situation and perpetuate an abuse of power that § 1983 should redress.

Our court has spoken to this before:

> "When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence in it is undermined." *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005).

So has the Supreme Court:

> "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress enacted § 1983 precisely to provide a remedy for such abuses of official power." *Owen v. City of Independence*, 445 U.S. 622, 654 (1980).

I therefore regretfully and respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LOUIS TAYLOR,

Plaintiff,

v.

COUNTY OF PIMA, ET AL.,

Defendants.

No. CV-15-00152-TUC-RM

ORDER

June 6, 2017

Pending before the Court is Plaintiff's Motion for Reconsideration (Doc. 68). Defendants filed Responses (Docs. 71, 72), and Plaintiff filed a Reply (Doc. 74). On April 19, 2017, the parties filed a Joint Report (Doc. 73), which contained requests for certification of certain issues for interlocutory appeal. On May 15, 2017, the Court held a hearing on Plaintiff's Motion for Reconsideration and the requests for certification of issues for interlocutory appeal. (Doc. 76.)

After the hearing, Defendant Pima County filed a Supplemental Request Regarding Issues for Interlocutory Appeal (Doc. 77), which is a one-

paragraph document clarifying the issues that Pima County believes should be certified for interlocutory appeal. Plaintiff then filed a Supplemental Memorandum (Doc. 78), which contains five pages of argument related to Plaintiff's Motion for Reconsideration, and nearly 70 pages of attachments. Defendant Pima County filed a request for leave to respond to the arguments raised in Plaintiff's Supplemental Memorandum. (Doc. 79).

I. Background[1]

On March 16, 2017, this Court issued an Order (Doc. 63) partially granting and partially denying Defendants' second Motions to Dismiss (Docs. 54, 55). In the Order, the Court held that claims based on allegations that Plaintiff was wrongfully charged, convicted, and imprisoned were barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), because a judgment in favor of Plaintiff on such claims would necessarily imply the invalidity of Plaintiff's outstanding 2013 convictions and sentence. (Doc. 63 at 9-11.) The Court also held that claims premised on allegations that Plaintiff was wrongfully arrested and unlawfully interrogated were barred by the statute of limitations. (*Id.* at 11-12.) The Court held that neither *Heck* nor the statute of limitations barred claims based on alleged constitutional violations affecting the validity of Plaintiff's 1972 convictions but not the validity of his subsequent 2013 convictions. (*Id.* at 13.) In determining whether Plaintiff's claims affect the validity of his 2013

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[1] Plaintiff's factual allegations and this case's procedural history are described more fully in prior Orders (*see, e.g.*, Docs. 35, 48, 63.)

convictions, the Court analyzed whether successfully proving the claims would fatally undermine the factual basis of Plaintiff's 2013 plea. (*Id.* at 13-16.)

The Court then evaluated the sufficiency of the factual allegations of Plaintiff's Second Amended Complaint. (*Id.* at 16-19.) The Court found that Plaintiff's Second Amended Complaint included sufficient factual allegations in support of the 42 U.S.C. § 1983 claims alleged in Counts One, Three, Four, Five, and Six, but that the factual allegations in support of Count Two were insufficient because Plaintiff did not identify any specific deficiencies in the City of Tucson's training and supervision of employees and did not connect any such deficiencies to allegations of constitutional injury that did not run afoul of either *Heck* or the statute of limitations. (*Id.* at 16-18.) The Court rejected Defendant Pima County's argument that it was entitled to Eleventh Amendment immunity. (*Id.* at 18-19.) Finally, the Court held that Plaintiff's outstanding 2013 convictions and time-served sentence preclude Plaintiff from obtaining compensatory damages for the approximately 42 years he spent incarcerated, but the Court declined to dismiss Plaintiff's compensatory damages claim because Plaintiff may be able to establish non-incarceration-based compensatory damages. [2] (*Id.* at 19-20.) In

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[2] The Court also determined that the state-law malicious prosecution claim alleged in Count Nine of Plaintiff's Second Amended Complaint should be dismissed because Plaintiff conceded that no notice of claim was filed. (*Id.* at 20.) The Court declined to address the state-law claims asserted in Counts Seven and Eight because Defendants made no specific

determining that Plaintiff was not entitled to compensatory damages, the Court cited *Jackson v. Barnes*, 749 F.3d 755, 762 (9th Cir. 2014), and *Olsen v. Correiro*, 189 F.3d 52, 66-70 (1st Cir. 1999).

II. Plaintiff's Supplemental Memorandum

Plaintiff's Supplemental Memorandum inaccurately states that both Pima County and the City of Tucson filed supplemental memoranda following the May 15, 2017 hearing. (Doc. 78 at 1.) The City of Tucson did not file any supplemental materials following the May 15, 2017 hearing. Pima County filed a Supplemental Request (Doc. 77) regarding the issues that it believes are appropriate for interlocutory appeal, but that Supplemental Request is only one paragraph long, and—unlike Plaintiff's Supplemental Memorandum—it does not contain arguments related to Plaintiff's Motion for Reconsideration.

Plaintiff's Supplemental Memorandum is essentially an untimely supplemental reply in support of Plaintiff's Motion for Reconsideration. Plaintiff did not seek leave of Court to file the Supplemental Memorandum. Furthermore, the exhibits attached to the Supplemental Memorandum—reports drafted by the Arson Review Committee and the Tucson Fire Department—are not appropriate for consideration at this stage of the case. A district court may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the

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arguments in their Motions to Dismiss concerning those claims. (*Id.*)

complaint, or matters of judicial notice—without converting [a] motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). A document "may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." *Id.* Although Plaintiff references the Arson Review Committee findings in his Second Amended Complaint (Doc. 40 at 10), he does not refer extensively to either the Arson Review Committee report or the Tucson Fire Department report, he did not attach either document to the complaint, and neither document is a matter appropriate for judicial notice.

Although the Court has reviewed the arguments raised in Plaintiff's Supplemental Memorandum, the Court does not find that a response to the Supplemental Memorandum would assist the Court in resolving Plaintiff's Motion for Reconsideration, as the parties have already thoroughly argued the issues implicated by the Motion for Reconsideration. Accordingly, the Court will deny Pima County's request to respond to the Supplemental Memorandum.

III. Plaintiff's Motion for Reconsideration[3]

Plaintiff's Motion for Reconsideration challenges the portion of the Court's March 16, 2017 Order holding that Plaintiff is precluded from obtaining incarceration-based compensatory damages. Plaintiff argues that *Jackson* and *Olsen* are inapplicable, and that no legal authority supports the Court's conclusion that *Heck* bars Plaintiff from obtaining such damages. (Doc. 68 at 2-7.) Plaintiff further argues that barring Plaintiff's incarceration-based compensatory-damages claim at this point in the proceedings is inappropriate because, under binding Ninth Circuit precedent, proximate cause in § 1983 cases is a question of fact for the jury rather than a question of law for the Court. (*Id.* at 8-9.) Finally, Plaintiff argues that public policy concerns dictate against dismissing Plaintiff's incarceration-based compensatory-damages claim. (*Id.* at 9-14.)

A. Standard of Review

Motions for reconsideration should be granted only in rare circumstances. *See Defenders of Wildlife v.*

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[3] Plaintiff attaches to his Motion for Reconsideration a transcript of his April 2, 2013 change of plea and sentencing hearing in the Pima County Superior Court (Doc. 68-1) and a copy of his 2013 plea agreement (Doc. 68-2). The Court may "take judicial notice of 'matters of public record'" without converting a Rule 12(b)(6) motion into a motion for summary judgment, but it "may not take judicial notice of a fact that is 'subject to reasonable dispute.'" *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001). Thus, it is appropriate for this Court to take judicial notice of the fact of Plaintiff's 2013 plea and subsequent 2013 convictions and sentence, but the Court will not take judicial notice of any disputed facts related to the 2013 proceedings.

Browner, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Motions for reconsideration should not be used for the purpose of asking a court "'to rethink what the court had already thought through – rightly or wrongly.'" *Defenders of Wildlife*, 909 F. Supp. at 1351 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A motion for reconsideration "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for reconsideration repeat any argument previously made in support of or in opposition to a motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D. Ariz. 2003). Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988).

Consistent with applicable Ninth Circuit precedent, Rule 7.2(g) of the Local Rules of Civil Procedure states that motions for reconsideration will ordinarily be denied "absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to [the Court's] attention earlier with reasonable diligence." LRCiv 7.2(g)(1). Rule 7.2(g) further provides:

> Any [motion for reconsideration] shall point out with specificity the matters that the movant believes were overlooked or misapprehended by the Court, any new matters being brought to the Court's attention for the first time and the reasons they were not presented earlier, and any specific modifications being sought in the Court's Order. No motion for reconsideration of an Order may repeat any oral or written argument made by the movant in support of or in opposition to the motion that resulted in the Order.

Id. Failure to comply with the requirements of Rule 7.2(g)(1) "may be grounds for denial of the motion." *Id.*

B. Discussion

Plaintiff does not present any new facts or intervening legal authority that could not have been brought to the Court's attention earlier with reasonable diligence. *See School Dist. No. 1J, Multnomah Cnty.*, 5 F.3d at 1263; LRCiv 7.2(g)(1). Accordingly, reconsideration is appropriate only if the Court's holding that Plaintiff cannot obtain incarceration-based compensatory damages is clearly erroneous or manifestly unjust. It appears that Plaintiff is arguing that the Court's holding is clearly erroneous because it is not required by any binding authority, and because the question of damages is one of proximate cause, which Plaintiff contends is a jury question under binding Ninth Circuit precedent. Plaintiff also argues that the holding is unjust in

light of the public policy issues implicated by this case.

In holding that Plaintiff cannot obtain incarceration-based compensatory damages, the Court relied upon the Ninth Circuit's opinion in *Jackson* and the First Circuit's opinion in *Olsen*.[4] The plaintiff in *Jackson* sued under § 1983 for damages resulting from an overturned first-degree murder conviction. 749 F.3d at 758. Prior to the § 1983 suit, the plaintiff was convicted at a trial in which the prosecution relied on evidence obtained in violation of the plaintiff's *Miranda* rights. *Id.* His conviction was reversed and he was again convicted without the use of the illegally obtained evidence. *Id.* The Ninth Circuit held that the Plaintiff's § 1983 suit was not barred by *Heck* because the plaintiff's outstanding conviction—his second conviction—was insulated from the illegally obtained evidence that was the subject of his § 1983 suit. *Id.* at 760. A judgment in the plaintiff's favor in the § 1983 suit would, accordingly, have had no bearing on the plaintiff's outstanding conviction; it would bear only on the plaintiff's earlier conviction, which had been reversed. *Id.*

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[4] Plaintiff's Motion for Reconsideration inaccurately describes the Court's March 16, 2017 Order. Plaintiff avers that the Order states "that *Jackson* and *Olsen* bar wrongful imprisonment claims under *Heck*." (Doc. 68 at 14.) In its March 16, 2017 Order, the Court cited to *Jackson* and *Olsen* as support for its conclusion that "Plaintiff is not entitled to compensatory damages for the time he spent incarcerated," but the Court did not state that *Jackson* and *Olsen* barred wrongful imprisonment claims under *Heck*. (*See* Doc. 63 at 19-20.)

After concluding that the plaintiff's § 1983 suit was not barred by *Heck*, the Ninth Circuit in *Jackson* analyzed whether the plaintiff was "entitled to compensatory damages for any time he spent in prison." *Id.* at 762. The Ninth Circuit found that the plaintiff "was not imprisoned for any additional time as a result of his first, illegal conviction" because, at the time of that conviction, he had already begun to serve 29 years for various unrelated convictions, and his earliest release date was not until two years after he was convicted for the second time. *Id.* Accordingly, the Ninth Circuit held that the plaintiff was "not entitled to compensatory damages for any time he spent in prison." *Id.* The Court did not mention *Heck* in its incarceration-based compensatory-damages analysis.

The plaintiff in *Olsen*, like the Plaintiff in *Jackson*, sued under § 1983 for damages resulting from an overturned first-degree murder conviction. *Olsen*, 189 F.3d at 55. Prior to the § 1983 suit, the plaintiff's conviction was overturned based on investigating police officers' failure to disclose an audiotaped interview with the prosecution's chief witness. *Id.* Rather than go through a new trial, the plaintiff pled nolo contendere to a charge of manslaughter, was convicted of that crime, and—like Plaintiff in the above-entitled action—was sentenced to the time he had already served for the original, overturned conviction. *Id.* A jury awarded the plaintiff $1.5 million in compensatory damages, but the district court overturned the award under *Heck* and ordered a new trial on damages, at which evidence of incarceration-based damages was excluded. *Id.* The second jury awarded $6,000 in damages, and the

plaintiff appealed to the First Circuit, seeking reinstatement of the first damage award. *Id.*

The First Circuit affirmed the district court, finding that the plaintiff was barred as a matter of law from recovering incarceration-based compensatory damages. *Id.* at 55, 66. The First Circuit first analogized to a hypothetical scenario in which an individual is sentenced to a concurrent term of imprisonment for two crimes or two counts of conviction. *Id.* at 66. If one of the convictions is overturned because it was secured through a wrongful act, that act cannot be the "but for" cause of the individual's incarceration, because the individual would have been incarcerated anyway pursuant to the remaining, valid conviction. *Id.* The First Circuit observed that such a hypothetical scenario was not precisely analogous to the plaintiff's situation in *Olsen*, because the plaintiff could argue that the defendants' wrongful acts caused his first murder conviction, that the first murder conviction caused his incarceration, that the invalidation of the first conviction caused prosecutors to offer a plea on a manslaughter charge, and that the fact that the plaintiff had already served time pursuant to the invalid murder conviction caused him to agree to the plea and to a sentence of time served. *Id.* at 67. However, the First Circuit held that "[t]his tenuous chain" of causation was not sufficient to allow the plaintiff to obtain incarceration-based damages. *Id.* The First Circuit reasoned that "the policies favoring the finality of valid criminal convictions and sentences and protecting them from collateral attack through civil suit dictate[d] against allowing § 1983 liability for damages for imprisonment" under the

circumstances of the case. *Id.* The court held: "whether the problem is viewed as one of the limits of § 1983 actions or of proximate cause, we conclude that incarceration-related damages are not available." *Id.* at 67-68.

The First Circuit in *Olsen* analogized to the rule of *Heck* but did not directly base its holding on a *Heck* bar, perhaps due to uncertainty as to whether *Heck* applies to a litigant who is no longer imprisoned. *See id.* at 68-69. However, the policy concerns underlying the court's holding—finality and the prevention of collateral attacks on outstanding criminal convictions—are precisely the same policy concerns underlying *Heck*. *Compare id.* at 67-70, *with Heck*, 512 U.S. at 485-86. And in the Ninth Circuit, it is now clear that *Heck* applies to a § 1983 plaintiff who is no longer imprisoned and is unable to seek federal habeas relief. *See Lyall v. City of L.A.*, 807 F.3d 1178, 1191-92, 1192 n.12 (9th Cir. 2015).

The facts of *Jackson* are somewhat analogous to the facts of the hypothetical scenario described by the First Circuit in *Olsen*. The facts of *Olsen* are more directly analogous to the facts of the present case. Like the plaintiff in *Olsen*, it is possible for Plaintiff in the present case to make an argument for causation: Plaintiff's 1972 convictions caused his 42-year imprisonment, and the fact that he had already served 42 years in prison caused him to accept the prosecution's plea offer in 2013 and plead no contest to 28 counts of murder for a sentence of time served. Although this chain of causation is arguably "tenuous," *Olsen*, 189 F.3d at 67, the Court would be more inclined to agree that the issue of incarceration-based damages should be decided at a

later point in these proceedings—either on summary judgment or by a jury—if the issue were viewed solely as an issue of causation.[5] However, the Court finds that the issue is properly viewed as one "of the limits of § 1983 actions" in light of the policies of finality and the prevention of collateral attacks on outstanding criminal convictions. *Id.*

Plaintiff argues that policy concerns warrant reconsideration of the Court's holding that he is barred from obtaining incarceration-based compensatory damages. In support of this argument, Plaintiff contends that he went to the Pioneer Hotel in December 1970 in order to help guests escape from the fire at the hotel; he was profiled, targeted, and arrested based on his race; he has maintained his innocence for over 45 years; and he suspects that Pima County required him to plead no contest in 2013 in order to protect its own financial interests.

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[5] Plaintiff asserts that *Conn v. City of Reno*, 591 F.3d 1081, 1102 (9th Cir. 2010) is "binding Ninth Circuit precedent" establishing that proximate cause in § 1983 cases is a question of fact for the jury. (Doc. 68 at 8.) The Court notes that the Ninth Circuit's decision in *Conn* was vacated upon the United States Supreme Court's grant of certiorari. *See City of Reno v. Conn*, 131 S. Ct. 1812 (2011). However, the portion of the decision relied upon by Plaintiff was later reinstated by the Ninth Circuit. *See Conn v. City of Reno*, 658 F.3d 897 (9th Cir. 2011). In that portion of the decision, the Ninth Circuit concluded that the plaintiffs had "presented sufficient evidence of foreseeability that the question of proximate cause must be decided by a jury." *Conn*, 591 F.3d at 1102. The Ninth Circuit did not hold that proximate cause in § 1983 cases must always be decided by a jury; however, the decision does support the proposition that issues of proximate cause should be resolved either by a jury or, if no disputes of material fact exist, by the Court on summary judgment.

The Court shares Plaintiff's concern that *Heck* and its progeny may have unintentionally created a financial incentive for prosecutors to require convicted defendants asserting actual innocence claims to enter no-contest pleas in exchange for immediate release from confinement. Plaintiff collaterally attacked his 1972 convictions with evidence that the Pioneer Hotel fire could not definitively be classified as arson. (Doc. 40 at 10 ¶¶ 35-37.) If the fire was not arson, then Plaintiff is innocent. The parties made an agreement that short-circuited the post-conviction proceedings: the Pima County Attorney's Office agreed to stipulate to Plaintiff's request for post-conviction relief if Plaintiff entered a no-contest plea to the same charges for a sentence of time served. At the time of the agreement, the parties' bargaining positions were inherently unequal. If Plaintiff agreed to plead no contest to 28 counts of murder, he would be rewarded with immediate release from confinement after having served 42 years. If he refused, he would continue to be imprisoned for months or years awaiting full adjudication of his petition for post-conviction relief. Plaintiff, understandably, chose immediate freedom. It's not clear that he understood the true price he was paying for that freedom: a *Heck* bar precluding him from attacking the validity of his 42-year imprisonment. If the Pima County Attorney's Office required Plaintiff to accept a no-contest plea for the purpose of creating a *Heck* bar to § 1983 liability, the Court is concerned that such conduct undermines the fairness and integrity of the justice system.

Nevertheless, the Court agrees with Defendants that Plaintiff's contentions—that he is innocent and was wrongfully required to plead no contest to 28 counts of murder for a sentence of time served—implicate the policy concerns underlying *Heck*. No court or jury has ruled that Plaintiff is innocent. If Plaintiff were to successfully prove his contentions, he would necessarily imply the invalidity of his outstanding 2013 convictions and sentence. By pleading no contest, Plaintiff agreed that both his 2013 convictions and time-served sentence were valid. After previously agreeing not to contest the 2013 convictions and time-served sentence, Plaintiff is now attempting to "question the finality of his valid imprisonment by an action for incarceration-based damages." *Olsen*, 189 F.3d at 70. Although the Court recognizes the difficulty of Plaintiff's predicament, Plaintiff's contentions that he is innocent and was wrongfully incarcerated for 42 years necessarily imply the invalidity of his outstanding 2013 convictions and outstanding sentence of time served. Plaintiff has cited no authority supporting the existence of an exception to *Heck* that applies in circumstances where a § 1983 plaintiff alleges that outstanding convictions were unfairly procured in order to insulate a governmental entity from § 1983 liability. Such an exception may be appropriate under certain circumstances in order to prevent manifest injustice; however, the Court is not comfortable recognizing such an exception absent further guidance from the Ninth Circuit on the issue.

IV. Requests for Interlocutory Appeal

When a district judge has made an interlocutory order not appealable under 28 U.S.C. § 1292(a), and is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [s]he shall so state in writing." 28 U.S.C. § 1292(b). The Court of Appeals then has discretion to permit an interlocutory appeal to be taken from such order "if application is made to it within ten days after the entry of the order." *Id.* Such application "shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." *Id.*

The Court finds that the issue of whether Plaintiff is barred from seeking incarceration-based compensatory damages "involves a controlling question of law as to which there is substantial ground for difference of opinion," and that permitting an interlocutory appeal of the Court's finding that such damages are barred would "materially advance the ultimate termination" of this litigation. 28 U.S.C. § 1292(b). The Court also finds that the issue of whether Defendant Pima County is entitled to Eleventh Amendment immunity is also appropriate for interlocutory appeal. Finally, the Court will grant Defendants' request to certify for interlocutory appeal the issue of whether Plaintiff has met the pleading requirements for asserting *Monell* claims.

IT IS ORDERED:

1. Pima County's Request (Doc. 79) to respond to Plaintiff's Supplemental Memorandum (Doc. 78) is **denied.**
2. Plaintiff's Motion for Reconsideration (Doc. 68) is **denied.**
3. The following issues are certified for interlocutory appeal:
   - Is Plaintiff barred from obtaining incarceration-based compensatory damages in light of his outstanding 2013 convictions and sentence?
   - Is Defendant Pima County entitled to Eleventh Amendment immunity on the grounds that the State of Arizona, rather than Pima County, prosecuted Plaintiff?
   - Has Plaintiff met the pleading requirements for asserting *Monell* claims?
4. The filing of an application for interlocutory appeal shall stay the district-court proceedings in this case.

Dated this 6th day of June, 2017.

/s/ R. Márquez
Honorable Rosemary Márquez
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LOUIS TAYLOR,

Plaintiff,

v.

COUNTY OF PIMA, ET AL.,

Defendants.

No. CV-15-00152-TUC-RM

ORDER

March 16, 2017

Pending before the Court are Defendants Pima County and City of Tucson's Motions to Dismiss Plaintiff's Second Amended Complaint (Docs. 54, 55), which seek dismissal under Rules 8 and 12(b) of the Federal Rules of Civil Procedure. Plaintiff filed a Combined Response (Doc. 57), and Defendants filed Replies (Docs. 60, 61).[1]

[1] Plaintiff filed a Request for Oral Argument (Doc. 62). The Court finds that the currently pending Motions to Dismiss are suitable for resolution without oral argument. Accordingly, Plaintiff's Request for Oral Argument is denied.

I. Procedural Background

This case arises out of Plaintiff's arrest, conviction of 28 counts of murder, and approximately 42-year imprisonment in connection with a fire that occurred at the Pioneer Hotel in Tucson, Arizona in December 1970. Plaintiff initiated this action in Pima County Superior Court, where he filed a First Amended Complaint raising claims against Pima County and the City of Tucson under 42 U.S.C. § 1983 and state tort law. (Doc. 1.) After removing the case to this Court, Defendants filed Motions to Dismiss Plaintiff's First Amended Complaint. (Docs. 5, 6.)

The Court partially granted the Motions to Dismiss in an Order filed on February 9, 2016. (Doc. 35.) In that Order, the Court found that Count Five of Plaintiff's First Amended Complaint sufficiently pled a claim against Pima County, but that Plaintiff's other claims were not supported by sufficient factual allegations. The Court also found that Plaintiff's claims fell under an exception to *Heck v. Humphrey*, 512 U.S. 477 (1994), and that they were not barred by the statute of limitations because they did not accrue until Plaintiff's 1972 convictions were vacated on April 2, 2013.

