

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

IKEMEFULA CHARLES IBEABUCHI,

Plaintiff-Appellant,

v.

MIKEL STEINFELD,

Defendant-Appellee.

No. 18-15726

D.C. No. 2:17-cv-04808-JAT-JZB
District of Arizona,
Phoenix

ORDER

Before: LEAVY, HAWKINS, and TALLMAN, Circuit Judges.

The district court certified that this appeal is not taken in good faith. *See* 28 U.S.C. § 1915(a). On May 2, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, responses to the court's order to show cause, and opening brief received on May 23, 2018, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 9) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending requests are denied as moot.

DISMISSED.

APPENDICE A

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ORDER

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or
- (2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

- (1) file in this court a motion to proceed in forma pauperis, OR
- (2) pay to the district court \$505.00 for the filing and docketing fees for this appeal AND file in this court proof that the \$505.00 was paid.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g).

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Corina Orozco
Deputy Clerk
Ninth Circuit Rule 27-7

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Ikemefula Charles Ibeabuchi,
Plaintiff,
v.
Mikel Steinfeld,
Defendant.

No. CV 17-04808-PHX-JAT (JZB)

ORDER

Plaintiff Ikemefula Charles Ibeabuchi, who is confined in the Central Arizona Correctional Facility in Florence, Arizona, has filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1) and an Application to Proceed In Forma Pauperis (Doc. 2). The Court will dismiss the Complaint and this action.

I. Application to Proceed In Forma Pauperis and Filing Fee

The Court will grant Plaintiff's Application to Proceed In Forma Pauperis. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will not assess an initial partial filing fee. *Id.* The statutory filing fee will be collected monthly in payments of 20% of the previous month's income credited to Plaintiff's trust account each time the amount in the account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government agency to collect and forward the fees according to the statutory formula.

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....

1 **II. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief
3 against a governmental entity or an officer or an employee of a governmental entity. 28
4 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
5 has raised claims that are legally frivolous or malicious, that fail to state a claim upon
6 which relief may be granted, or that seek monetary relief from a defendant who is
7 immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

8 A pleading must contain a “short and plain statement of the claim *showing* that the
9 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8
10 does not demand detailed factual allegations, “it demands more than an unadorned, the-
11 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
12 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” *Id.*

14 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
15 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
16 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual
17 content that allows the court to draw the reasonable inference that the defendant is liable
18 for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible
19 claim for relief [is] . . . a context-specific task that requires the reviewing court to draw
20 on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s
21 specific factual allegations may be consistent with a constitutional claim, a court must
22 assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.*
23 at 681.

24 But as the United States Court of Appeals for the Ninth Circuit has instructed,
25 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
26 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
27 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

1 If the Court determines that a pleading could be cured by the allegation of other
2 facts, a pro se litigant is entitled to an opportunity to amend a complaint before dismissal
3 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc).
4 Plaintiff's Complaint will be dismissed for failure to state a claim and because it cannot
5 be amended to state a claim, it will be dismissed without leave to amend.

6 **III. Complaint**

7 In his one-count Complaint, Plaintiff asserts violations of his First, Sixth, Eighth,
8 and Fourteenth Amendment rights. Plaintiff sues Deputy Maricopa County Public
9 Defender Mikel Steinfeld. Plaintiff seeks injunctive and compensatory relief.

10 Plaintiff alleges the following:

11 In a November 28, 2017 letter, Defendant Steinfeld informed Plaintiff that his
12 conviction had been affirmed on November 21, 2017 and attached a copy of the decision.
13 Steinfeld also stated that he would inform Plaintiff within thirty days whether he intended
14 to petition the Arizona Supreme Court for review. Until receiving the letter, Defendant
15 had never consulted with Plaintiff about challenging his conviction on appeal. Plaintiff
16 sent a reply seeking an explanation regarding Plaintiff's right to make decisions about his
17 appeal. Plaintiff also contends that Steinfeld miscalculated or misstated the time within
18 which to act on the denial of his appeal and thereby foreclosed certain actions, such as
19 filing a motion for reconsideration, and denied Plaintiff access to the court.

20 **IV. Failure to State a Claim Under 42 U.S.C. § 1983.**

21 To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants
22 under color of state law (3) deprived him of federal rights, privileges or immunities
23 and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th
24 Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d
25 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific
26 injury as a result of the conduct of a particular defendant and he must allege an
27 affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*,
28 423 U.S. 362, 371-72, 377 (1976).

1 Plaintiff sues his former criminal defense attorney. A prerequisite for any relief
2 under § 1983 are allegations to support that a defendant acted under the color of state
3 law. The under color of state law component is the equivalent of the state action
4 requirement under the Constitution. *Lugar v. Edmondson Oil Co, Inc.*, 457 U.S. 922, 928
5 (1982); *Jensen v. Lane County*, 222 F.3d 570, 574 (9th Cir. 2000) (citing *Rendel-Baker v.*
6 *Kohn*, 457 U.S. 830, 838 (1982); *West v. Atkins*, 487 U.S. 42, 49 (1988)). Acting under
7 color of state law is a jurisdictional requisite for a § 1983 action. *Gritchen v. Collier*, 254
8 F.3d 807, 812 (9th Cir. 2001) (quoting *West*, 487 U.S. at 46). Whether an attorney
9 representing a criminal defendant is privately retained, a public defender, or court-
10 appointed counsel, he does not act under color of state law. See *Polk County v. Dodson*,
11 454 U.S. 312, 317-18 (1981); *Miranda v. Clark County, Nevada*, 319 F.3d 465, 468 (9th
12 Cir. 2003) (en banc).

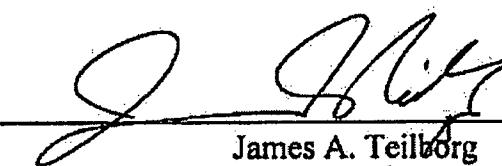
13 Plaintiff seeks relief against Defendant Steinfeld based solely on Steinfeld's
14 representation of Plaintiff on appeal. As explained above, Steinfeld did not act under
15 color of state law when representing Plaintiff on appeal. Accordingly, Plaintiff fails to
16 state a claim under § 1983. Because Plaintiff cannot amend his Complaint to state a
17 claim against Defendant, the Complaint and this action will be dismissed.

18 **IT IS ORDERED:**

- 19 (1) Plaintiff's Application to Proceed In Forma Pauperis (Doc. 2) is **granted**.
- 20 (2) As required by the accompanying Order to the appropriate government
21 agency, Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial
22 filing fee.
- 23 (3) The Complaint (Doc. 1) is **dismissed** for failure to state a claim pursuant to
24 28 U.S.C. § 1915A(b)(1), and the Clerk of Court must enter judgment accordingly.
- 25 (4) The Clerk of Court must make an entry on the docket stating that the
26 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).
- 27 (5) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3)
28 and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal

1 of this decision would be taken in good faith and certifies that an appeal would not be
2 taken in good faith for the reasons stated in the Order and because there is no arguable
3 factual or legal basis for an appeal.

4 Dated this 9th day of April, 2018.

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8 James A. Teilborg
9 Senior United States District Judge
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