

IN THE
SUPREME COURT OF THE UNITED STATES
JUNE TERM 2020

No.

JOHN LEO DAVIS

Petitioner

-against-

GOODYEAR POLICE DEPARTMENT, et al.,

Respondents

INDEX

John Lee Davis, ADOC #343109

ASPC-Tucson, Rincon Unit Cell 2A14

P.O. Box 24403

Tucson, Az. 85734-4401

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MOTION FOR REHEARING WITH SUGGESTION OF REHEARING.

EN BANC (Disc. 9), March 18th, 2020

RESPECTFULLY SUBMITTED this 20th day of October, 2020.

John Doe

John Davis

APPENDIX A

United States Court Of Appeals For The Ninth Circuit

MEMORANDUM

Document #8

March 6th, 2020

Davis v. Goodyear Police Department, 796 Fed.Appx. 449 (2020)

796 Fed.Appx. 449 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir.

Rule 36-3.

United States Court of Appeals, Ninth Circuit.

John Leo DAVIS, Plaintiff-Appellant,
v.

GOODYEAR POLICE DEPARTMENT, et al.,
Defendants-Appellees.

No. 19-15857

Submitted March 3, 2020*

FILED March 6, 2020

Attorneys and Law Firms

John Leo Davis, Pro Se

Appeal from the United States District Court for the District of Arizona, Susan M. Brnovich, District Judge, Presiding, D.C. No. 2:18-cv-02603-SMB-CDB

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

Arizona state pretrial detainee John Leo Davis appeals pro se from the district court's judgment dismissing his action alleging federal and state law claims arising out of his arrest in 2015. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044, 1047 (9th Cir. 2008) (dismissal on the basis of the statute of limitations); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (dismissal under 28 U.S.C. § 1915A). We affirm.

The district court properly dismissed Davis's action as time-barred because Davis filed this action more than two years after his federal claims accrued, and more than one year after his state law claims accrued. See Ariz. Rev. Stat. § 12-542 (two-year statute of limitations for personal injury claims); Ariz. Rev. Stat. § 12-821 (one-year statute of limitations for actions against a public entity or public employee); *Soto v. Sweetman*, 882 F.3d 865, 870-71 (9th Cir. 2018) (state tolling and statute of limitations for personal injury claims apply to § 1983 action, and federal law governs when claim accrues, which is when a plaintiff knows or should know of the injury that forms the basis for his cause of action); see also *Doe v. Roe*, 191 Ariz. 313, 955 P.2d 951, 964 (1998) (unsound mind equitable tolling may not be established by "conclusory averments such as assertions that one was unable to manage daily affairs or understand legal rights and liabilities" but rather requires plaintiff to set forth "specific facts").

AFFIRMED.

All Citations

796 Fed.Appx. 449 (Mem)

MEMORANDUM**

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 6 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Rec'd
3/11/20

JOHN LEO DAVIS,

No. 19-15857

Plaintiff-Appellant,

D.C. No. 2:18-cv-02603-SMB-
CDB

v.

GOODYEAR POLICE DEPARTMENT, et
al.,

MEMORANDUM*

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Susan M. Brnovich, District Judge, Presiding

Submitted March 3, 2020**

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

Arizona state pretrial detainee John Leo Davis appeals pro se from the district court's judgment dismissing his action alleging federal and state law claims arising out of his arrest in 2015. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Lukovsky v. City & County of San Francisco*, 535 F.3d 1044,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

1047 (9th Cir. 2008) (dismissal on the basis of the statute of limitations); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (dismissal under 28 U.S.C. § 1915A).

We affirm.

The district court properly dismissed Davis's action as time-barred because Davis filed this action more than two years after his federal claims accrued, and more than one year after his state law claims accrued. *See Ariz. Rev. Stat. § 12-542* (two-year statute of limitations for personal injury claims); *Ariz. Rev. Stat. § 12-821* (one-year statute of limitations for actions against a public entity or public employee); *Soto v. Sweetman*, 882 F.3d 865, 870-71 (9th Cir. 2018) (state tolling and statute of limitations for personal injury claims apply to § 1983 action, and federal law governs when claim accrues, which is when a plaintiff knows or should know of the injury that forms the basis for his cause of action); *see also Doe v. Roe*, 955 P.2d 951, 964 (Ariz. 1998) (unsound mind equitable tolling may not be established by "conclusory averments such as assertions that one was unable to manage daily affairs or understand legal rights and liabilities" but rather requires plaintiff to set forth "specific facts").

AFFIRMED.

APPENDIX B

United States District Court For The District Of Arizona

ORDER

Document # 8-1

November 16th, 2018

Rec'd
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Reply
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

John Leo Davis,

Plaintiff,

v.

Goodyear Police Department, et al.,
Defendants.