Defendant Pima County moved for reconsideration of only "one narrow aspect" of the Court's February 9, 2016 Order. (Doc. 39 at 1.) Specifically, Pima County asked the Court to reconsider its holding that Plaintiff's claims fell under an exception to *Heck*, arguing that the holding had been foreclosed by a recent Ninth Circuit decision, *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015). The Court partially granted the Motion for Reconsideration,

finding that *Lyall* made it clear that "Plaintiff is *Heck*-barred from challenging the validity of his outstanding 2013 convictions," and thus withdrawing the portion of its February 9, 2016 Order finding that Plaintiff's claims fell under an exception to *Heck*. (Doc. 48 at 2-3.) The Court declined to dismiss Plaintiff's compensatory damages claim because "it would be premature, prior to discovery, to determine whether Plaintiff can present evidence of compensable damages arising from alleged constitutional violations underlying his 1972 convictions." (Doc. 48 at 3.)

Plaintiff filed a Second Amended Complaint ("SAC") on March 14, 2016. (Doc. 40.)

II. Allegations of SAC

The allegations of Plaintiff's SAC are as follows.

Plaintiff, an African American, was arrested by Tucson Police Department officers on or about December 20, 1970, in connection with the Pioneer Hotel fire. (Doc. 40 at 3, ¶¶ 4-5.) Plaintiff was 16 years old at the time. (*Id.* at 4, ¶ 9.) Plaintiff was arrested based on his race, before any investigation had been commenced to determine if the fire was arson. (*Id.* at 3, ¶¶ 5-6.) A Caucasian man suspected of starting three other fires at the Pioneer Hotel was neither questioned nor investigated. (*Id.* at 3, ¶ 8.)

After his arrest, Plaintiff was interrogated by at least eight Tucson Police Department officers over the course of several hours early in the morning of December 20, 1970. (*Id.* at 4, ¶ 9.) Plaintiff denied starting the hotel fire during a polygraph, and the polygraph did not indicate deception. (*Id.*)

Plaintiff was initially charged with trespassing and arson, but the arson charge was dropped almost immediately. (*Id.* at 4, ¶ 10.) Although the deputy county attorney did not believe there was enough evidence to charge Plaintiff with any other crimes, at the urging of the director of the Pima County Juvenile Court Center, Plaintiff was charged as an adult with 28 counts of murder before any investigation had been commenced to determine if the hotel fire was arson. (*Id.* at 4-5, ¶¶ 10-13.)

The deputy county attorney assigned to Plaintiff's prosecution was Horton Weiss, who was well known to the Arizona judiciary as an over-zealous and unethical prosecutor with a record of violating or potentially violating criminal defendants' constitutional rights. (*Id.* at 5-7, ¶¶ 17-21.) The county attorney was asked to remove Weiss from Plaintiff's case due to Weiss's reputation, but she refused to do so because she was under pressure to obtain a conviction given the high-profile nature of the hotel fire. (*Id.* at 7, ¶ 22.)

In connection with Plaintiff's prosecution, Defendants (1) withheld exculpatory evidence in the form of a written report known as the "Truesdail" report, which found that no evidence of accelerants was discovered during post-fire inspections of the hotel, (2) presented false testimony from two jailhouses snitches, including testimony that was contradicted by the findings of the undisclosed Truesdail report, and (3) hired an expert who believed Plaintiff was guilty because "black boys" are more likely to start fires. (*Id.* at 5, 8-10, ¶¶ 16, 23-33.)

On March 21, 1972, Plaintiff was convicted by an all-white jury of 28 counts of murder. (*Id.* at 5, ¶ 15.) Over forty years later, on October 23, 2012, Plaintiff filed a Petition for Post-Conviction Relief based in part on the findings and conclusions of a panel of fire experts who, after reviewing all of the evidence in Plaintiff's case, concluded that the Pioneer Hotel fire could not be classified as arson. (*Id.* at 10, ¶¶ 35-36.) On April 1, 2013, the county attorney stipulated to Plaintiff's request for post-conviction relief on the condition that Plaintiff enter a no-contest plea. (*Id.* at 11, ¶ 38.)[2] On April 2, 2013, Plaintiff's 1972 convictions were vacated, he pled no contest to charges related to the fire for a stipulated sentence of time served, and he was released from incarceration. (*Id.* at 11, ¶¶ 39-41.)

Plaintiff's SAC raises six claims under 42 U.S.C. § 1983 and three claims under state law.

In Count One, Plaintiff alleges that Defendant City of Tucson, through its Police Department, had a custom/practice of racial discrimination against African Americans that resulted in the violation of Plaintiff's constitutional rights. (*Id.* at 12-18, ¶¶ 1-18.)[3] Plaintiff alleges that only seven out of seven hundred officers in the Tucson Police Department

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[2] The county attorney also stipulated that if "a review of the original evidence using new advances and techniques in fire investigation is legally 'newly discovered evidence' [under Ariz. R. Crim. P. 32.1(e)]. . . the State would be unable to proceed with a retrial, and the convictions would not stand." (*Id.* at 10-11, ¶ 37.)

[3] The sequential numbering of the paragraphs of Plaintiff's SAC begins anew in Count One.

were African Americans as of 1972. (*Id.* at 13-14, ¶ 5.) Although the Department received federal funds in 1970 to recruit more African Americans, recruitment efforts failed because the Department used entrance exams that were racially biased against African Americans and because African Americans did not trust the Department due to the Department's longstanding policy of discrimination. (*Id.*) Those African Americans that the Department did hire confronted stereotypes engrained in the Tucson Police Department. (*Id.* at 14, ¶ 6.) Racial discrimination in the Department led to a practice of arresting African Americans without probable cause on the basis of their race and ignoring credible evidence implicating white suspects. (*Id.* at 13, 16-17, ¶¶ 4, 12-13.)

In Count Two, Plaintiff alleges that Defendant City of Tucson failed to train and/or supervise its police employees in deliberate indifference to the constitutional rights of criminal defendants. (*Id.* at 18-19, ¶¶ 19-24.) Plaintiff alleges that the failure to train and supervise is evidenced by the racially discriminatory customs and practices alleged in Count One, as well as by "the fact that at least eight officers interviewed Plaintiff . . . while he was in custody and his constitutional rights were being violated, and either knowingly acquiesced to the violations or were unaware" of them. (*Id.* at 19, ¶ 23.)

In Count Three, Plaintiff alleges that Defendant Pima County, through its County Attorney's Office, had a custom/practice of racial discrimination against African Americans that resulted in the violation of Plaintiff's constitutional rights. (*Id.* at 19-21, ¶¶ 25-34.) Plaintiff indicates that Pima

County's discriminatory policies are evidenced by incidents described elsewhere in the SAC, including the allegation that prior to Plaintiff's trial, Weiss referred to a white lawyer representing an African American criminal defendant as a "nigger lover," and the allegation that the County Attorney's Office prosecuted cases against African Americans with a presumption of guilt and knowingly elicited unreliable testimony from "jailhouse snitches and informants." (*See id.* at 7, ¶¶ 20-21.)

In Count Four, Plaintiff alleges that Defendant Pima County failed to train and/or supervise its deputy county attorneys, in deliberate indifference to the constitutional rights of criminal defendants. (*Id.* at 21-23, ¶¶ 35-41.) Defendant alleges that the ethical and constitutional violations committed by Weiss were obvious to Pima County, but that Pima County was deliberately indifferent to the violations because "Weiss was effective in securing convictions, even when the defendant was innocent." (*Id.* at 22, ¶ 38.) Plaintiff further alleges that the county attorney failed to remove Weiss from Plaintiff's case despite a specific request that he be removed, because the case was high-profile and Weiss was successful "in securing convictions through ethical and constitutional violations when there was insufficient evidence." (*Id.*) Earlier in the SAC, Plaintiff alleges that Weiss was known to train other county attorneys to use "inherently unreliable" testimony from "jailhouse snitches . . . when there was otherwise insufficient evidence to convict." (*Id.* at 7, ¶ 21.)

In Count Five, Plaintiff alleges that, prior to Plaintiff's trial, Weiss had demonstrated a

continuing pattern of violating the constitutional rights of criminal defendants and was well known to the Arizona judiciary as an over-zealous and unethical prosecutor. (*Id.* at 23-25, ¶¶ 42-49.) Pima County's failure to terminate Weiss's employment prior to Plaintiff's trial exhibited deliberate indifference to the constitutional rights of criminal defendants and caused the violation of Plaintiff's constitutional rights. (*Id.* at ¶¶ 45-47.)

In Count Six, Plaintiff alleges that "certain employees of both the City of Tucson and Pima County unlawfully conspired and mutually agreed to violate" Plaintiff's constitutional rights, including by improperly arresting, charging, and prosecuting Plaintiff; deliberately withholding exculpatory evidence in the form of the Truesdail Report; and calling a witness whose testimony was obviously false and contradicted by the undisclosed Truesdail Report. (*Id.* at 25-29, ¶¶ 50-72.) Plaintiff alleges that Weiss and others, including employees of the Tucson Fire Department, knew of and/or were in possession of the Truesdail Report. (*Id.* at 27, ¶¶ 59-61.) Plaintiff further alleges that, at the direction of Weiss, detectives from the Tucson Police Department went to jail "to induce one or more inmates" to provide incriminating testimony against Plaintiff and ultimately produced two witnesses, Bruce Wallmark and Robert Jackson, who gave false testimony in violation of Plaintiff's due process rights. (*Id.* at 28-29, ¶¶ 63-68.)

In Counts Seven and Eight, Plaintiff raises state-law claims for negligence and wrongful arrest against City of Tucson. (*Id.* at 30-31, ¶¶ 73-81.) In Count Nine, Plaintiff raises a state-law malicious

prosecution claim against Pima County. (*Id.* at 31-32, ¶¶ 81-85.)

III. Standard of Review

A complaint must include a "short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require in-depth factual allegations, it does require more than "labels[,] conclusions, [or] a formulaic recitation of a cause of action's elements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). There must be sufficient "factual content [to] allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Dismissal under Rule 12(b)(6) may be "based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), a court takes "all factual allegations set forth in the complaint . . . as true and construed in the light most favorable to plaintiffs." *Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001). However, only well-pleaded facts are given a presumption of truth. *Iqbal*, 556 U.S. at 679. Conclusory allegations—that is, allegations that "simply recite the elements of a cause of action" without supplying underlying facts to support those elements—are not "entitled to the presumption of truth." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

If a complaint falls short of meeting the necessary pleading standards, a district court should dismiss

with leave to amend unless the deficiencies of a pleading "could not possibly be cured by the allegation of other facts." *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 926 (9th Cir. 2012) ("We have adopted a generous standard for granting leave to amend from a dismissal for failure to state a claim . . . ."). Failing to give leave to amend when a plaintiff could include additional facts to cure a complaint's deficiencies is an abuse of discretion. *AE ex rel. Hernandez v. Cnty. of Tulare*, 666 F.3d 631, 637-38 (9th Cir. 2012).

The Court may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting [a] motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Judicial proceedings in other courts are matters of judicial notice and may appropriately be considered on a motion to dismiss. *See Rosales-Martinez v. Palmer*, 753 F.3d 890, 894-95 (9th Cir. 2014).

IV. Discussion

Defendant City of Tucson requests that Counts One, Two and Six against the City be dismissed with prejudice. (Doc. 54 at 12.) Defendant Pima County requests dismissal of all claims alleged against it. (Doc. 55 at 17.)

A. Claims Under 42 U.S.C. § 1983

Defendants argue that Plaintiff's § 1983 claims must be dismissed because they are barred by *Heck*, and that any portions not barred by *Heck* are barred

by the statute of limitations. Defendants further argue that the claims must be dismissed because they are not supported by sufficient non-conclusory factual allegations. In addition, Pima County argues that it is entitled to Eleventh Amendment immunity regarding claims premised on the conduct of Weiss or the County Attorney's Office in the handling of Plaintiff's prosecution. Finally, Pima County argues that the Court erred in previously finding that Plaintiff stated a valid municipal liability claim in Count Five.

1. Law of the Case

Plaintiff argues that this Court has already rejected Defendants' contentions regarding *Heck* and the statute of limitations, and that Defendants are precluded from re-litigating those issues because the Court's prior resolution of the issues is the law of the case. The law of the case doctrine "counsels against reopening questions once resolved in ongoing litigation." *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989). Nevertheless, "a trial court has discretion to reconsider its prior, non-final decisions." *Id.*; *see also City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (so long as district court retains jurisdiction over case, it has inherent authority "to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient").[4] Reconsideration of a previous ruling is

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[4] Furthermore, an amended complaint supersedes the original and may be attacked anew. *See Gustavson v. Mars, Inc.*, 2014 WL 2604774, at *5 n.3 (N.D. Cal. June 10, 2014); *In re Sony Grand Wega KDF-E A10/A20 Series Real Projection*

appropriate where "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997).

