

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

<b>AMIN A. RASHID,</b>	:	<b>CIVIL ACTION,</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>MONTEVERDE &amp; HEMPHILL, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 95-2449</b>

**MEMORANDUM**

**Reed, J.**

**June 24, 1997**

Plaintiff Amin A. Rashid ("Rashid"), proceeding *pro se* and with *in forma pauperis* status, brings this action against nineteen defendants<sup>1</sup> alleging a widespread conspiracy among various state and private actors to violate his constitutional and civil rights in relation to his conviction on December 27, 1993 on multiple counts for wire fraud, mail fraud, money laundering and criminal forfeiture in United States v. Amin A. Rashid, Criminal No. 93-264 (E.D. Pa.). Rashid also asserts several related state law claims. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

Presently before the Court are nine motions by defendants to dismiss the complaint of Rashid.<sup>2</sup> Rashid has filed an omnibus response (Document No. 57). This

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<sup>1</sup> Monteverde & Hemphill, George A. Bochetto ("Bochetto"), Gavin P. Lentz ("Lentz"), Thomas Ruddick ("Ruddick"), Alan Turner ("Turner"), Sharron T. Smalls ("Smalls"), Mark H. Langman ("Langman"), Taylor Aspinwall, individually and in her official capacity ("Aspinwall"), Thomas H. Suddath, Jr., individually and in his official capacity ("Suddath"), James G. Sheehan, individually and in his official capacity ("Sheehan"), Susan Dein Bricklin, individually and in her official capacity ("Bricklin"), Robert A. Kauffman, individually and in his official capacity ("Kauffman"), Carol Hazelton, individually and in her official capacity ("Hazelton"), Jerria Williams, individually and in her official capacity ("Williams"), The Honorable James T. Giles, individually and in his official capacity ("Judge Giles"), Claire J. Rauscher ("Rauscher"), John W. Cawley, III, individually and in his official capacity ("Cawley"), Thomas J. Hunt ("Hunt"), and the United States of America.

<sup>2</sup> The motions are: motion by defendants Bochetto and Lentz to dismiss (Document No. 22), the motion by defendant Monteverde & Hemphill (Document Nos. 23 and 55), motion by the United States of America to dismiss (Document No. 26), motion by defendant Rauscher to dismiss (Document Nos. 27 and 52), motion by federal defendants Aspinwall, Bricklin, Kauffman, Sheehan and Suddath to dismiss (Document No. 28), motion by federal defendant Cawley to dismiss (Document No. 29), motion by federal defendants Hazelton, Williams and Hunt to dismiss (Document No. 34), motion by defendant Turner to dismiss (Document No. 47), and motion by federal defendant The Honorable James T. Giles to dismiss (Document No. 50).

Court has considered the motions and responses of parties thereto.

At the outset, I note that the first claim of Rashid in his amended complaint is labelled "Conspiracy to Violate Civil Rights, Title 28, United States Code, Section 1331." Section 1331 provides federal question jurisdiction and does not provide a basis for a proper claim for relief. Because Rashid alleges in that claim that defendants participated in a conspiracy to deprive him of his constitutional rights, I will treat the first claim as a 42 U.S.C. § 1983 claim ("Section 1983"). Rashid also asserts federal claims under 42 U.S.C. § 1985(3) and 42 U.S.C. § 1985(2) ("Section 1985" claims), and state law claims for breach of contract, misrepresentation, fraud, and negligence.

For the following reasons, I will dismiss with prejudice the claims asserted pursuant to Sections 1983, 1985(3), and 1985(2) as against all defendants. I will also dismiss the negligence claim against all Federal Defendants and the United States of America. In addition, I will exercise my discretion and dismiss without prejudice all remaining state law claims and defendants.

## **I. BACKGROUND**

Rashid is a federal prisoner presently incarcerated after his December 27, 1993 conviction for mail fraud, wire fraud, money laundering, and criminal forfeiture. Since his conviction, Rashid has sojourned along numerous legal avenues here in the Eastern District of Pennsylvania. He has filed four civil suits relating to his criminal conviction in this District.<sup>3</sup>

Rashid commenced the present lawsuit on January 26, 1996. On September 4, 1996, Rashid filed an amended complaint, the sufficiency of which is currently at issue before the Court. In his amended complaint, Rashid asserts claims for "violation of civil rights under color of law, deprivation of equal protection, privileges or immunities under the

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<sup>3</sup> They are: Rashid v. Hazelton, Williams, and the United States of Am. (93-1135); Rashid v. Society Hill Sav. and Loan Ass'n, et al. (No. 94-4763); Rashid v. Intercontinent Dev. Corp., et al. (95-5777); and Rashid v. Kite, et al. (95-7868).

