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

8 Christopher J. Soto, Sr.,

No. CV 13-00692-PHX-DGC (MEA)

9 Plaintiff,

10 vs.

ORDER

11 Matt Ritter,

12 Defendant.
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14 Plaintiff Christopher J. Soto, Sr., who is confined in the Pinal County Jail in
15 Florence, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983
16 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 2). Plaintiff has also
17 filed what appears to be a request to consider Plaintiff's case in conjunction with another
18 pending case, *Cleveland v. Voyles*, CV 13-0265-PHX-DGC¹ (Doc. 5) ("Request"); a
19 "Motion to Submit" (Doc. 13) ("Motion"); and numerous documents advising the Court
20 of documents he has filed in a pending case in Pinal County Superior Court, case
21 CR2012-02485 (Doc. 6, 7, 8, 9, 11, 12) ("Notices"). The Court will dismiss the
22 Complaint and this action. To the extent that Plaintiff seeks any relief in his Request,
23 Motion or Notices, such relief will be denied.

24 **I. Application to Proceed *In Forma Pauperis* and Filing Fee**

25 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.
26 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).
27 The Court will not assess an initial partial filing fee. The statutory fee will be collected

28 ¹ Plaintiff does not allege that his case is related to CV 13-0265-PHX-DGC or that he is a party in that case.

1 monthly in payments of 20% of the previous month's income each time the amount in the
2 account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order
3 requiring the appropriate government agency to collect and forward the fees according to
4 the statutory formula.

5 **II. Statutory Screening of Prisoner Complaints**

6 The Court is required to screen complaints brought by prisoners seeking relief
7 against a governmental entity or an officer or an employee of a governmental entity. 28
8 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
9 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
10 which relief may be granted, or that seek monetary relief from a defendant who is
11 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

12 A pleading must contain a “short and plain statement of the claim *showing* that the
13 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
14 does not demand detailed factual allegations, “it demands more than an unadorned, the-
15 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
16 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
17 conclusory statements, do not suffice.” *Id.*

18 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
19 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
20 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
21 content that allows the court to draw the reasonable inference that the defendant is liable
22 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
23 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
24 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
25 specific factual allegations may be consistent with a constitutional claim, a court must
26 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
27 at 681.

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

6 If the Court determines that a pleading could be cured by the allegation of other
7 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
8 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The
9 Court should not, however, advise the litigant how to cure the defects. This type of
10 advice “would undermine district judges’ role as impartial decisionmakers.” *Pliler v.*
11 *Ford*, 542 U.S. 225, 231 (2004); *see also Lopez*, 203 F.3d at 1131 n.13 (declining to
12 decide whether the court was required to inform a litigant of deficiencies). Plaintiff’s
13 Complaint will be dismissed for failure to state a claim, without leave to amend, because
14 the defects cannot be corrected.

15 **III. Complaint**

16 Plaintiff alleges two counts in his Complaint. Count I alleges a violation of
17 Plaintiff’s Sixth Amendment right to counsel and “access to the court.” Count II alleges
18 a violation of Plaintiff’s Fifth Amendment right to due process and liberty because he
19 was not indicted. Plaintiff sues only his “private” criminal defense attorney, Matt Ritter.
20 Plaintiff seeks compensatory and “hedonic damages.”

21 Plaintiff alleges the following facts: A summons for Plaintiff to appear at a
22 hearing on November 14, 2012 was sent to an Arizona City address. Because Plaintiff
23 did not receive mail at that address, he never received the summons and did not appear at
24 the hearing.

25 On March 29, 2013, Ritter, who had been appointed to represent Plaintiff three
26 days after Plaintiff’s January 2013 arrest, told Plaintiff that a summons for the November
27 14, 2012 hearing in case CR2012-02485 had been sent to him at the Arizona City
28 address. Plaintiff appears to contend that his Sixth Amendment right to counsel was

1 violated where counsel did not represent him at the November 14, 2012 hearing or two
2 hearings held in December 2012. On January 11, 2013, Ritter informed Plaintiff of a plea
3 agreement offered by the prosecutor that would result in Plaintiff being sentenced to three
4 years' probation. Plaintiff appears to assert that Ritter failed to ascertain that Plaintiff
5 had never been properly summoned for the November hearing or been indicted in case
6 CR2012-02485. Plaintiff asserts that case CR2012-02485 has not been processed "in a
7 judicial manner" where there was no arraignment, indictment, initial hearing, "colloquy,"
8 or grand jury transcripts. (Doc. 1 at 4.)

9 **IV. Failure to State a Claim**

10 Section 1983 provides a cause of action against persons acting under color of state
11 law who have violated rights guaranteed by the United States Constitution and federal
12 law. 42 U.S.C. § 1983; *see also Buckley v. City of Redding*, 66 F.3d 188, 190 (9th Cir.
13 1995). To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the
14 conduct about which he complains was committed by a person acting under the color of
15 state law and (2) the conduct deprived him of a federal constitutional or statutory right.
16 *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). A plaintiff must also allege that
17 he suffered a specific injury as a result of the conduct of a particular defendant and he
18 must allege an affirmative link between the injury and the conduct of that defendant.
19 *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

20 The "under color of state law" component is the equivalent of the "state action"
21 requirement under the Constitution. *Lugar v. Edmondson Oil Co, Inc.*, 457 U.S. 922, 928
22 (1982); *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000) (citing *Rendell-Baker*
23 *v. Kohn*, 457 U.S. 830, 838 (1982); *West v. Atkins*, 487 U.S. 42, 49 (1988)). "Acting
24 under color of state law is a jurisdictional requisite for a § 1983 action." *Gritchen v.*
25 *Collier*, 254 F.3d 807, 812 (9th Cir. 2001) (quoting *West*, 487 U.S. at 46). Whether an
26 attorney representing a criminal defendant is privately retained, a public defender, or
27 court-appointed counsel, he or she does not act under color of state law. *See Polk County*
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1 v. *Dodson*, 454 U.S. 312, 317-18 (1981); *Miranda v. Clark County, Nevada*, 319 F.3d
2 465, 468 (9th Cir. 2003) (*en banc*).

3 Here, Plaintiff sues only his criminal defense attorney, Ritter. As stated above, a
4 criminal defense attorney does not act under color of state law. Therefore, Plaintiff fails
5 to state a claim against Ritter under § 1983. Because Plaintiff cannot amend his
6 complaint to state a claim against Ritter, the Court will dismiss Plaintiff's Complaint and
7 this action.

8 **IT IS ORDERED:**

9 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 2) is **granted**.
10 (Doc. 2.)

11 (2) As required by the accompanying Order to the appropriate government
12 agency, Plaintiff must pay the \$350.00 filing fee.

13 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim pursuant to
14 28 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment accordingly. (Doc.
15 1.)

16 (4) Plaintiff's Request, Motion or Notices are **denied** as moot, to the extent that
17 any relief is sought therein. (Doc. 5-13.)

18 (5) The Clerk of Court must make an entry on the docket stating that the
19 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

20 (6) The docket shall reflect that the Court certifies, pursuant to 28 U.S.C.
21 § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), that any appeal of
22 this decision would not be taken in good faith.

23 Dated this 17th day of May, 2013.

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28 David G. Campbell
United States District Judge