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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY BILLINGSLEY,

Plaintiff,

No. CIV S-08-2919 EFB P

vs.

DORA RIOS,

Defendant.

ORDER

_____ /

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He seeks leave to proceed *in forma pauperis*. This case is before the undersigned pursuant to plaintiff's consent. *See* 28 U.S.C. § 636; *see also* E.D. Cal. Local Rules, Appx. A, at (k)(1)-(2).

Plaintiff's declaration makes the showing required by 28 U.S.C. § 1915(a)(1) and (2).

Pursuant to 28 U.S.C. § 1915(b)(1), plaintiff must pay the \$350 filing fee. *See* 28 U.S.C. § 1914(a). Plaintiff must make monthly payments of 20 percent of the preceding month's income credited to his trust account. 28 U.S.C. § 1915(b)(2). The agency having custody of plaintiff shall forward payments from plaintiff's account to the Clerk of the Court each time the amount in the account exceeds \$10 until the filing fee is paid.

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1 The court has reviewed plaintiff's complaint pursuant to 28 U.S.C. § 1915A and finds it
2 does not state a cognizable claim against defendant.

3 To state a claim under 42 U.S.C. § 1983, plaintiff must allege an identified defendant
4 deprived plaintiff of a right secured to him by the Constitution or laws of the United States while
5 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48-49 (1988).

6 In his complaint, plaintiff names Dora Rios, his Conflict Defender, as the defendant. He
7 lists his claims against her as ineffective assistance of counsel, malpractice, professional
8 negligence, breach of faith, moral and ethical turpitude, and alleges that she failed to call a key
9 witness. Plaintiff requests that the court provide him with "proper representation."

10 Plaintiff's allegations do not state a cognizable claim for relief under § 1983. Public
11 defenders do not act under color of state law for purposes of § 1983 when performing a lawyer's
12 traditional functions. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981). Additionally,
13 plaintiff's claims for legal malpractice do not come within the jurisdiction of the federal courts.
14 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). To the extent plaintiff's claim may
15 relate to the length of his confinement, it must be brought in a habeas corpus action, after
16 exhausting state court remedies. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Therefore,
17 plaintiff's complaint should be dismissed. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 586
18 (9th Cir. 1995) (civil rights complaint seeking habeas relief should be dismissed without
19 prejudice to bringing it as a petition for writ of habeas corpus).

20 Accordingly, the court hereby ORDERS that:

21 1. Plaintiff's request to proceed *in forma pauperis* is granted.

22 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in
23 accordance with the notice to the Director of the California Department of Corrections and
24 Rehabilitation filed concurrently herewith.

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3. This action is dismissed without prejudice to filing a habeas action.

4. The Clerk is directed to close the case.

Dated: August 4, 2009.



EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE