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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JAMES EDWARD ROSE,  
12 Plaintiff,  
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14 v.

15 EDMUND GERALD BROWN,  
16 Governor; STATE OF  
17 CALIFORNIA; COUNTY OF SAN  
18 DIEGO; ALEX LANDON, an  
19 individual,

Defendants.

Case No.: 18-cv-01461-BTM-MDD

**ORDER DISMISSING COMPLAINT  
FOR FAILURE TO STATE A  
CLAIM**

**[ECF Nos. 10, 12]**

20 Pending before the Court are Plaintiff James Edward Rose's First Amended  
21 Complaint, Motion to Open Judgment in 1974 Homicide Conviction, and Motion to  
22 Purge Plaintiff's Criminal Records and Conviction. (ECF Nos. 10, 12). The Court  
23 interprets the Motions as a Second Amended Complaint. (ECF No. 12). For the  
24 reasons set forth below, both of Plaintiff's amended pleadings are dismissed with  
25 prejudice. (ECF Nos. 10, 12).

26 **I. BACKGROUND**

27 Plaintiff initiated this action on June 25, 2018. (ECF No. 1). The Complaint  
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1 asserted civil rights violations under 42 U.S.C. §§ 1983, 1985, and 1987 and  
2 names as defendants Governor Brown, the State of California, the County of San  
3 Diego, and Attorney Alex Landon. (ECF No. 1 “Compl.”). Plaintiff alleged that forty  
4 years ago, he was extradited from Georgia to California pursuant to a detainer and  
5 warrant naming a man other than Plaintiff. (Compl. at 1-3). Because the warrant  
6 and indictment allegedly named a “fictitious character who did not exist,” and  
7 whose name did not match Plaintiff’s, Plaintiff asserted he was wrongfully  
8 kidnapped, convicted of first degree murder, and sentenced to eight years in  
9 prison. *Id.* The Complaint also alleged legal malpractice against Plaintiff’s defense  
10 attorney, (Compl. at 7) and raised tort claims against prison officials for beating  
11 him and causing other injuries while he was incarcerated. (Compl. at 5-7).

12 On December 10, 2018, the Court dismissed Plaintiff’s Complaint for failure  
13 to state a claim. (ECF No. 9). The Court gave Plaintiff until January 4, 2019 to file  
14 a First Amended Complaint, and specified that failure to timely file would result in  
15 the dismissal of the action. (ECF No. 9 at 10). Plaintiff filed the First Amended  
16 Complaint (“FAC”) on February 4, 2019 and stated he was too ill to make the  
17 January 4, 2019 deadline. (ECF No. 10). The FAC names the previously  
18 dismissed Defendants and largely repeats the earlier pleading. (ECF No. 10). On  
19 May 20, 2019, Plaintiff moved this Court to open the judgment in his 1974 homicide  
20 conviction and purge his criminal record and convictions. (ECF No. 12). The  
21 Motion is formatted like a complaint, re-alleges the facts in the original Complaint  
22 and FAC, and aside from cursorily referencing the Fourteenth Amendment at the  
23 conclusion of the pleading, does not set forth the statutory or other constitutional  
24 basis basis for relief. (ECF No. 12). The Court interprets the pleading as a Second  
25 Amended Complaint (“SAC”) re-alleging Plaintiff’s section 1983 claims.

## 26 II. LEGAL STANDARD

27 The court must dismiss an IFP litigant’s complaint if it determines the action  
28 “is frivolous or malicious; fails to state a claim on which relief may be granted; or

1 seeks monetary relief against a defendant who is immune from such relief.” 28  
2 U.S.C. § 1915(e)(2)(B)(i)-(iii). Under Federal Rule of Civil Procedure 8(a)(2), all  
3 complaints must contain “a short and plain statement of the claim showing that the  
4 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The pleading must “contain  
5 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible  
6 on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic*  
7 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when  
8 the plaintiff pleads factual content that allows the court to draw the reasonable  
9 inference that the defendant is liable for the misconduct alleged.” *Id.* Conclusory  
10 statements, devoid of factual support, are insufficient. *Id.*

### 11 III. DISCUSSION

12 Plaintiff submitted the FAC a month after the Court-ordered deadline. (ECF  
13 No. 9). The Court may thus dismiss this action because of Plaintiff’s failure to  
14 prosecute in compliance with a court order requiring amendment. See *Lira v.*  
15 *Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage  
16 of the opportunity to fix his complaint, a district court may convert the dismissal of  
17 the complaint into dismissal of the entire action.”).