law, conspiracy to falsely arrest, maliciously prosecute and falsely imprison, conspiracy to deter by intimidation or threat [sic] parties and witnesses in order to influence the verdict, presentment, or indictment of a grand and a petit jury in the United States District Court, negligence, breach of contract, misrepresentation and fraud." Amended Complaint ¶ 20. Rashid claims he was "falsely accused, tried, convicted and imprisoned through the joint efforts of the defendants." Amended Complaint ¶ 1. Rashid names defendants that are all related in some way to the criminal proceedings that ultimately led to his conviction, including prosecuting attorneys, defense attorneys, and a public defender, as well as various case agents, probation officers, witnesses, and the presiding judge. Amended Complaint ¶¶ 2 through 19.1. Specifically, Rashid alleges that he retained two lawyers, Bochetto and Lentz, who were, at the time, employed by the law firm of Monteverde & Hemphill to assist him in various legal matters. In addition to these two attorneys, Rashid alleges that he hired Ruddick and Turner to recover Rashid's records that had been seized by government authorities. Rashid further alleges that his former secretary, Smalls, and a former vice president of one of Rashid's companies, Langman, testified falsely during his criminal proceedings. According to Rashid, Aspinwall, Suddath, Sheehan, Bricklin, and Kauffman, all Assistant U.S. Attorneys, were involved in the criminal prosecution of Rashid. Other individuals named by Rashid who were allegedly involved in his criminal prosecution include a United States Postal Inspector, Hazelton, a Federal Bureau of Investigation agent, Williams, and a forensic document analysis employed by the United States Postal Service, Cawley. Rashid also names as defendants his public defender, Rauscher, the presiding judge, The Honorable James T. Giles, the probation officer, Hunt, and the United States of America.

## **I. LEGAL STANDARD**

Because Rashid is proceeding *pro se*, I must construe his complaint liberally.<sup>4</sup> Haines v. Kerner, 404 U.S. 519, 520-21 (1972). Title 28 U.S.C. § 1915(e)(2)(B) authorizes federal courts to dismiss a claim filed *in forma pauperis* if the court determines that, *inter alia*, the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).<sup>5</sup> A finding of a failure to state a claim does not imply the claim is frivolous. See Neitzke v. Williams, 490 U.S. 319, 328-29 (1989). The complaint should not be dismissed unless the plaintiff can prove no set of facts in support of the claim that would entitle plaintiff to relief. Ala. Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994).

## II. DISCUSSION

### A. Motions to Dismiss by Federal Defendants

#### 1. Section 1983, Section 1985(3), and Section 1985(2) Claims

As Rashid has named five Assistant U.S. Attorneys in his complaint-- Aspinwall, Bricklin, Sheehan, Kauffman, and Suddath,<sup>6</sup> The Honorable James T. Giles, a sitting federal judge, an employee of the United States Probation Office, Hunt, an employee of the United States Postal Service, Hazelton, an employee of the Federal Bureau of Investigation, Williams, and an employee of the United States Postal Service who was a witness at the criminal trial, Cawley ("Federal Defendants"). The first claim of Rashid's complaint is brought pursuant to Section 1983 against all defendants for "conspiracy to violate his civil rights." The second claim of Rashid's complaint is brought pursuant to

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<sup>4</sup> I note, however, that Rashid has demonstrated through his submissions to the Court to be skilled and knowledgeable with respect to procedural and substantive legal matters.

<sup>5</sup> This section was formerly 28 U.S.C. § 1915(d).

<sup>6</sup> Kauffman and Suddath are not currently employed by the U.S. Attorneys' Office. For purposes of this Memorandum, however, I will refer to them as Assistant U.S. Attorneys. See Mem. of Aspinwall, et al. at 3.

Section 1985(3) against all defendants for "depriving persons of rights or privileges." The third claim is brought pursuant to Section 1985(2) against defendants Suddath, Williams and Hazelton for "obstruction of justice, intimidating parties, witnesses or jurors."

The Federal Defendants argue, *inter alia*,<sup>7</sup> that the claims of Rashid are barred by Heck v. Humphrey, et al., 114 S. Ct. 2364 (1994). In Heck, the United States Supreme Court held:

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, . . . . A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 2372 (emphasis, footnote, and citations omitted). If "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Id.

Although Rashid erroneously brought this action under Section 1983 and Section 1985, I will construe his amended complaint under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), which allows a plaintiff to sue a *federal* defendant who acted under federal law to deprive plaintiff of a constitutional right. The holding in Heck is equally applicable Bivens actions where a federal prisoner is suing federal actors for alleged constitutional violations. See Tavarez v. Reno, 54 F.3d 109, 109-

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<sup>7</sup> The Federal Defendants present a plethora of arguments in their memoranda in support of dismissal of the complaint, including improper service, barred by the Prisoner Litigation Reform Act, and barred by statute of limitations. While it is likely that the claims of Rashid against the Federal Defendants could have been dismissed on any one of these grounds, I have chosen to proceed under a Heck v. Humphrey analysis.

10 (2d Cir. 1995); Stephenson v. Reno, 28 F.3d 26, 27 n.1 (5th Cir. 1994); Zolicoffer v. Federal Bureau of Investigation, 884 F. Supp. 173, 175-76 (M.D. Pa. 1995).