No. CV 18-02603-PHX-DWL (BSB)

ORDER

On August 16, 2018, Plaintiff John Leo Davis, who is confined in a Maricopa County Jail, filed a Motion for Leave to Extend Page Limit (Doc. 1) and an Application to Proceed In Forma Pauperis (Doc. 3) and lodged a proposed pro se civil rights complaint pursuant to 42 U.S.C. § 1983. On September 4, 2018, Plaintiff filed a Motion to Amend (Doc. 6) and lodged a proposed first amended complaint (Doc. 6-1). The Court will deny as moot the Motion for Leave to Extend Page Limit, grant the Application to Proceed and Motion to Amend, and dismiss the First Amended Complaint with leave to amend.

I. Application to Proceed In Forma Pauperis and Filing Fee

The Court will grant Plaintiff's Application to Proceed In Forma Pauperis. 28 U.S.C. § 1915(a). Plaintiff must pay the statutory filing fee of \$350.00. 28 U.S.C. § 1915(b)(1). The Court will not assess an initial partial filing fee. *Id.* The statutory filing fee will be collected monthly in payments of 20% of the previous month's income credited to Plaintiff's trust account each time the amount in the account exceeds \$10.00. 28 U.S.C.

1 § 1915(b)(2). The Court will enter a separate Order requiring the appropriate government
 2 agency to collect and forward the fees according to the statutory formula.

3 **II. Statutory Screening of Prisoner Complaints**

4 The Court is required to screen complaints brought by prisoners seeking relief
 5 against a governmental entity or an officer or an employee of a governmental entity. 28
 6 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 7 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
 8 relief may be granted, or that seek monetary relief from a defendant who is immune from
 9 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

10 A pleading must contain a “short and plain statement of the claim *showing* that the
 11 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). Although Rule 8
 12 does not demand detailed factual allegations, “it demands more than an unadorned, the-
 13 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 14 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 15 conclusory statements, do not suffice.” *Id.*

16 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 17 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 18 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 19 that allows the court to draw the reasonable inference that the defendant is liable for the
 20 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 21 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 22 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 23 allegations may be consistent with a constitutional claim, a court must assess whether there
 24 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

25 The Ninth Circuit has instructed that courts must “continue to construe *pro se* filings
 26 liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). A “complaint [filed by a
 27 pro se prisoner] ‘must be held to less stringent standards than formal pleadings drafted by
 28 lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

1 If the Court determines that a pleading could be cured by the allegation of other
2 facts, a pro se litigant is entitled to an opportunity to amend a complaint before dismissal
3 of the action. *Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc). Plaintiff's
4 First Amended Complaint will be dismissed for failure to state a claim, but because it may
5 possibly be amended to state a claim, the Court will dismiss it with leave to amend.

6 **III. Motion to Amend**

7 Plaintiff's Motion to Amend will be granted. The Court will direct the Clerk of
8 Court to file the lodged proposed first amended complaint as a separate document.

9 **IV. First Amended Complaint**

10 The First Amended Complaint supersedes the original Complaint. *Ferdik v.*
11 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner &*
12 *Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court treats the original
13 Complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Thus, the Court will consider only
14 those claims raised in the September 4, 2018 First Amended Complaint against only those
15 Defendants named in the First Amended Complaint.

16 In his eight-count First Amended Complaint, Plaintiff asserts two constitutional
17 claims pursuant to the Fourth and Fourteenth Amendments and six claims arising under
18 state law. Plaintiff names the Goodyear Police Department, Goodyear Police Chief Jerry
19 Geier, Sergeants James Dougal and Noah Yeo, and Crime Scene Technician Lori Ohrt as
20 Defendants. Plaintiff is seeking compensatory and punitive damages.

21 Each count in the First Amended Complaint is premised on the following
22 allegations:

23 On the night of March 26, 2015, Plaintiff was arrested and taken to a Goodyear
24 police precinct for questioning. (Doc. 6-1 at 6.)¹ When he arrived, officials took his shoes
25 and all of his clothing except his underwear. (*Id.*) Plaintiff was provided with a "tex-suit"
26 and shoe covers to wear during questioning. (*Id.*) Plaintiff was subsequently placed in an

27
28 ¹ The citation refers to the document and page number generated by the Court's Case
Management/Electronic Case Filing system.

