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

TIMOTHY THOMPSON,  
Plaintiff,

No. CIV S-09-1918-MCE-CMK-P

vs.

FINDINGS AND RECOMMENDATIONS

RUSSELL W. MILLER, JR, et al.,  
Defendants.

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Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s complaint (Doc. 1).

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court is also required to screen complaints brought by litigants who have been granted leave to proceed in forma pauperis. See 28 U.S.C. § 1915(e)(2). The court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1), (2). Moreover, the Federal Rules of Civil Procedure require that complaints contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This means that claims must be stated simply, concisely, and directly. See *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied if the complaint gives the defendant fair notice

1 of the plaintiff's claim and the grounds upon which it rests. See Kimes v. Stone, 84 F.3d 1121,  
2 1129 (9th Cir. 1996). Because plaintiff must allege with at least some degree of particularity  
3 overt acts by specific defendants which support the claims, vague and conclusory allegations fail  
4 to satisfy this standard. Additionally, it is impossible for the court to conduct the screening  
5 required by law when the allegations are vague and conclusory.

#### 6 **I. PLAINTIFF'S ALLEGATIONS**

7 Plaintiff brings this action against his retained defense attorney and several of his  
8 attorney's staff. He claims his attorney failed to obtain the results he promised related to his state  
9 criminal proceedings, and that his attorney and staff lied to him and his family.

#### 10 **II. DISCUSSION**

11 Section 1983 provides that "[e]very person who, under color of any statute,  
12 ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,  
13 subjects, or causes to be subjected, any citizen of the United States or other person within the  
14 jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the  
15 Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or  
16 other proper proceeding for redress . . . ." 42 U.S.C. § 1983. "Traditionally, the requirements for  
17 relief under [§] 1983 have been articulated as (1) a violation of rights protected by the  
18 Constitution or created by federal statute, (2) proximately caused (3) by conduct of a 'person' (4)  
19 acting under color of state law." Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991).  
20 Generally, plaintiffs are required to "plead that (1) the defendants acting under color of state law  
21 (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." Gibson v. United  
22 States, 781 F.2d 1334, 1338 (9th Cir. 1986); see also WMX Techs., Inc. v. Miller, 197 F.3d 367,  
23 372 (9th Cir. 1999) (en banc). Public defenders, acting as an advocate for their client, are not  
24 acting under color of state law for § 1983 purposes. See Georgia v. McCollum, 505 U.S. 42, 53  
25 (1992); Polk County v. Dodson, 454 U.S. 312, 320-25 (1981).

26 Plaintiff's complaint names only his trial attorney, Russell W. Miller, Jr., and

1 three of his defense attorney's staff. It appears from the complaint that defendant Miller was  
2 retained by Plaintiff and his family to represent Plaintiff in a criminal matter. Defendant  
3 Miller, and the others named as defendants, were acting as advocates for Plaintiff. There is  
4 nothing in the complaint which indicate any of the defendants were state actors, acting under  
5 color of state law. Plaintiff therefore cannot state a claim under § 1983 against them.

6 The undersigned finds that Plaintiff fails to state a claim upon which relief can be  
7 granted because the only named defendants were not acting under color of state law.

### 8 III. CONCLUSION

9 Based on the foregoing, the undersigned recommends that this action be dismissed  
10 for Plaintiff's failure to state a claim upon which relief can be granted. Because it does not  
11 appear possible that the deficiencies identified herein can be cured by amending the complaint,  
12 plaintiff is not entitled to leave to amend prior to dismissal of the entire action. See Lopez v.  
13 Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc).

14 These findings and recommendations are submitted to the United States District  
15 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days  
16 after being served with these findings and recommendations, any party may file written  
17 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
18 Findings and Recommendations." Failure to file objections within the specified time may waive  
19 the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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21 DATED: November 18, 2009

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23 **CRAIG M. KELLISON**  
24 UNITED STATES MAGISTRATE JUDGE  
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