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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Servando Reynaldo Angulo,  
10 Plaintiff,

No. CV 13-1321-PHX-RCB (MEA)

11 vs.

**ORDER**

12 Unknown Harvey, et al.,  
13 Defendants.  
14

15 Plaintiff Servando Reynaldo Angulo, who is confined in the Lower Buckeye Jail  
16 in Phoenix, Arizona, has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C.  
17 § 1983 (Doc. 1) and an Application to Proceed *In Forma Pauperis* (Doc. 2). The Court  
18 will dismiss the Complaint with leave to amend.

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

20 Plaintiff's Application to Proceed *In Forma Pauperis* will be granted. 28 U.S.C.  
21 § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1).  
22 The Court will not assess an initial partial filing fee. 28 U.S.C. § 1915(b)(1). The  
23 statutory fee will be collected monthly in payments of 20% of the previous month's  
24 income each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2).  
25 The Court will enter a separate Order requiring the appropriate government agency to  
26 collect and forward the fees according to the statutory formula.  
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1     **II.     Statutory Screening of Prisoner Complaints**

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

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

14             “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
15 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,  
16 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual  
17 content that allows the court to draw the reasonable inference that the defendant is liable  
18 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible  
19 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw  
20 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s  
21 specific factual allegations may be consistent with a constitutional claim, a court must  
22 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*  
23 at 681.

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

1           If the Court determines that a pleading could be cured by the allegation of other  
2 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal  
3 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The  
4 Court should not, however, advise the litigant how to cure the defects. This type of  
5 advice “would undermine district judges’ role as impartial decisionmakers.” *Pliler v.*  
6 *Ford*, 542 U.S. 225, 231 (2004); *see also Lopez*, 203 F.3d at 1131 n.13 (declining to  
7 decide whether the court was required to inform a litigant of deficiencies). The Court  
8 will dismiss Plaintiff’s Complaint for failure to state a claim, but because the Complaint  
9 may possibly be saved by amendment, will dismiss the Complaint with leave to amend.

### 10 **III. Complaint**

11           In his three-count complaint, Plaintiff sues Mesa Police Department Detective  
12 Harvey #10145, Sergeant Scantlebury #10036, Officer Ingram #13539 and unknown  
13 “doctor(s) psychologist” at the Lower Buckeye Jail. Plaintiff seeks to have his felony  
14 case dismissed, to be released from custody, to be placed back on certain psychiatric  
15 medications, and to be compensated \$10,000.00.

16           In Count I, Plaintiff alleges that his Fourth Amendment rights were violated when  
17 he was “fals[e]ly incarcerated for traf[f]icking stolen property.” Plaintiff states that on or  
18 about June 21, 2012, he purchased a beer at a Safeway store. Afterwards, he left his bike  
19 parked by the front of the store and went to smoke a spice joint and drink his beer.  
20 Plaintiff, who was heavily intoxicated and not on his psychiatric medications, returned to  
21 the store and got on the wrong bike, which was unlocked. Sergeant Scantlebury, who  
22 was in civilian clothes, approached Plaintiff and asked Plaintiff if he would sell the bike.  
23 Plaintiff told Scantlebury that he was not selling the bike.

24           In Count II, Plaintiff states that his Eighth Amendment right to constitutionally  
25 adequate medical care has been violated because he has not received the proper mental  
26 health care. Plaintiff alleges that for approximately five months the doctors at the jail  
27 “acted with d[e]liberate indifference in the medical treatment for psychiatric medication.  
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1 And intentionally [i]nterferes and denies medication.” He states that he has not been  
2 prescribed the “same medication as prescribed at DOC.”

3 In Count III, which he denotes as violating the Sixteenth and Seventeenth  
4 Amendments, Plaintiff alleges that his public defender, Amanda Marten, has denied him  
5 “the right to receive full discovery report due to the fact that [he] was on Rule 11.2 at the  
6 time.”

7 The electronic docket for Maricopa County Superior Court shows that Plaintiff is  
8 currently in custody and awaiting trial, scheduled for October 7, 2013, in case #CR 2013-  
9 132707.<sup>1</sup> Plaintiff has been charged with trafficking in stolen property.<sup>2</sup>

#### 10 **IV. Failure to State a Claim**

11 To state a claim under § 1983, a plaintiff must allege facts supporting that (1) the  
12 conduct about which he complains was committed by a person acting under the color of  
13 state law and (2) the conduct deprived him of a federal constitutional or statutory right.  
14 *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). A plaintiff must also allege that  
15 he suffered a specific injury as a result of the conduct of a particular defendant and he  
16 must allege an affirmative link between the injury and the conduct of that defendant.  
17 *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

##### 18 **A. Defendants Harvey and Ingram**

19 Plaintiff sues Detective Harvey and Officer Ingram of the Mesa Police  
20 Department. However, Plaintiff asserts no allegations against Harvey and Ingram.  
21 Therefore, Defendants Harvey and Ingram will be dismissed.