In its February 9, 2016 Order resolving Defendants' first Motions to Dismiss, the Court found that Plaintiff's claims could proceed under an exception to *Heck* and that they were not barred by the statute of limitations because they did not accrue until April 2013, when Plaintiff's 1972 convictions were vacated. (*See* Doc. 35 at 13-15). However, on reconsideration, the Court withdrew the portion of its February 9, 2016 Order finding that Plaintiff's claims fell under an exception to *Heck*. (*See* Doc. 48 at 2-3). In doing so, the Court held that, in light of the Ninth Circuit's decision in *Lyall*, "it is now clear that Plaintiff is *Heck*-barred from challenging his 2013 convictions in this action." (*Id.*) This holding substantially changes the nature of the claims that Plaintiff may permissibly raise in this action.

In light of the Court's holding that Plaintiff's claims cannot proceed under an exception to *Heck*, the Court must now apply *Heck* in analyzing the § 1983 claims asserted in Plaintiff's SAC. In addition, reexamination of the interplay between *Heck* and the statute of limitations is appropriate.

HDTV Television Litig., 758 F. Supp. 2d 1077, 1098 (S.D. Cal. 2010); *Belshaw v. Credit Bureau of Prescott*, 392 F. Supp. 1356, 1360-61 (D. Ariz. 1975).

2. *Heck*-Bar

A § 1983 damages action is *Heck*-barred if "a judgment in favor of the plaintiff would necessarily imply the invalidity of the plaintiff's outstanding criminal conviction or sentence." *Heck*, 512 U.S. at 487. As the Supreme Court explained in *Heck*:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.

Id. at 486-87.

As described more fully in the Court's February 9, 2016 Order resolving Defendants' first Motions to Dismiss (*see* Doc. 35 at 10-13), under certain circumstances, a § 1983 plaintiff may successfully challenge the constitutionality of underlying events that led to an outstanding criminal conviction without necessarily implying the invalidity of that conviction. *See generally Jackson v. Barnes*, 749 F.3d 755 (9th Cir. 2014); *Poventud v. City of N.Y.*, 750 F.3d 121 (2d Cir. 2014) (en banc); *Lockett v. Ericson*,

656 F.3d 892 (9th Cir. 2011); *Ove v. Gwinn*, 264 F.3d 817 (9th Cir. 2001). Where an earlier conviction is vacated or overturned but a subsequent conviction is outstanding, the plaintiff may bring a § 1983 suit premised on alleged constitutional violations that affected the first conviction but did not taint the subsequent, outstanding conviction. *See, e.g.*, *Jackson*, 749 F.3d at 758, 760-61; *Poventud*, 750 F.3d at 136-37.

In all of the SAC's claims seeking relief under 42 U.S.C. § 1983—Counts One through Six—Plaintiff alleges that Defendants' challenged actions or inactions caused Plaintiff to experience "a profound deprivation of his civil rights and liberties" in that he was wrongly charged and convicted of multiple counts of homicide and spent approximately 42 years in prison. (*See* Doc. 40 at 18-19, 21, 23, 25, 29, ¶¶ 17, 24, 33, 41, 49, 72.) In other words, in his SAC, Plaintiff has tied all of his § 1983 claims to a theory of constitutional harm that would require him to prove that he was wrongfully charged and convicted of, and imprisoned for, 28 counts of felony murder. Although Plaintiff's 1972 convictions have been vacated, in 2013 Plaintiff was again convicted of 28 counts of felony murder and sentenced to time served. Plaintiff's 2013 convictions and sentence have not "been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. Success on the merits of the theory of constitutional harm alleged in Plaintiff's SAC would necessarily undermine the validity of Plaintiff's outstanding

2013 convictions and sentence. *See id.* at 487.[5] Accordingly, *Heck* bars Plaintiff from premising his claims on the alleged constitutional injuries of being wrongfully charged, convicted, and imprisoned. *See* 512 U.S. at 487. However, as described more fully below, *Heck* does not bar Plaintiff from raising claims premised on alleged constitutional violations that affect his 1972 convictions but do not taint his 2013 convictions.

3. Statute of Limitations

In Arizona, a two-year statute of limitations applies to § 1983 actions. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). A § 1983 cause of action accrues "when the plaintiff has a complete and present cause of action," e.g., when the plaintiff is able to "file suit and obtain relief." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (internal quotation marks omitted).[6] Under

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[5] In its February 9, 2016 Order resolving Defendants' first Motions to Dismiss, the Court noted that an assertion that Plaintiff was wrongfully convicted in 1972 is not necessarily inconsistent with his 2013 no-contest plea, because the plea did not admit factual guilt. (*See* Doc. 35 at 13.) However, although Plaintiff's no-contest plea cannot be used as an admission of factual guilt, it does represent an agreement by Plaintiff that his 2013 convictions and sentence are valid. The theory alleged in Plaintiff's SAC—that Plaintiff was wrongfully convicted of 28 counts of felony murder and sentenced to approximately 42 years in prison—necessarily implies the invalidity of Plaintiff's outstanding 2013 convictions of 28 counts of felony murder and outstanding sentence of 42 years imprisonment.

[6] Although the statute of limitations applicable to a § 1983 action is the limitations period applicable to personal-injury torts under state law, "the accrual date of a § 1983 cause of action is a question of federal law and is *not* resolved by reference to state law." *Wallace*, 549 U.S. at 387-88.

the *Heck* deferred-accrual rule, "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Heck*, 512 U.S. at 489-90; *see also Wallace*, 549 U.S. at 393 (where success in a tort action would impugn an outstanding criminal judgment, "the *Heck* rule for deferred accrual . . . delays what would otherwise be the accrual date of [the] tort action until the setting aside" of the conviction that the action would impugn); *Rosales-Martinez*, 753 F.3d at 896 (same).

The Court previously found that, due to the *Heck* rule for deferred accrual, Plaintiff's claims did not accrue until Plaintiff's 1972 convictions were vacated in 2013, and thus that the statute of limitations did not bar Plaintiff's § 1983 action. (Doc. 35 at 15.) This finding remains true with respect to claims premised on a theory of wrongful conviction and sentence. However, because the Ninth Circuit's decision in *Lyall* makes clear that *Heck* precludes Plaintiff from premising his claims on a theory that he was wrongfully convicted and sentenced, the Court now clarifies its statute-of-limitations analysis to address the accrual date applicable to other potential constitutional injuries upon which Plaintiff could frame his claims.

The *Heck* deferred accrual rule does not apply to a claim seeking damages for an arrest without probable cause in violation of the Fourth Amendment. *See Wallace*, 549 U.S. at 390-96. Absent state tolling rules requiring a different result, the statute of limitations on such a claim begins to run "at the time the claimant becomes detained pursuant

to legal process"—for example, when "he is bound over by a magistrate or arraigned on charges." *Id.* at 389, 394-96. A contrary rule would require a "bizarre extension of *Heck*" whereby "an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside." *Id.* at 393-94.

By extension of the Supreme Court's reasoning in *Wallace*, the *Heck* deferred accrual rule also does not apply to claims seeking damages for an unconstitutional interrogation. Such claims accrue at the time of the allegedly unconstitutional interrogation. *See Johnson v. Johnson Cnty. Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) ("Claims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur.").[7]

Accordingly, to the extent that Plaintiff's allegations of constitutional harm are premised on him being wrongfully arrested without probable cause and/or unlawfully interrogated, the statute of limitations on such claims expired decades ago. *See Wallace*, 549 U.S. at 390-91; *Johnson*, 925 F.2d at 1301.

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[7] A different analysis might apply to a § 1983 suit challenging the admission at trial of evidence obtained as a result of an allegedly unconstitutional interrogation. However, the Court need not conduct that analysis here, for Plaintiff's SAC does not allege that Plaintiff's constitutional rights were violated during his 1972 trial by the admission of evidence obtained as a result of his allegedly unlawful interrogation. Rather, it alleges that Plaintiff's constitutional rights were violated by the allegedly unlawful interrogation itself.

4. Surviving Claims

The interplay between *Heck* and the statute of limitations sharply constrains Plaintiff's § 1983 claims. *Heck* bars claims based on allegations that Plaintiff was wrongfully charged, convicted, and imprisoned. The statute of limitations bars claims based on allegations that Plaintiff was arrested without probable cause and unlawfully interrogated. However, neither the statute of limitations nor *Heck* bars claims based on constitutional violations that affect the validity of Plaintiff's 1972 convictions *but not the validity of his subsequent 2013 convictions*. *See Jackson*, 749 F.3d at 760-61; *Poventud*, 750 F.3d at 136-37.

Plaintiff's SAC alleges that his constitutional rights, including his rights to due process and to a fair trial free of racial bias, were violated during his original trial proceedings by the non-disclosure of the Truesdail Report, the hiring of an expert who believed Plaintiff was guilty because "black boys" are more likely to start fires, and the presentation of false testimony from two "jailhouse snitches." These allegations of constitutional injury implicate the fairness of Plaintiff's 1972 trial and the validity of his 1972 convictions. Accordingly, claims premised on these allegations of constitutional injury are not barred by the statute of limitations because, under the *Heck* deferred accrual rule, the claims did not accrue until Plaintiff's 1972 convictions were vacated. The claims are not barred by *Heck* so long as Plaintiff's 2013 convictions are untainted by the alleged constitutional harms.

Plaintiff's 2013 convictions resulted from Plaintiff's no-contest plea. In *Lockett*, the Ninth Circuit held that a plaintiff was not *Heck*-barred from bringing a § 1983 action challenging the lawfulness of a search that led to his arrest, notwithstanding the fact that the plaintiff was ultimately convicted and the conviction had not been vacated, because the plaintiff's conviction derived from a nolo contendere plea rather than from a verdict obtained with allegedly illegally obtained evidence. *See* 656 F.3d at 895-97. Similarly, in *Ove*, the Ninth Circuit held that plaintiffs with outstanding convictions for driving under the influence based on guilty and nolo contendere pleas were not *Heck*-barred from bringing a § 1983 action challenging the manner in which their blood was drawn, because the validity of their outstanding convictions did not depend upon the legality of the blood draws. 264 F.3d at 821, 823. However, in *Szajer v. City of Los Angeles*, the Ninth Circuit held that a plaintiff with an outstanding conviction derived from a no-contest plea was *Heck*-barred from bringing a § 1983 action challenging the validity of an undercover operation that led to the discovery of evidence forming the sole factual basis of the no-contest plea. 632 F.3d 607, 608, 612 (9th Cir. 2011).

At first glance, the decisions in *Lockett*, *Ove*, and *Szajer* appear to be inconsistent. However, the decisions are reconcilable if they are understood as together standing for the proposition that a § 1983 action is *Heck*-barred when successfully proving the plaintiff's § 1983 claims would fatally undermine the factual basis of an outstanding plea-based conviction, because under such circumstances the § 1983 action

challenges the validity of the outstanding conviction. Defendants argue that such circumstances are present here, because Plaintiff's § 1983 claims are inconsistent with the factual basis of his 2013 plea. For the following reasons, the Court disagrees.

In accepting Plaintiff's no-contest plea, the Pima County Superior Court incorporated by reference a memorandum filed by the State ("Plea Memorandum"). (*See* Doc. 6-2 at 14; *see also* Doc. 6-1 at 65-74.) The Plea Memorandum states that Plaintiff was arrested at the Pioneer Hotel within hours of discovery of the fire, that he had no legitimate reason to be at the hotel, and that he gave inconsistent statements when questioned by hotel employees and police officers. The Plea Memorandum summarizes testimony presented at Plaintiff's original trial, including testimony by hotel employees David Johnson, Giles Scoggins, and James Holsinger; Police Officer Louis Adams; Sergeant Eugene Rossetti; Sergeant H.L. Gassaway; Detective David Smith; juveniles Bruce Walmark and Robert Jackson; and expert witnesses called by both the prosecution and the defense. The Plea Memorandum explains that Walmark and Jackson both testified that Plaintiff admitted to them that he had started the fire, but that Jackson "later recanted his testimony and claimed police coercion." The Plea Memorandum also explains that expert witnesses for both the prosecution and the defense testified at Plaintiff's original trial that the fire was arson, but that this testimony is inconsistent with more recent findings by the Arson Review Committee and the Tucson Fire Department, both of which concluded—after reviewing the evidence using current fire

investigation methodology—that a fire-cause determination is not possible.

