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

VIRGIL POPESCU,

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,

Defendants.

CASE NO. 13-CV-564-BEN (JLB)

**ORDER GRANTING
DEFENDANTS’ MOTIONS TO
DISMISS**

[Docket Nos. 24, 25, & 31]

Now before the Court are motions filed by all defendants to dismiss the First Amended Complaint. The federal claims are barred by the statute of limitations. Because the federal claims are being dismissed, the Court declines to exercise supplemental jurisdiction over the remaining state-law claims. Therefore, for the reasons stated below, the case is dismissed.

BACKGROUND

Plaintiff Virgil Popescu, a California parolee, has filed a civil rights lawsuit pursuant to 42 U.S.C. § 1983, alleging violations of his Fourth, Eighth, and Fourteenth Amendment rights. Plaintiff also alleges supplemental state-law claims pursuant to 42 U.S.C. § 1367(a). In particular, he alleges claims of intentional infliction of emotional distress, negligent infliction of emotional distress, “failure to properly train,” and “failure to supervise and discipline.” The First Amended Complaint (“FAC”) was filed on January 27, 2014. For purposes of computing

1 statutes of limitations, the FAC relates back to the date the original Complaint was
2 filed on March 11, 2013.

3 Popescu states that he was convicted of California stalking and weapons
4 charges in 2006.¹ (FAC ¶ 12.) He asserts that, following his prison term, he was
5 due for parole on October 8, 2009, but he was not allowed to parole to San Diego (at
6 the request of a stalking victim). (*Id.* ¶ 14.) He further asserts that Parole Agent T.J.
7 Ayala imposed ten other conditions which were “outrageous, illegal and
8 unconstitutional, and not related to the offense.” (*Id.*) Plaintiff claims that since his
9 conviction for stalking fell under California Penal Code section 649, he should not
10 have been prevented from paroling to San Diego County. (*Id.* ¶ 24.) He then asserts
11 that after a parole supervisor refused to modify the conditions, he refused to comply
12 with the conditions and he was sentenced to six more months in prison. (*Id.*) Based
13 on his belief that he was wrongfully required to parole to Indio, California, Popescu
14 alleges that he returned to San Diego on two separate occasions to seek assistance
15 from the courts. He was arrested each time. (*Id.* ¶¶ 37, 46.)

16 In January 2010, while Plaintiff was in prison for his parole violation at the
17 California Rehabilitation Center in Norco, the California Court of Appeal reversed
18 the stalking conviction. The state firearms conviction was affirmed. (*Id.* ¶ 17.) He
19 asked parole officials to release him from custody, because, he alleges, “he was in
20 prison at the time, for refusing to sign the conditions related to STALKING.” (*Id.*
21 ¶ 18.) Popescu claims that because the stalking conviction was kept on the records
22 he was still ordered to be paroled to Indio, which he refused to do. (*Id.* ¶ 19.)
23 Popescu alleges that the failure of the parole officials to realize that his stalking
24 conviction had been overturned was directly responsible for 18 months of additional
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28 ¹ The following statement of facts is drawn from Plaintiff’s FAC. Although this
Court has carefully reviewed the FAC, the background section is intended as a summary
of relevant information, and does not recite all of the details of Plaintiff’s claims.

1 incarceration. (*Id.* ¶¶ 19-20.) He claims he was incarcerated seven times² on the
2 “NON-EXISTING offense of STALKING.” (*Id.* ¶ 19). He further asserts that he
3 wrote letters to various parole officials requesting to be released based on the
4 appellate decision, but received no response. (*Id.* ¶ 30.) Plaintiff also alleges that
5 the inactions of the parole agents caused severe mental stress and required him to
6 take medication to stay alive. (*E.g., id.* ¶¶ 26-27, 31, 35, 42, 50.)

