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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BERIHU H. FKADU,
Patient #063295-0,

Plaintiff,

vs.

RANDY MIZE, et al.

Defendants.

Case No.: 3:17-cv-01184-WQH-PCL

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF. No. 2]**

AND

**2) DISMISSING CIVIL ACTION
FOR FAILING TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED AND AS FRIVOLOUS
PURSUANT TO
28 U.S.C. § 1915(e)(2)(B)**

Berihu Fkadu (“Plaintiff”), proceeding pro se, and civilly detained at Atascadero State Hospital (“ASH”) in Atascadero, California, has filed this civil action pursuant to 42 U.S.C. § 1983 (ECF No. 1).

Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a); instead he filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

1 **I. Motion to Proceed IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the
3 United States, except an application for writ of habeas corpus, must pay a filing fee of
4 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
5 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
6 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007).

7 However, “[u]nlike other indigent litigants, prisoners proceeding IFP must pay the
8 full amount of filing fees in civil actions and appeals pursuant to the PLRA [Prison
9 Litigation Reform Act].” *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002). As defined
10 by the PLRA, a “prisoner” is “any person incarcerated or detained in any facility who is
11 accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of
12 criminal law or the terms and conditions of parole, probation, pretrial release, or
13 diversionary program.” 28 U.S.C. § 1915(h).

14 A “civil detainee” on the other hand, like Plaintiff, is not a “prisoner” within the
15 meaning of the PLRA. *Andrews v. King*, 398 F.3d 1113, 1122 (9th Cir 2005); *Agyeman*,
16 296 F.3d at 886 (holding that INS detainee not also facing criminal charges is not a
17 “prisoner” under § 1915); see also *Page v. Torrey*, 201 F.3d 1136, 1140 (9th Cir. 2000)
18 (person confined under California’s Sexually Violent Predator Law, while “a ‘prisoner’
19 within the meaning of the PLRA when he served time for his conviction, . . . ceased being
20 a ‘prisoner’ when he was released from the custody of the Department of Corrections.”);
21 *Mullen v. Surtshin*, 590 F. Supp. 2d 1233, 1240 (N.D. Cal. 2008) (holding plaintiff
22 “adjudicated NGI [not guilty by reason of insanity] and committed to [Napa State Hospital]
23 as a result of that adjudication” was “not a prisoner as defined by the PLRA.”).

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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. See
27 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff.
28 June 1, 2016). The additional \$50 administrative fee does not apply to persons granted leave to proceed
IFP. *Id.*

1 Thus, because Plaintiff is a civilly committed patient at ASH, and not a “prisoner”
2 as defined by 28 U.S.C. § 1915(h) when he filed this action, the filing fee provisions of 28
3 U.S.C. § 1915(b) do not apply. *Andrews*, 398 F.3d at 1122. Therefore, the Court has
4 reviewed Plaintiff’s affidavit of assets, just as it would for any other non-prisoner litigant
5 seeking IFP status, and finds it is sufficient to show that he is unable to pay the fees or post
6 securities required to maintain this action. See S.D. CAL. CIVLR 3.2(d). Accordingly, the
7 Court GRANTS Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF
8 No. 2).

9 **II. Screening Pursuant to 28 U.S.C. § 1915(e)(2)**

10 A. Standard of Review

11 A complaint filed by any person proceeding in forma pauperis is subject to sua
12 sponte dismissal, however, if it is “frivolous, malicious, fail[s] to state a claim upon which
13 relief may be granted, or seek[s] monetary relief from a defendant immune from such
14 relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001)
15 (per curiam) (holding that “the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to
16 prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection
17 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis
18 complaint that fails to state a claim.”).

19 All complaints must contain “a short and plain statement of the claim showing that
20 the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations are not
21 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
22 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
23 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining whether a
24 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the
25 reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere
26 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; see also
27 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

28 “When there are well-pleaded factual allegations, a court should assume their

1 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
2 Iqbal, 556 U.S. at 679; see also Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000)
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.”); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
6 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

7 However, while the court “ha[s] an obligation where the petitioner is pro se,
8 particularly in civil rights cases, to construe the pleadings liberally and to afford the
9 petitioner the benefit of any doubt,” Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th Cir.
10 2010) (citing Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not “supply
11 essential elements of claims that were not initially pled.” Ivey v. Board of Regents of the
12 University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

13 B. Plaintiff’s Complaint

14 The Complaint appears to allege that since “early 1995” various public defenders,
15 alternate public defenders, private criminal counsel and appellate counsel have conspired
16 with prosecutors and judges to have him convicted of crimes. (ECF No. 1 at 2-7).

