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

Michael Dean Davis,  
Plaintiff,  
vs.  
Richard Albrecht, et al.,  
Defendants.

No. CV 14-00009-PHX-DGC (MEA)

**ORDER**

On November 1, 2013, Plaintiff Michael Dean Davis, who is confined in the Maricopa County Fourth Avenue Jail, filed a *pro se* civil rights Complaint in Maricopa County Superior Court, case number CV2013-013518 (Doc. 1, Exhibit 1). In his Complaint, Plaintiff alleges violations of his rights under the Fifth and Fourteenth Amendments of the United States Constitution, as well as claims under the Arizona Constitution and Arizona state law. Plaintiff named as Defendants Commissioner Richard Albrecht, Maricopa County Superior Court Judges Susanna Pineda and Teresa Sanders, MCAO<sup>1</sup> Jennifer Hanson, MCAO Jeffrey Duvenback, and OPDS<sup>2</sup> Attorneys Marvin Davis and Amy Bain.

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<sup>1</sup> Plaintiff is apparently referring to the Maricopa County Attorney’s Office.

<sup>2</sup> Plaintiff is apparently referring to the Maricopa County Office of Public Defense Services.

1 On January 2, 2014, Defendants Jennifer Hanson, Jeffery Hanson,<sup>3</sup> and Albrecht  
2 removed the case to federal court based on federal subject matter jurisdiction, stating that  
3 they were served with the Complaint on December 17, 2013. On January 9, 2014,  
4 Defendants Albrecht, Pineda and Sanders filed a Motion to Dismiss based on absolute  
5 judicial immunity, or, alternatively, Plaintiff’s failure to comply with Arizona’s notice of  
6 claim statute. (Doc. 3.) Also on January 9, 2014, Defendants Duvenback and Jennifer  
7 Hanson filed a Motion to Dismiss based on prosecutorial immunity, or, alternatively,  
8 failure to state a claim against them. (Doc. 4.)

9 The Court will dismiss the Motions to Dismiss as moot. The Court is already  
10 statutorily required to screen complaints brought by prisoners seeking relief against a  
11 governmental entity or an officer or an employee of a governmental entity.<sup>4</sup> 28 U.S.C.  
12 § 1915A(a); 42 U.S.C. § 1997e(c). The Court will dismiss this action.

13 **I. Removal to Federal Court was Proper**

14 The Complaint facially shows that subject matter jurisdiction is proper in federal  
15 court and that the case was timely removed. 28 U.S.C. § 1446(b).

16 A defendant may remove any civil action brought in state court over which the  
17 federal court would have original jurisdiction. 28 U.S.C. §1441(a). That is, a civil action  
18 that could have originally been brought in federal court may be removed from state to  
19 federal court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). A federal court has  
20 original jurisdiction “of all civil actions arising under the Constitution, laws, or treaties of  
21 the United States.” 28 U.S.C. § 1331.

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25 <sup>3</sup> Although Defendants wrote Jeffery “Hanson” in the Notice of Removal, they  
apparently meant to write Jeffrey Duvenback, the only “Jeffery” named in the Complaint.

26 <sup>4</sup> Plaintiff is a “prisoner” within the meaning of the Prisoner Litigation Reform Act  
27 (PLRA). Under the PLRA, a “prisoner” is a “person incarcerated or detained in any  
28 facility” who has been charged or convicted and sentenced for violations of criminal law.  
28 U.S.C. §§ 1915(h), 1915A(c); 42 U.S.C. § 1997e(h). Consequently, this case is  
subject to PLRA requirements, including screening of the complaint. 28 U.S.C.  
§§ 1915(h), 1915A.

1           The Complaint in this case alleges violations of his federal constitutional rights.  
2 28 U.S.C. § 1441(a). Further, the case was timely removed. 28 U.S.C. § 1446(b).

## 3 **II. Statutory Screening of Prisoner Complaints**

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

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

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

26           But as the United States Court of Appeals for the Ninth Circuit has instructed,  
27 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,  
28 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less

1 stringent standards than formal pleadings drafted by lawyers.” *Id.* (quoting *Erickson v.*  
2 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

3 If the Court determines that a pleading could be cured by the allegation of other  
4 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal  
5 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*).  
6 Plaintiff’s Complaint will be dismissed for failure to state a claim, without leave to  
7 amend because the defects cannot be corrected.

### 8 **III. Complaint**

9 In Count One,<sup>5</sup> labeled “Lack of Jurisdiction,” Plaintiff alleges that he was  
10 arrested on August 9, 2012 but was not given a “probable [cause] hearing” within the  
11 statutory time frame. Plaintiff was taken to his “I.A. court on August 9, 2012,” and he  
12 contends that he should have been given a preliminary hearing on August 19, 2012.  
13 Plaintiff alleges that “this didn’t happen, because of this the court lacks jurisdiction.”  
14 Plaintiff further alleges that the “defendants knew or should ha[ve] known that the  
15 defendant did not receive a grand jury indictment.” Plaintiff argues that “a person cannot  
16 be prosecuted by information in the event that a conviction amounts to more than (1) year  
17 and thereby constitutes an infamous crime within the meaning of the [F]ifth Amendment  
18 to the Constitution of the United States.”