As an initial matter, it is not clear that the Plea Memorandum is admissible as evidence in this case. *See* Fed. R. Evid. 410(a).[8] However, Ninth Circuit authority supports Defendants' contention that the Plea Memorandum should be considered in the context of a *Heck* analysis. *See Szajer*, 632 F.3d at 612 (considering factual basis for plea as part of *Heck* analysis); *Rosales-Martinez*, 753 F.3d at 899 (suggesting district court may wish to consider, as part of *Heck* analysis, whether facts allocuted to in plea were inconsistent with allegations in § 1983 action). Accordingly, the Court has compared the facts set forth in the Plea Memorandum with the factual allegations of Plaintiff's SAC.

Plaintiff's challenges to the fairness of his 1972 trial—specifically, the withholding of the Truesdail Report, the hiring of an expert who believed "black boys" are more likely to start fires, and the presentation of "jailhouse snitch" testimony—do not necessarily undermine the factual basis of his 2013 plea such that they call into doubt the validity of Plaintiff's 2013 convictions. Plaintiff's allegation that Defendants presented false "jailhouse snitch" testimony is actually consistent with the Plea Memorandum, which specifically notes that Jackson recanted his trial testimony and claimed police

[8] In its Reply in Support of Motion to Dismiss Second Amended Complaint, Pima County states that the Plea Memorandum is not subject to the constraints of Rule 410, but it does not provide any specific arguments to support this statement. (Doc. 61 at 7.)

coercion. Accordingly, successfully proving Plaintiff's allegation that Defendants knowingly presented false testimony from Jackson during Plaintiff's 1972 trial would not undermine the factual basis of Plaintiff's 2013 plea. Likewise, successfully proving Plaintiff's allegation that Defendants hired an expert who believed Plaintiff was guilty because "black boys" are more likely to start fires would not undermine the factual basis of Plaintiff's 2013 plea; the Plea Memorandum specifies that the prosecution expert's trial testimony is contradicted by more recent findings of the Arson Review Committee and the Tucson Fire Department, and thus the factual basis of Plaintiff's 2013 plea cannot hinge on the accuracy of the expert witness's testimony at Plaintiff's original trial. Finally, Plaintiff's allegation that the Truesdail Report was exculpatory and should have been disclosed to him during his original trial proceedings does not undermine the validity of Plaintiff's 2013 convictions. Plaintiff was aware of the Truesdail report at the time of his 2013 plea, and thus his 2013 convictions are untainted by the alleged *Brady* violation. *See Poventud*, 750 F.3d at 136-37. Contrary to Defendants' arguments, the Plea Memorandum does not conclusively establish that the Truesdail Report was inculpatory. Whether the Truesdail Report was inculpatory or exculpatory is not an issue appropriate for resolution at this stage of the proceedings.

In conclusion, neither *Heck* nor the statute of limitations requires dismissal of Counts One through Six of Plaintiff's SAC to the extent that those claims are construed as alleging that Plaintiff's rights to due process and a constitutionally fair, racially

unbiased trial were violated during his original trial proceedings by the non-disclosure of the Truesdail Report, the hiring of an expert who believed Plaintiff was guilty because "black boys" are more likely to start fires, and the presentation of false testimony from two "jailhouse snitches." The Court now turns to the issue of whether the claims alleged in Plaintiff's SAC, so construed, satisfy the pleading standards of Rule 8.

Defendants' arguments regarding the sufficiency of the SAC's factual allegations conflate, to some extent, the standard for pleading claims with the standard for proving claims. With respect to Counts One, Three, and Six, the new factual content contained in Plaintiff's SAC—assumed to be true for purposes of evaluating a motion to dismiss—is sufficient to permit a reasonable inference that a custom or practice of racial discrimination existed in the City of Tucson Police Department and the Pima County Attorney's Office, and that this custom/practice, in combination with pressure to secure a conviction in a high-profile case, caused the Defendants to conspire to violate Plaintiff's constitutional rights by withholding the Truesdail report and knowingly presenting false "jailhouse snitch" testimony. Accordingly, the Court declines to dismiss Counts One, Three, and Six of Plaintiff's SAC.

Plaintiff's SAC also contains sufficient factual content to support the failure-to-train claim contained in Count Four. Plaintiff alleges that Pima County employees were trained to secure convictions even where there was insufficient evidence of guilt by using ethically and constitutionally suspect

methods, including the procurement and presentation of unreliable "jailhouse snitch" testimony. Plaintiff has pleaded factual content that identifies specific deficiencies in Pima County's training and supervision of employees and connects those deficiencies to permissible allegations of constitutional injury. Accordingly, the Court declines to dismiss Count Four. However, the Court will grant Defendant City of Tucson's Motion to Dismiss with respect to Count Two, because Plaintiff's SAC does not contain sufficient non-conclusory factual allegations to (1) identify specific deficiencies in the City of Tucson's training and supervision of employees, and (2) connect those deficiencies to allegations of constitutional injury that do not run afoul of either *Heck* or the statute of limitations.

The Court found in its February 9, 2016 Order that Count Five sufficiently states a claim. Pima County argues that this Court's prior decision not to dismiss Count Five was clearly erroneous because Pima County cannot be held liable under § 1983 for failing to terminate Weiss in deliberate indifference to Weiss's prosecutorial misconduct.[9] Pima County relies upon *Hounshell v. White*, 220 Ariz. 1, 5 (App. 2008), for the proposition that it has no authority to hire or terminate deputy county attorneys and no authority or control over the training provided to them. (*See* Doc. 55 at 9 n.3, 11.)[10] *Hounshell* and the

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[9] Pima County could have, but did not, raise this argument in its Motion for Reconsideration (Doc. 39).

[10] In addition, Pima County cites to *Lacey* for the proposition that administrative hiring and training decisions regarding prosecutors are not actionable against a county. (*See* Doc. 55 at

statutory provisions cited therein do not provide adequate support for Pima County's contentions. Although *Hounshell* indicates that a county attorney has the sole authority to dismiss or discipline deputy county attorneys, it does not hold that a county has no control over the hiring or training of deputy county attorneys. Indeed, pursuant to A.R.S. § 11-409, the county board of supervisors must consent to the county attorney's appointment of deputy county attorneys. Furthermore, *Hounshell* does not indicate that counties lack the ability to establish policies, customs, and practices concerning the hiring, firing, training, and supervision of deputy county attorneys, nor does it hold that a county is immune from § 1983 liability with respect to such policies, customs, and practices. Plaintiff's SAC contains sufficient factual content from which a reasonable inference could be drawn that Pima County had a deliberately indifferent practice or custom of hiring and retaining deputy county attorneys who secured convictions through unethical and unconstitutional tactics, and that this practice or custom caused the violation of Plaintiff's constitutional rights. Pima County has not shown that the factual allegations of Plaintiff's SAC are insufficient to state a municipal liability claim in Count Five.

Pima County further argues that it is entitled to Eleventh Amendment immunity because the acts of Weiss and the County Attorney's Office in the course

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11 (citing *Lacey*, 693 F.3d at 929).) The cited portion of *Lacey* discusses cases holding that district attorneys' hiring decisions are administrative in nature and not shielded by absolute prosecutorial immunity. *Lacey* "express[ed] no view on the merits" of any municipal liability claims. *See* 693 F.3d at 940.

of Plaintiff's prosecution were taken on behalf of the state. "[T]he Eleventh Amendment does not extend to counties." *Eason v. Clark Cnty. School Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2002). Pima County cites to two unpublished district court decisions for the proposition that Eleventh Amendment immunity may extend to counties "where the conduct complained of involved the acts of county prosecutors exercising prosecutorial functions on behalf of the State." (Doc. 55 at 13-14 (citing *Nazir v. Cty. of L.A.*, 2011 WL 819081, at *8 (C.D. Cal. Mar 2, 2011); *Neri v. Cty. of Stanislaus Dist. Atty's Office*, 2010 WL 3582575, at *3 (E.D. Cal. Sept. 9, 2010).) The Court interprets these cases as applying the rule that a county cannot be liable under § 1983 for the actions of state, rather than county, policymakers. *See McMillan v. Monroe Cnty.*, 520 U.S. 781, 783 (1997). This rule is relevant only to the extent that Plaintiff's claims hinge upon a final policymaker theory of *Monell* liability. *See McMillan*, 520 U.S. at 796. Plaintiff's SAC does not expressly rely upon such a theory. To the extent that any of Plaintiff's claims do hinge upon such a theory, Pima County has not shown that a county attorney acts as a state policymaker under Arizona law. *See Jett v. Dall Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) ("whether a particular official has final policymaking authority is a question of state law"). The cases cited by Pima County do not apply Arizona law on this issue, and Ninth Circuit precedent supports finding that an Arizona county prosecutor can act as a final county policymaker in certain circumstances. *See, e.g.*, *Gobel v. Maricopa Cnty.*, 867 F.2d 1201, 1208-09 (9th Cir. 1989) (finding that plaintiffs may be able to prove "that in Arizona the county attorney is the kind of

county official whose policy decisions automatically constitute county policy"), *abrogated on other grounds by Merritt v. Cnty. of L.A.*, 875 F.2d 765 (9th Cir. 1989).[11]

Defendants also argue that Plaintiff's claim for compensatory damages must be dismissed with prejudice because Plaintiff's outstanding 2013 convictions and time-served sentence preclude Plaintiff from obtaining compensatory damages for any time he spent in prison. Defendants are correct that Plaintiff is not entitled to compensatory damages for the time he spent incarcerated. *See Jackson*, 749 F.3d at 762; *Olsen v. Correiro*, 189 F.3d 52, 66-70 (1st Cir. 1999) (plaintiff not entitled to incarceration-based damages in § 1983 lawsuit challenging actions in criminal proceedings underlying murder conviction where, after murder conviction was overturned, plaintiff pled nolo contendere to manslaughter and was sentenced to time served). However, dismissal of Plaintiff's compensatory damages claim is inappropriate at this stage of the proceedings because Plaintiff may be able to establish non-incarceration-based compensatory damages. *See Olsen*, 189 F.3d at 56-57, 71 (although precluded from recovering incarceration-based damages, plaintiff could nevertheless recover compensatory damages for injuries associated with his first, overturned murder

[11] More recent Ninth Circuit precedent has called *Gobel* into doubt. *See Weiner v. San Diego Cnty.*, 210 F.3d 1025, 1031 (9th Cir. 2000). However, the Arizona Supreme Court has assumed the correctness of *Gobel*. *See City of Phx v. Yarnell*, 909 P.2d 377, 387 (Ariz. 1995) (en banc).

trial and conviction, such as attorney fees expended in that trial and/or damages for emotional injury not resulting from incarceration).

B. State-Law Claims

Defendant Pima County's Motion to Dismiss argues that the malicious prosecution claim in Count Nine of Plaintiff's SAC must be dismissed. In his Combined Response to Defendants' Motions to Dismiss, Plaintiff concedes that Count Nine is barred because no notice of claim was filed. Accordingly, Count Nine will be dismissed with prejudice.

Defendants' Motions to Dismiss do not make any specific arguments concerning the state-law claims asserted in Counts Seven and Eight, and the City of Tucson does not specifically request dismissal of Counts Seven and Eight. (*See* Doc. 54 at 12 (requesting dismissal of Counts One, Two, and Six).)

Accordingly,

IT IS ORDERED that Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint (Docs. 54, 55) are **granted in part and denied in part as follows**:

1. Count Four of Plaintiff's Second Amended Complaint is **dismissed without prejudice**.

2. Count Nine of Plaintiff's Second Amended Complaint is **dismissed with prejudice**.

3. Defendants' Motions to Dismiss are otherwise denied, but the allegations of constitutional injury and the compensable damages claim of Plaintiff's Second Amended Complaint are

constrained by the limitations set forth in this Order.

