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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NOEL KEITH WATKINS,  
Plaintiff,  
v.  
VAMIL SINGH et al.,  
Defendants.

No. 2:12-cv-1343 GEB DAD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action seeking relief under 42 U.S.C. § 1983. This matter is before the court on a motion to dismiss brought on behalf of defendants Johnson and Rosario. Plaintiff has filed an opposition to the motion, and defendants have filed a reply.

**BACKGROUND**

Plaintiff is proceeding on an amended complaint against defendants Johnson, Rosario, Caraway, and Spears.<sup>1</sup> On March 19, 2013, the court screened plaintiff’s complaint and found that it appeared to state cognizable claims against defendant Johnson for retaliation and for failure to protect and against defendant Rosario for failure to protect. (Doc. No. 36)

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<sup>1</sup> Defendants Caraway and Spears have not yet appeared in this action. To date, plaintiff has not submitted the necessary documents to effect service on them. For the reasons discussed herein, the court will recommend dismissal of these defendants pursuant to Federal Rule of Civil Procedure 4(m).

1 ANALYSIS

2 Defendants have moved to dismiss plaintiff’s complaint as barred by the applicable statute  
3 of limitations. Specifically, defense counsel contends the alleged actions that plaintiff complains  
4 about took place more than two decades ago in 1990, but that plaintiff did not file his complaint  
5 in this action until 2012. (Defs.’ Mem. of P. & A. 1-9.) In opposition to defendants’ motion,  
6 plaintiff argues that he is entitled to equitable tolling of the statute of limitations because he  
7 received threats from prison officials and inmates whenever he filed a lawsuit. (Pl.’s Opp’n to  
8 Defs.’ Mot. to Dismiss at 1-11.) For the reasons set forth below, the court will recommend that  
9 defendants’ motion to dismiss this action as time-barred be granted.

10 I. Statute of Limitations for 42 U.S.C. § 1983

11 Because § 1983 does not contain a specific statute of limitations, federal courts apply the  
12 forum state’s statute of limitations for personal injury actions. See Jones v. Blanas, 393 F.3d 918,  
13 927 (9th Cir. 2004); Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004); Fink v. Shedler, 192  
14 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of limitations for personal injury  
15 actions was one year. Jones, 393 F.3d at 927. Effective January 1, 2003, however, in California  
16 that limitations period is now two years. See id. Federal courts also apply the forum state’s laws  
17 with respect to tolling of the statute of limitations insofar as state law is not inconsistent with  
18 federal law. Jones, 393 F.3d at 297. Under California law, the statute of limitations is tolled for  
19 up to two years where the cause of action accrues while the plaintiff is in prison. See Cal. Civ. P.  
20 Code § 352.1.

21 Unlike the length of the statute of limitations or tolling, federal courts apply federal law to  
22 determine when a § 1983 cause of action accrues. Under federal law, a § 1983 action accrues,  
23 and the statute of limitations begins to run, when the defendants’ alleged wrongful act or  
24 omission causes damage(s). See Wallace v. Kato, 549 U.S. 384, 388 (2007). In this regard, “a  
25 claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of  
26 the action.” Maldonado, 370 F.3d at 955.

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1 II. Discussion

2 The court may dismiss a claim under Rule 12(b)(6) on the grounds that it is barred by the  
3 applicable statute of limitations when “the running of the statute is apparent on the face of the  
4 complaint.” Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006). See also  
5 Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980) (a court may grant a motion to  
6 dismiss based on the statute of limitations “if the assertions of the complaint, read with required  
7 liberality, would not permit the plaintiff to prove that the statute was tolled.”). In this case,  
8 plaintiff’s allegations against defendants Johnson and Rosario center on events that allegedly took  
9 place in 1990. As such, plaintiff’s cause of action accrued in 1990, and he had up to four years  
10 (the two-year limitations period plus the two-year statutory tolling due to plaintiff’s incarceration)  
11 to file his § 1983 action in this court. However, plaintiff did not file this action until May 17,  
12 2012, nearly two decades after the statute of limitations for doing so had expired. Neither party  
13 appears to dispute, and the undersigned finds, that this action is untimely unless plaintiff is  
14 entitled to equitable tolling.

15 Generally speaking, whether equitable tolling applies in a case is not amenable to  
16 resolution on a motion to dismiss because the determination often depends on matters outside of  
17 the pleadings. See Cervantes v. City of San Diego, 5 F.3d 1273, 1276 (9th Cir. 1993). However,  
18 where factual and legal issues are sufficiently clear to permit the court to determine as a matter of  
19 law that the equitable tolling doctrine cannot be successfully invoked, the court may dismiss an  
20 action on a Rule 12(b)(6) motion. See id. at 1276-77; Supermail Cargo v. United States, 68 F.3d  
21 1204, 1206 (9th Cir. 1995). For the reasons discussed below, the court finds that it is clear from  
22 the complaint and matters subject to judicial notice that plaintiff in this case is not entitled to the  
23 over fifteen years of equitable tolling of the statute of limitations that it would take to render this  
24 action timely filed.

