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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

CARL RAY JACKSON,  
CDCR # T-83472

Plaintiff,

vs.

CALIFORNIA DEP'T OF CORRECTIONS  
AND REHABILITATION; HENRY  
PROVENCHER; F. MORSHEDIAN; GARY  
THOMAS,,

Defendants.

Civil No. 10cv1561 H (BLM)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE AND GARNISHING  
\$350.00 BALANCE FROM  
PRISONER TRUST ACCOUNT  
[Doc. No. 2];**

**(2) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL  
[Doc. No. 3]**

**AND**

**(3) DISMISSING ACTION FOR  
SEEKING MONETARY DAMAGES  
AGAINST DEFENDANTS WHO ARE  
IMMUNE AND FOR FAILING TO  
STATE A CLAIM PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2)(B)  
& 1915A(b)**

Plaintiff, a state inmate currently incarcerated at the California Substance Abuse Treatment Facility located in Corcoran, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”)

1 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion for Appointment of Counsel  
2 [Doc. No. 3]

3 **I.**

4 **MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3]**

5 Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action.  
6 The Constitution provides no right to appointment of counsel in a civil case, however, unless an  
7 indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social*  
8 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are  
9 granted discretion to appoint counsel for indigent persons. This discretion may be exercised  
10 only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).  
11 “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success  
12 on the merits and the ability of the plaintiff to articulate his claims pro se in light of the  
13 complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be  
14 viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d  
15 1328, 1331 (9th Cir. 1986)).

16 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice  
17 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,  
18 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

19 **II.**

20 **MOTION TO PROCEED IFP**

21 All parties instituting any civil action, suit or proceeding in a district court of the United  
22 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
23 U.S.C. § 1914(a). An action may proceed despite a party’s failure to pay only if the party is  
24 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493  
25 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).  
26 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in  
27 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28  
28 U.S.C. § 1915(b)(1) & (2).

1 The Court finds that Plaintiff has submitted a certified copy of his trust account statement  
2 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement  
3 shows that he has insufficient funds from which to pay an initial partial filing fee.

4 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and  
5 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further  
6 orders the Secretary of the California Department of Corrections and Rehabilitation (“CDCR”)  
7 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them  
8 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
9 § 1915(b)(1).

### 10 III.

#### 11 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

12 The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also  
13 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like  
14 Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or  
15 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,  
16 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.”  
17 See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua  
18 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,  
19 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
20 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
21 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.  
22 2000) (§ 1915A).

23 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
24 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28  
25 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner’s suit  
26 make and rule on its own motion to dismiss before directing that the Complaint be served by the  
27 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits,  
28 but requires a district court to dismiss an in forma pauperis complaint that fails to state a

1 claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing  
2 § 1915A).

3 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
4 allegations of material fact and must construe those facts in the light most favorable to the  
5 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
6 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even  
7 presuming Plaintiff’s factual allegations true, the Court finds his Complaint both fails to state  
8 a claim upon which relief can be granted and seeks monetary relief from defendants who are  
9 immune. *See* 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213  
10 F.3d at 446, n.1.

11 Where the running of the statute of limitations is apparent on the face of the complaint,  
12 dismissal for failure to state a claim is proper. *See Cervantes v. City of San Diego*, 5 F.3d 1273,  
13 1276 (9th Cir. 1993). Because section 1983 contains no specific statute of limitation, federal  
14 courts apply the forum state’s statute of limitations for personal injury actions. *Jones v. Blanas*,  
15 393 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004);  
16 *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of  
17 limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations  
18 period was extended to two years. *Id.* (citing CAL. CIV. PROC. CODE § 335.1). The two-years  
19 limitations period, however, does not apply retroactively. *Canatella v. Van de Kamp*, 486 F.3d  
20 1128, 1132-22 (9th Cir. 2007) (citing *Maldonado*, 370 F.3d at 955).

21 Unlike the length of the limitations period, however, “the accrual date of a § 1983 cause  
22 of action is a question of federal law that is not resolved by reference to state law.” *Wallace v.*  
23 *Kato*, 549 U.S. 384, 388 (2007); *Hardin v. Staub*, 490 U.S. 536, 543-44 (1989) (federal law  
24 governs when a § 1983 cause of action accrues). “Under the traditional rule of accrual ... the tort  
25 cause of action accrues, and the statute of limitation begins to run, when the wrongful act or  
26 omission results in damages.” *Wallace*, 549 U.S. at 391; *see also Maldonado*, 370 F.3d at 955  
27 (“Under federal law, a claim accrues when the plaintiff knows or has reason to know of the  
28 injury which is the basis of the action.” ).

