

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NYANKUN THOMAS : CIVIL ACTION  
: :  
v. : :  
: :  
ANTHONY D. JACKSON, Atty. at : :  
Law : NO. 06-1117

M E M O R A N D U M

KAUFFMAN, J.

MAY 5, 2006

Plaintiff, a prisoner, has filed a pro se 42 U.S.C. § 1983 civil rights lawsuit against Anthony D. Jackson, Esq., who represented plaintiff during his criminal trial and post-conviction proceedings.<sup>1</sup> Plaintiff alleges that Mr. Jackson failed "to represent post sentence motions (PSM) and an appeal to the Pennsylvania Superior Court or to notify the Plaintiff of the procedural defaults to those actions . . ." Plaintiff seeks monetary relief.

With his complaint, plaintiff filed a request for leave to proceed in forma pauperis, which will be granted. However, the complaint will be dismissed as legally frivolous pursuant to 28 U.S.C. § 1915(e), for the reasons which follow.

**I. STANDARD OF REVIEW**

The standard under which a district court may dismiss an action as frivolous under 28 U.S.C. § 1915(e) was clarified by

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1. Plaintiff asserts jurisdiction under 28 U.S.C. §§ 1331(a) and 1343(3)(4) for his federal constitutional claims; and supplemental jurisdiction under 28 U.S.C. § 1367 for his state law tort claims.

the Supreme Court in Neitzke v. Williams, 490 U.S. 319 (1989). Dismissal under § 1915(e) is appropriate both when the action is "based on an indisputably meritless legal theory" and when it posits "factual contentions [that] are clearly baseless." Id. at 327.

## **II. DISCUSSION**

In order to bring suit under § 1983, the plaintiff must allege that a person acting under color of state law deprived him of his constitutional rights. Kost v. Kozakiewicz, 1 F.3d 176, 185 (3d Cir. 1993) (listing elements of a § 1983 claim). The Supreme Court has determined that a defense attorney "does not act under color of state law when performing a lawyer's traditional functions as counsel in a criminal proceeding." See Polk County v. Dodson, 454 U.S. 312, 325 (1981) (footnote omitted). This is the case regardless of whether the attorney is court appointed or privately retained. Black v. Bayer, 672 F.2d 309 (3d Cir.), cert. denied, 459 U.S. 916 (1982).

Since the defendant was not acting under color of state law while acting as plaintiff's attorney, he is not subject to liability under § 1983. Accordingly, Plaintiff's § 1983 claim will be dismissed as legally frivolous. Because the § 1983 claim was the sole source of federal question jurisdiction, the Court will dismiss the remaining state law tort claims as well.

## **II. CONCLUSION**

Because the plaintiff has advanced an "indisputably meritless legal theory," Neitzke, supra at 327, the Court is

empowered to dismiss this action as legally frivolous pursuant to  
28 U.S.C. § 1915(e). An appropriate order follows.

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O R D E R

AND NOW, this day of May, 2006, having considered plaintiff's complaint and motion to proceed in forma pauperis, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for leave to proceed in forma pauperis is GRANTED;

2. Plaintiff's complaint is DISMISSED as legally frivolous for the reasons stated in the accompanying memorandum;

3. Plaintiff, Nyankun Thomas, FW-4744, shall pay in installments the full filing fee of \$250. The Superintendent or other appropriate official at SCI-Rockview, or at any other prison at which plaintiff may be confined, shall deduct an initial partial filing fee of \$26.62 from plaintiff's inmate account, when such funds become available, and forward such funds to the Clerk, U.S. District Court for the Eastern District of Pennsylvania, 601 Market St., Room 2609, Philadelphia, PA, 19106 to be credited to Civil Action No. 06-1117;

4. The Superintendent or other appropriate official at SCI-Rockview shall, after the initial partial filing fee is paid, deduct from plaintiff's inmate account, each time that plaintiff's account exceeds \$10, an amount no greater than 20

percent of the money credited to his account during the preceding month and forward that amount, to be credited to Civil Action No. 06-1117, to the address shown above, until the full filing fee is paid; and

5. The Clerk of Court is directed to send a copy of this order to the Superintendent of SCI-Rockview.

**BY THE COURT:**

/s/ Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**