##### 22 **B. Count I**

23 Plaintiff designates Count I as a Fourth Amendment claim for false incarceration  
24 in relation to a charge of trafficking in stolen property. As noted, Plaintiff is currently  
25 awaiting trial on a charge of trafficking in stolen property and seeks to have his felony

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27 <sup>1</sup>See <http://www.courtminutes.maricopa.gov/docs/Criminal/082013/m5905474.pdf>  
(last visited Sept. 3, 2013).

28 <sup>2</sup>See <http://www.courtminutes.maricopa.gov/docs/Criminal/052013/m5760076.pdf>  
(last visited Sept. 3, 2013).

1 case dismissed and to be released from custody.

2 The abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971),  
3 prevents a federal court in most circumstances from directly interfering with ongoing  
4 criminal proceedings in state court. The *Younger* abstention doctrine also bars requests  
5 for declaratory and monetary relief for constitutional injuries arising out of a plaintiff's  
6 ongoing state criminal prosecution. *Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986).  
7 In addition, the *Younger* abstention doctrine applies while a case works its way through  
8 the state appellate process, if a prisoner is convicted. *New Orleans Pub. Serv., Inc. v.*  
9 *Council of City of New Orleans*, 491 U.S. 350, 369 (1989). Only in limited,  
10 extraordinary circumstances will the *Younger* doctrine not bar federal interference with  
11 ongoing (non-final) state criminal proceedings. Such circumstances include when a  
12 prisoner alleges that he is being subjected to double jeopardy. *See Mannes v. Gillespie*,  
13 967 F.2d 1310, 1312 (9th Cir. 1992). Speedy trial claims may also be reviewed if a  
14 detainee is seeking to compel the state to bring him to trial, rather than seeking dismissal  
15 of the charges, and the detainee has exhausted all of his state court remedies. *Braden v.*  
16 *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489-90 (1973); *see In re Justices*  
17 *of Superior Court Dep't of Mass. Trial Court*, 218 F.3d 11, 18 & n.5 (1st Cir. 2000).

18 Plaintiff has not alleged that he is being subjected to double jeopardy or that his  
19 right to a speedy trial has been violated. Rather, he seeks to be released from custody and  
20 to have his felony case dismissed. Because Plaintiff's grounds for relief do not fall  
21 within the very limited circumstances in which a federal court may intercede in ongoing  
22 state criminal proceedings under the *Younger* doctrine, Count I and Defendant  
23 Scantelbury will be dismissed.

24 **C. Count II**

25 Plaintiff designates Count II as a denial of constitutionally adequate medical care.  
26 Not every claim by a prisoner relating to inadequate medical treatment states a violation  
27 of the Eighth or Fourteenth Amendment. To state a § 1983 medical claim, a plaintiff  
28 must show that the defendants acted with "deliberate indifference to serious medical

1 needs.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting *Estelle v. Gamble*,  
2 429 U.S. 97, 104 (1976)). A plaintiff must show (1) a “serious medical need” by  
3 demonstrating that failure to treat the condition could result in further significant injury  
4 or the unnecessary and wanton infliction of pain and (2) the defendant’s response was  
5 deliberately indifferent. *Jett*, 439 F.3d at 1096 (quotations omitted).

6 “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d  
7 1051, 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must  
8 both know of and disregard an excessive risk to inmate health; “the official must both be  
9 aware of facts from which the inference could be drawn that a substantial risk of serious  
10 harm exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825,  
11 837 (1994). Deliberate indifference in the medical context may be shown by a  
12 purposeful act or failure to respond to a prisoner’s pain or possible medical need and  
13 harm caused by the indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may  
14 also be shown when a prison official intentionally denies, delays, or interferes with  
15 medical treatment or by the way prison doctors respond to the prisoner’s medical needs.  
16 *Estelle*, 429 U.S. at 104-05; *Jett*, 439 F.3d at 1096.

17 Deliberate indifference is a higher standard than negligence or lack of ordinary  
18 due care for the prisoner’s safety. *Farmer*, 511 U.S. at 835. “Neither negligence nor  
19 gross negligence will constitute deliberate indifference.” *Clement v. California Dep’t of*  
20 *Corrs.*, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*,  
21 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or  
22 “medical malpractice” do not support a claim under § 1983). “A difference of opinion  
23 does not amount to deliberate indifference to [a plaintiff’s] serious medical needs.”  
24 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care,  
25 without more, is insufficient to state a claim against prison officials for deliberate  
26 indifference. *See Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 407  
27 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of  
28 “unnecessary and wanton infliction of pain.” *Estelle*, 429 U.S. at 105.

1 Plaintiff alleges that for approximately five months the doctors at the jail “acted  
2 with d[e]liberate indifference in the medical treatment for psychiatric medication. And  
3 intentionally [i]nterferes and denies medication.” He states that he has not been  
4 prescribed the “same medication as prescribed at DOC.” Plaintiff fails to state what  
5 medication he was prescribed prior to his present incarceration, who prescribed it, when,  
6 or whether it was recommended that Plaintiff continue with that medication. Moreover,  
7 Plaintiff fails to allege who denied him medication, when, and the reasons for the denial,  
8 if any. Accordingly, Plaintiff fails to state a claim and Count II and the unnamed  
9 Defendant doctor/psychologist at the Lower Buckeye Jail will be dismissed.

