ALD-244 July 2, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-1267**

DAVID MERRITT, Appellant

v.

WARDEN JAMES T VAUGHN CORRECTIONAL CENTER; ET AL.

(D. Del. Civ. No. 1-13-cv-01734)

Present: MCKEE, SHWARTZ, and PHIPPS, Circuit Judges

Submitted are:

(1) Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

(2) Appellant's motion for an evidentiary hearing; and

(3) Appellant's document in support of appeal

in the above-captioned case.

Respectfully,

Clerk

ORDER

Merritt's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would agree without debate that Merritt was not entitled to relief on his Fed. R. Civ. P. 60(b) motion. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Morris v. Horn, 187 F.3d 333, 341 (3d Cir. 1999). More specifically, to the extent that Merritt presented claims that "attack[ed] the federal court's previous resolution of a claim on the merits," or "[sought] to add a new ground for relief," his putative Rule 60(b) motion constituted an unauthorized second or successive 28 U.S.C. § 2254 petition that the District Court lacked jurisdiction to consider. Gonzalez v.

Crosby, 545 U.S. 524, 532 (2005) (emphasis omitted); see also Magwood v. Patterson, 561 U.S. 320, 331 (2010). Merritt also challenged the District Court's ruling that his insufficiency-of-the-evidence claim was procedurally defaulted, but the District Court rejected those arguments in the underlying § 2254 proceedings and this Court denied Merritt's request for a certificate of appealability. See C.A. No. 17-1668. Merritt may not use Rule 60(b) as a substitute for an appeal or a certiorari petition. See Morris, 187 F.3d at 343; Reform Party of Allegheny Cty. v. Allegheny Cty. Dep't of Elections, 174 F.3d 305, 311–12 (3d Cir. 1999). The application is, therefore, denied. Merritt's motion for an evidentiary hearing is also denied.

By the Court,

s/ *Peter J. Phipps*
Circuit Judge

Dated: August 14, 2020
JK/cc: David Merritt
Maria T. Knoll, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

s/ Patricia S. Dodszuweit
Clerk

By: James King
Case Manager
267-299-4958

cc: John A. Cerino

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID MERRITT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 10-1092-GMS
	)	
JOHN S. EDINGER, JR., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM

The plaintiff, David Merritt ("Merritt"), an inmate at the Howard R. Young Correctional Institution ("HRYCI), Wilmington, Delaware, filed this lawsuit pursuant to 42 U.S.C. § 1983.[1] (D.I. 4.) He appears *pro se* and was granted permission to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (D.I. 6.) The court now proceeds to review and screen the complaint pursuant to 28 U.S.C. § 1915 and § 1915A.

I. BACKGROUND

Merritt raises claims against his public defenders, John S. Edinger, Jr. ("Edinger") and Nicole M. Walker ("Walker"), complaining of their actions while representing Merritt during criminal proceedings. Edinger represented Merritt during the pretrial and trial phases of the proceeding, and Walker represented Merritt on appeal. Merritt was convicted of eight counts of rape in the first degree and one count of continuous sexual abuse of a child by a person of trust. *Merritt v. State*, 12 A.3d 1154, 2011 WL 285097 (Del. 2011) (table decision). On January 27,

[1]When bringing a § 1983 claim, a plaintiff must allege that some person has deprived him of a federal right, and that the person who caused the deprivation acted under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Merritt's entitlement to relief; rather it must "show" such an entitlement with its facts. *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged - but it has not shown - that the pleader is entitled to relief." *Iqbal*,129 S.Ct. at 1949 (quoting Fed. R. Civ. P. 8(a)(2)).

III. DISCUSSION

When bringing a § 1983 claim, a plaintiff must allege that some person has deprived him of a federal right, and that the person who caused the deprivation acted under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993). To act under "color of state law" a defendant must be "clothed with the authority of state law." *West*, 487 U.S. at 49. Public defenders do not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in criminal proceedings. *Polk County v. Dodson*, 454 U.S. 312 (1981); *Harmon v. Delaware Sec'y of State*, 154 F. App'x 283, 284-85 (3d Cir. 2005) (not published). Because defendants are not considered state actors, Merritt's claims fail under § 1983.