19 In Count Two, labeled “Treason,” Plaintiff alleges that “the commissioner, trial  
20 judges, and the county attorney’(s) knew or should have known that their [sic] was not  
21 jurisdiction to proceed. The defendant’(s) fundamental rights to due process has been  
22 violated[;] he is entitled to dismissal of the charges for failure to find probable cause to  
23 proceed with this prosecution.” “When a judge acts where he or she do[es] not have  
24 jurisdiction to act, the judge is engaged in an act, or acts of treason.”

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28 <sup>5</sup> Plaintiff did not separate his various claims into separate counts. For clarity, the  
Court will assign numbers to each claim.

1 In Count Three, labeled “Malic[i]ous Prosecution,” Plaintiff alleges that “the  
2 commissioner, trial judges, and county attorneys commit[] malicious prosecution when  
3 the[re is] a lack of jurisdiction, and the county attorney attempts to prosecute you  
4 anyway, and the commissioners, judges al[l]ow it to take place.”

5 In Count Four, labeled “Fraud,” Plaintiff alleges that the “County Attorney  
6 Jennifer Hanson, and Marvin L. Davis on Aug. 30<sup>th</sup> 2012 had committed fraud by means  
7 of hav[ing] me sign a waiver of probable cause . . . when my probable cause hearing had  
8 already lapsed by [11 days].” Defendant Davis “had purposely deceived the defendant on  
9 Aug. 30<sup>th</sup> 2012. Marvin L. Davis and prosecutor Jennifer Hanson conspired to commit[]  
10 fraud against me by fraudulently dup[ing] me into signing the waiver of probable cause  
11 when the [preliminary hearing] had already lapsed the statutory time frame of [10 days]  
12 by [11 days].”

13 In Count Five, labeled “Abuse of Discretion,” Plaintiff alleges that Defendants  
14 Pineda and Sanders “abused their d[i]scretion when they den[i]ed [Plaintiff] the right to  
15 be heard, and, or rul[ing] [on Plaintiff’s motions] without answers from the state.”

16 In Count Six, labeled “Legal Malpractice,” Plaintiff alleges that he notified his  
17 attorney of his concerns about the lack of jurisdiction, but his attorney failed to “apress  
18 [sic] those concerns,” thereby violating her duty as a legal criminal defender and  
19 breaching the attorney-client relationship. Plaintiff had to file his own motions because  
20 his attorney would not and his attorney told him it would be unethical to do so.

21 Plaintiff appears to allege in the section labeled “Argument” that he has been  
22 denied equal protection of the law and due process under the Fifth and Fourteenth  
23 Amendments.

24 Plaintiff seeks the dismissal of all charges against him with prejudice, immediate  
25 release from custody, the filing of judicial and bar complaints, and \$1,000,000 from each  
26 Defendant.

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

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

9 **A. Defendants Albrecht, Pineda and Sanders**

10 Judges are absolutely immune from § 1983 suits for damages for their judicial acts  
11 except when they are taken “in the clear absence of all jurisdiction.” *Stump v. Sparkman*,  
12 435 U.S. 349, 356-357 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986).  
13 An act is “judicial” when it is a function normally performed by a judge and the parties  
14 dealt with the judge in his or her judicial capacity. *Stump*, 435 U.S. at 362; *Crooks v.*  
15 *Maynard*, 913 F.2d 699, 700 (9th Cir. 1990).

16 This immunity attaches even if the judge is accused of acting maliciously and  
17 corruptly, *Peirson v. Ray*, 386 U.S. 547, 553-54 (1967), or of making grave errors of law  
18 or procedure, *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988); *see also*  
19 *Ammons v. Baldwin*, 705 F.2d 1445, 1446-48 (11th Cir. 1983) (judge entitled to  
20 immunity from a claim that he verbally abused and humiliated plaintiff); *Tanner v. Heise*,  
21 879 F.2d 572, 577-78 (9th Cir. 1989).

22 Regardless of the judge’s status in the judicial hierarchy, a judge has absolute  
23 immunity for acts performed in the judge’s official capacity. *O’Neill v. City of Lake*  
24 *Oswego*, 642 F.2d 367 (9th Cir. 1981) (*pro tem* municipal judge); *Tanner*, 879 F.2d at  
25 577-78 (magistrate); *Brewer v. Blackwell*, 692 F.2d 387, 396 (11th Cir. 1982) (justice of  
26 the peace).

