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CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA	
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT ALAN CROW,

Plaintiff,

v.

PAUL S. REED,

Defendant.

Case No. C01-5273RJB

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
REMANDING CASE TO
MAGISTRATE JUDGE AND
DENYING MOTION TO AMEND
COMPLAINT

This matter comes before the Court on consideration of the Report and Recommendation of the Magistrate Judge (Dkt. #6), and upon review of plaintiff's motion to amend the complaint (Dkt. #7). The court has considered the relevant documents and the file herein.

Plaintiff has brought this civil rights action against his court-appointed criminal defense attorney, alleging that he conspired with others to deprive him of an effective defense at his criminal trial. Judge Arnold concluded that plaintiff had not made a showing that his criminal defense attorney acted under color of state law; and in the alternative, concluded that the action was barred by *Heck v. Humphrey*, 114 S.Ct. 2364 (1994) because plaintiff had not shown that his conviction or sentence had been invalidated.

On June 14, 2001, plaintiff filed a motion to amend the complaint. Dkt. #7. The court has considered this document as both an objection to the Report and Recommendation, and as a motion to amend the original complaint.

To the extent that plaintiff claims his counsel was ineffective at trial, plaintiff has not alleged state action on the part of his attorney. Defense counsel does not act under color of state law for purposes of actions brought under the Civil Rights Act. See *Polk County v. Dodson*, 454 U.S. 312 (1981). Allegations

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1 that an attorney conspired with state officials may be sufficient to meet the state action requirement of
2 Section 1983. *See Tower v. Glover*, 467 U.S. 914 (1984). However, conspiracy requires proof of an
3 agreement to accomplish an illegal objective and the requisite intent to commit the underlying offense.
4 *U.S. v. Mesa-Farias*, 53 F.3d 258, 260 (9th Cir. 1995). Plaintiff has not alleged sufficient facts to
5 establish that his defense counsel conspired with prosecutors and the court to violate his rights.
6 Accordingly, plaintiff has not alleged facts sufficient to demonstrate that his attorney acted under color of
7 state law.

8 Significantly, however, Judge Arnold concluded that this civil rights action is barred by *Heck v.*
9 *Humphrey, supra*, because plaintiff has not shown that his conviction and/or sentence has been
10 invalidated. Even if plaintiff could allege facts sufficient to state a claim that his defense attorney
11 conspired with others to violate his constitutional rights, this action would be barred by *Heck v.*
12 *Humphrey*. The Report and Recommendation should be adopted, and the case should be dismissed as
13 frivolous and for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B).

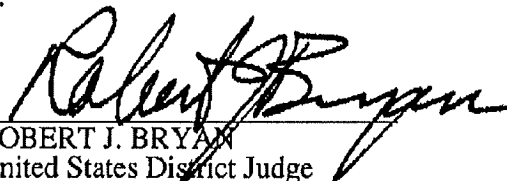
14 Plaintiff has requested the opportunity to amend his complaint to show that his defense attorney
15 conspired to violate his constitutional rights. The court should grant a plaintiff leave to file an amended
16 complaint unless amendment would be futile. *See Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000).
17 As discussed above, amendment of the complaint would be futile because the action is barred by *Heck v.*
18 *Humphrey*. The motion to amend the complaint (Dkt. #7) should be denied.

19 Therefore, it is hereby

20 **ORDERED** that the Report and Recommendation of the Magistrate Judge (Dkt. 6) is **ADOPTED**.
21 Plaintiff's motion to amend the complaint (Dkt. #7) is **DENIED**. This case is **DISMISSED** as frivolous
22 and for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B), and the dismissal constitutes a strike
23 under 28 U.S.C. & 1915(g).

24 The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record
25 and to any part appearing *pro se* at said party's last known address.

26 DATED this 18th day of June, 2000.

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ROBERT J. BRYAN
United States District Judge