25 Under California law, a plaintiff must meet three conditions before he is entitled to  
26 equitable tolling of the statute of limitations: (1) he must have diligently pursued his claim; (2)  
27 that plaintiff is left without a judicial forum for his claims must be the result of forces beyond his  
28 control; and (3) the defendants must not be prejudiced by the application of equitable tolling. See

1 Bollinger v. National Fire Insurance Co., 25 Cal. 2d 399, 406-11 (Cal. 1944); Rose v. Hudson,  
2 153 Cal. App. 4th 641, 655-56 (2007) (discussing the Bollinger rule of equitable tolling); Hull v.  
3 Central Pathology Serv. Med. Clinic, 28 Cal. App. 4th 1328, 1334-35 (1994) (same). “The  
4 fundamental purpose underlying statutes of limitations is to protect defendants from having to  
5 defend stale claims by providing notice in time to prepare a fair defense on the merits.” See  
6 Downs v. Dep’t of Water & Power, 58 Cal. App. 4th 1093, 1099-1100 (1997).

7 In this case, the court finds that plaintiff was not diligent in the pursuit of his claims.  
8 Specifically, there is no question that plaintiff has long been aware of the facts underlying his  
9 claims against the defendants. According to plaintiff himself, he filed a § 1983 action in the mid-  
10 1990s and therein requested damages, an injunction, and a restraining order. (Am. Compl. at 15  
11 & Ex. 1 5-13) According to plaintiff, shortly thereafter prison officials allegedly took plaintiff’s  
12 legal materials and, when he informed the court of these circumstances, the District Judge  
13 assigned to that case purportedly advised him to re-file his legal action at a later date. (Id.)  
14 Presumably, plaintiff is referring to his prior action filed in this court and entitled Watkins v.  
15 White, 2:96-cv-1497 DFL JFM P in which he named as defendants Johnson, Rosario, Caraway  
16 and others prison officials.<sup>2</sup>

17 Even assuming plaintiff’s allegations about prison officials confiscating his property while  
18 he was pursuing his previously filed action are true, plaintiff acknowledges that prison officials  
19 returned his legal materials to him five months after they were allegedly seized. (Am. Compl. at  
20 15-16) Here, plaintiff has not adequately explained why he then waited so many years to re-file  
21 his lawsuit. In this regard, even if the court granted plaintiff equitable tolling for the period he  
22 pursued his claims in his prior action, too much time thereafter remains unaccounted for in this  
23 case. Compare Bollinger, 25 Cal. 2d at 411 (granting equitable tolling because plaintiff had done  
24 all in his power to diligently prosecute his claim), with Wood v. Elling Corp., 20 Cal. 3d 353, 362  
25 (1977) (denying the plaintiff the benefit of equitable tolling because he was not diligent and failed

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26 <sup>2</sup> Plaintiff has attached as an exhibit to his amended complaint the amended complaint he filed in  
27 Watkins v. White, 2:96-cv-1497 DFL JFM P. In addition, a court may take judicial notice of  
28 court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United  
States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 to effect service on defendants within three years). See also Hu v. Silgan Containers Corp., 70  
2 Cal. App. 4th 1261, 1270 (1999) (“In the majority of cases in which courts apply the equitable  
3 tolling doctrine, the plaintiff possess several legal remedies, and reasonably and in good faith  
4 pursues one designed to lessen the extent of his or her injuries or damages. In these cases, if the  
5 defendant is not prejudiced, the running of the limitations period is tolled as to the other available  
6 remedies.”); Downs, 58 Cal. App. 4th at 1099-1100 (“A second policy underlying the statutes is  
7 to require plaintiffs to diligently pursue their claims. The ‘equitable tolling doctrine evolved in  
8 the 1970’s to toll statutes of limitations when defendants would not be prejudiced and plaintiffs,  
9 who had several legal remedies, pursued one such remedy reasonably and in good faith.”).

10 To be sure, in plaintiff’s amended complaint and in his opposition to defendants’ pending  
11 motion to dismiss plaintiff contends that he received threats from prison officials and was told not  
12 to file or litigate any legal actions. Plaintiff’s allegations in this regard, however, are vague and  
13 conclusory and suggest an implausible scenario – that for two decades unspecified prison officials  
14 and inmates at three separate prisons threatened plaintiff to such a degree that he felt he could not  
15 file this civil rights lawsuit. In fact, plaintiff’s litigation record in this court demonstrates that he  
16 was able to file and pursue litigation during the very period of time he suggests here that he could  
17 not. Specifically, the undersigned notes that from 1990 to 2011, plaintiff filed at least eight other  
18 lawsuits in this court. See Watkins v. Borg, No. 2:90-cv-1098 DFL PAN P; Watkins v. White,  
19 No. 2:96-cv-0380 DFL JFM P; Watkins v. White, 2:96-cv-1497 DFL JFM P; Watkins v. Daly,  
20 No. 2:06-cv-0685 MCE DAD P; Watkins v. Knowles, No. 2:09-cv-0363 WBS DAD P; Watkins  
21 v. Monday, No. 2:11-cv-1327 GEB KJN P; Watkins v. Singh, No. 2:11-cv-1689 MCE EFB P;  
22 Watkins v. Dickinson, No. 2:11-cv-1386 CMK P.