The requisites of Heck are present in this case. First, Rashid is seeking substantial damages, including actual damages, punitive damages, loss of consortium, costs, attorney fees, and equitable relief. Second, throughout his amended complaint, Rashid accuses the Federal Defendants of unlawful acts that led to his conviction.<sup>8</sup> These

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<sup>8</sup> For example, Rashid alleges that

55. Aspinwall, Sheehan, Bricklin and Suddath conspired with Judge Giles to convict Rashid.

57. On July 26, 1993, Judge Giles revoked Rashid's right to self-representation in furtherance of the conspiracy to deny Rashid his rights to due process and effective assistance of counsel. . . . Rauscher was appointed because Judge Giles, Suddath, Aspinwall, Bricklin, Sheehan and the Agents knew she is skilled at giving incompetent representation and would work with them to deny Rashid due process, convict him and send him to prison.

58. . . . [Rauscher] conspired with Suddath, Judge Giles and the Agents to deny Rashid a fair trial.

62. Suddath and the Agents obtained the indictment against Rashid by presenting willfully false information to the grand jury and by intimidating witnesses . . . to provide favorable prosecution testimony or no testimony.

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63. Suddath, Aspinwall, Sheehan, Bricklin, Judge Giles and the Agents knew that the evidence would not prove that Rashid defrauded 47 victims out of \$1.6 million. Sheehan obtained an agreement from Judge Giles before Judge Giles was assigned to Rashid's case, that he would work with them to ensure Rashid's conviction.

64. . . . Rashid was convicted by testimony which Suddath, Rauscher and the Agents knew to be false and by Judge Giles either ordering or permitting the government to change the indictment to fit the evidence.

65. Hunt joined in the conspiracy to cause Rashid's personal and financial ruin by deliberately writing a false presentence investigation report. Hunt included in the report information regarding Rashid and the crime he was convicted of perpetrating, which he knew was false, including victim information and an unfounded mental evaluation report.

71. . . . As a direct and proximate result of the joint or several and direct or vicarious conspiracy between the defendants to deprive Rashid of his rights to due process, equal protection of law, effective assistance of counsel and a fair trial . . .  
. Rashid

accusations, separately and as a whole, amount to an attack on his federal conviction.

However, Rashid fails to allege or demonstrate the invalidity of his conviction. Indeed, his conviction was affirmed by the Third Circuit Court of Appeals (No. 93-2241), 66 F.3d 314 (3d Cir. 1995), and the United States Supreme Court subsequently denied certiorari, (No. 95-6605), 116 S. Ct. 929 (1996). The Court of Appeals for the Third Circuit also affirmed the district court's decision denying Rashid's second motion for new trial. Absent a showing or allegation that his conviction has been held invalid, Rashid's Section 1983 claim is barred by

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has been  
directly  
injured .  
. . .

75. . . . As a direct and proximate result of the joint or  
several and direct or vicarious conspiracy between [defendant  
Suddath,  
Williams,  
and  
Hazelton]  
. . . to  
deprive  
Rashid of  
due  
process,  
equal  
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of law and  
a fair  
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Rashid has  
been  
directly  
injured .  
. . .

Amended Complaint ¶¶ 55, 57, 58, 62, 63, 64, 65, 71, 75.

Heck.

Rashid also cites 42 U.S.C. § 1985(3) as statutory authority for his claim against all defendants that they conspired to deprive him of his constitutional rights. Rashid further cites 42 U.S.C § 1985(2) against defendants Suddath, Williams, and Hazelton for conspiring to deprive him of his constitutional rights by intimidating parties, witnesses or juror and obstructing justice. Although the Court of Appeals for the Third Circuit has not addressed whether a plaintiff can attack the validity of a conviction pursuant to Section 1985, I can see no reason to limit the scope of Heck to Section 1983 claims only, especially in light of the tendency of courts to extend Heck to *Bivens* actions, supra. It is contrary to the rationale of Heck to permit Rashid to escape the dictates of Heck by merely couching his attack on the defendants responsible for his conviction in Section 1985 terms rather than in Section 1983 terms. Therefore, I conclude that Rashid's Section 1985 claims are likewise barred by Heck. See Martinez v. Ensor, 958 F. Supp. 515, 517 (D. Colo. 1997) (holding that inmate could not challenge validity of his conviction by seeking damages pursuant to Section 1985).

In fact, Rashid acknowledges in his omnibus response memorandum that these claims are barred under Heck. However, Rashid argues that Heck mandates a complaint be dismissed without prejudice and that he should therefore be permitted to amend his amended complaint, *i.e.*, file a second amended complaint. Although several circuits have required that a Section 1983 complaint under a Heck analysis be dismissed without prejudice,<sup>9</sup> there is no such mandate articulated in Heck. Moreover, Rashid has had ample time to cure these defects. In two other lawsuits brought by Rashid in the Eastern District of Pennsylvania against various federal defendants (No. 95-5777 and No. 95-7868),

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<sup>9</sup> See, e.g., Perez v. Sifel, 57 F.3d 503, 505 (7th Cir. 1995); Trimble v. City of Santa Rosa, et al., 49 F.3d 583, 585 (9th Cir.1995); Schafer v. Moore, 46 F.3d 43, 45 (8th Cir. 1995).

