



In Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997), the Eleventh Circuit interpreted the language contained in 28 U.S.C. § 1915(e)(2)(B)(ii), which is nearly identical to that contained in the screening provisions at § 1915A(b). As the language of § 1915(e)(2)(B)(ii) closely tracks the language of Federal Rule of Civil Procedure 12(b)(6), the court held that the same standards for determining whether to dismiss for failure to state a claim under Rule 12(b)(6) should be applied to prisoner complaints filed pursuant to § 1915(e)(2)(B)(ii). Mitchell, 112 F.3d at 1490. The court may dismiss a complaint for failure to state a claim only where it appears beyond a doubt that a *pro se* litigant can prove no set of facts that would entitle him to relief. Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 176, 66 L. Ed. 2d 163, 169-70 (1980); Mitchell, 112 F.3d at 1490. While the court in Mitchell interpreted § 1915(e), its interpretation guides this Court in applying the identical language of § 1915A.

Plaintiff makes various allegations of malpractice against Defendant Hardin, the attorney who represented him following his August 10, 2006 arrest. Plaintiff contends that Defendant's actions constitute fraud, perjury, denial of access to the courts, and violation of his Sixth Amendment rights.

"In order to prevail on a civil rights action under § 1983, a plaintiff must show that he or she was deprived of a federal right by a person acting under color of state law." Griffin v. City of Opa-Locka, 261 F.3d 1295, 1303 (11th Cir. 2001). A plaintiff's allegations against criminal defense counsel, whether court-appointed or privately retained, fail to state a claim under §1983 because such counsel does not act under color of state law. See O'Brien v. Colbath, 465 F.2d 358, 359 (5th Cir. 1972) (stating

that §1983 "was never intended as a vehicle for prosecuting malpractice suits against court-appointed attorneys").<sup>1</sup>

Plaintiff's Complaint, when read in a light most favorable to him, fails to state a claim for relief under 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1915. Plaintiff has not shown that Defendant acted under color of state law, and therefore, Plaintiff cannot sustain a §1983 claim. Accordingly, it is my **RECOMMENDATION** that Plaintiff's Complaint be **DISMISSED**.

So **REPORTED** and **RECOMMENDED**, this 20<sup>th</sup> day of April, 2007.

  
\_\_\_\_\_  
JAMES E. GRAHAM  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup> The Eleventh Circuit has adopted as binding precedent all decisions of the Fifth Circuit Court of Appeals rendered prior to October 1, 1981. Bonner v. Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981).