7 Popescu also alleges that excessive force was used to arrest him on multiple
8 occasions. (*E.g., id.* ¶¶ 33, 41, 46, 48.) During these incidents, he claims that
9 officers assaulted him, placed handcuffs on him too tightly, and dislocated his
10 shoulder. (*Id.*) In addition, he claims that the officers insulted and threatened him.
11 (*Id.* ¶¶ 33, 41.) Finally, he alleges that when he requested his medications to
12 counteract an imminent heart attack, the officer refused. (*Id.* ¶¶ 33, 41.) Popescu
13 does not allege that he suffered a heart attack as a result of these events. (*See id.* ¶¶
14 33-35, 41-44.) However, he claims to have suffered numbness in his extremities,
15 severe chest pains, and extreme mental and emotional distress. (*Id.* ¶¶ 33, 41.)
16 During one of the arrests, Popescu alleges that the arresting officer was unable to
17 restrain him with traditional handcuffs and wrapped a chain around his waist to
18 secure him. (*Id.* ¶ 41.)

19 After one of the arrests, Plaintiff alleges that Parole Agent Hurtado took his
20 keys and searched his apartment. (*Id.* ¶¶ 46-47.) He further alleges that Agent
21 Hurtado stole some of his personal items while conducting the search, although he
22 does not indicate what those items were. Plaintiff alleges that he was held for nine
23 hours in “a very cold tank” wearing only his boxers. Afterwards, he was moved to a
24 place called the “Light House”, where he was forced to participate in “rehabilitation
25 programs with drug addicts and alcoholics.” Plaintiff was then moved to the Indio
26 Rescue Mission where he received food, clothing, and shelter in the evening, while
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28 ² While Plaintiff alleges that he was incarcerated seven times, his Complaint describes six occasions.

1 describing the time as “three days of pain and suffering” where he “expected to die.”

2 In short, all of these claims arise from the period between his conviction for
3 stalking and imposition of parole conditions in 2009, and the time when the
4 conviction was eventually reversed, recognized in the superior court, and the parole
5 conditions formally removed in 2011.

6 Popescu now asserts several claims for relief against the State of California
7 Department of Corrections and Rehabilitation and 13 individual defendants: James
8 Davis, Chairman of the Parole Board, Benny Davides, Parole Administrator, Bonita
9 Stewart, Assistant Administrator, T.K. Ayala, Parole Agent, Louie Saldana, Parole
10 Agent, Michael Ortiz, Parole Agent, Edward Galindo, Parole Agent, Sandra Walker,
11 Parole Supervisor, Steve Smith, Parole Supervisor, Kenneth Ford, Parole
12 Administrator, Frank Hurtado, Parole Agent, William Gore, San Diego County
13 Sheriff, and C. Desalme, Deputy Sheriff, San Diego County. Federal claims for
14 relief are brought principally under 42 U.S.C. §1983.

15 **I. STANDARD FOR A MOTION TO DISMISS**

16 Under Federal Rule of Civil Procedure 12(b)(6), dismissal is appropriate if,
17 taking all factual allegations as true, the complaint fails to state a plausible claim for
18 relief on its face. FED. R. CIV. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
19 556-57 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (requiring
20 plaintiff to plead factual content that provides “more than a sheer possibility that a
21 defendant has acted unlawfully”). Under this standard, dismissal is appropriate if
22 the complaint fails to state enough facts to raise a reasonable expectation that
23 discovery will reveal evidence of the matter complained of, or if the complaint lacks
24 a cognizable legal theory under which relief may be granted. *Twombly*, 550 U.S. at
25 556. A claim may be dismissed pursuant to Rule 12(b)(6) on the ground that it is
26 barred by the applicable statute of limitations when “the running of the statute is
27 apparent on the face of the complaint.” *Huynh v. Chase Manhattan Bank*, 465 F.3d
28 992, 997 (9th Cir. 2006).