Dated this 16th day of March, 2017.

/s/ R. Márquez
Honorable Rosemary Márquez
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LOUIS TAYLOR,

Plaintiff,

v.

PIMA, COUNTY OF, ET AL.,

Defendants.

No. CV-15-00152-TUC-RM

ORDER

June 1, 2016

Pending before the Court is Defendant Pima County's Motion for Reconsideration (Doc. 39). For the reasons that follow, the Court will partially grant Defendant's Motion.

I. Motion for Reconsideration of Prior Order

In a prior Order (Doc. 35) ruling on Defendants' Motions to Dismiss (Docs. 5, 6), the Court relied on Justice Souter's concurring opinion and Justice Stevens' dissenting opinion in *Spencer v. Kemna*, 523 U.S. 1 (1998), as well as the Ninth Circuit's opinion in *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002), in finding that an exception to *Heck v. Humphrey*, 512

U.S. 477 (1994), applied in the above-entitled action. (Doc. 35 at 13-15.) Specifically, the Court found that, because Plaintiff Louis Taylor's release from incarceration prevented him from seeking habeas relief under 28 U.S.C. § 2254 with respect to his 2013 convictions, Plaintiff could pursue claims under 42 U.S.C. § 1983 in this action even if success on those claims would necessarily imply the invalidity of his 2013 convictions. (*Id.* at 14-15.) As a result of this finding, the Court rejected Defendants' argument that Plaintiff is precluded from seeking compensatory damages for the 42 years he spent in prison. (*Id.* at 15.)

In its Motion for Reconsideration, Defendant Pima County asks the Court to reconsider its holding that Plaintiff may seek compensatory damages for his 42-year imprisonment. Defendant argues that the exception to *Heck* previously relied upon by the Court has been foreclosed by the Ninth Circuit's recent decision in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), which was issued after the completion of briefing on Defendants' Motions to Dismiss.

II. Analysis

"[A]bsent highly unusual circumstances," a motion for reconsideration should be granted only if "the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000); *see also* LRCiv 7.2(g) ("The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a

showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence."). At the time the parties completed their briefing on Defendants' Motion to Dismiss in this case, the law was unsettled as to whether *Heck* bars § 1983 claims challenging an outstanding conviction if the § 1983 plaintiff never had an opportunity to challenge the conviction in a § 2254 habeas petition. However, *Lyall* has since resolved that question in a manner irreconcilable with this Court's prior ruling. Accordingly, reconsideration of the Court's prior ruling is appropriate.

In *Lyall*, the Ninth Circuit held that the narrow exception to *Heck* recognized in *Spencer* and *Nonnette* does not apply to § 1983 claims challenging an underlying conviction, even in cases in which the § 1983 plaintiff is unable to pursue § 2254 habeas relief through no fault of his own. *Lyall*, 807 F.3d at 1192, 1192 n.12. In light of *Lyall*, the Court withdraws the portion of its prior Order (Doc. 35) finding that an exception to *Heck* applies in this case. Pursuant to *Lyall*, it is now clear that Plaintiff is *Heck*-barred from challenging his 2013 convictions in this action.

The remaining issue is whether Plaintiff's inability to challenge the validity of his 2013 convictions precludes him from seeking compensatory damages. Defendants do not seek reconsideration of the Court's prior ruling that Plaintiff may pursue some claims related to his 1972 convictions without necessarily implying the invalidity of his 2013 convictions. However, Defendant Pima County argues in its Motion to Reconsider that Plaintiff is

barred from seeking compensatory damages with respect to those claims, because an award of compensatory damages would necessarily imply the invalidity of his 2013 time-served sentence. The Court finds that it would be premature, prior to discovery, to determine whether Plaintiff can present evidence of compensable damages arising from alleged constitutional violations underlying his 1972 convictions. Accordingly, the Court rejects Defendant Pima County's argument that Plaintiff's claim for compensatory damages must be dismissed in its entirety at this early stage of the proceedings.

IT IS ORDERED that Defendant Pima County's Motion for Reconsideration (Doc. 39) is **granted in part and denied in part** as follows:

1. The Motion is **granted** to the extent it seeks reconsideration of the Court's prior finding that an exception to *Heck* applies in this § 1983 action. The Court **withdraws** the portion of its February 9, 2016 Order (Doc. 35) finding an exception to *Heck* pursuant to *Spencer* and *Nonnette*. Specifically, the Court **withdraws** the discussion beginning at page 13, line 17 and ending at page 15, line 6 of the Order (Doc. 35). In light of *Lyall*, it is now clear that Plaintiff is *Heck*-barred from challenging the validity of his outstanding 2013 convictions.

2. Defendant Pima County's Motion for Reconsideration is **denied** to the extent it requests dismissal of Plaintiff's claim for compensatory damages.

Dated this 1st day of June, 2016.

/s/ R. Márquez
Honorable Rosemary Márquez
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LOUIS TAYLOR,

Plaintiff,

v.

PIMA, COUNTY OF, ET AL.,

Defendants.

No. CV-15-00152-TUC-RM

ORDER

February 8, 2016

Plaintiff Louis Taylor sues Defendants City of Tucson and Pima County under 42 U.S.C. § 1983. Pending before the Court are Defendants' Motions to Dismiss (Docs. 5, 6), and Plaintiff's Motion for Leave to File Supplemental Response to Defendants' Motions to Dismiss (Doc. 31). The Court has considered Plaintiff's Supplemental Response (Doc. 30) and Defendants' Replies to the Supplemental Response (Docs. 32, 34). The Court will grant leave to file the Supplemental Response and the Supplemental Replies, and will consider all to have been properly filed.

I. Standard of Review

Rule 8 of the Federal Rules of Civil Procedure requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While this pleading standard does not demand "detailed factual allegations," it requires more than labels, conclusions, "and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of a cause of action, supported by mere conclusory statements, do not suffice."). A complaint must tender more than "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation and alteration omitted). Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 678-79. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679.

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). In other words, the complaint's "non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

A court evaluating a motion to dismiss must view the complaint "in the light most favorable to the plaintiff." *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990). All well-pleaded factual allegations of the complaint must be accepted as true, but the same does not apply to legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678-79.

II. Allegations of Plaintiff's First Amended Complaint

Plaintiff filed his First Amended Complaint in Pima County Superior Court on February 10, 2015, naming Pima County and the City of Tucson as Defendants. (Doc. 1-3, First Amended Complaint.) In the First Amended Complaint, Plaintiff alleges that he was arrested by Tucson Police Department officers on December 20, 1970, in connection with a fire that had occurred at the Pioneer Hotel in Tucson. (*Id.* at ¶ 7.) Plaintiff, an African American, alleges that he was arrested "based at least in part on his race." (*Id.* at ¶ 8.) Plaintiff further alleges that he was arrested before any investigation of the fire had been commenced to determine if the fire was caused by arson. (*Id.* at ¶¶ 9, 17.)[1] Plaintiff states that no adequate and scientifically reliable evidence proves that the fire was caused by arson, and thus there is insufficient evidence to show that any crime

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[1] The Tucson Fire Department conducted an investigation into the fire in the weeks and/or months after it occurred. (*Id.* at ¶ 17.)

was committed. (*Id.* at ¶ 10.) If the fire was arson, however, Plaintiff alleges that he should not have been a primary suspect. (*Id.* at ¶ 13.) Rather, the primary suspect should have been a man named Donald Anthony, who was the suspect in three prior fires, thought to be arson, that had recently occurred at the Pioneer Hotel. (*Id.* at ¶¶ 11-13.)

After his arrest, Plaintiff was interrogated by Tucson Police Department officers for several hours in the early morning of December 20, 1970. (*Id.* at ¶ 14.) Near the end of the interrogation, Plaintiff requested and was given a polygraph, during which he denied starting the Pioneer Hotel fire. (*Id.* at ¶ 15.) The polygraph did not indicate deception. (*Id.* at ¶ 16.) Despite the polygraph results and the existence of a known arson suspect in other recent fires at the hotel, and before any investigation had been commenced to determine if the fire was arson, Plaintiff was charged with 28 counts of murder. (*Id.* at ¶¶ 16-17.) Deputy Pima County Attorney Horton Weiss was assigned to Plaintiff's prosecution. (*Id.* at ¶ 21.)[2] Plaintiff alleges that, by the time of his trial, Weiss was well-known to be an over-zealous and unethical prosecutor whose prior misconduct involved violating or potentially violating criminal defendants' constitutional rights. (*Id.* at ¶¶ 22-23.)[3]

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[2] Plaintiff alleges that the Tucson Fire Department, the Tucson Police Department, and the Pima County Attorney's Office worked together on his prosecution. (*Id.* at ¶ 18.)

[3] In support of this allegation, Plaintiff cites to several cases in which Weiss's prosecutorial conduct was at issue. (*See id.* at ¶¶ 22, 24.)

Plaintiff alleges that Defendants violated and conspired to violate his clearly established federal constitutional rights during and after his trial. (*Id.* at ¶¶ 20, 34-36.) First, Plaintiff alleges that Defendants withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); specifically, he alleges that they withheld a written report, known as the Truesdail report, stating that no evidence of accelerants was discovered during post-fire inspections. (Doc. 1-3 at ¶¶ 25-27, 30.) Plaintiff alleges that this *Brady* violation was compounded by Defendants' presentation of false testimony from a jailhouse snitch, Robert Jackson. (*Id.* at ¶¶ 28-29, 31-32.) Jackson—who was called as a rebuttal witness at the very end of the trial—testified that Plaintiff had admitted using an accelerant to start the Pioneer Hotel fire. (*Id.* at ¶¶ 28-29, 31-32.)

On March 21, 1972, Plaintiff was convicted of 28 counts of murder by an all-white jury. (*Id.* at ¶ 19.) On October 23, 2012, he filed a Petition for Post-Conviction Relief. (*Id.* at ¶ 39.) In the Petition, Plaintiff detailed the findings and conclusions of a panel of fire experts that, after reviewing all evidence in the case, concluded that the Pioneer Hotel fire could not be classified as arson. (*Id.* at ¶ 40.) The Pima County Attorney stipulated that, if "a review of the original evidence using new advances and techniques in fire investigation is legally 'newly discovered evidence' . . . the State would be unable to proceed with a retrial, and [Plaintiff's] convictions would not stand." (*Id.* at ¶ 42.) The Pima County Attorney then stipulated to Plaintiff's request for post-conviction relief on the condition that Plaintiff enter a "no contest" plea. (*Id.*)

On April 2, 2013, while maintaining his innocence, Plaintiff pled "no contest" to charges related to the fire, on the condition that he serve no additional time in prison for the new convictions. (*Id.* at ¶ 44.) On the same date, Plaintiff's March 1972 convictions were vacated, and he was released from prison after having served approximately 42 years of incarceration. (*Id.* at ¶¶ 43, 45.)

Plaintiff raises claims under 42 U.S.C. § 1983 asserting municipal liability for customs/practices of racial discrimination, inadequate training/supervision of employees, failure to terminate Prosecutor Weiss in deliberate indifference to the constitutional rights of criminal defendants, and conspiracy to violate his constitutional rights.

III. Analysis

In their Motions to Dismiss, Defendants argue that Plaintiff's First Amended Complaint should be dismissed on numerous grounds. They argue that the complaint contains insufficient non-conclusory factual allegations to support Plaintiff's claims of racial discrimination, failure to train/supervise, failure to terminate Weiss, and civil conspiracy. Defendant Pima County argues that it cannot be held liable for Weiss's conduct. In addition, Defendants argue that Plaintiff's complaint must be dismissed pursuant to *Heck v. Humphrey*, 512 U.S. 477 (1994). They also argue that Plaintiff cannot prove compensatory damages, that he cannot obtain punitive damages from municipalities, and that his claims are barred by the statute of limitations and the doctrine of collateral estoppel.