1 Here, Plaintiff claims that Defendants violated his constitutional rights when he was  
2 released on parole in October of 2006. *See* Compl. at 1, 3. Plaintiff alleges that Defendants  
3 knew or should have known that he was a “significant risk to the community” and mentally ill.  
4 *Id.* at 3. As a result, Plaintiff was later “arrested, charged and convicted of committing a violent  
5 crime.” *Id.* Based on these allegations, Plaintiff would have reason to believe that his  
6 constitutional rights were violated in October of 2006. *Wallace*, 549 U.S. at 391.; *see also*  
7 *Maldonado*, 370 F.3d at 955. However, Plaintiff did not file his Complaint in this case until  
8 July 23, 2010, which exceeds California’s statute of limitation. *See* CAL. CODE CIV. PROC.  
9 § 335.1; *Jones*, 393 F.3d at 927.

10 Plaintiff does not allege any facts to suggest how or why California’s two-year statute  
11 of limitations might be tolled for a period of time which would make his claims timely. *See*,  
12 *e.g.*, CAL. CODE CIV. P. § 352.1 (tolling statute of limitations “for a maximum of 2 years” during  
13 a prisoner’s incarceration); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL.  
14 CODE CIV. P. § 352.1 tolls a California prisoner’s personal injury claims accruing before January  
15 1, 1995 for two years, or until January 1, 1995, whichever occurs later, unless application of the  
16 statute would result in a “manifest injustice.”). It is not clear when Plaintiff, once again, became  
17 incarcerated following his release on parole. While Plaintiff may be entitled to additional  
18 tolling based on his subsequent incarceration, it is not clear from Plaintiff’s Complaint if he is  
19 entitled to the additional statutory tolling.

20 Generally, federal courts also apply the forum state’s law regarding equitable tolling.  
21 *Fink*, 192 F.3d at 914; *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir. 1988). Under  
22 California law, however, a plaintiff must meet three conditions to equitably toll a statute of  
23 limitations: (1) he must have diligently pursued his claim; (2) his situation must be the product  
24 of forces beyond his control; and (3) the defendants must not be prejudiced by the application  
25 of equitable tolling. *See Hull v. Central Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328,  
26 1335 (Cal. Ct. App. 1994); *Addison v. State of California*, 21 Cal.3d 313, 316-17 (Cal. 1978);  
27 *Fink*, 192 F.3d at 916. Here, however, Plaintiff has failed to plead any facts which, if proved,  
28 would support the equitable tolling of his claims. *See Cervantes v. City of San Diego*, 5 F.3d

1 1273, 1277 (9th Cir. 1993). Thus, Plaintiff’s entire action must be dismissed as barred by the  
2 statute of limitations.

3 In addition, Plaintiff names the California Department of Corrections and Rehabilitation  
4 (“CDCR”) as a Defendant in this matter. The State of California, and the California Department  
5 of Corrections and Rehabilitation, as an agency of the State of California, are not “persons”  
6 subject to suit and are instead, entitled to absolute immunity from monetary damages actions  
7 under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54  
8 (1996); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also Hale*  
9 *v. State of Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993) (holding that a state department of  
10 corrections is not a “person” within the meaning of § 1983). In order to state a claim under  
11 § 1983, Plaintiff must identify a “person” who, acting under color of state law, deprived him of  
12 a right guaranteed under the Constitution or a federal statute. *See* 42 U.S.C. § 1983.

13 Therefore, Plaintiff’s claims for monetary damages against the California Department of  
14 Corrections and Rehabilitation are dismissed with prejudice pursuant to 28 U.S.C.  
15 § 1915(e)(2)(B)(iii).

#### 16 **IV. CONCLUSION AND ORDER**

17 Good cause appearing, **IT IS HEREBY ORDERED:**

18 1. Plaintiff’s Motion for Appointment of Counsel [Doc. No. 3] is **DENIED** without  
19 prejudice.

20 2. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is  
21 **GRANTED.**

22 3. The Secretary of California Department of Corrections and Rehabilitation, or his  
23 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee  
24 owed in this case by collecting monthly payments from the account in an amount equal to twenty  
25 percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court  
26 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).

27 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
28 **ASSIGNED TO THIS ACTION.**

