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

BENJAMIN FORD,

Plaintiff,

vs.

CONTRA COSTA COUNTY PUBLIC  
DEFENDER'S OFFICE, MIKE KELLY,  
TERRY KOCHLER,

Defendants.

No. C 09-4921 JSW (PR)

**ORDER OF DISMISSAL**

(Docket No. 7)

Plaintiff, incarcerated at the West County Detention Center in Richmond, California, has filed a pro se civil rights complaint under 42 U.S.C. § 1983 against the public defender and the office of the public defender representing him on his criminal prosecution. He has also filed a motion to proceed *in forma pauperis*, which is now GRANTED in a separate order filed simultaneously (docket no. 7).

**DISCUSSION**

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See *id.* at 1915A(b)(1),(2). Pro se

1 pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d  
2 696, 699 (9th Cir. 1990).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
4 elements: (1) that a violation of a right secured by the Constitution or laws of the  
5 United States was violated, and (2) that the alleged deprivation was committed by a  
6 person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

7 **B. Legal Claim**

8 In this case, Plaintiff has sued his public defender and his office with regard to  
9 their role in representing him during his criminal prosecution for a crime with which he  
10 has been charged. Plaintiff complains that the public defender's office is not doing an  
11 adequate job representing him, by looking for witnesses or possible defenses.

12 A public defender does not act under color of state law, an essential element of  
13 an action under 42 U.S.C. § 1983, when performing a lawyer's traditional functions,  
14 such as entering pleas, making motions, objecting at trial, cross-examining witnesses,  
15 and making closing arguments. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981);  
16 *accord Vermont v. Brillon*, 129 S. Ct. 1283, 1291-92 (2009). It matters not that the  
17 public defender failed to exercise independent judgment or that he was employed by a  
18 public agency; it is the nature and context of the function performed by the public  
19 defender that is determinative under *Polk County*. *Miranda v. Clark County, Nevada*,  
20 319 F.3d 465, 468 (9th Cir.) (en banc), *cert. denied*, *Clark County, Nev. v. Miranda*,  
21 540 U.S. 814 (2003). Purely private conduct, no matter how wrongful, is not covered  
22 under § 1983. *See Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 559 (9th Cir. 1974).  
23 Simply put: there is no right to be free from the infliction of constitutional deprivations  
24 by private individuals. *See Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir.  
25 1996). Therefore, Plaintiff's claims against his public defender and the Contra Costa  
26 County Public Defender's Office are DISMISSED without prejudice to his bringing  
27 his claims in a proper forum.

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**CONCLUSION**

For the forgoing reasons, Plaintiff's complaint is hereby DISMISSED. The Clerk shall close the file and enter judgment in this case.

IT IS SO ORDERED.

DATED: November 2, 2009

  
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JEFFREY S. WHITE  
United States District Judge