1 The Ninth Circuit requires trial courts to “construe *pro se* filings liberally
2 when evaluating them under *Iqbal*.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir.
3 2010) (footnote omitted). “While the standard is higher, our obligation remains,
4 where the petitioner is *pro se*, particularly in civil rights cases, to construe the
5 pleadings liberally and to afford the petitioner the benefit of any doubt.” *Id.*
6 (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)
7 (internal quotations marks omitted)).

8 For any plaintiff to sustain an action under 42 U.S.C. § 1983, it must be
9 shown: (1) that the conduct complained of was committed by a person acting under
10 color of state law; and (2) that the conduct deprived the plaintiff of a constitutional
11 right. *Rinker v. Napa County*, 831 F.2d 829, 831 (9th Cir. 1987) (citing *Parratt v.*
12 *Taylor*, 451 U.S. 527, 535 (1981)). Dismissal can be based on the lack of a
13 cognizable legal theory or the absence of sufficient facts alleged under a cognizable
14 legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th
15 Cir. 1984).

16 **II. STATUTE OF LIMITATIONS**

17 There is no specified statute of limitations under 42 U.S.C. § 1983, so federal
18 courts look to the law of the state in which the claim arose and apply that state’s
19 statute of limitations from an analogous cause of action. *Pouncil v. Tilton*, 704 F.3d
20 568, 573 (9th Cir. 2012) (citing *Wallace v. Kato*, 549 U.S. 384, 387 (2007)). Since
21 Popescu’s claims arise out of conduct in California, the correct place to look is
22 California’s statute of limitations for personal injury actions, which the Ninth Circuit
23 has held applies in §1983 cases. That period is two years. CAL. CODE CIV. PROC. §
24 335.1; see *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004).

25 While state law determines the applicable statute of limitations, federal law
26 determines when a §1983 claim accrues. *Lukovsky v. City and County of San*
27 *Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008). Accrual is the date on which the
28 statute of limitations begins to run. Under federal law, the limitations period for a

1 cause of action accrues when a plaintiff “knows or has reason to know of the injury
2 that is the basis of the cause of action.” *Pouncil*, 704 F.3d at 574 (quoting *Kimes v.*
3 *Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996) (internal quotation marks omitted)).

4 State law determines the application of tolling doctrines. *See Hardin v.*
5 *Straub*, 490 U.S. 536, 543-44 (1989). California law provides for the tolling of its
6 statute of limitations. If a plaintiff is incarcerated at the time his claim accrues, the
7 incarceration will toll the period for up to two years. CAL. CODE CIV. PROC. §
8 352.1(a). For a California litigant, however, tolling is not available “unless it *existed*
9 when his right of action accrued.” CAL. CODE CIV. PROC. § 357 (emphasis added);
10 *see also Cooper v. Franchise Tax Bd., State of Cal.*, 661 F. Supp. 60, 61 (N.D. Cal.
11 1987) (holding that tolling was not available because the plaintiff was not
12 imprisoned on the date the claims accrued). This is significant for Popescu’s claims,
13 as discussed below. The Ninth Circuit has emphasized that “actual, uninterrupted
14 incarceration is the touchstone for determining disability by incarceration.” *Jones v.*
15 *Blanas*, 393 F.3d 918, 928 (9th Cir. 2004) (quoting *Bianchi v. Bellingham Police*
16 *Dep’t*, 909 F.2d 1316, 1318 (9th Cir. 1990)). Subsequent, disjointed periods of re-
17 incarceration, such as those which occur after multiple parole violations, cannot be
18 “tacked” on to earlier periods of disability for purposes of tolling the statute of
19 limitations in § 1983 cases. The disability of imprisonment ends as soon as a
20 plaintiff is released from prison or jail.