10 **D. Count III**

11 In Count III, Plaintiff alleges that his public defender denied him the right to  
12 receive his “full discovery report.” Plaintiff did not identify his public defender as a  
13 Defendant, but even if he had, she would be dismissed as a defendant. A prerequisite for  
14 any relief under § 1983 are allegations to support that a defendant acted under the color  
15 of state law. The “under color of state law” component is the equivalent of the “state  
16 action” requirement under the Constitution. *Lugar v. Edmondson Oil Co, Inc.*, 457 U.S.  
17 922, 928 (1982); *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000) (citing  
18 *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *West v. Atkins*, 487 U.S. 42, 49  
19 (1988)). “Acting under color of state law is ‘a jurisdictional requisite for a § 1983  
20 action.’” *Gritchen v. Collier*, 254 F.3d 807, 812 (9th Cir. 2001) (quoting *West*, 487 U.S.  
21 at 46). Whether an attorney representing a criminal defendant is privately retained, a  
22 public defender, or court-appointed counsel, he or she does not act under color of state  
23 law. *See Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981); *Miranda v. Clark*  
24 *County, Nevada*, 319 F.3d 465, 468 (9th Cir. 2003) (*en banc*). Because Plaintiff has  
25 failed to state a claim in Count III, it will be dismissed.

26 **V. Leave to Amend**

27 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to  
28 state a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a

1 first amended complaint to cure the deficiencies outlined above. The Clerk of Court will  
2 mail Plaintiff a court-approved form to use for filing a first amended complaint. If  
3 Plaintiff fails to use the court-approved form, the Court may strike the amended  
4 complaint and dismiss this action without further notice to Plaintiff.

5 If Plaintiff files an amended complaint, Plaintiff must write short, plain statements  
6 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name  
7 of the Defendant who violated the right; (3) exactly what that Defendant did or failed to  
8 do; (4) how the action or inaction of that Defendant is connected to the violation of  
9 Plaintiff's constitutional right; and (5) what specific injury Plaintiff suffered because of  
10 that Defendant's conduct. *See Rizzo*, 423 U.S. at 371-72, 377.

11 Plaintiff must repeat this process for each person he names as a Defendant. If  
12 Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific  
13 injury suffered by Plaintiff, the allegations against that Defendant will be dismissed for  
14 failure to state a claim. **Conclusory allegations that a Defendant or group of**  
15 **Defendants has violated a constitutional right are not acceptable and will be**  
16 **dismissed.**

17 Plaintiff must clearly designate on the face of the document that it is the "First  
18 Amended Complaint." The first amended complaint must be retyped or rewritten in its  
19 entirety on the court-approved form and may not incorporate any part of the original  
20 Complaint by reference. Plaintiff may include only one claim per count.

21 A first amended complaint supersedes the original complaint. *Ferdik v. Bonzelet*,  
22 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896  
23 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat an original  
24 complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised  
25 in the original complaint is waived if it is not raised in a first amended complaint. *King v.*  
26 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

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1 **VI. Warnings**

2 **A. Release**

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

7 **B. Address Changes**

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

12 **C. Copies**

13 Plaintiff must submit an additional copy of every filing for use by the Court. *See*  
14 LRCiv 5.4. Failure to comply may result in the filing being stricken without further  
15 notice to Plaintiff.

16 **D. Possible “Strike”**

17 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff  
18 fails to file an amended complaint correcting the deficiencies identified in this Order, the  
19 dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).  
20 Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil  
21 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more  
22 prior occasions, while incarcerated or detained in any facility, brought an action or appeal  
23 in a court of the United States that was dismissed on the grounds that it is frivolous,  
24 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner  
25 is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

26 **E. Possible Dismissal**

27 If Plaintiff fails to timely comply with every provision of this Order, including  
28 these warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963

1 F.2d at 1260-61 (a district court may dismiss an action for failure to comply with any  
2 order of the Court).

3 **IT IS ORDERED:**

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

5 (2) As required by the accompanying Order to the appropriate government  
6 agency, Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial  
7 filing fee.

8 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim. Plaintiff  
9 has **30 days** from the date this Order is filed to file a first amended complaint in  
10 compliance with this Order.

11 (4) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of  
12 Court must, without further notice, enter a judgment of dismissal of this action with  
13 prejudice that states that the dismissal may count as a "strike" under 28 U.S.C. § 1915(g).

14 (5) The Clerk of Court must mail Plaintiff a court-approved form for filing a  
15 civil rights complaint by a prisoner.

16 DATED this 9th day of September, 2013.

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20 Robert C. Broomfield  
21 Senior United States District Judge  
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