1 interrogation room, where he was questioned by Defendants Dougal and Yeo about the
2 incident that led to his arrest. (*Id.*) When Plaintiff refused to speak to Dougal and Yeo
3 without an attorney, Dougal and Yeo grew “very upset” and left the room. (*Id.*) They
4 returned a short time later with a search warrant authorizing the collection of a blood
5 sample, a DNA sample, and photographs of Plaintiff’s naked body, including his genitalia
6 and buttocks. (*Id.*) Defendant Ohrt, who is female, proceeded to collect DNA samples
7 with Plaintiff’s consent. (*Id.*) After collecting his DNA, Ohrt instructed Plaintiff to remove
8 the tex-suit. (*Id.*) After he did so, Ohrt began photographing him. (*Id.*) When Ohrt
9 instructed Plaintiff to remove his underwear, Plaintiff stated that he was uncomfortable
10 with Ohrt taking photographs of him naked. (*Id.*) Ohrt told Plaintiff that “he did not have
11 a choice.” (*Id.*) When Plaintiff refused to remove his underwear, Defendants Dougal and
12 Yeo “threaten[ed] Plaintiff with physical force,” telling him they would “forcefully
13 remove” his underwear if he refused to comply with Ohrt’s instruction. (*Id.* at 7.) Fearing
14 for his safety, Plaintiff removed his underwear. (*Id.*) Ohrt then took several photographs
15 of Plaintiff’s naked body, including his genitalia and buttocks. (*Id.*) According to Plaintiff,
16 Defendants Dougal and Yeo, who are both male, “w[ere] perfectly capable of taking naked
17 photo[]s of Plaintiff,” and there were no “eminent circumstance[s]” justifying a cross-
18 gender search. (*Id.* at 7, 8.) As a result of Defendants’ conduct, Plaintiff suffered
19 unspecified physical, emotional, and mental injuries. (*Id.* at 6.)

20 On the basis of these allegations, Plaintiff asserts claims under the Fourth and
21 Fourteenth Amendments of the United States Constitution (Counts One and Two); article
22 II, §§ 4 and 15 of the Arizona Constitution (Counts Seven and Eight); and state-law claims
23 for assault and battery (Count Three), intentional infliction of emotional distress (Count
24 Four), negligent infliction of emotional distress (Count Five), and negligence (Count Six).

25 **V. Failure to State a Claim**

26 **A. Section 1983 Claims**

27 Failure to state a claim includes circumstances where a defense is complete and
28 obvious from the face of the pleadings. *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir.

1 1984). In the absence of waiver, the Court may raise the defense of statute of limitations
 2 *sua sponte*. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993). *See*
 3 *also Hughes v. Lott*, 350 F.3d 1157, 1163 (11th Cir. 2003) (upholding *sua sponte* dismissal
 4 under 28 U.S.C. § 1915(e)(2)(B)(i) of prisoner's time-barred complaint); *Nasim v. Warden*,
 5 *Maryland House of Corr.*, 64 F.3d 951, 956 (4th Cir. 1995) (same); *Pino v. Ryan*, 49 F.3d
 6 51, 53-54 (2d Cir. 1995) (same); *Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir. 1994)
 7 (same); *Johnson v. Rodriguez*, 943 F.2d 104, 107-108 (1st Cir. 1991) (same).

8 The applicable statute of limitations in an action under 42 U.S.C. § 1983 is the forum
 9 state's statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261,
 10 276 (1985). The Arizona statute of limitations for personal injury actions is two years. *See*
 11 Ariz. Rev. Stat. § 12-542(1). Accrual of § 1983 claims is governed by federal law. *Wallace*
 12 *v. Kato*, 549 U.S. 384, 388 (2007). Under federal law, a claim accrues when the plaintiff
 13 "knows or has reason to know of the injury that is the basis of the action." *Pouncil v.*
 14 *Tilton*, 704 F.3d 568, 574 (9th Cir. 2012); *Cabrera v. City of Huntington Park*, 159 F.3d
 15 374, 381 (9th Cir. 1998).

16 Plaintiff did not commence this action until August 16, 2018, more than three years
 17 after the incident that forms the basis for his claims and more than one year after the
 18 relevant statute of limitations expired. While Plaintiff broadly claims that he did not
 19 "realize" he was injured until January 9, 2018, he does not allege any facts to show why
 20 none of his injuries would have been readily apparent on or about March 26, 2015. Nor
 21 has he alleged any basis for equitable tolling. Accordingly, Plaintiff has failed to state a
 22 claim under § 1983 and Counts One and Two will be dismissed accordingly.

23 **B. State-Law Claims**

24 Plaintiff's state-law claims are similarly flawed. Arizona applies a one-year statute
 25 of limitations to actions brought against a public entity or public employee. Ariz. Rev.
 26 Stat. § 12-821; *Mayer Unified Sch. Dist. v. Winkleman*, 201 P.3d 523, 527 (Ariz. 2009). A
 27 cause of action against a public entity or public employee accrues when the plaintiff
 28 "discovers or reasonably should have discovered that an injury was caused by the

1 government's action." *Canyon del Rio Investors, L.L.C. v. City of Flagstaff*, 258 P.3d 154,
 2 158 (Ariz. Ct. App. 2011) (citing Ariz. Rev. Stat. § 12-821.01(B)). Plaintiff does not allege
 3 any facts to show why none of his injuries would have been readily apparent on or about
 4 March 26, 2015. Thus, based on the allegations in the First Amended Complaint,
 5 Plaintiff's state-law claims are barred by the relevant statute of limitations. Counts Three
 6 through Eight will therefore be dismissed.