21 **A. Claims 1 & 2: Conditions of Parole**

22 Popescu alleges that he was subjected to “illegal, outrageous[,] and
23 unconstitutional [p]arole [c]onditions [that] amounted to [c]ruel and [u]nusual
24 punishment” and “were not related to the offense.” He first claims that when he was
25 released on parole on October 8, 2009, he signed off³ on the parole conditions and
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27 ³ There is ambiguity in the FAC about whether Plaintiff signed, or refused to
28 sign, the parole conditions. At one point, Plaintiff claims that he signed them under
“stress and duress,” while at another point he claims that he refused to sign and was
sentenced to six months in prison as a result. (*See* FAC at ¶¶ 15, 16.) In either case, the

1 specified that they were signed under duress. In particular, Popescu alleges that
2 Parole Agent T.J. Ayala⁴ imposed these conditions, refused to modify them, and
3 forced him to parole to Indio, instead of his prior county of residence, San Diego.

4 Popescu's claim for relief for the allegedly unconstitutional parole conditions
5 accrued on October 8, 2009, as he was aware on that date of the existence of
6 circumstances that formed the basis of his § 1983 claim. He clearly knew, or should
7 have known, that his rights had been violated (if violated at all) when he signed off
8 on the parole conditions – in fact, he alleges that he noted on the document that he
9 had signed “under stress and duress.” Since he was not in prison at the time his
10 cause of action accrued – he had just been released on parole at the time – there is no
11 statutory tolling available for the disability of imprisonment. CAL. CODE CIV. PROC.
12 § 357.

13 Therefore, Popescu had two years from October 8, 2009 to file his lawsuit
14 against Agent Ayala. He did not file this action until March 11, 2013,
15 approximately seventeen months too late.⁵

16 In his second claim, Popescu notes that the his conviction for stalking was
17 reversed on January 11, 2010. He says that he wrote letters to defendants Davis,
18 Benavides, Ayala, Saldana, Walker, and Ford. Despite the letters, none responded
19 and he was kept in prison. He asserts that the lack of response subjected him to
20 Eighth and Fourteenth Amendment violations. Claim 2 does not specify the dates on
21 which he wrote to the defendants or the number of days he waited during their
22 alleged inaction. However, in Claim 3 he describes being returned to the Superior

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24 alleged injury occurs on the same day – October 8, 2009. As the only issue relevant for
25 disposition in this case is the timing of the accrual of his cause of action, there is no
26 need to resolve the ambiguity.

26 ⁴ Popescu also alleges that Benny Benavides, Parole Supervisor, was responsible
27 for these conditions. However, Benavides remains unserved. (Doc. No. 31-1 at 1.)

27 ⁵ Even if tolling were allowed for Plaintiff's subsequent period of imprisonment,
28 the statute would only be tolled until his next release, which was on May 11, 2010. In
this case, he would have been required to file his lawsuit by May 11, 2012. His action
would be still ten months too late.

1 Court for a hearing on March 30, 2010, after which he was eventually released from
2 custody on May 11, 2010. Because he was released, his federal claim against the
3 parole officers for their alleged inaction and his continued incarceration accrued no
4 later than his release date of May 11, 2010. The statute of limitations required his
5 claim be filed no later than two years later on May 11, 2012. As mentioned before,
6 he did not file this action until March 11, 2013.

7 Like Claim 1, Claim 2 has been brought too late and is now barred by the
8 statute of limitations. Accordingly, Claims 1 and 2 are dismissed with prejudice.

9 **B. Claims 3 & 4: False Imprisonment and Arrest**

10 Popescu asserts claims of false imprisonment and arrest against a number of
11 defendants. In particular, he alleges that San Diego County Sheriff William Gore
12 and Sheriff's Deputy C. DeSalme ignored a "[c]ourt [o]rder" and kept Popescu in
13 prison after April 7, 2010, the date he was scheduled to be released on parole.

14 Plaintiff is entitled to statutory tolling for 34 days, since he was imprisoned on the
15 date this claim accrued. Because of tolling, the limitations period did not start until
16 May 11, 2010 – the date of his release. *See* CAL. CODE CIV. PROC. § 357.

17 Unfortunately, the time for filing his lawsuit ended on May 11, 2012. This action
18 was not filed until March 11, 2013, ten months too late. Consequently, the statute of
19 limitations had run out before Plaintiff filed the instant lawsuit against Gore and
20 DeSalme.

