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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD JOHN VIEIRA,

No. C 14-3568 SI (pr)

Plaintiff,

ORDER OF DISMISSAL

v.

WESLEY A. VAN WINKLE,

Defendant.

Richard John Vieira, an inmate on death row at San Quentin State Prison, filed this *pro se* civil rights action under 42 U.S.C. § 1983 against his appointed counsel. In his complaint, he complains about counsel's representation during Vieira's capital appeal. His complaint is now before the court for review under 28 U.S.C. § 1915A and § 1915(e)(2).

A federal court must engage in a preliminary screening of any case in which a prisoner seeks 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). Even if § 1915A does not apply – as, for example, occurs when the prisoner-plaintiff does not seek redress from a governmental entity or officer or employee of a governmental entity – § 1915 permits the court to review a complaint filed *in forma pauperis*, and dismiss the action

1 if the complaint fails to state a claim upon which relief may be granted. *See* 28 U.S.C.
2 § 1915(e)(2)(B)(ii). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*
3 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

4 Federal courts are courts of limited jurisdiction. As relevant here, the court only has
5 jurisdiction to entertain this action if it raises a federal question, such as a civil rights claim
6 asserted under 42 U.S.C. § 1983. (There are other federal statutes that grant other bases of
7 federal court jurisdiction, but none are applicable to this action.) In simple terms, a prisoner's
8 complaint can go forward in federal court if a claim is stated under § 1983; if a complaint does
9 not state a claim under § 1983, the plaintiff must file his action in state court.

10 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a
11 person acting under the color of state law (2) violated a right secured by the Constitution or laws
12 of the United States. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

13 The amended complaint fails to state a claim under § 1983 because the defendant is not
14 a state actor. State court criminal defendants cannot sue their lawyers in federal court for most
15 lawyer-type mistakes. A public defender does not act under color of state law, an essential
16 element of an action under 42 U.S.C. § 1983, when performing a lawyer's traditional functions,
17 such as entering pleas, making motions, objecting at trial, cross-examining witnesses, and
18 making closing arguments. *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981); *cf. Vermont*
19 *v. Brillon*, 556 U.S. 81, 84 (2009) (state court erred in ranking assigned counsel essentially as
20 state actors for purposes of evaluating speedy trial claim). A private attorney under court
21 appointment to represent a prisoner in a capital appeal also is not a state actor. *See Simmons*
22 *v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003). Plaintiff's
23 conclusory allegations of conspiracy do not suffice to transform the private attorney's actions
24 into state action. *See id.* As the defendant here is not a state actor, he has no liability under
25 § 1983 for the acts and omissions alleged by plaintiff in this action.

26 For the foregoing reasons, this action is DISMISSED for failure to state a claim upon
27 which relief may be granted. Leave to amend will not be granted because the defect in the
28 complaint is not curable.

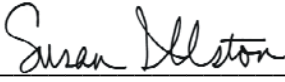
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In light of the dismissal of this action, plaintiff's motion for appointment of counsel is DENIED. (Docket # 4.)

The clerk shall close the file.

IT IS SO ORDERED.

Dated: October 9, 2014



SUSAN ILLSTON
United States District Judge