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

GEORGE WALLACE,  
Plaintiff,

No. 2:17-cv-0428-CMK-P

vs.

ORDER

JESSIE MORRIS,  
Defendant.

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Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s amended complaint (Doc. 10). Plaintiff has consented to Magistrate Judge jurisdiction pursuant to 28 U.S.C. § 636(c) and no other party has been served or appeared in the action.

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 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

1 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).  
2 This means that claims must be stated simply, concisely, and directly. See McHenry v. Renne,  
3 84 F.3d 1172, 1177 (9th Cir. 1996) (referring to Fed. R. Civ. P. 8(e)(1)). These rules are satisfied  
4 if the complaint gives the defendant fair notice of the plaintiff’s claim and the grounds upon  
5 which it rests. See Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996). Because plaintiff must  
6 allege with at least some degree of particularity overt acts by specific defendants which support  
7 the claims, vague and conclusory allegations fail to satisfy this standard. Additionally, it is  
8 impossible for the court to conduct the screening required by law when the allegations are vague  
9 and conclusory.

#### 10 **I. PLAINTIFF’S ALLEGATIONS**

11 Plaintiff alleges his public defender, Jessie Morris, conspired with the state  
12 prosecutor to secure his conviction. He contends that his attorney intentionally kept information  
13 and evidence from the jury, attempted to prejudice the jury against him, refused to investigate  
14 potential witnesses, and was generally incompetent especially in regards to his examination of  
15 witnesses.

#### 16 **II. DISCUSSION**

17 In general, § 1983 imposes liability upon any person who, acting under color of  
18 state law, deprives another of a federally protected right. 42 U.S.C. § 1983 (1982). “To make  
19 out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting  
20 under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal  
21 statutes.” Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir.1986). Public defenders act as  
22 an advocate for their client and are not acting under color of state law for § 1983 purposes, nor  
23 are attorneys appointed by the court to represent a defendant in place of the public defender. See  
24 Georgia v. McCollum, 505 U.S. 42, 53 (1992); Polk County v. Dodson, 454 U.S. 312, 320-25  
25 (1981). Thus, plaintiff cannot state a claim against defendant Morris based on his representation  
26 of plaintiff at his criminal trial.

1           It is possible that plaintiff may be attempting to state a claim for something akin to  
2 malicious prosecution, based on his allegations that his public defender conspired with the  
3 prosecution. However, such a claim is not cognizable under § 1983 unless the underlying  
4 conviction or sentence has first been invalidated on appeal, by habeas petition, or through some  
5 similar proceeding. See Heck v. Humphrey, 512 U.S. 477, 483-84 (1994) (concluding that §  
6 1983 claim not cognizable because allegations were akin to malicious prosecution action which  
7 includes as an element a finding that the criminal proceeding was concluded in plaintiff's favor).  
8 More generally, when a state prisoner challenges the legality of his custody and the relief he  
9 seeks is a determination that he is entitled to an earlier or immediate release, such a challenge is  
10 not cognizable under 42 U.S.C. § 1983 and the prisoner's sole federal remedy is a petition for a  
11 writ of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973); see also Neal v.  
12 Shimoda, 131 F.3d 818, 824 (9th Cir. 1997); Trimble v. City of Santa Rosa, 49 F.3d 583, 586  
13 (9th Cir. 1995) (per curiam). Thus, where a § 1983 action seeking monetary damages or  
14 declaratory relief alleges constitutional violations which would necessarily imply the invalidity of  
15 the prisoner's underlying conviction or sentence, or the result of a prison disciplinary hearing  
16 resulting in imposition of a sanction affecting the overall length of confinement, such a claim is  
17 not cognizable under § 1983 unless the conviction or sentence has first been invalidated on  
18 appeal, by habeas petition, or through some similar proceeding. See Heck, 512 U.S. at 483-84.

19           Plaintiff refers to another case wherein he filed a petition for writ of habeas corpus  
20 in this court, case number 2:14-cv-0157-MCE-EFB.<sup>1</sup> A review of the court's docket shows that  
21 plaintiff's petition was denied. Thus, plaintiff fails to show that his underlying conviction has  
22 been overturned and this claim is not cognizable.

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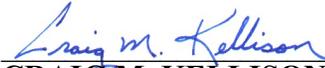
25           <sup>1</sup> The court may take judicial notice of its own records. See Chandler v. U.S., 378  
26 F.2d 906, 909 (9th Cir. 1967).

1 **III. CONCLUSION**

2 Because it does not appear possible that the deficiencies identified herein can be  
3 cured by amending the complaint, plaintiff is not entitled to leave to amend prior to dismissal of  
4 the entire action. See Lopez v. Smith, 203 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc).  
5 Plaintiff shall show cause in writing, within 30 days of the date of this order, why this action  
6 should not be dismissed for failure to state a claim. Plaintiff is warned that failure to respond to  
7 this order may result in dismissal of the action for the reasons outlined above, as well as for  
8 failure to prosecute and comply with court rules and orders. See Local Rule 110.

9 IT IS SO ORDERED.

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11 DATED: January 12, 2018

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13 **CRAIG M. KELLISON**  
14 UNITED STATES MAGISTRATE JUDGE  
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