21 Popescu next alleges that Parole Agent Louie Saldana illegally issued an
22 arrest warrant for Plaintiff on May 12, 2010, the day after he had been released from
23 R.J. Donovan Prison. Apparently, Popescu went to San Diego, which was
24 presumably still a violation of his parole conditions. While in San Diego, Plaintiff
25 was arrested by Agent Saldana. At the time of this arrest, Plaintiff was released on
26 parole, so he is not entitled to tolling pursuant to CALIFORNIA CODE OF CIVIL
27 PROCEDURE § 357. Even if he were entitled to statutory tolling, it would only toll
28 the limitations period until May 26, 2012, when he was again released. The deadline

1 for filing his lawsuit was May 12, 2012 – or May 26, 2012 if the statute was tolled.
2 Either way, the statute of limitations had run out for this claim because Plaintiff filed
3 the instant lawsuit ten months too late.

4 Finally, Popescu alleges that he was once again wrongfully arrested: this time
5 on May 27, 2010 at the Parole Office in Indio. Based on the allegations, Parole
6 Officer Edward Galindo indicated to Plaintiff that he had not been officially notified
7 that the stalking conviction had been reversed. Because of that, Popescu would still
8 be required to parole to Indio. Plaintiff asked to speak to Parole Supervisor Sandra
9 Walker. During their conversation, according to the Complaint, Walker became
10 hysterical and ordered Parole Officer Ortiz to arrest Popescu. Popescu was arrested.
11 Once he arrived at the prison, he was informed that he was being charged with four
12 “false charges,” which were: (1) refusal to sign parole conditions, (2) absconding,
13 (3) challenging another to fight with clenched fists, and (4) resisting arrest. Plaintiff
14 was on parole when he was arrested, but he was in custody when the alleged false
15 charges were made.

16 For the part of the claim concerning his re-arrest on May 27, 2010, the statute
17 of limitations ran out on May 27, 2012. The complaint was filed ten months late.
18 Even if tolling were applied until the time of his subsequent release on December 24,
19 2010, his suit would still be three months too late. As all of Plaintiff’s claims for
20 false imprisonment or false arrest are barred by the statute of limitations, Claims 3
21 and 4 for false arrest and imprisonment are dismissed with prejudice.

22 **C. Claims 3 & 4: Excessive Force**

23 Popescu also alleges in Claims 3 and 4 two incidents where officers used
24 excessive force to arrest him.⁶ According to the Complaint, the arrests occurred on
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26 ⁶Use of excessive force by an arresting officer on a convicted prisoner may
27 violate the Eighth Amendment. *See Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).
28 However, in order to state a claim under Section 1983, a plaintiff must show that the
officer(s) applied force “maliciously and sadistically for the purpose of causing harm.”
Farmer v. Brennan, 511 U.S. 825, 835 (1994); *see also Wall v. County of Orange*, 364
F.3d 1107, 1112 (9th Cir. 2004) (finding that ignoring a prisoner’s repeated pleas to

1 March 26, 2010 and May 27, 2010. As Popescu was not imprisoned at the time he
2 says excessive force was used, he is not entitled to any statutory tolling. *See* CAL.
3 CODE CIV. PROC. § 357. The deadline to file these claims was March 26, 2012 and
4 May 27, 2012, respectively. And these claims, like the others, are too late. Even
5 tolling the limitations period for the subsequent periods of imprisonment, the
6 deadlines would be extended only to May 27, 2012 and December 24, 2012, and the
7 complaint would still be too late. Therefore, the excessive force claims are also
8 barred by the statute of limitations and Claims 3 and 4 are dismissed with prejudice.

