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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN LIMBIRD DAVIS,  
Plaintiff,  
v.  
V. ROY LEFCOURT,  
Defendant.

Case No. [16-cv-04980-JD](#)

**ORDER REVOKING  
PLAINTIFF'S IN FORMA  
PAUPERIS STATUS AND  
DENYING MOTION TO FILE AN  
AMENDED COMPLAINT**

Re: Dkt. No. 15

Plaintiff, a detainee, filed a pro se civil rights complaint under 42 U.S.C. § 1983 that was dismissed at screening. Plaintiff filed an appeal with the Ninth Circuit and the case has been referred back to this Court for the limited purpose of determining whether plaintiff's in forma pauperis status should continue or whether the appeal is frivolous or taken in bad faith.

An indigent party who cannot afford the expense of pursuing an appeal may file a motion for leave to proceed in forma pauperis. Fed. R. App. P. 24(a); 28 U.S.C. § 1915(a)(1). Pursuant to Federal Rule of Appellate Procedure 24(a), "a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court." The party must attach an affidavit that (1) shows in detail "the party's inability to pay or give security for fees and costs," (2) "claims an entitlement to redress," and (3) "states the issues that the party intends to present on appeal." Fed. R. App. P. 24(a)(1). However, even if a party provides proof of indigence, "an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U.S.C. § 1915(a)(3). An appeal is in "good faith" where it seeks review of any issue that is "non-frivolous." *Hooker v. American Airlines*, 302 F.3d 1091, 1092 (9th Cir. 2002). An issue is "frivolous" if it has "no arguable basis in fact or law." *See O'Loughlin v. Doe*, 920

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F.2d 614, 617 (9th Cir. 1990).

Plaintiff alleged that his defense attorney did not properly handle his criminal case. Plaintiff sought money damages. Plaintiff was given an opportunity to amend but the case was dismissed because a public defender does not act under color of state law, an essential element of an action under 42 U.S.C. § 1983, when performing a lawyer’s traditional functions, such as entering pleas, making motions, objecting at trial, cross-examining witnesses, and making closing arguments. *Polk County v. Dodson*, 454 U.S. 312, 318–19 (1981). A private attorney representing a defendant or appellant also is not a state actor. *See Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003).

Because the law is well settled that his complaint fails to state a claim the appeal is meritless and frivolous. Therefore, plaintiff’s in forma pauperis status is **REVOKED**. The Clerk shall forward this Order to the Ninth Circuit in case No. 17-15482. Plaintiff’s motion to amend (Docket No. 15) is **DENIED** for the reasons set forth in the prior order and because further amendment would be futile.

**IT IS SO ORDERED.**

Dated: March 27, 2017

  
\_\_\_\_\_  
JAMES DONATO  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 JOHN LIMBIRD DAVIS,  
4 Plaintiff,  
5 v.  
6 V. ROY LEFCOURT,  
7 Defendant.  
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Case No. [16-cv-04980-JD](#)

**CERTIFICATE OF SERVICE**

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
10 District Court, Northern District of California.

11  
12 That on March 27, 2017, I SERVED a true and correct copy(ies) of the attached, by  
13 placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
15 receptacle located in the Clerk's office.  
16

17 John Limbird Davis  
18 #16664426  
19 850 Bryant Street  
20 San Francisco, CA 94103

21 Dated: March 27, 2017

22  
23 Susan Y. Soong  
24 Clerk, United States District Court

25  
26 By:   
27 LISA R. CLARK, Deputy Clerk to the  
28 Honorable JAMES DONATO