The Honorable J. Curtis Joyner, in both suits, dismissed the federal defendants from the action, citing to Heck in a footnote. See Mem. of Aspinwall, et al., Exhs. 6, 7. These Orders were issued on April 16, 1996 (No. 95-5777) and on June 28, 1996 (No. 95-7868), over two months *prior* to Rashid's filing of the amended complaint in the case *sub judice*.

Consequently, it is reasonable to infer that Rashid was aware of the Heck decision prior to his filing of the amended complaint in this lawsuit in September 1996. Despite Rashid's presumed awareness of Heck and its limitations and having sufficient opportunity to cure any defect before filing the September 1996 complaint, Rashid failed to account for the principles set forth in Heck in his September 1996 filing. Now, Rashid urges the Court to allow him to cure the defect.

In his omnibus response memorandum, Rashid proposes several amendments that, if permitted, would be incorporated into his second amended complaint. Particularly, Rashid proposes that he be able to show that "Suddath used his influence as a former law clerk to cause a \$108 Million Judgment to be entered against Rashid," that "the Federal Defendants caused him personal and economic injury," that "the Agents contacted Rashid's clients and gave them 'tortious information' . . . Rashid should be permitted to pursue any claims he has [as] a result of libel or slander," and that "Rashid should be permitted to pursue any claims for damages resulting from personal injuries as a direct result of the Agents breaking and entering his office." Mem. of Plaintiff at 19. Even considering these proposed amendments on their merits, which I am not obligated to do, I find that they do not, even minimally, alter his previous allegations and still imply the invalidity of his conviction.<sup>10</sup>

Because Rashid's conviction was affirmed on direct appeal, and because he

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<sup>10</sup> Moreover, the amendments sounding in common law tort would be barred by the applicable statutes of limitations. See Order No. 2 of June 24, 1997.

has not demonstrated that his conviction has been declared invalid or otherwise called into question, and because he already had ample opportunity to attempt to cure the defects by the time he filed his amended complaint in September 1996, I will dismiss with prejudice the federal claims asserted by Rashid pursuant to Section 1983, Section 1985(2), and Section 1985(3) as against all defendants.<sup>11</sup>

2. Negligence Claim

In his sixth claim against all defendants in the amended complaint, Rashid asserts that, as a result of the negligent refusal of defendants to uphold the laws and Constitution of the United States, he has suffered damages. Amended Complaint ¶¶ 80-81. I will treat this claim separately from Rashid's Section 1985 and 1983 claims because it is listed as a distinct claim in the amended complaint and because it sounds in the common law tort of negligence, rather than falling under the United States Constitution. Torts, allegedly committed by federal employees and that are not in the nature of a constitutional deprivation, are governed by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2679. Generally, the FTCA provides for liability against the United States of America for certain negligent and intentional acts committed by federal employees. See 28 U.S.C. § 2679. In short, a federal employee is absolutely immune from suit for common law claims of tortious conduct occurring within the scope of his or her employment. Haas v. Barto, 829 F. Supp. 729, 733 (M.D. Pa. 1993) (citing United States v. Smith, 499 U.S. 160, 166 (1991)), aff'd, 27

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<sup>11</sup> Rashid, in a subsequent filing with the Court for leave to file a second amended complaint also filed an "Order of Voluntary Non-Suit Second Amended Complaint." (Document Nos. 63 and 65). Although these motions are not being considered in the current Memorandum, I note that Rashid attempts to voluntarily dismiss his Section 1983 ("conspiracy to violate civil rights"), Section 1985(3) ("depriving persons of rights or privileges"), and Section 1985(2) ("obstruction of justice") claims. This Court has not and will not permit Rashid to voluntarily dismiss any claims or defendants. See Federal Rule of Civil Procedure 41.

F.3d 557 (3d Cir. 1994). The United States is the exclusive defendant whenever federal employees are sued on common law tort claims arising out of acts within the scope of their employment. See 28 U.S.C. § 2679(b)(1); Maclean v. Secor, 876 F. Supp. 695, 704-05 (E.D. Pa. 1995). An Attorney General or her designee may certify that a defendant federal employee was acting within the scope of her employment at the time of the alleged incident, and if the court so finds, the United States is then substituted as the proper defendant. Id.; 28 U.S.C § 2679(d)(1). Thereafter, the action proceeds as if the United States had been sued under the FTCA in the first instance. Id.; 28 U.S.C. § 2679(d)(1).

Federal Defendants Aspinwall, Bricklin, Kauffman, Sheehan, Suddath, Cawley, Hazelton, Williams, and Hunt submit affidavits of Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania stating that these defendants were at all relevant times pertinent to the allegations contained in the complaint, acting within the scope of their federal employment. Rashid challenges these affidavits as not properly certifying that the defendants were acting within the scope of their employment in performing acts that gave rise to this lawsuit. Rashid points out that the affidavits were signed by individuals other than Michael R. Stiles and therefore are not proper designees under the regulations,<sup>12</sup> thus rendering the certifications invalid. Upon review of the affidavits, I find that some of the affidavits contained the signature of an individual, presumably an Assistant U.S.