23 Although plaintiff did not prosecute some of these cases to their conclusion, he pursued  
24 others to judgment demonstrating that he could have filed this lawsuit far earlier. For example, in  
25 Watkins v. Daly, No. 2:06-cv-0685 MCE DAD P, petitioner filed a 197-page petition for writ of  
26 habeas corpus challenging the Board of Parole Hearings’ decision to deny him parole. (Id., Doc.  
27 1) His traverse to the respondent’s answer was 94 pages long, and his objections to the court’s  
28 findings and recommendations were also 94 pages in length. (Id., Doc. Nos. 15 & 27) According

1 to the record in that case, before plaintiff filed his petition he filed petitions for writ of habeas  
2 corpus in the Solano County Superior Court, the California Court of Appeal, and the California  
3 Supreme Court in order to exhaust his claims before coming to federal court. (Id., Doc. No. 25)

4 In light of plaintiff's litigation history, the court finds plaintiff's failure to file and pursue  
5 this lawsuit sooner was unreasonable and demonstrates unequivocally his lack of diligence in  
6 pursuing his claims in this action. Having so concluded, the court finds that plaintiff is not  
7 entitled to equitable tolling of the statute of limitations and declines to address the remaining two  
8 requirements of the equitable tolling doctrine. See Wood, 20 Cal. 3d at 361 (all three elements  
9 must be present before equitable tolling will apply); Hull, 28 Cal. App. 4th at 1336, n.7 (because  
10 plaintiff failed to meet first two prongs for equitable tolling court need not determine third prong  
11 of whether defendants would be prejudiced).

12 In sum, the undersigned finds that plaintiff's claims against defendants Johnson and  
13 Rosario arising from alleged events that took place back in 1990 are time-barred. In addition, for  
14 the reasons discussed above, the court finds that the granting of leave to amend in this case would  
15 be futile. See Chaset v. Fleeer/Skybox Int'l, 300 F.3d 1083, 1088 (9th Cir. 2002) (there is no need  
16 to prolong the litigation by permitting further amendment where the "basic flaw" in the  
17 underlying facts as alleged cannot be cured by amendment); Lipton v. Pathogenesis Corp., 284  
18 F.3d 1027, 1039 (9th Cir. 2002) ("Because any amendment would be futile, there was no need to  
19 prolong the litigation by permitting further amendment."). Accordingly, defendants' motion to  
20 dismiss this action as barred by the statute of limitations should be granted.

#### 21 **OTHER MATTERS**

22 On September 18, 2013, the court ordered the United States Marshal to serve plaintiff's  
23 amended complaint on the defendants. The Marshal was unable to effect service on defendants  
24 Caraway and Spears because these defendants were no longer employed by CSP-Sacramento.  
25 The court ordered plaintiff to provide the court with additional information to serve these  
26 defendants and granted him sixty days to complete and submit the necessary documents to effect  
27 service. On January 24, 2014, plaintiff filed a motion for a sixty-day extension of time to obtain  
28 the addresses for defendants Caraway and Spears. On February 7, 2014, the court granted

1 plaintiff's motion. That sixty-day period has long since expired, and plaintiff has not submitted  
2 the necessary service documents. He has only recently filed a motion requesting the court to use  
3 its "judicial authority" to serve defendants Caraway and Spears.

4 As the court previously instructed plaintiff, he is required to provide the court with the  
5 information necessary to serve defendants Caraway and Spears. To date, he has not done so.  
6 Under the circumstances of this case as set forth above, the undersigned finds that plaintiff cannot  
7 show good cause for the failure to effect service on defendants Caraway and Spears. Although  
8 plaintiff has had more than sufficient time to provide the court with the additional information  
9 necessary to enable the United States Marshal to serve these defendants, on two separate  
10 occasions plaintiff has failed to provide the court with a current addresses for them. Accordingly,  
11 the court concludes that defendants Caraway and Spears should be dismissed from this action.  
12 See Fed. R. Civ. P. 4(m).

### 13 CONCLUSION

14 Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for the court to use its  
15 "judicial authority" to serve his complaint on defendants Caraway and Spears (Doc. No. 67) is  
16 denied.

17 IT IS HEREBY RECOMMENDED that:

- 18 1. Defendants' amended motion to dismiss (Doc. No. 60) be granted;
- 19 2. Defendants' Caraway and Spears be dismissed; and
- 20 3. This action be closed.

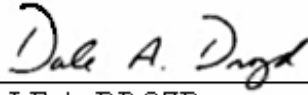
21 These findings and recommendations are submitted to the United States District Judge  
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
23 after being served with these findings and recommendations, any party may file written  
24 objections with the court and serve a copy on all parties. Such a document should be captioned  
25 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
26 objections shall be filed and served within seven days after service of the objections. The parties

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1 are advised that failure to file objections within the specified time may waive the right to appeal  
2 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: June 26, 2014

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6 DALE A. DROZD  
7 UNITED STATES MAGISTRATE JUDGE

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