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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

STAN R. WAFF,  
Plaintiff,  
v.  
ESMERALDA CO., NEVADA, et al.,  
Defendants.

Case No. 2:10-CV-00088-KJD-RJJ

**ORDER**

Currently before the Court is Defendant Esmeralda County of Nevada’s (“Esmeralda County”) Motion to Dismiss (#38). Plaintiff filed a response in opposition (#43) to which Defendant replied (#45). Specifically, Defendant Esmeralda County seeks that the Court dismiss Plaintiff’s cause of action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

**I. Background**

Plaintiff Stan R. Waff’s Motion for Leave to Proceed *in forma pauperis* was granted by the Court (#16) on March 18, 2010. Plaintiff filed his initial Complaint (#17) on that same date alleging what the Court liberally construes to be a single claim for relief for ineffective assistance of counsel against Esmeralda County. On August 23, 2010, Plaintiff filed an Amended Complaint (#21) that added the Nye County Defendants, but did not assert any new allegations or claims. Plaintiff’s claim

1 is described as “UnJust Reipresentation unduly oppersistion / No Public Defender in Centural Nevada”  
2 (sic) (#17 at 4). It appears that Plaintiff’s ineffective assistance of counsel claim arises from the  
3 events commencing on January 22, 2008 when Plaintiff was arrested by the Esmeralda Sheriff’s  
4 office for alleged domestic abuse. Plaintiff was subsequently provided with representation by a  
5 public defender. At an arraignment hearing on February 26, 2008, the public defender made a motion  
6 to withdraw as counsel for the Plaintiff. After the motion to withdraw as counsel was granted, the  
7 Esmeralda County District Attorney filed a Notice of Non-Prosecution, declining to prosecute  
8 Plaintiff for domestic abuse.

9 **II. Standard of Law for Motion to Dismiss**

10 Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a Plaintiff’s complaint for “failure to  
11 state a claim upon which relief can be granted.” A properly pled complaint must provide “a short and  
12 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2);  
13 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed  
14 factual allegations, it demands more than “labels and conclusions” or a “formulaic recitation of the  
15 elements of a cause of action.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan v.  
16 Allain, 478 U.S. 265, 286 (1986)). “Factual allegations must be enough to rise above the speculative  
17 level.” Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain  
18 sufficient factual matter to “state a claim to relief that is plausible on its face.” Iqbal, 129 S. Ct. at  
19 1949 (internal citation omitted).

20 In Iqbal, the Supreme Court recently clarified the two-step approach district courts are to  
21 apply when considering motions to dismiss. First, the Court must accept as true all well-pled factual  
22 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.  
23 Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory  
24 statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual  
25 allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially  
26 plausible when the Plaintiff’s complaint alleges facts that allow the court to draw a reasonable

1 inference that the defendant is liable for the alleged misconduct. Iqbal, 129 S. Ct. at 1949. Where  
2 the complaint does not permit the court to infer more than the mere possibility of misconduct, the  
3 complaint has “alleged—but not shown—that the pleader is entitled to relief.” Id. (internal quotation  
4 marks omitted). When the claims in a complaint have not crossed the line from conceivable to  
5 plausible, Plaintiff’s complaint must be dismissed. Twombly, 550 U.S. at 570.

### 6 **III. Discussion**

#### 7 **1. Nye County Defendants**

8 The Court must liberally construe the pleadings of *pro se* parties. See United States v.  
9 Eatinger, 902 F.2d 1383, 1385 (9th Cir. 1990). However, even given the most liberal reading,  
10 Plaintiff’s Complaint against the Nye County Defendants fails to state a claim upon which relief can  
11 be granted because it is completely silent as to any factual allegations concerning the Nye County  
12 Defendants. Plaintiff identifies the Nye County Defendants as parties to his action and subsequently  
13 fails to provide even a single factual statement identifying the Nye County Defendants’ involvement  
14 with the Plaintiff. Furthermore, all discernable facts and allegations occurred in Esmeralda County,  
15 not in Nye County.

16 Accordingly, the Court finds that the Plaintiff has failed to state a claim against any Nye  
17 County Defendant.

#### 18 **2. Esmeralda County Defendants**

19 The Court liberally construes Plaintiff’s Complaint as asserting a claim for ineffective  
20 assistance of counsel against the Esmeralda County Defendants. Plaintiff is attempting to bring an  
21 ineffective assistance of counsel claim under 42 U.S.C. § 1983. In order to establish a claim under §  
22 1983, Plaintiff must first, “allege that some person has deprived him of a federal right,” and second,  
23 “he must allege that the person who has deprived him of that right acted under color of state or  
24 territorial law.” Gomez v. Toledo, 446 U.S. 635, 640 (1980). Even if Plaintiff’s claim was supported  
25 by sufficient factual allegations, “a public defender does not act under color of state law when  
26 performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding” and

1 therefore, a claim of ineffective assistance of counsel brought under § 1983 fails. Polk County v.  
2 Dodson, 102 S. Ct. 445, 453 (1981). Finally, if the Court assumes that Plaintiff is attempting to bring  
3 an ineffective assistance of counsel claim under state malpractice law, no subject-matter jurisdiction  
4 would exist and dismissal of the claim is appropriate pursuant to Fed. R. Civ. P. 12(h)(3).

5 Accordingly, even liberally construing Plaintiff's complaint, Plaintiff presents no cognizable  
6 claim and Defendant Esmeralda County's Motion to Dismiss (#38) should be granted. Furthermore,  
7 the Court finds that giving the Plaintiff leave to amend would be futile since ineffective assistance  
8 claims may not brought under § 1983.

9 **IV. Conclusion**

10 **IT IS HEREBY ORDERED** that Defendant Esmeralda County of Nevada's Motion to  
11 Dismiss (#38) is **GRANTED**;

12 **IT IS FURTHER ORDERED** that the Clerk of the Court enter **JUDGMENT** for  
13 Defendants and against Plaintiff.

14 DATED this 2<sup>nd</sup> day of June 2011.

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Kent J. Dawson  
United States District Judge