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<sup>12</sup> The relevant regulation is 28 C.F.R. § 15.3(a). It states, in pertinent part:

The United States Attorneys are authorized to make the certifications provided for in . . . 28 U.S.C. 2679(d) . . . with respect to civil actions or proceedings brought against Federal employees in their respective districts. . . . The making, withholding, or withdrawing of certifications, and the removal and defense of, or the refusal to remove and defend, such civil actions or proceedings by the United States Attorneys shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division.

Attorney, which indicated that she was signing it for "for Michael R. Stiles." In the other affidavits, an individual signed the name of Michael R. Stiles and initialed it. I find that the signatures on behalf of Michael R. Stiles, the United States Attorney for the Eastern District of Pennsylvania, are facially reliable, authorized representations of United States Attorney Stiles and thus, as a matter of law, constitute proper certification that the individual Federal Defendants were acting within the scope of their employment pursuant to 28 C.F.R. § 15.3. Accordingly, it is appropriate to substitute the United States of America on Rashid's negligence claim. Rashid has already named the United States of America as a defendant in his amended complaint, the motion to dismiss of which I will discuss in the next section.<sup>13</sup>

On a final note, Rashid's negligence claim against The Honorable James T. Giles is barred by the doctrine of judicial immunity. See Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). All the allegations against Judge Giles in the amended complaint pertained to events that took place while Judge Giles was acting within his judicial power, and therefore Judge Giles is entitled to judicial immunity. See id.

In light of the foregoing, I will dismiss the sixth claim for negligence against all Federal Defendants.

**B. Motion to Dismiss by United States of America**

In addition to the Section 1983 and Section 1985 claims, Rashid has named the United States as a defendant in the sixth claim for negligence, and the seventh claim for false arrest, malicious prosecution, and false imprisonment. He alleges that

19.1 Defendant, United States of America, was at all times mentioned herein respondeat superior to the federal defendants mention in this complaint and did empower the federal defendants to act in their official capacities [sic].

69.1 . . . Rashid filed a Federal Tort Claim[s] [Act] (FTCA) with the United States Department of Justice . . . alleg[ing] a conspiracy against him by defendants Giles, Suddath, Hazelton, Williams and Rauscher, to abuse the grand jury process, falsely arrest, maliciously prosecute, falsely imprison and

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<sup>13</sup> See infra Part II.B.

deny him civil rights.

81. As a direct and proximate result of the . . . negligent refusal of [all defendants except Smalls and Langman] to uphold the laws and constitution of the United States of America . . . Rashid has been directly injured . . .

83. As a direct and proximate result of the joint or several and direct or vicarious conspiracy [of defendant United States of America] to falsely arrest, maliciously prosecute and falsely imprison Rashid, . . . Rashid has been directly injured and has suffered immeasurable mental, physical and economic damage and loss of consortium.

Amended Complaint ¶¶ 19.1, 69.1, 81, 83. In his sixth and seventh claims, Rashid seeks compensatory damages, interest, loss of consortium, costs, attorney's fees, and equitable relief.

The United States has sovereign immunity from suit for money damages except to the extent it expressly consents to suit. Dalehite v. United States, 346 U.S. 15, 30 (1953). The United States has not waived sovereign immunity for constitutional torts. See Bivens v. Six Unnamed Federal Narcotics Agents, 403 U.S. 388 (1971). With respect to the sixth and seventh claims in the instant case, the only potential applicable waiver of immunity of the United States of America exists through the FTCA. Therefore, I will analyze these claims as brought under the FTCA.

While not raised by defendant United States of America,<sup>14</sup> I find that the sixth and seventh claims Rashid asserts against the United States of America implicate the validity of his criminal conviction, even if they are disguised in terms of negligence or a constitutional deprivation. Under the principles of Heck, as discussed above, all of Rashid's claims against the United States of America must fail.<sup>15</sup> Therefore, I will dismiss the sixth

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<sup>14</sup> Defendant United States of America asserts several arguments in support of dismissal, including sovereign immunity, failure to comply with requirements of the FTCA, statute of limitations, and res judicata.

<sup>15</sup> Although no court in the Third Circuit has addressed this issue, the Court of Appeals of the Tenth Circuit in Parris v. United States, 45 F.3d 383 (10th Cir. 1995), recently extended the principles in Heck to an FTCA claim. In that case, a prisoner sued the United States of America for damages under the FTCA based on allegations that the public defender who defended him during the criminal proceedings committed legal malpractice, which

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resulted in his present incarceration. Id. at 384. The Parris court held that the FTCA was not an appropriate vehicle for contesting the validity of criminal convictions. The Court of Appeals concluded that

[t]he FTCA, like § 1983, creates liability for certain torts committed by government officials. As such, we conclude the same common law principles that informed the Supreme Court's decision in Heck should inform the decision of whether an action under the FTCA is cognizable when it calls into question the validity of a prior conviction. We conclude that the FTCA, like § 1983, is "not [an] appropriate vehicle[ ] for challenging the validity of outstanding criminal

claim for negligence and the seventh claim for malicious prosecution and false imprisonment against the United States of America.<sup>16</sup>

