

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

JAMES MITCHELL

PLAINTIFF

V.

3:17CV00126 JM

L.D. GIBSON

DEFENDANT

ORDER

Pending before this Court is the Plaintiff's Motion to Proceed *In Forma Pauperis* and Complaint. The Eighth Circuit has instructed that the decision of whether a complaint is frivolous or malicious precedes the decision of whether to grant *in forma pauperis* status and whether to order service of process. *See Carney v. Houston* 33 F.3d 893, 895 (8th Cir. 1994) (quoting *Gentile v. Missouri Dept. Of Corrections*, 986 F.2d 214 (8th Cir. 1993)). "If the complaint is frivolous or malicious, the district court should dismiss it out of hand." *Id.* A complaint is frivolous where it lacks an arguable basis in either law or fact. *See Neitzke v. Williams*, 490 U.S. 319, 325-27 (1989).

In this case, Plaintiff claims that Defendant L.D. Gibson violated his rights under 42 U.S.C. §1983. He states that Mr. Gibson, who is apparently Plaintiff's attorney, has a conflict of interest and is not acting in his best interest. Plaintiff is incarcerated at the Poinsett County Detention Center in Harrisburg, Arkansas (Complaint, ECF No. 2).

"To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a violation of a constitutional right committed by a person acting under color of state law." *Andrews v. City of W. Branch, Iowa*, 454 F.3d 914, 918 (8th Cir. 2006) (citing *Leshner v. Reed*, 12 F.3d 148, 150 (8th Cir.1994); *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir.1993)). "The conduct of counsel,

either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of section 1983 violations.” *Holbird v. Armstrong-Wright*, 949 F.2d 1019, 1020 (8th Cir. 1991) (citing *Harkins v. Eldredge*, 505 F.2d 802, 803 (8th Cir.1974) (per curiam); see also *Eling v. Jones*, 797 F.2d 697, 699 (8th Cir.1986), *cert. denied*, 480 U.S. 917, 107 S.Ct. 1371, 94 L.Ed.2d 687 (1987)). Therefore, the Court finds that Plaintiff’s Complaint is frivolous and dismisses the case without prejudice.

Plaintiff’s Motion to Proceed *in forma pauperis* (ECF No. 1) is DENIED. Plaintiff’s Complaint is dismissed without prejudice. The Clerk is directed to close the case.

IT SO ORDERED this 22nd day of May, 2017.


UNITED STATES DISTRICT JUDGE