A. Sufficiency of Allegations: Counts One and Three

A municipality may be liable under 42 U.S.C. § 1983 "if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such a deprivation." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (internal quotations omitted). "*Respondeat superior* or vicarious liability will not attach under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Because a municipality can be held responsible under § 1983 "only where the municipality *itself* causes the constitutional violation at issue," *id.*, plaintiffs seeking to impose § 1983 liability on local governments must show that the challenged acts were taken "'pursuant to official municipal policy,'" *Connick*, 563 U.S. at 60 (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978)). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.* at 61. "A policy of inaction or omission may be based on failure to implement procedural safeguards to prevent constitutional violations," but a plaintiff alleging *Monell* liability based on a policy of inaction must show, in addition to a constitutional violation, that the municipality's policy of inaction "amounts to deliberate indifference" to constitutional rights and that the municipality could have prevented the constitutional violation with an appropriate policy. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012).

In Count One of his First Amended Complaint, Plaintiff alleges that the City of Tucson, prior to and at all times relevant to his arrest and prosecution in the 1970s, "had a pervasive long-standing custom/practice of racial discrimination against African Americans" that caused the deprivation of his constitutional rights, including his due process rights, and caused him to be wrongfully charged and convicted of multiple counts of homicide. (Doc. 1-3 at ¶ 54, 57-58.) In Count Three, he alleges the same with respect to Pima County. (*Id.* at ¶ 66, 69-70.) Plaintiff's allegation that he was arrested at least in part based on his race lends some support to Count One, but Plaintiff fails to allege non-conclusory factual content linking his arrest to any policy or custom of racial discrimination on the part of Defendant City of Tucson. Similarly, in Count Three, Plaintiff fails to offer any non-conclusory factual allegations linking the constitutional violations that he alleges occurred during his trial to any policy or custom of racial discrimination on the part of Defendant Pima County. Accordingly, Counts One and Three fail to state § 1983 claims upon which relief can be granted.

B. Sufficiency of Allegations: Counts Two and Four

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick*, 563 U.S. at 61. However, "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a

claim turns on a failure to train." *Id.* A plaintiff seeking to hold a municipality liable under § 1983 for inadequate employee training must show that the constitutional injury that he suffered is "closely related" to an "identified deficiency" in the municipality's training program. *City of Canton*, 489 U.S. at 391. Further, a municipality can be held liable under § 1983 for inadequate training "only where the failure to train amounts to deliberate indifference to the rights of persons with whom" the municipality's employees come into contact. *Id.* at 388.[4] "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61 (internal quotation and alteration omitted). "A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 62 (internal quotation omitted).

In Count Two of his First Amended Complaint, Plaintiff alleges that his civil rights and liberties were violated as a result of Defendant City of Tucson's failure "to train" and/or "supervise its police employees." (Doc. 1-3 at ¶¶ 62-63.) In Count Four, Plaintiff alleges that his civil rights and liberties were violated as a result of Defendant Pima County's failure "to train" and/or "supervise" its employees,

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[4] The same "deliberate indifference" standard governing claims for inadequate training has also been applied to claims for inadequate supervision and hiring. *See, e.g.*, *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989) (inadequate supervision); *Benavides v. Cnty. of Wilson*, 955 F.2d 968, 974-75 (5th Cir. 1992) (inadequate hiring).

including its "Deputy County attorneys." (*Id.* at ¶¶ 74-75, 78.) Plaintiff does not identify any specific deficiencies in Defendants' training or supervision of employees.[5] Because Plaintiff has failed to allege factual content showing that he suffered constitutional deprivations closely related to identified deficiencies in Defendants' training and supervision of employees, Counts Two and Four fail to state § 1983 claims upon which relief can be granted.

C. Sufficiency of Allegations: Count Five

In Count Five of his First Amended Complaint, Plaintiff alleges that Pima County's failure to terminate Weiss's employment prior to Plaintiff's trial constituted deliberate indifference to the constitutional rights of criminal defendants and caused Plaintiff to be wrongfully charged and convicted of multiple counts of homicide. (Doc. 1-3 at ¶ 81, 84.) Defendant Pima County argues that Plaintiff fails to allege non-conclusory factual content sufficient to support this claim. The Court disagrees. Plaintiff alleges that, prior to his trial, Weiss "had demonstrated a continuing pattern of violating the constitutional rights of criminal defendants" and was well-known to the Arizona judiciary as "an over-zealous and unethical prosecutor who habitually practiced on the edge of, and often beyond, what was ethically and constitutionally proper." (*Id.* at ¶ 80.)

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[5] Though Plaintiff does not identify the specific constitutional rights that he alleges were violated as a result of Defendants' alleged failure to train/supervise, it appears from the other allegations of his complaint that he is alleging violation of his due process rights.

Based on these factual allegations, reasonable inferences could be drawn that Pima County knew or should have known that continued employment of Weiss as a Deputy County Attorney posed a danger of violating the constitutional rights of criminal defendants, that Pima County was deliberately indifferent to that danger, and that Pima County's deliberate indifference caused a deprivation of Plaintiff's constitutional rights.[6]

D. Sufficiency of Allegations: Count Six

"A civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 935 (9th Cir. 2012) (internal quotation omitted). "Conspiracy is not itself a constitutional tort under § 1983." *Id.* Allegations of a conspiracy do "not enlarge the nature of the [§ 1983] claims asserted by the plaintiff, as there must always be an underlying constitutional violation." *Id.*

In Count Six of his First Amended Complaint, Plaintiff alleges that Defendants' employees "unlawfully conspired and mutually agreed to violate Plaintiff Taylor's constitutional rights." (Doc. 1-3 at ¶ 86.) To bring this claim under the umbrella of *Monell* liability, Plaintiff alleges that the

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[6] Though Plaintiff does not identify the specific constitutional rights that he alleges were violated as a result of Defendants' alleged failure to terminate Weiss, it appears from the other allegations of his complaint that he is alleging violation of his due process rights.

conspiratorial conduct of Defendants' employees directly resulted from Defendants' "unconstitutional, racially discriminatory policies or customs." (Doc 1-3 at ¶ 87.) Because Plaintiff's conspiracy claim is premised on the same allegations of racially discriminatory customs/practices at issue in Counts One and Three, and the Court has determined that the conclusory allegations of Counts One and Three are insufficient to state a § 1983 claim for racially discriminatory customs/practices, "a conspiracy claim predicated upon the same allegations" fails. *See Cassettari v. Nevada Cnty., Cal.*, 824 F.2d 735, 739 (9th Cir. 1987).[7] Count Six fails to state a claim upon which relief can be granted.

E. Prosecutorial Immunity

Pima County argues that challenges to Weiss's prosecutorial conduct are precluded by absolute prosecutorial immunity, as is the decision to assign Weiss to Plaintiff's prosecution. "Prosecutors performing their official prosecutorial functions are entitled to absolute immunity against constitutional torts." *Lacey*, 693 F.3d at 912; *see also Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (prosecutors enjoy absolute immunity from civil suits for damages under § 1983 for acts taken "in initiating a prosecution and in presenting the State's case"). In addition, "[d]ecisions related to appointments and

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[7] It does not appear that Plaintiff is alleging a conspiracy under 42 U.S.C. § 1985; to the extent he is, he has failed to offer sufficient non-conclusory factual allegations showing that the alleged conspiracy was motivated by "racial" or "otherwise class-based, invidiously discriminatory animus." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

removals in a particular matter" are generally "shielded from suit by absolute immunity." *Lacey*, 693 F.3d at 930-31. However, "[d]ecisions related to general conditions of employment—including decisions to hire, promote, transfer, and terminate" generally do not qualify for absolute immunity. *Id.*

Plaintiff concedes that absolute prosecutorial immunity would normally apply to Weiss's alleged failure to disclose *Brady* material and to Weiss's alleged decision to present perjured testimony; however, Plaintiff argues that Weiss forfeited his prosecutorial immunity by conspiring with non-immune employees. *See Lacey*, 693 F.3d at 937 (a prosecutor may forfeit prosecutorial immunity by conspiring with non-immune employees in conduct that is not prosecutorial in nature). The Court need not, at this time, determine whether absolute prosecutorial immunity would shield Weiss from liability for his alleged misconduct. Weiss is not a defendant in this action. Plaintiff alleges *Monell* claims based upon Pima County's own customs, practices, training, supervision, and hiring/termination decisions. Pima County has failed to cite authority supporting the proposition that absolute prosecutorial immunity shields a municipality from liability for claims alleging that the municipality's racially discriminatory customs or practices caused a prosecutor to violate a defendant's constitutional rights, or from liability for claims alleging that the municipality's constitutionally deficient training, supervision, and hiring/retention

of prosecutors exhibited deliberate indifference to criminal defendants' constitutional rights.[8]

F. State v. County Officer

Defendant Pima County argues that it cannot be held liable for Weiss's alleged misconduct, because Weiss acted as a state officer with respect to actions taken in his prosecutorial capacity. This argument assumes that Weiss acted as an official with final policymaking authority, as Pima County could be held liable for Weiss's actions only if Weiss acted as a final policymaker. *See Gobel v. Maricopa Cnty.*, 867 F.2d 1201, 120609 (9th Cir. 1989). However, Plaintiff's complaint does not allege that Weiss acted as a final policymaker. To the contrary, the complaint premises *Monell* liability on Defendants' own policies, practices, customs, training, supervision, and hiring/termination decisions. Accordingly, the Court need not, at this time, address the issue of whether Weiss acted as a state or county officer.

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[8] Pima County cites to *Van de Kemp v. Goldstein*, 555 U.S. 335 (2009), and *Lacey v. Maricopa County*, 693 F.3d at 929-30, for the proposition that absolute prosecutorial immunity shields a municipality from liability for failure to train prosecutors. However, *Van de Kemp* and the cited portion of *Lacey* discuss § 1983 liability with respect to individual district attorneys, as opposed to municipal liability under § 1983. In *Connick v. Thompson*, the Supreme Court evaluated a claim asserting municipal liability for failure to train prosecutors about their duty to disclose *Brady* material. *See generally* 563 U.S. 51 (2011). *Connick* was decided two years after *Van de Kemp*, and yet the Supreme Court did not indicate in *Connick* that absolute prosecutorial immunity would operate to bar a § 1983 claim asserting municipal liability for failure to train prosecutors.

G. Heck-Bar and Compensatory Damages

In *Heck*, the United States held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

512 U.S. at 486-87. A § 1983 damages action is *Heck*-barred if "a judgment in favor of the plaintiff would necessarily imply the invalidity" of the plaintiff's outstanding criminal conviction or sentence. *Id.* at 487. However, if "the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.*

Because Plaintiff's 1972 convictions were vacated in 2013, those convictions are no longer outstanding. Accordingly, Plaintiff may challenge the 1972 convictions in a § 1983 action.[9] However, Plaintiff's

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[9] Defendant Pima County argues that Plaintiff's § 1983 action is not cognizable because Plaintiff's 1972 convictions have not been declared constitutionally invalid. (Doc. 6 at 7-8.) Defendants fail to cite any authority holding that *Heck* requires a conviction to be declared invalid on constitutional grounds; to

action may still be *Heck*-barred if success on Plaintiff's claims would necessarily imply the invalidity of his outstanding 2013 convictions.

In certain factual scenarios, a § 1983 plaintiff may successfully challenge the constitutionality of underlying events that led to an outstanding criminal conviction without necessarily implying the invalidity of that conviction. For example, in *Lockett v. Ericson*, the Ninth Circuit held that a plaintiff with an outstanding conviction for reckless driving resulting from a nolo contendere plea could bring a § 1983 action challenging an allegedly unlawful search that led to his arrest, because his conviction derived from his plea, not from a verdict obtained with allegedly illegal evidence, and thus the validity of his conviction did not depend upon the legality of the search. 656 F.3d 892, 895-97 (9th Cir. 2011); *but see Szajer v. City of L.A.*, 632 F.3d 607, 608, 612 (9th Cir. 2011) (plaintiffs with outstanding convictions for possession of an illegal assault weapon resulting from no-contest pleas were *Heck*-barred from pursuing a § 1983 action challenging the validity of the undercover operation that formed the only basis for finding probable cause for the search that led to the discovery of the weapon). In *Ove v. Gwinn*, the Ninth Circuit held that plaintiffs with outstanding convictions for driving under the influence based on guilty and nolo contendere pleas were not *Heck*-barred from challenging, in a § 1983 action, the

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the contrary, *Heck* provides that a § 1983 action challenging a conviction is not barred if the challenged conviction is no longer outstanding. 512 U.S. at 487. Plaintiff's 1972 convictions are no longer outstanding criminal judgments; accordingly, Plaintiff may challenge the 1972 convictions in a § 1983 action.

manner in which their blood was drawn, because the validity of their convictions did not depend upon the legality of the blood draws. 264 F.3d 817, 821, 823 (9th Cir. 2001).