**C. Motion to Dismiss by Rauscher**

1. Section 1983 and Section 1985(3) Claims

Rashid alleges that Rauscher conspired with other federal agents during the course of Rashid's criminal trial to deprive him of his constitutional rights. As discussed above, I will dismiss the claims against all defendants asserted by Rashid pursuant to Sections 1985 and 1983 as barred by Heck v. Humphrey. Therefore, these claims against Rauscher fail.<sup>17</sup>

A second, independent reason exists for dismissing these claim against Rauscher based on insufficient allegations of conspiracy. A public defender who performs a lawyer's traditional function as counsel to a defendant in a criminal proceeding is not acting under color of law. Polk County v. Dodson, 454 U.S. 312, 325 (1981). Whether court-appointed or privately retained, a defense attorney represents only her client and not the state. Johnson v. Kafrissen, et al., No.Civ.95-855, 1995 WL 355289, at \*2 (E.D. Pa. June 5, 1995). However, liability may extend to a non-state actor acting in conspiracy with a state

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judgments."

Id. at 385 (quoting Heck, 114 S. Ct. at 2372); see also Echols v. Dwyer, 914 F. Supp. 325, 327 (E.D. Mo. 1996) (applying principles of Heck to FTCA claim). Here, in his claim against the United States of America, Rashid clearly challenges the validity of his conviction by alleging he was falsely arrested, maliciously prosecuted and falsely imprisoned.

<sup>16</sup> I note parenthetically that, in his "Order of Voluntary Non-Suit Second Amended Complaint," supra note 10, Rashid attempts to voluntarily dismiss the United States of America from the lawsuit and he attempts to voluntarily dismiss his seventh claim against the United States for malicious prosecution and false imprisonment.

<sup>17</sup> Although I have found no case in the Third Circuit where the principles of Heck v. Humphrey are applied to a public defender who allegedly conspires with other state or federal actors, other jurisdictions have applied Heck in similar situations. See Gonzales v. Sammons, et al., No. 96-4670, 1996 WL 613165, at \*2 (N.D. Ill. Oct. 21, 1996); Kevakian v. Kennedy, No. 94-20382 JW, 1995 WL 7938, at \*5 (N.D. Cal. Jan. 6, 1995).

actor. Figueroa v. Clark, 810 F. Supp. 613, 616 (E.D. Pa. 1992) (citing Dennis v. Sparks, 449 U.S. 24, 27-28 (1980)). Public defenders are not immune when they conspire with state officials to deprive their client of federal rights. Id. (citing Tower v. Glover, 467 U.S. 914 (1984)); see also Oatess v. Sobolevitch, 914 F.2d 428, 432 n.8 (3d Cir. 1990) (noting that defendant private attorneys appear to have acted under color of state law through their alleged conspiracy with state actors).

Rashid alleges in his amended complaint that Rauscher "conspired with Suddath, Judge Giles and the Agents to deny Rashid a fair trial." Amended Complaint ¶ 58. The complaint also alleges that "Rauscher was appointed because Judge Giles, Suddath, Aspinwall, Bricklin, Sheehan and the Agents knew she is skilled at giving incompetent representation and would work with them to deny Rashid due process, convict him and send him to prison." Amended Complaint ¶ 57.

"A general averment of conspiracy or collusion without alleging the facts which constituted such conspiracy or collusion is a conclusion of law and is insufficient." Kalmanovitz v. G. Heileman Brewing Co., 595 F. Supp. 1385, 1400 (D. Del. 1984), aff'd, 769 F.2d 152 (3d Cir. 1985). Upon review of the amended complaint, I do not consider these adequate allegations that Rauscher conspired with individuals who were acting under color of law. The amended complaint is devoid of credible factual allegations of any agreement to commit an unlawful act combined with intent to commit a deprivation of constitutional rights. There is no mention of the specific conduct exercised by Rauscher in participating in a conspiracy, or the time and place of that conduct. See Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989). The liberal pleading requirements afforded to *pro se* litigants does not overcome the lack of specificity and vague allegations of conspiracy in Rashid's complaint.

Because the conspiracy claims against Rauscher were not adequately alleged and in light of the principles set forth in Heck, I will dismiss with prejudice as legally

frivolous the Section 1983 and Section 1985 claims against Rauscher.<sup>18</sup>

## 2. Negligence Claim

The sixth claim of negligence asserted by Rashid in his amended complaint against all defendants, including Rauscher. This claim against Rauscher does not involve state action or a constitutional or civil deprivation of rights. Rather, it is purely a negligence claim under state tort law against a non-state actor. See Polk County, 454 U.S. at 325 ("And of course we intimate no views as to a public defender's liability for malpractice in an appropriate case under state tort law."); Getch v. Rosenbach, 700 F. Supp. 1365, 1374 n.26 (D.N.J. 1988) (noting that, in inmate's Section 1983 action, court takes no position on the possibility that public defender may have been held liable for malpractice under state tort law). Pennsylvania courts have recognized that public defenders can be held liable for tortious conduct. See Reese v. Danforth, 406 A.2d 735, 739 (Pa. 1979) (holding that once a public defender is assigned to assist a criminal defendant, his public function ceases, and he is subject to civil liability for tortious conduct); Veneri v. Pappano, 622 A.2d 977, 978 (Pa. Super. 1993) (holding that public defender cannot avail himself of immunity under the Political Subdivision Tort Claims Act of Pennsylvania in action brought by inmate against his counsel for legal malpractice), appeal denied, 641 A.2d 589 (Pa. 1994); Quick v. Swem, 568 A.2d 223, 224 (Pa. Super. 1989) (holding that Post Conviction Relief Act of Pennsylvania does not preclude a convicted defendant's malpractice action against his former public defender), appeal denied, 626 A.2d 1158 (Pa. 1993).