17 C. Statute of Limitations

18 Plaintiff’s claims arose when he was engaged in criminal proceedings in 1995. (ECF
19 No. 1 at 1, 5). “A claim may be dismissed [for failing to state a claim] on the ground that
20 it is barred by the applicable statute of limitations only when ‘the running of the statute is
21 apparent on the face of the complaint.’” Von Saher v. Norton Simon Museum of Art at
22 Pasadena, 592 F.3d 954, 969 (9th Cir. 2010) (quoting Huynh v. Chase Manhattan Bank,
23 465 F.3d 992, 997 (9th Cir. 2006)). ““A complaint cannot be dismissed unless it appears
24 beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness
25 of the claim.”” Id. (quoting Supermail Cargo, Inc. v. U.S., 68 F.3d 1204, 1206 (9th Cir.
26 1995)); see also Cervantes v. City of San Diego, 5 F.3d 1273, 1276-77 (9th Cir. 1993)
27 (where the running of the statute of limitations is apparent on the face of a complaint,
28 dismissal for failure to state a claim is proper, so long as Plaintiff is provided an opportunity

1 to amend in order to allege facts which, if proved, might support tolling); see also *Tahoe-*
2 *Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 788 (9th Cir.
3 2000) (court may raise the defense of statute of limitations sua sponte); *Hughes v. Lott*,
4 350 F.3d 1157, 1163 (11th Cir. 2003) (upholding sua sponte dismissal under 28 U.S.C. §
5 1915(e)(2)(B) of prisoner's time-barred complaint).

6 Because section 1983 contains no specific statute of limitation, federal courts apply
7 the forum state's statute of limitations for personal injury actions. *Jones v. Blanas*, 393
8 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004);
9 *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California's statute of
10 limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations
11 period was extended to two years. *Id.* (citing CAL. CIV. PROC. CODE § 335.1). The law of
12 the forum state also governs tolling. *Wallace v. Kato*, 549 U.S. 384, 394 (2007) (citing
13 *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989)); *Jones*, 393 F.3d at 927 (noting that in
14 actions where the federal court borrows the state statute of limitation, the federal court also
15 borrows all applicable provisions for tolling the limitations period found in state law).

16 Under California law, the statute of limitations for prisoners serving less than a life
17 sentence is tolled for two years. CAL. CIV. PROC. CODE § 352.1(a); *Johnson v. California*,
18 207 F.3d 650, 654 (9th Cir. 2000), overruled on other grounds, 543 U.S. 499 (2005).
19 Accordingly, the effective statute of limitations for most California prisoners is three years
20 for claims accruing before January 1, 2003 (one year limitations period plus two year
21 statutory tolling), and four years for claims accruing thereafter (two year limitations period
22 plus two years statutory tolling).

23 Unlike the length of the limitations period, however, "the accrual date of a § 1983
24 cause of action is a question of federal law that is not resolved by reference to state law."
25 *Wallace*, 549 U.S. at 388; *Hardin*, 490 U.S. at 543-44 (federal law governs when a § 1983
26 cause of action accrues). "Under the traditional rule of accrual ... the tort cause of action
27 accrues, and the statute of limitation begins to run, when the wrongful act or omission
28 results in damages." *Wallace*, 549 U.S. at 391. "Under federal law, a claim accrues when

1 the plaintiff knows or has reason to know of the injury which is the basis of the action.”
2 Maldonado, 370 F.3d at 955; TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999).

3 In this case, the “wrongful act” which is alleged to have caused Plaintiff harm
4 occurred more than twenty years before Plaintiff filed his Complaint in this action, and far
5 outside California’s statute of limitations, even including all presumed periods of tolling
6 provided by statute, or pending the exhaustion of any administrative remedies. Wallace,
7 591 U.S. at 391; see also Maldonado, 370 F.3d at 955; CAL. CODE CIV. PROC. § 335.1
8 (tolling statute of limitations “for a maximum of 2 years” during a prisoner’s incarceration);
9 Jones, 393 F.3d at 927; Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (finding that
10 “the applicable statute of limitations must be tolled while a prisoner completes the
11 mandatory exhaustion process” required by 42 U.S.C. § 1997e(a)).

