

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

|                     |   |                  |
|---------------------|---|------------------|
| EDVIN BARKER,       | ) |                  |
|                     | ) |                  |
| Plaintiff,          | ) |                  |
|                     | ) | CIVIL ACTION NO. |
| v.                  | ) | 2:17cv527-MHT    |
|                     | ) | (WO)             |
| MONTGOMERY POLICE   | ) |                  |
| DEPARTMENT, et al., | ) |                  |
|                     | ) |                  |
| Defendants.         | ) |                  |

OPINION

Pursuant to 42 U.S.C. § 1983, plaintiff filed this lawsuit complaining of being shot by the police in 2002 and challenging his arrest and incarceration in 2009. He was incarcerated at the time of filing the complaint. This lawsuit is now before the court on the recommendation of the United States Magistrate Judge that plaintiff's case be dismissed as frivolous due to the passage of the statute of limitations. There are no objections to the recommendation. After an independent and de novo review of the record, the court

concludes that the magistrate judge's recommendation should be adopted.\*

An appropriate judgment will be entered.

DONE, this the 31st day of August, 2017.

/s/ Myron H. Thompson  
UNITED STATES DISTRICT JUDGE

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\* The court takes issue with one minor point in the recommendation, which was stated too broadly. The recommendation states that "in an action proceeding under section 1983, [the court] may consider, sua sponte, affirmative defenses that are apparent from the face of the complaint. Clark v. Georgia Pardons and Parole Board, 915 F.2d 636, 640 n.2 (11th Cir. 1990); see also Ali v. Higgs, 892 F.2d 438 (5th Cir. 1990)." Recommendation (doc. no. 4) at 4. This court does not read these cases to authorize sua sponte consideration of affirmative defenses in all section 1983 cases, but only in those in which the plaintiff proceeds in forma pauperis pursuant to 28 U.S.C. § 1915. See Ali, 892 F.2d at 440 ("However, we conclude that in an action proceeding under section 1915(d), we may consider, sua sponte, affirmative defenses that are apparent from the record even where they have not been addressed or raised in the district court. In so doing, we are following consistently the special treatment given to section 1915(d) suits."; see also 28 U.S.C. § 1951(e)(2)(B)(i) (requiring courts to dismiss cases brought in forma pauperis that are "frivolous or malicious").