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

TYRONE L. REED,

No. C-09-0324 TEH (PR)

Plaintiff,

v.

DEBORAH L. LEVY, et. al.,

ORDER OF DISMISSAL

Defendants.

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I

Plaintiff, a prisoner currently incarcerated at the Oakland North County Jail in Oakland, California, has filed a pro se civil rights complaint for damages under 42 U.S.C. § 1983 alleging various violations of his rights by his court-appointed private counsel Deborah L. Levy and Alameda County District Attorney Tom Orloff during his prosecution on sexual assault charges in 2007. Plaintiff had previously filed a pro se civil rights complaint against the Alameda County Judge presiding over his 2007 sexual assault trial, C-08-5612 TEH, which the court dismissed without prejudice on December 24, 2008 for failure to state a claim. Plaintiff's present complaint is now before the Court for review

1 pursuant to 28 U.S.C. § 1915A.

2 II

3 Federal courts must engage in a preliminary screening of  
4 cases in which prisoners seek redress from a governmental entity or  
5 officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
6 The court must identify cognizable claims or dismiss the complaint,  
7 or any portion of the complaint, if the complaint "is frivolous,  
8 malicious, or fails to state a claim upon which relief may be  
9 granted," or "seeks monetary relief from a defendant who is immune  
10 from such relief." Id. § 1915A(b). Pro se pleadings, however, must  
11 be liberally construed. Balistreri v. Pacifica Police Dept., 901  
12 F.2d 696, 699 (9th Cir. 1990).

13 III

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
15 allege two essential elements: (1) that a right secured by the  
16 Constitution or laws of the United States was violated; and (2) that  
17 the alleged violation was committed by a person acting under the  
18 color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

19 In his present Complaint, C-09-0324 TEH, Plaintiff makes  
20 essentially the same allegations he made in his prior complaint, C-  
21 08-5612 TEH, namely, that certain charges against him which had been  
22 dismissed were read to the jury during trial, that the judge failed  
23 to allow him to "fire" his defense attorney despite multiple  
24 requests, that Plaintiff was convicted of charges for which the  
25 judge had previously found there was insufficient evidence to hold  
26 him over for trial, and that certain jurors were dismissed during  
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1 his trial when he was not present. The difference between the two  
2 complaints is that Plaintiff is now suing his court-appointed  
3 private counsel, Deborah L. Levy, and Alameda County District  
4 Attorney Tom Orloff, rather than the trial judge.

5 A

6 Attorneys in private practice are not state actors. See  
7 Simmons v. Sacramento County Superior Court, 318 F.3d 1156, 1161  
8 (9th Cir. 2003); see also Kimes v. Stone, 84 F.3d 1121, 1126 (9th  
9 Cir. 1996) (attorneys are private actors). Services performed by a  
10 private attorney in connection with a lawsuit do not constitute  
11 action under color of state law. See Franklin v. Oregon, 662 F.2d  
12 1337, 1345 (9th Cir. 1981); Briley v. California, 564 F.2d 849,  
13 855-56 (9th Cir. 1977). And claims for legal malpractice do not  
14 come within the jurisdiction of the federal courts. See Franklin,  
15 662 F.2d at 1344.

16 Plaintiff's allegations against his court-appointed  
17 private counsel, therefore, fail to state a claim upon which relief  
18 under § 1983 may be granted. To whatever extent Plaintiff seeks a  
19 new state trial or appeal on the basis of ineffective assistance of  
20 counsel, he must do so by way of a petition for writ of habeas  
21 corpus under 28 U.S.C. § 2254 after exhausting state judicial  
22 remedies. See Calderon v. Ashmus, 523 U.S. 740, 747 (1998) (any  
23 claim by a prisoner attacking the validity or duration of his  
24 confinement must be brought under the habeas sections of Title 28 of  
25 the United States Code).

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1 B

2 A prosecutor performing an advocate's role is an officer  
3 of the court entitled to absolute immunity. See Buckley v.  
4 Fitzsimmons, 509 U.S. 259, 272-73 (1993). Prosecutors therefore are  
5 absolutely immune from liability for their conduct as "advocates"  
6 during the initiation of a criminal case and its presentation at  
7 trial. See id.; Imbler v. Pachtman, 424 U.S. 409, 431 (1976); see,  
8 e.g., Van De Kamp v. Goldstein, No. 07-854, slip op. at 6-7 (U.S.  
9 Jan. 26, 2009) (relying on Imbler to extend absolute immunity to  
10 prosecutors performing certain administrative obligations related to  
11 the conduct of a trial, including claims that the prosecution failed  
12 to disclose impeachment material pursuant to Giglio v. United  
13 States, 405 U.S. 150 (1972) based on: (1) failure to properly train  
14 prosecutors; (2) failure to supervise prosecutors; and (3) failure  
15 to establish an information system with potential impeachment  
16 information). Prosecutors also are entitled to absolute immunity  
17 for the decision not to prosecute. See Botello v. Gammick, 413 F.3d  
18 971, 977 (9th Cir. 2005); Roe v. City and County of San Francisco,  
19 109 F.3d 578, 583 (9th Cir. 1997). For absolute immunity to apply,  
20 the activities at issue must be "intimately associated with the  
21 judicial phase of the criminal process." Imbler, 424 U.S. at 430;  
22 see, e.g., Genzler v. Loganbach, 410 F.3d 630, 643-44 (9th Cir.  
23 2005) (reversing denial of absolute immunity to supervisors of  
24 District Attorney's office where conduct alleged in complaint  
25 amounted to advocacy functions as set forth in Imbler).

26 Alameda County District Attorney Tom Orloff, therefore, is  
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1 entitled to absolute immunity for the prosecution of Plaintiff's  
2 criminal trial.

3 IV

4 For the foregoing reasons, Plaintiff's Complaint is  
5 DISMISSED WITHOUT PREJUDICE under the authority of 28 U.S.C. §  
6 1915(e)(2)(B). Plaintiff's Applications to Proceed In Forma  
7 Pauperis (Doc. #s 2 & 4) are GRANTED in a separate order filed  
8 simultaneously with this order.

9 The Clerk is directed to terminate any pending motions as  
10 moot and close the file.

11 The clerk is further directed to provide Plaintiff with a  
12 copy of the court's form petition for a writ of habeas corpus with  
13 this order.

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15 IT IS SO ORDERED.

16  
17 DATED 03/03/09



18 THELTON E. HENDERSON  
19 United States District Judge

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