12 Finally, Plaintiff’s claims could be considered timely if, in his Complaint, he alleges
13 facts sufficient to show the limitations period may be equitably tolled. See Cervantes, 5
14 F.3d at 1276-77. Generally, federal courts also apply the forum state’s law regarding
15 equitable tolling. Fink, 192 F.3d at 914; Bacon v. City of Los Angeles, 843 F.2d 372, 374
16 (9th Cir.1988). Under California law, however, Plaintiff must meet three conditions to
17 equitably toll the statute of limitations: (1) he must have diligently pursued his claim; (2)
18 his situation must be the product of forces beyond his control; and (3) Defendants must not
19 be prejudiced by the application of equitable tolling. See Hull v. Central Pathology Serv.
20 Med. Clinic, 28 Cal. App. 4th 1328, 1335 (Cal. Ct. App. 1994); Addison v. State of
21 California, 21 Cal.3d 313, 316-17 (Cal. 1978); Fink, 192 F.3d at 916.

22 As currently pleaded, however, the Court finds Plaintiff has failed to plead any facts
23 which, if proved, would support any plausible claim for equitable tolling. See Cervantes, 5
24 F.3d at 1277; Iqbal, 556 U.S. at 679. In addition, the Court takes judicial notice that
25 Plaintiff pursued these identical claims against some of the named Defendants in 2016. See
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1 Fkadu v. Mize, et al., S.D. Cal. Civil Case No. 3:16-cv-01120-CAB-RBB.²

2 Accordingly, the Court finds Plaintiff's claims are barred by the statute of
3 limitations, and his entire Complaint must be dismissed for failing to state a claim upon
4 which section 1983 relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii); Barren, 152
5 F.3d at 1194.

6 D. Frivolous claims

7 The Court also finds Plaintiff's Complaint is frivolous. A pleading is "factual[ly]
8 frivolous[]" if "the facts alleged rise to the level of the irrational or the wholly incredible,
9 whether or not there are judicially noticeable facts available to contradict them." Denton
10 v. Hernandez, 504 U.S. 25, 25-26 (1992). While most of Plaintiff's Complaint contains
11 disjointed allegations, and are difficult to discern, he alleges that the Defendants have
12 been "faking & ganging mindlessly & polluting me & persecuting me & my loved one &
13 or my supporters." (ECF No. 1 at 5). He also alleges that Defendant Price "bizarrely
14 ganged with Ethiopians (traitors & secretive criminals for future dictators, etc.)." (Id. at
15 6).

16 "[A] complaint, containing as it does both factual allegations and legal
17 conclusions, is frivolous where it lacks an arguable basis either in law or in fact. . . .
18 [The] term 'frivolous,' when applied to a complaint, embraces not only the inarguable
19 legal conclusion, but also the fanciful factual allegation." Neitzke v. Williams, 490 U.S.
20 319, 325 (1989). When determining whether a complaint is frivolous, the court need not
21 accept the allegations as true, but must "pierce the veil of the complaint's factual
22 allegations," Id. at 327, to determine whether they are "'fanciful,' 'fantastic,' [or]
23 'delusional,'" Denton, 504 U.S. at 33 (quoting Neitzke, 490 U.S. at 328).

24 Here, the Court finds that Plaintiff's claims "rise to the level of the irrational or the
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27 ² The Court takes judicial notice that Plaintiff has filed fifteen actions pursuant to 42 U.S.C. § 1983 in
28 the Southern District of California since 2006. See <https://pcl.uscourts.gov/search> (website last visited
July 26, 2017).

1 wholly incredible,” Denton, 504 U.S. at 33, and as such, his Complaint requires dismissal
2 as frivolous and without leave to amend. See Lopez v. Smith 203 F.3d 1122, 1127 n.8
3 (9th Cir. 2000) (en banc) (noting that if a claim is classified as frivolous, “there is by
4 definition no merit to the underlying action and so no reason to grant leave to amend.”).

5 **III. Conclusion and Order**

6 Good cause appearing, the Court:

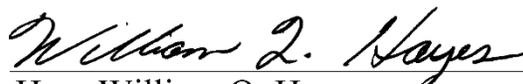
7 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
8 (ECF No. 2); and

9 2. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
10 relief may be granted and as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) and without
11 leave to amend.

12 3. **CERTIFIES** that an IFP appeal from this Order would also be frivolous and
13 therefore, could not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). See
14 Coppedge v. United States, 369 U.S. 438, 445 (1962); Gardner v. Pogue, 558 F.2d 548,
15 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if
16 appeal would not be frivolous).

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18 **IT IS SO ORDERED.**

19 Dated: August 3, 2017

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21 Hon. William Q. Hayes
22 United States District Court
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