I will not comment on whether the allegations of negligence in the amended complaint against Rauscher are sufficient to withstand a motion to dismiss. Instead, I will exercise my discretion pursuant to 28 U.S.C. § 1367(c)(3), discussed in more detail below,

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<sup>18</sup> I note that in his "Order of Voluntary Non-Suit Second Amended Complaint," Rashid attempts to voluntarily dismiss the Rauscher from the lawsuit. See supra note 10.

and dismiss without prejudice the negligence claim against Rauscher.

**D. Motions to Dismiss of Bochetto and Lentz, Monteverde & Hemphill, and Turner**

As discussed above, I will dismiss plaintiff's Section 1983, Section 1985(2), and Section 1985(3) as barred by the holding and rationale of Heck. Consequently, the remaining claims of Rashid are grounded in state law and are against Monteverde & Hemphill, Bochetto, Lentz, Ruddick, and Turner for breach of contract claim, misrepresentation, fraud, and negligence.

Supplemental jurisdiction is a doctrine of discretion, not of plaintiff's right. Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966)). If the claims over which a district court has original jurisdiction are dismissed, the district court has the option of declining to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). In determining whether to dismiss the state law claims, the district court should consider judicial economy, convenience and fairness to the parties, the stage of the litigation, whether either party will be prejudiced by the dismissal of the state law claims, and whether state law claims involve issues of federal policy. Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993); Glaziers & Glassworkers Local 252 Annuity Fund, et al. v. Newbridge Sec., Inc., 823 F. Supp. 1191, 1197 (E.D. Pa. 1993). In the instant action, the litigation is still in an early stage, discovery has not begun, and no federal policies are implicated by the remaining state law claims. In addition, because Pennsylvania law provides that matters dismissed by a federal court for lack of subject matter jurisdiction may be refiled in the appropriate state court without regard to the limitations period, Rashid will not be prejudice if he refiles his amended complaint. See 42 Pa. Cons. Stat. Ann. § 5103(b); Fulkerson v. City of Lancaster, 801 F. Supp. 1476, 1486 n.3 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993). Accordingly, I will dismiss without prejudice the remaining state law claims.

### **III. CONCLUSION**

For the foregoing reasons, I will dismiss with prejudice claims one, two, and three of the amended complaint asserted by Rashid pursuant to Section 1983, Section 1985(3), and Section 1985(2) against all defendants. I will dismiss with prejudice the negligence claim against all Federal Defendants and defendant United States of America. Finally, I will exercise my discretion to dismiss without prejudice all remaining state law claims against all remaining defendants.

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

<b>AMIN A. RASHID,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
v.	:	
	:	
<b>MONTEVERDE &amp; HEMPHILL, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 95-2449</b>

**ORDER NO. 1**

**AND NOW**, on this 24th day of June, 1997, upon consideration of the motions to dismiss by George A. Bochetto and Gavin P. Lentz (Document No. 22), Monteverde & Hemphill (Document Nos. 23 and 55), the United States of America (Document No. 26), Claire J. Rauscher (Document Nos. 27 and 52), Taylor Aspinwall, Thomas H. Suddath, Jr., James G. Sheehan, Susan Dein Bricklin, and Robert A. Kauffman (Document No. 28), John W. Cawley, III (Document No. 29), Carol Hazelton, Jerria Williams, and Thomas J. Hunt (Document No. 34), Alan Turner (Document No. 47), and The Honorable James T. Giles (Document No. 50), and the omnibus response of plaintiff Amin A. Rashid thereto (Document No. 57), and for the reasons set forth in the foregoing memorandum, and pursuant to 28 U.S.C. § 1915(e)(2), it is hereby **ORDERED** that the claims of Amin A. Rashid asserted pursuant to 42 U.S.C. §§ 1983, 1985(2)-(3) are **DISMISSED WITH PREJUDICE** as against all defendants for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii);

**IT IS FURTHER ORDERED** that the sixth claim of Amin A. Rashid for negligence is **DISMISSED WITH PREJUDICE** as against Aspinwall, Suddath, Sheehan, Bricklin, Kauffman, Hazelton, Williams, Hunt, Cawley, The Honorable James T. Giles, and the United States of America;

**IT IS FURTHER ORDERED** that supplemental state law claims of Amin A. Rashid are, in the exercise of this Court's discretion, **DISMISSED WITHOUT PREJUDICE**

pursuant to 28 U.S.C. § 1367(c)(3), recognizing the right of Amin A. Rashid to refile these state claims in the appropriate state court pursuant to 42 Pa. Cons. Stat. Ann. § 5103(b).