In *Jackson v. Barnes*, a § 1983 plaintiff sued for violation of his *Miranda* rights at a trial that led to his conviction for first-degree murder. *Jackson v. Barnes*, 749 F.3d 755, 758 (9th Cir. 2014). Prior to the filing of the § 1983 action, the conviction was reversed and the plaintiff was re-convicted at a re-trial, without the use of the illegally obtained evidence. *Id.* The Ninth Circuit held that—though the plaintiff would likely only be able to recover minimal damages—his lawsuit was not *Heck*-barred, because the illegally obtained evidence was not used at the plaintiff's re-trial and thus success on the plaintiff's claim for violation of his *Miranda* rights would not demonstrate the invalidity of the plaintiff's outstanding conviction. *Jackson*, 749 F.3d at 758, 760-61.

The Ninth Circuit in *Jackson* relied upon *Poventud v. City of New York*, a case in which a § 1983 plaintiff sued for the withholding of *Brady* material at a trial that resulted in a first-degree murder conviction. *Poventud v. City of N.Y.*, 750 F.3d 121, 124 (2d Cir. 2014) (en banc). The plaintiff brought a successful state collateral challenge to his attempted murder conviction based on the withholding of *Brady* material and, while the prosecution was considering appeal, pled guilty to a lesser charge of attempted robbery in exchange for dismissal of all other charges and a stipulated sentence of time served. *Poventud*, 750 F.3d at 124. The Second Circuit held that *Heck* did not bar the plaintiff's § 1983 suit, because

success on his claim for the withholding of *Brady* material at his first trial would not invalidate his subsequent, plea-based conviction, since that conviction was not tainted by the earlier *Brady* violation. *Poventud*, 750 F.3d at 136-37.

Based upon the reasoning of cases such as *Lockett*, *Ove*, *Jackson*, and *Poventud*, it is clear that, in the present case, Plaintiff—at a minimum—can challenge municipal policies, practices, and/or training, supervision, and hiring/termination decisions that caused the violation of his *Brady* rights without running afoul of *Heck*, because his 2013 convictions were untainted by the earlier alleged withholding of *Brady* material: Plaintiff knew of the Truesdail Report at the time of his 2013 no-contest plea. *See Poventud*, 750 F.3d at 136-37. The issue of whether proof of Plaintiff's other claims would necessarily imply the invalidity of his 2013 convictions is complicated slightly by Plaintiff's 2013 no-contest plea. A plea of no contest is "not an admission of factual guilt," but merely an authorization for a criminal court to treat a defendant as if he were guilty." *United States v. Nguyen*, 465 F.3d 1128, 1131 (9th Cir. 2006). "A conviction resulting from a nolo contendere plea . . . is not by itself sufficient evidence to prove a defendant committed the underlying crime," and Rule 410 of the Federal Rules of Evidence prohibits the admission of nolo contendere pleas and the resulting convictions "as proof that the pleader actually committed the underlying crimes charged." *Id.* at 1131. Because Plaintiff's 2013 no-contest plea did not admit factual guilt, his assertion in the present lawsuit that he was wrongfully convicted in

1972 is not necessarily inconsistent with his 2013 no-contest plea.

Even if success on Plaintiff's theories of wrongful arrest, wrongful conviction, and wrongful imprisonment would necessarily imply the invalidity of his 2013 convictions, Plaintiff's § 1983 action may fall under an exception to *Heck*. In *Spencer v. Kemna*, five justices of the United States Supreme Court indicated that *Heck* would not bar a released prisoner unable to pursue habeas relief from bringing a § 1983 claim. *Spencer v. Kemna*, 523 U.S. 1, 19 (Souter, J., concurring) ("*Heck* did not hold that a released prisoner [unable to pursue habeas relief] is out of court on a § 1983 claim"); *id.* at 25 n.8 (Stevens, J., dissenting) ("Given the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear . . . that he may bring an action under 42 U.S.C. § 1983). "In following the reasoning" of the *Spencer* concurrence, the Ninth Circuit has "emphasized the importance of timely pursuit" of habeas remedies. *Guerrero v. Gates*, 442 F.3d 697, 704 (9th Cir. 2003). The Ninth Circuit has declined to find an exception to *Heck* where habeas relief is unavailable to a § 1983 plaintiff as a result of the plaintiff's own delay in seeking such relief. *Cunningham v. Gates*, 312 F.3d 1148, 1153 n.3 (9th Cir. 2002); *see also Guerrero*, 442 F.3d at 705. However, the Ninth Circuit has found an exception to *Heck* where a plaintiff is unable to pursue habeas relief not due to his own delay in seeking such relief but because he has been released from incarceration. *Nonnette v. Small*, 316 F.3d 872, 876-77 (9th Cir. 2002) (holding that, if a remedy in habeas is unavailable due to mootness, a plaintiff

may "maintain a § 1983 action for damages [resulting from deprivation of good-time credits], even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits").

In the present case, the Court finds that Plaintiff's situation is more analogous to the situation of the plaintiff in *Nonnette* than the plaintiffs in *Cunningham* and *Guerrero*. Plaintiff cannot file an application for a writ of habeas corpus under 28 U.S.C. § 2254 because he fails to meet the in-custody requirements of the statute. His inability to file a habeas application does not result from any delay on his part in seeking habeas relief. When he was convicted in 2013, he was sentenced to time served and immediately released from custody; thus, he *never* had the opportunity to seek habeas relief with respect to his 2013 convictions. Arguably, Plaintiff's inability to seek habeas relief results from his own decision to plead no contest to 28 counts of felony murder for a sentence of time served. In 2013, Plaintiff had already spent 42 years incarcerated for crimes that he contends he did not commit. The prosecution gave him an option: he could plead no contest to 28 counts of felony murder—while maintaining his innocence—and be immediately released from custody, or he could remain in custody awaiting final adjudication of his petition for post-conviction relief. It is difficult to fault Plaintiff for choosing immediate release. The Court does not find that Plaintiff's decision weighs against finding an exception to *Heck*. Because Plaintiff is unable to pursue habeas relief due to his release from incarceration, rather than due to delay in seeking

habeas relief, the Court finds that an exception to *Heck* applies under the Ninth Circuit's reasoning in *Nonnette* and the reasoning of the *Spencer* concurrence.

Because an exception to *Heck* applies, the Court finds that Plaintiff may pursue § 1983 claims even if success on the claims would necessarily imply the invalidity of his 2013 convictions. Because Plaintiff may challenge the validity of his 2013 convictions and time-served sentence in this action, Defendants' argument that Plaintiff may not seek compensatory damages for the 42 years that he spent in prison fails.

H. Statute of Limitations

Defendant City of Tucson alleges that Plaintiff's claims are barred by the statute of limitations because they are based on conduct, policies, practices, and customs "that are buried in the past." (Doc. 5 at 13.) In § 1983 actions, federal courts apply the statute of limitations applicable to personal injury claims in the forum state, but use federal law to determine when a claim accrues. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). "In Arizona, the courts apply a two-year statute of limitations to § 1983 claims." *Id.* However, "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Heck*, 512 U.S. at 489-90. Plaintiff's § 1983 claims did not accrue until his 1972 convictions were vacated on April 2, 2013. Plaintiff filed this lawsuit within two years of the date the convictions were vacated.

Accordingly, the claims are not barred by the statute of limitations.

I. Collateral Estoppel

Defendant City of Tucson argues that the doctrine of collateral estoppel precludes Plaintiff from relitigating issues decided against him in relation to his prior criminal proceedings. Defendant Pima County joins in this argument. (Doc. 25 at 7.)

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The doctrine reduces unnecessary litigation, fosters reliance on adjudication, and—because federal courts generally accord preclusive effect to issues decided by state courts—promotes comity between state and federal courts. *Id.* at 95-96. The doctrine is generally applicable to § 1983 actions. *See Allen*, 449 U.S. at 96-97, 10405. However, collateral estoppel is not available to resolve issues in a subsequent case if the issues actually litigated in the earlier case were different. *Bates v. Union Oil Co. of Cal.*, 944 F.2d 647, 651 (9th Cir. 1991); *see also Eureka Fed. Sav. & Loan Ass'n v. Am. Cas. Co.*, 873 F.2d 229, 233 (9th Cir. 1989) ("Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding."). Further, it is inappropriate to apply collateral estoppel when its effect would be unfair. *Eureka Fed. Sav. & Loan Ass'n*, 873 F.2d at 234.

Plaintiff argues that his 1972 convictions and sentences have been vacated and thus have no preclusive effect. Defendants have failed to identify— and the Court has been unable to locate— authority holding that rulings made during appellate and collateral attacks on a criminal judgment continue to have collateral estoppel effect in a § 1983 action after the criminal judgment is vacated. Application of collateral estoppel under the unique circumstances of this case may be unfair. Further, even if collateral estoppel does bar Plaintiff from re-litigating issues decided during his appellate and collateral attacks on his 1972 convictions, Defendants have not shown that all issues underlying Plaintiff's claims in this action are identical to those decided previously.

J. Punitive Damages: Count Seven

Plaintiff's punitive damages claim must be dismissed because municipalities are not liable for punitive damages under 42 U.S.C. § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (holding that municipalities are immune from punitive damages under 42 U.S.C. § 1983).

K. Leave to Amend

Leave to amend should be "freely given where justice so requires," unless the deficiencies of a pleading "could not possibly be cured by the allegation of other facts." *Lacey*, 693 F.3d at 939 (internal quotations omitted). The deficiencies of Plaintiff's punitive damages claim cannot possibly be cured by the allegation of other facts, and thus the Court will dismiss Count Seven of Plaintiff's First

Amended Complaint with prejudice. However, Plaintiff may be able to cure the deficiencies of Counts One through Four and Count Six of his First Amended Complaint by alleging sufficiently specific, non-conclusory factual content. Thus, the Court will dismiss Counts One through Four and Count Six with leave to amend.

IT IS ORDERED that Plaintiff's Motion for Leave to File Supplemental Response (Doc. 31) is **granted**. Plaintiff's Supplemental Response (Doc. 30) and Defendants' Replies to the Supplemental Response (Docs. 32, 34) will be considered properly filed.

IT IS FURTHER ORDERED that Defendants' Motions to Dismiss (Docs. 5, 6) are **granted in part and denied in part as follows:**

4. Counts One through Four and Count Six of Plaintiff's First Amended Complaint are **dismissed with leave to amend**.

5. Count Seven of Plaintiff's First Amended Complaint is **dismissed with prejudice**.

6. Defendant Pima County's Motion to Dismiss Count Five of Plaintiff's First Amended Complaint is **denied**.

IT IS FURTHER ORDERED that Plaintiff may file an amended complaint within **twenty (20) days** of the date this Order is issued.

Dated this 8th day of February, 2016.

/s/ R. Márquez
Honorable Rosemary Márquez
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16980

LOUIS TAYLOR, a single man,
Plaintiff-Appellee,
v.
COUNTY OF PIMA, a body politic; CITY OF TUCSON, a body politic,
Defendants-Appellants.

D.C. No. 4:15-cv-00152-RM

ORDER

Filed: August 14, 2019

Before: Mary M. Schroeder, Eugene E. Siler,* and Susan P. Graber, Circuit Judges.

Order

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* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

ORDER

Judges Siler and Graber voted to deny the petitions for panel rehearing. Judge Schroeder voted to grant the petitions for panel rehearing. Judge Graber voted to deny the petitions for rehearing en banc, and Judge Siler so recommended. Judge Schroeder recommended granting the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

Judge Hurwitz did not participate in the deliberations or vote in this case.

The petitions for panel rehearing and the petitions for rehearing en banc are **DENIED**.