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1           Although Plaintiff alleges that the state court was without jurisdiction, he has not  
2 alleged any facts to even suggest that the state court did not have jurisdiction over his  
3 criminal case.<sup>6</sup> *See, e.g., Stump*, 435 U.S. at 356-357, n.7 (noting, for example, that a  
4 probate judge with jurisdiction over only wills and estates who tries a criminal case  
5 would be acting in the absence of jurisdiction; whereas a criminal court judge who  
6 convicts a defendant of a nonexistent crime would merely be acting in excess of his  
7 jurisdiction and would be immune from liability for his action). Accordingly, Defendants  
8 Albrecht, Pineda and Sanders are absolutely immune from suit and will be dismissed.

9           **B. Defendants Davis and Bain**

10           Plaintiff sues criminal defense attorneys Davis and Bain. A prerequisite for any  
11 relief under § 1983 are allegations to support that a defendant acted under the color of  
12 state law. The “under color of state law” component is the equivalent of the “state  
13 action” requirement under the Constitution. *Lugar v. Edmondson Oil Co, Inc.*, 457 U.S.  
14 922, 928 (1982); *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000) (citing *West*  
15 *v. Atkins*, 487 U.S. 42, 49 (1988); *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)).  
16 “Acting under color of state law is ‘a jurisdictional requisite for a § 1983 action.’”  
17 *Gritchen v. Collier*, 254 F.3d 807, 812 (9th Cir. 2001) (quoting *West*, 487 U.S. at 46).  
18 Whether an attorney representing a criminal defendant is privately retained, a public  
19 defender, or court-appointed counsel, he or she does not act under color of state law. *See*  
20 *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981); *Miranda v. Clark County, Nevada*,  
21 319 F.3d 465, 468 (9th Cir. 2003) (*en banc*). For this reason, Plaintiff fails to state a  
22 claim against Davis and Bain and they will be dismissed as Defendants.

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25           <sup>6</sup> Plaintiff apparently believes the state court lacked jurisdiction because a  
26 preliminary hearing was not held within ten days of his arrest. Court records available  
27 on-line, however, reflect that Plaintiff signed a waiver of a probable cause hearing and  
28 the court accepted the waiver of a preliminary hearing. *See* Maricopa County Superior  
Court Minute Entry dated August 30, 2012, at [http://www.courtminutes.maricopa.gov/  
docs/Criminal/092012/m5401861.pdf](http://www.courtminutes.maricopa.gov/docs/Criminal/092012/m5401861.pdf) (last visited May 8, 2014).

1           **C. Defendants Hanson and Duvenback**

2           Plaintiff sues prosecutors Hanson and Duvenback. A prosecutor is absolutely  
3 immune from liability under § 1983 for conduct in “initiating a prosecution and in  
4 presenting the State’s case” insofar as that conduct is “intimately associated with the  
5 judicial phase of the criminal process.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 270  
6 (1993) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); *see also Burns v. Reed*,  
7 500 U.S. 478, 486 (1991); *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986). That  
8 is, “[a] prosecutor is protected by absolute immunity from liability for damages under  
9 § 1983 ‘when performing the traditional functions of an advocate.’” *Genzler v.*  
10 *Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005) (quoting *Kalina v. Fletcher*, 522 U.S.  
11 118, 131 (1997)). Absolute immunity extends to a prosecutor “eliciting false or  
12 defamatory testimony from witnesses” or making false or defamatory statements during,  
13 and related to judicial proceedings. *Buckley*, 509 U.S. at 270 (citations omitted).  
14 “However, ‘the actions of a prosecutor are not absolutely immune merely because they  
15 are performed by a prosecutor.’” *Genzler*, 410 F.3d at 636 (quoting *Buckley*, 509 U.S. at  
16 273). Rather, prosecutorial immunity depends on “‘the nature of the function performed,  
17 not the identity of the actor who performed it.’” *Id.* (quoting *Kalina*, 522 U.S. at 127). A  
18 prosecutor is only entitled to qualified immunity, rather than absolute immunity, when  
19 she performs administrative or investigative functions. *Id.*

20           Plaintiff’s allegations against Hanson and Duvenback concern their prosecution of  
21 Plaintiff. Such conduct is intimately associated with the judicial phase of criminal  
22 proceedings against Plaintiff and is entitled to absolute immunity. As discussed herein,  
23 such allegations are not a basis for liability under § 1983. For this reason, Plaintiff fails  
24 to state a claim against Hanson and Duvenback and they will be dismissed.<sup>7</sup>

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26           <sup>7</sup> Although Plaintiff labels Count Three as a “malicious prosecution” claim, he  
27 fails to state *any* facts supporting a claim of malicious prosecution. To state a claim for  
28 malicious prosecution, a plaintiff must allege facts to support that a defendant prosecuted  
him with malice and without probable cause for the purpose of denying equal protection  
or another specific constitutional right. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068  
(9th Cir. 2004) (citing *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir.  
1995)).