IV. CONCLUSION

For the above reasons, the request for counsel will be denied as moot and the complaint will be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)(1). Amendment of the complaint would be futile. *See Alston v. Parker*, 363 F.3d 229 (3d Cir. 2004); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 111 (3d Cir. 2002); *Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976).

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possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*

F.3d 1080, 1091-92 (3d Cir. 1995) (holding frivolous a suit alleging that prison officials took an inmate's pen and refused to give it back).

The legal standard for dismissing a complaint for failure to state a claim pursuant to § 1915(e)(2)(B)(ii) and § 1915A(b)(1) is identical to the legal standard used when ruling on 12(b)(6) motions. *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999) (applying Fed. R. Civ. P. 12(b)(6) standard to dismissal for failure to state a claim under § 1915(e)(2)(B)). However, before dismissing a complaint or claims for failure to state a claim upon which relief may be granted pursuant to the screening provisions of 28 U.S.C. §§ 1915 and 1915A, the court must grant Merritt leave to amend his complaint unless amendment would be inequitable or futile. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 114 (3d Cir. 2002).

A well-pleaded complaint must contain more than mere labels and conclusions. *See Ashcroft v. Iqbal*, –U.S.–, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The assumption of truth is inapplicable to legal conclusions or to "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements." *Id.* at 1949. When determining whether dismissal is appropriate, the court conducts a two-part analysis. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). First, the factual and legal elements of a claim are separated. *Id.* The court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. *Id.* at 210-11. Second, the court must determine whether the facts alleged in the complaint are sufficient to show that Merritt has a "plausible claim for relief."[2] *Id.* at 211. In other words, the complaint must do more than allege

[2]A claim is facially plausible when its factual content allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). The plausibility standard "asks for more than a sheer

2011, the Delaware Supreme Court affirmed the judgment of the Superior Court on direct appeal. (*Id.*)

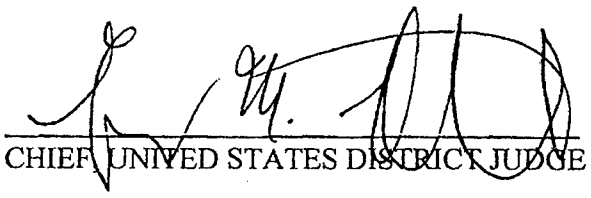
For relief Merritt seeks an order permitting the withdrawal of Edinger and Walker as counsel, the immediate appointment of new independent counsel, and the right to protect his rights during the pendency of this action. He also requests counsel. (D.I. 8.)

II. STANDARD OF REVIEW

This court must dismiss, at the earliest practicable time, certain *in forma pauperis* and prisoner actions that are frivolous, malicious, fail to state a claim, or seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2) (*in forma pauperis* actions); 28 U.S.C. § 1915A (actions in which prisoner seeks redress from a governmental defendant); 42 U.S.C. § 1997e (prisoner actions brought with respect to prison conditions). The court must accept all factual allegations in a complaint as true and take them in the light most favorable to a *pro se* plaintiff. *Phillips v. County of Allegheny*, 515 F.3d 224, 229 (3d Cir. 2008); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Because Merritt proceeds *pro se*, his pleading is liberally construed and his complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. at 94 (citations omitted).

An action is frivolous if it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Under 28 U.S.C. § 1915(e)(2)(B)(i) and § 1915A(b)(1), a court may dismiss a complaint as frivolous if it is "based on an indisputably meritless legal theory" or a "clearly baseless" or "fantastic or delusional" factual scenario. *Neitzke*, 490 at 327-28; *Wilson v. Rackmill*, 878 F.2d 772, 774 (3d Cir. 1989); *see, e.g., Deutsch v. United States*, 67

An appropriate order will be entered.



CHIEF UNITED STATES DISTRICT JUDGE

June 14, 2011
Wilmington, Delaware

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID MERRITT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Action No. 10-1092-GMS
	)	
JOHN S. EDINGER, JR., et al.,	)	
	)	
Defendants.	)	

ORDER

At Wilmington this 14th day of June, 2011, for the reasons set forth in the Memorandum issued this date, it is hereby ordered that:

1. The request for counsel is denied as moot. (D.I. 8.)

2. The complaint is **dismissed** as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)(1). Amendment would be futile.

3. The clerk of court is directed to **close** the case.

CHIEF, UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.