9 **III. CLAIMS 5, 6, 7 & 8: STATE-LAW CLAIMS**

10 Popescu asserts a number of claims based upon California state law in Claims
11 5 through 8. However, since Claims 1 through 4 are being dismissed with prejudice
12 because of the statute of limitations bar, there remains no federal law claims to
13 support continued original federal jurisdiction. Where all federal law claims are
14 dismissed, federal courts usually decline to exercise jurisdiction over remaining
15 state-law claims under Title 28 U.S.C. §1367. *Carnegie-Mellon Univ. v. Cohill*, 484
16 U.S. 343, 350 n. 7 (1988) (in usual case where all federal claims eliminated before
17 trial, factors point toward dismissing state-law claims). “With respect to
18 supplemental jurisdiction in particular, a federal court has subject-matter jurisdiction
19 over specified state-law claims, which it may (or may not) choose to exercise. A
20 district court’s decision whether to exercise that jurisdiction after dismissing every
21 claim over which it had original jurisdiction is purely discretionary.” *Carlsbad*
22 *Tech., Inc. v. HIF BIO, Inc.*, 129 S. Ct. 1862, 1866 (2009) (citations omitted);
23 *Fossen v. Blue Cross & Blue Shield of Montana*, 660 F.3d 1102, n.7 (9th Cir. 2011)
24 (same).

25 In this case, there are reasons why retaining jurisdiction would be detrimental

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27 remove handcuffs could constitute excessive force where the tightness of the cuffs
28 causes the prisoner lasting pain or injury). Finally, disrespectful and assaultive
comments by arresting officers do not implicate Eighth Amendment protections. *See*
Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996).

1 to Popescu's state-law claims. For example, Popescu named as a defendant the
2 California Department of Corrections and Rehabilitation, which is a suit against the
3 State of California. That defendant would be absolutely immune from suit in this
4 Court. The immunity flows from the Eleventh Amendment to the U.S. Constitution.
5 *Thornton v. Brown*, 724 F.3d 1255, 1258 (9th Cir. 2013) (under the Eleventh
6 Amendment, a state is absolutely immune from a suit for damages in a federal court
7 when brought by a citizen). Consequently, if this Court retained jurisdiction over
8 the state-law claims against the state defendant, the claims would be immediately
9 dismissed. The same is true for Popescu's state-law claims against defendant James
10 Davis, in his official capacity. Davis is named as the Chairman of the California
11 Board of Parole Hearings. If Popescu is suing Davis for money damages in his
12 official capacity, then Popescu's claims would be construed as against the State of
13 California and, once again, barred by Eleventh Amendment immunity. *Id.* Federal
14 law also grants parole officers imposing conditions of parole absolute immunity.
15 *Id.* at 1259 (absolute immunity bars claim for damages against parole officers for
16 imposing allegedly unconstitutional provisions).

17 These obstacles would be absent if Popescu brought his suit in state court.
18 Moreover, the state-law claims he asserts against other defendants appear to be
19 barred by California's statute of limitations. However, questions of the appropriate
20 limitations periods and whether, and to what effect, state principles of accrual and
21 tolling may apply to his state-law claims, might be favorably resolved by a state
22 court.

23 Therefore, the Court exercises its discretion and declines to retain
24 supplemental jurisdiction over Popescu's state-law claims.

25 26 27 **IV. CONCLUSION**

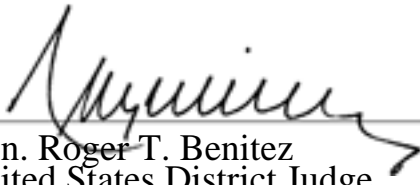
28 Claims 1, 2, 3 and 4 are barred by the statute of limitations and are dismissed

1 with prejudice. The Court declines to exercise supplemental jurisdiction over the
2 remaining state-law claims in Claims 5, 6, 7 and 8 and dismisses those claims
3 without prejudice and without leave to amend.

4 The Clerk of Court may close the file.

5 IT IS SO ORDERED.

6 DATED: August 22, 2014

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9 Hon. Roger T. Benitez
10 United States District Judge
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