**LOWELL A. REED, JR., J.**

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

<b>AMIN A. RASHID,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
v.	:	
	:	
<b>MONTEVERDE &amp; HEMPHILL, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 95-2449</b>

**ORDER NO. 2**

**AND NOW**, on this 24th day of June, 1997, upon consideration of the motion of *pro se* plaintiff Amin A. Rashid ("Rashid") for leave to amend his complaint for the second time pursuant to Federal Rule of Civil Procedure 15(a) (Document No. 63), and response of federal defendants Taylor Aspinwall, Susan Dein Bricklin, Carol Hazelton, James G. Sheehan, Thomas H. Suddath, Jr., and Jerria Williams ("Federal Defendants"), and having dismissed with prejudice the federal claims of Amin A. Rashid on this same date, and having exercised discretion to dismiss without prejudice the remaining state law claims recognizing the right of Amin A. Rashid to refile the state claims in the appropriate state court on this same date, and having found and concluded that:

1. Rashid urges the Court to allow him to amend his first amended complaint and add various factual allegations as well as four new claims: illegal search and seizure; tortious interference in a business relationship; tortious interference in a contract relationship; and slander and libel;

2. A motion to leave to amend a complaint under Federal Rule of Civil Procedure 15(a) should be freely granted in the absence of substantial or undue prejudice to the non-moving party, bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of the amendment. Lorenz v. CSX Corp., 1 F.3d 1406, 1413-14 (3d Cir. 1993). A court may deny a motion to amend based on undue delay when the movant is unable to "satisfactorily explain" the reasons for delay. See Fishbein v. Family Partnership v. PPG Indus., Inc., 871 F. Supp. 764, 768 (D.N.J. 1997). "Amendment of the complaint is futile if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss." Jablonski v. Pan Am. World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988). In the present case, not only has there been undue delay, but also the new claims are futile;

3. Rashid originally filed his complaint in this lawsuit on January 26, 1996. He filed an amended complaint on September 4, 1996. Over one year after filing his original complaint and after nine motions to dismiss filed by the various defendants, Rashid requests that he be granted leave to amend his complaint for a second time. Rashid offers no explanation as to why he failed to include these four new claims in his original complaint or his first amended complaint.<sup>1</sup> Therefore, I find that Rashid's dilatory efforts are suspicious and constitute undue delay;

4. In addition, the four claims of Rashid are barred by either Heck v. Humphrey, et al., 114 S. Ct. 2364 (1994) or relevant statutes of limitations. The first of Rashid's new claims is against several federal defendants for conspiring to deprive Rashid of his rights to be free from illegal search and seizures as guaranteed by the Fourth Amendment of the United States Constitution. Rashid is seeking damages. Because Rashid is attacking the validity of his conviction without making a showing as to the invalidity of his conviction, the claim is barred by the principles, rationale, and holding of Heck. See Memorandum and Order of June 24, 1997.

Rashid's other three claims against the federal defendants are grounded in common law tort. Because there is no constitutional deprivation at issue in these three claims, the claims are governed by the Federal Tort Claims Act (FTCA) and thus the proper defendant is the United States of America and not the individual defendants. See 28 U.S.C. § 2679; Maclean v. Secor, 876 F. Supp. 695, 704-05 (E.D. Pa. 1995). Consequently, all of Rashid's claims based in tort must be asserted against the United States of America as the party defendant, and not the individual federal defendants;

5. Even considering the date of the filing of the original complaint by Rashid on January 26, 1996, the three proposed new claims asserted against the United States of America were already barred by their respective statute of limitations. See 42 Pa. Cons. Stat. Ann. § 5523(1) (one year limitation for libel and slander actions); 42 Pa. Cons. Stat. Ann. § 5524(7) (two year limitation for any other action to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct). The incidents giving rise to the allegations set forth in Rashid's proposed second amended complaint took place in or before 1993. Therefore, I find that an amended complaint asserting these three claims would be futile;<sup>2</sup>

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<sup>1</sup> As previously observed in the Memorandum and Order No. 1 issued this same date, Rashid demonstrates, by the legal sophistication of his submissions, that he is an intelligent person and a skilled litigator. He is not your average pro se prisoner.

<sup>2</sup> The limited waiver of sovereign immunity of the United States under the FTCA does not include claims for libel and slander or interference with contractual rights. See 28 U.S.C. § 2690(h). Thus, this is another reason to render the proposed second amended complaint futile.

6. I conclude that the amendments Rashid proposes are merely rehashing facts which will not support any cause of action;

7. Because I will deny the motion for leave to amend on the grounds that it is futile and with undue delay as to the federal defendants, I will exercise my discretion pursuant to 28 U.S.C. § 1367(c)(3), and not rule on any claims related to defendants other than federal defendants; and

it is accordingly hereby **ORDERED** that the motion for leave to amend the complaint is **DENIED**;

**IT IS FURTHER ORDERED** that the Clerk of the Court is directed to mark this case closed for statistical purposes.

This is a final order.

LOWELL A. REED, JR., J.