



the Lehigh County Public Defender Office. Plaintiff's complaint alleged that the Defendants conspired to deprive him of his right to a fair trial. He sought damages and declaratory relief.

In a Memorandum and Order dated June 1, 1992, this court dismissed the claims against Glennis Clark and the Lehigh County District Attorney's Office because they were barred by the doctrine of prosecutorial immunity. See Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976). The claims against public defender Michael Brunnabend were also dismissed because a court appointed defense attorney participating in court proceedings is not acting under color of state law as was required to state a cause of action under 42 U.S.C. § 1983. See Polk County v. Dodson, 454 U.S. 312, 324-25 (1981). However, the complaint did allege, without offering specific facts, that Michael Brunnabend was in a conspiracy with a state actor to deprive plaintiff of his constitutional rights. Such a conspiracy with a state actor could give rise to § 1983 liability. See Dennis v. Sparks, 449 U.S. 24, 27-28 (1980). As such, this court's dismissal was without prejudice to Plaintiff filing an amended complaint alleging the conspiracy with specific facts.

The Plaintiff filed an amended complaint on June 19, 1992. In the complaint, other attorneys who had represented plaintiff during his criminal proceedings were added as defendants. Plaintiff also added Lehigh County as a defendant alleging the

county had policies, rules, and regulations that caused the conspiracy. The amended complaint also alleged that Lehigh County violated Plaintiff's due process rights when it transferred him from one prison to another in an attempt to deprive him of a fair trial.

In a Memorandum and Order dated November 5, 1992, this court dismissed as frivolous Plaintiff's claims that were pursuant to criminal provisions as well as his claim for money damages against his prosecutors. This court did not dismiss his claims for declaratory and injunctive relief against his prosecutors, his conspiracy claim against his attorneys, or his claims against Lehigh County. This court also found that the factual and legal issues in Plaintiff's complaint were inseparably linked to the question of whether Plaintiff's state conviction was constitutionally obtained. This court stayed all federal proceedings, stating that it would only consider Plaintiff's claims after he had exhausted his remedies pursuant to a state collateral relief petition.

Plaintiff next filed in this court a motion to lift the stay on December 28, 1993, but the motion was denied since Plaintiff had not exhausted state court remedies. On October 3, 2000, Plaintiff filed a second motion to lift the stay, attaching proof that he had brought an ineffective assistance claim in state court that was denied both at the trial and appellate levels.

Accordingly, the motion to lift the stay is granted, but, for the reasons stated below, the complaint must be dismissed without prejudice since plaintiff's underlying criminal conviction continues to be valid.

### **III. Plaintiff's claims**

Section 42 U.S.C. 1997e(c)(2) enables a court to dismiss a prisoner's claim if it determines that the claim is frivolous on its face. Because they are frivolous, all of the claims in Plaintiff's complaint that were not previously dismissed are now dismissed.

Plaintiff's claim for injunctive and declaratory relief against Glennis Clark and the Lehigh County District Attorney's Office are dismissed without prejudice. Plaintiff seeks a court order to keep these defendants from continuing their alleged conspiracy which began with a denial of a fair trial and continues with Plaintiff's continued incarceration. Plaintiff cannot bring such a federal claim without filing a writ of habeas corpus. See Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973) ("Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983."). In 1992, this court gave Plaintiff the opportunity to challenge his criminal conviction in

the state court system and to try to overturn it. Any state collateral attack was unsuccessful. Therefore, the claim must now be dismissed without prejudice to Plaintiff reasserting the claim should he file a federal writ of habeas corpus.

Plaintiff's claims against his attorneys are also dismissed without prejudice because the United States Supreme Court has held that a § 1983 action to recover damages based on "actions whose unlawfulness would render a conviction unjust" can only be brought after the conviction is invalidated by a successful state collateral relief or federal habeas corpus petition. Heck v. Humphry, 512 U.S. 477, 486-87 (1994). Plaintiff may reassert his claim for damages in a § 1983 action only if he seeks and obtains vacation of his state conviction through a federal writ of habeas corpus.

Plaintiff's claims against Lehigh County are also dismissed without prejudice. He claims that Lehigh County transferred him to different prisons unjustly in furtherance of an alleged conspiracy with other defendants to deprive him of a fair trial. He further alleges that Lehigh County had policies, rules, and regulations that allowed this conspiracy of all defendants to occur. Because such claims can only be brought after a conviction is invalidated by a successful state collateral relief or federal habeas corpus petition, this court dismisses the claim without prejudice to reassertion if Plaintiff applies for and is granted

a federal writ of habeas corpus that vacates his state conviction. See id.

#### **IV. Writ of Habeas Corpus**

This court does not wish to encourage the filing of a frivolous habeas corpus petition; however, it must be noted that the statute of limitations for federal habeas petitions is very strict and if Plaintiff wishes to file a federal habeas petition, he must do so by October 7, 2001.

Plaintiff's conviction became final prior to April 24, 1996, the date Congress enacted the one-year federal habeas statute of limitations. The federal habeas statute of limitations began running on that date. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998). However, the statute of limitations is tolled while a properly filed petition is pending in state court. See 28 U.S.C. §2244(d)(2). Plaintiff had a properly filed state petition pending from the day he filed his state collateral relief petition, which was before the enactment of the new federal habeas statute of limitations, until the last day he could appeal the Pennsylvania Superior Court denial of his state petition on October 7, 2000.<sup>1</sup> Hence, Plaintiff has until October 7, 2001, to

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<sup>1</sup> The Superior Court of Pennsylvania denied Plaintiff relief on September 7, 2000. His time to file an appeal ended on October 8, 2000. See Penn. R. App. Proc. 903. The federal habeas statute of limitations began running on that date. See Swartz v. Meyers, 204 F.3d 417, 421 (3d Cir. 2000).

file a federal habeas petition.

An appropriate Order follows.