18 Even if the Court were to accept Plaintiff’s untimely filed FAC and SAC, the  
19 Court must nevertheless dismiss the pleadings because Plaintiff’s amendments  
20 have not cured the deficiencies identified in the Court’s December 2018 Order.  
21 First, Plaintiff still does not allege facts curing the statute of limitations or equitable  
22 tolling issues. The fact remains that Plaintiff filed this section 1983 Complaint forty  
23 years after his claim first accrued, well beyond the statutory deadline. See Cal Civ.  
24 Proc. Code § 335.1 (providing a section 1983 claim must be brought within two  
25 years); Cal Civ. Proc. Code § 352.1 (providing that if the cause of action arises  
26 while claimant is serving a non-life prison sentence, statute of limitations may be  
27 equitably tolled for up to two years). As currently pled, Plaintiff can prove no set  
28 of facts to establish the timeliness of the Complaint. *Von Saher v. Norton Simon*

1 *Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (“A claim may be  
2 dismissed [for failure to state a claim] on the ground that it is barred by the  
3 applicable statute of limitations only when ‘the running of the statute is apparent  
4 on the face of the complaint.’ ”)

5 Plaintiff further fails to allege facts supporting equitable tolling, including that  
6 he diligently pursued his claim, that forces outside of his control have left him  
7 without judicial forum for the resultion of his claim, and that defendants would not  
8 be prejudiced by the decades long delay. *See Hull v. Central Pathology Serv.*  
9 *Medical Clinic*, 28 Cal. App. 4th 1328 (1994) (enumerating conditions necessary  
10 to equitably toll statute of limitations). Although Plaintiff alleges that he  
11 immediately appealed his alleged unlawful extradition when he arrived to  
12 California, the pleadings state that the presiding federal judge declined to award  
13 Plaintiff any relief for the “kidnapping” and Plaintiff did not appeal. (SAC ¶14; FAC  
14 at 2). Plaintiff’s reasons for not appealing are devoid of factual basis and are not  
15 plausible. (FAC at 2 (alleging Plaintiff had a personal letter from United States  
16 Supreme Court Justice Douglas stating that he “would hear the case if the plaintiff  
17 appealed to the United States Supreme Court,” but another attorney withdrew the  
18 appeal)). Furthermore, Plaintiff’s generalized fear of the prison system after his  
19 release, though lamentable, cannot excuse the forty year delay. (SAC ¶¶ 21, 31).  
20 The amended pleadings do not set forth grounds for equitable tolling.

21 Plaintiff’s pleadings primarily allege ineffective assistance provided by his  
22 public defender. But Plaintiff cannot assert a 42 U.S.C. § 1983 claim against his  
23 public defender without showing that the public defender acted under the color of  
24 state law. *See Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (stating that  
25 attorneys representing criminal defendants generally do not act under color of state  
26 law because such representation is “essentially a private function . . . for which  
27 state office and authority are not needed”); *Miranda v. Clark County*, 319 F.3d 465,  
28 468 (9th Cir. 2003) (en banc) (holding that public defender was not a state actor

1 subject to suit under § 1983 because, so long as she performs a traditional role of  
2 an attorney for a client, “h[er] function,” no matter how ineffective, is “to represent  
3 h[er] client, not the interests of the state or county.”). Because Plaintiff still has not  
4 set forth facts plausibly showing his attorney’s representation constituted state  
5 action, these claims remain insufficiently pled.

6 The pleadings again name the State of California as a Defendant. (FAC at  
7 2; SAC ¶ 25). However, the Court previously dismissed the State of California as  
8 a party to the action pursuant to 28 U.S.C. §§ 1915(e)(2)(B) as barred by the  
9 Eleventh Amendment. (ECF No. 9 at 6-7). Plaintiff has not shown that the State  
10 of California has affirmatively waived its sovereign immunity. See *Krainski v. Nev.*  
11 *ex rel. Bd. of Regents of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 967 (9th Cir.  
12 2010) (“The Eleventh Amendment bars suits against the State or its agencies for  
13 all types of relief, absent unequivocal consent by the state.”) (internal citations  
14 omitted). Accordingly, Plaintiff cannot state a claim against the State of California.

15 Finally, Plaintiff cannot state a claim for monetary damages under 42 U.S.C.  
16 § 1983 because a favorable ruling would necessarily imply the invalidity of  
17 Plaintiff’s conviction, which remains in effect according to the pleadings. See *Heck*  
18 *v. Humphrey*, 512 U.S. 477, 486-87 (1994) (providing that section 1983 claims that  
19 “necessarily imply the invalidity of [plaintiff’s] conviction or sentence” must be  
20 dismissed “unless the plaintiff can demonstrate that the conviction or sentence has  
21 already been invalidated”); *Guerrero v. Gates*, 442 F.3d 697, 704 (9th Cir. 2006)  
22 (holding *Heck* applies equally to plaintiffs no longer in custody); SAC ¶ 14 (stating  
23 a sympathetic federal judge told Plaintiff “there was nothing he could do”). The  
24 Court thus concludes that the pleadings fail to state a claim upon which relief can  
25 be granted, and dismisses this civil action. See 28 U.S.C. § 1915(e)(2)(B)(ii).

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