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

RONALD KEMONI PETERSON,

Plaintiff,

No. CIV S-10-2193 JAM DAD P

vs.

LAURA MICHELLE PETTY,

Defendant.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. This proceeding was referred to the undersigned magistrate judge in accordance with Local Rule 302 and 28 U.S.C. § 636(b)(1).

PLAINTIFF’S IN FORMA PAUPERIS APPLICATION

Plaintiff has submitted an in forma pauperis application that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, plaintiff will be granted leave to proceed in forma pauperis.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. See 28 U.S.C. §§ 1914(a) & 1915(b)(1). Plaintiff has been without funds for six months and is currently without funds. Accordingly, the court will not assess an initial partial filing fee. See 28

1 U.S.C. § 1915(b)(1). Plaintiff will be obligated to make monthly payments of twenty percent of
2 the preceding month's income credited to plaintiff's prison trust account. These payments shall
3 be collected and forwarded by the appropriate agency to the Clerk of the Court each time the
4 amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. See 28 U.S.C.
5 § 1915(b)(2).

6 **SCREENING REQUIREMENT**

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

13 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
14 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
15 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
16 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
17 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
18 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
19 Cir. 1989); Franklin, 745 F.2d at 1227.

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and
21 plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
23 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
24 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must
25 contain more than "a formulaic recitation of the elements of a cause of action;" it must contain
26 factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic,

1 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
2 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
3 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
4 doubts in the plaintiff's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

5 The Civil Rights Act under which this action was filed provides as follows:

6 Every person who, under color of [state law] . . . subjects, or causes
7 to be subjected, any citizen of the United States . . . to the
8 deprivation of any rights, privileges, or immunities secured by the
9 Constitution . . . shall be liable to the party injured in an action at
10 law, suit in equity, or other proper proceeding for redress.

11 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
12 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
13 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
14 (1976). "A person 'subjects' another to the deprivation of a constitutional right, within the
15 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
16 omits to perform an act which he is legally required to do that causes the deprivation of which
17 complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

18 Moreover, supervisory personnel are generally not liable under § 1983 for the
19 actions of their employees under a theory of respondeat superior and, therefore, when a named
20 defendant holds a supervisory position, the causal link between him and the claimed
21 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
22 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory
23 allegations concerning the involvement of official personnel in civil rights violations are not
24 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

25 **PLAINTIFF'S COMPLAINT**

26 In his complaint, plaintiff identifies Laura Michelle Petty, Esq. as the defendant in
this action. (Compl. at 2.) Plaintiff alleges that attorney Petty provided him with incompetent
and ineffective representation at his criminal trial in 2008. (Id. at 3.) Specifically, plaintiff

1 alleges that defendant made misstatements in her motion to dismiss and failed to accept the
2 prosecutor's sentencing recommendation of 19 years to life. (Id.) In terms of relief, plaintiff
3 seeks monetary damages and a stay on this action. (Id.)

4 **ANALYSIS**

5 To state a cognizable claim under § 1983, a plaintiff must allege: (1) a violation of
6 a right secured by the Constitution and the laws of the United States; and (2) that the deprivation
7 was committed by a person acting under color of state law. See West v. Atkins, 487 U.S. 42, 28
8 (1988); Ketchum v. County of Alameda, 811 F.2d 1243, 1245 (9th Cir. 1987). Here, plaintiff's
9 allegations consist of general, legal malpractice claims against his former attorney in a criminal
10 matter. However, defense attorneys (including public defenders or appointed counsel) do not act
11 under color of state law for the purposes of § 1983. See Polk County v. Dodson, 454 U.S. 312,
12 325 (1981); Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir. 1996) (noting that attorneys are
13 generally private, not state, actors). Plaintiff's complaint does not allege any facts suggesting
14 that his attorney acted in a manner that went beyond the traditional functions of a lawyer. Polk,
15 454 U.S. at 325; cf. Tower v. Glover, 467 U.S. 914, 923 (1984) (finding plaintiff's claim that his
16 public defender conspired with state officials to obtain his conviction cognizable under § 1983).
17 Accordingly, plaintiff's allegations of general, legal malpractice fail to state a cognizable claim
18 under § 1983 and must be dismissed.¹ See Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.
19 1981) (holding that plaintiff's legal malpractice claims do not come within the jurisdiction of
20 federal courts).

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23 ¹ The court notes that it appears to be the case in California, as in most jurisdictions, that
24 a legal malpractice claim arising out of a criminal proceeding requires proof of actual innocence.
25 See Wiley v. County of San Diego, 19 Cal. 4th 532, 545 (1998). Therefore, to the extent plaintiff
26 is seeking post-conviction relief in federal court so that he may proceed with a legal malpractice
action against his former attorney in state court, he is advised that he must file a habeas petition
and not a § 1983 action. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

1 **CONCLUSION**

2 In accordance with the above, IT IS HEREBY ORDERED that:

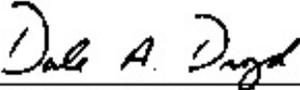
3 1. Plaintiff's August 13, 2010 application to proceed in forma pauperis (Doc. No.
4 7) is granted.

5 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.
6 The fee shall be collected and paid in accordance with this court's order to the Director of the
7 California Department of Corrections and Rehabilitation filed concurrently herewith.

8 Also, for the reasons set forth above, IT IS HEREBY RECOMMENDED that this
9 action be dismissed without prejudice to plaintiff's filing of a habeas petition in the appropriate
10 court.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
13 one days after being served with these findings and recommendations, plaintiff may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that
16 failure to file objections within the specified time may waive the right to appeal the District
17 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: September 2, 2010.

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21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

23 DAD:sj
24 sims1893.56