7 **VI. Leave to Amend**

8 For the foregoing reasons, Plaintiff's First Amended Complaint will be dismissed
 9 for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff may
 10 submit a second amended complaint to cure the deficiencies outlined above. The Clerk of
 11 Court will mail Plaintiff a court-approved form to use for filing a second amended
 12 complaint. If Plaintiff fails to use the court-approved form, the Court may strike the second
 13 amended complaint and dismiss this action without further notice to Plaintiff.

14 Plaintiff must clearly designate on the face of the document that it is the "Second
 15 Amended Complaint." The second amended complaint must be retyped or rewritten in its
 16 entirety on the court-approved form and may not incorporate any part of the original
 17 Complaint or First Amended Complaint by reference. Plaintiff may include only one claim
 18 per count.

19 A second amended complaint supersedes the original Complaint and First Amended
 20 Complaint. *Ferdik*, 963 F.2d at 1262; *Hal Roach Studios*, 896 F.2d at 1546. After
 21 amendment, the Court will treat the original Complaint and First Amended Complaint as
 22 nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised in the original
 23 Complaint or First Amended Complaint and that was voluntarily dismissed or was
 24 dismissed without prejudice is waived if it is not alleged in a second amended complaint.
 25 *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

26 **VI. Warnings**

27 **A. Release**

1 If Plaintiff is released while this case remains pending, and the filing fee has not
2 been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court
3 that he intends to pay the unpaid balance of his filing fee within 120 days of his release or
4 (2) file a non-prisoner application to proceed in forma pauperis. Failure to comply may
5 result in dismissal of this action.

6 **B. Address Changes**

7 Plaintiff must file and serve a notice of a change of address in accordance with Rule
8 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
9 relief with a notice of change of address. Failure to comply may result in dismissal of this
10 action.

11 **C. Possible “Strike”**

12 Because the First Amended Complaint has been dismissed for failure to state a
13 claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies
14 identified in this Order, the dismissal may count as a “strike” under the “3-strikes”
15 provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring
16 a civil action or appeal a civil judgment in forma pauperis under 28 U.S.C. § 1915 “if the
17 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
18 brought an action or appeal in a court of the United States that was dismissed on the
19 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be
20 granted, unless the prisoner is under imminent danger of serious physical injury.” 28
21 U.S.C. § 1915(g).

22 **D. Possible Dismissal**

23 If Plaintiff fails to timely comply with every provision of this Order, including these
24 warnings, the Court may dismiss this action without further notice. *Ferdik*, 963 F.2d at
25 1260-61 (a district court may dismiss an action for failure to comply with any order of the
26 Court).

27 **IT IS ORDERED:**

1 (1) Plaintiff's Motion for Leave to Extend Page Limit (Doc. 1) is **denied** as
2 moot.

3 (2) Plaintiff's Application to Proceed In Forma Pauperis (Doc. 3) is **granted**.

4 (3) As required by the accompanying Order to the appropriate government
5 agency, Plaintiff must pay the \$350.00 filing fee and is not assessed an initial partial filing
6 fee.

7 (4) Plaintiff's Motion to Amend (Doc. 6) is **granted**. The Clerk of Court must
8 **separately file** the lodged First Amended Complaint (Doc. 6-1).

9 (5) Plaintiff's First Amended Complaint is **dismissed** for failure to state a claim.
10 Plaintiff has **30 days** from the date this Order is filed to file a second amended complaint
11 in compliance with this Order.

12 (6) If Plaintiff fails to file a second amended complaint within 30 days, the Clerk
13 of Court must, without further notice, enter a judgment of dismissal of this action with
14 prejudice that states that the dismissal may count as a "strike" under 28 U.S.C. § 1915(g)
15 and deny any pending unrelated motions as moot.

16 (7) The Clerk of Court must mail Plaintiff a court-approved form for filing a
17 civil rights complaint by a prisoner.

18 Dated this 16th day of November, 2018.

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23 Dominic W. Lanza
24 United States District Judge

APPENDIX C

United States District Court For The District Of Arizona
ORDER

Document # 14

April 10th, 2019

Rec'd
4/15/19

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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John Leo Davis, No. CV 18-02603-PHX-SMB (CDB)

Plaintiff,

v.

Goodyear Police Department, et al.,

Defendants.

ORDER

On August 16, 2018, Plaintiff John Leo Davis, who is confined in a Maricopa County Jail, filed a Motion for Leave to Extend Page Limit and an Application to Proceed In Forma Pauperis and lodged a proposed pro se civil rights complaint pursuant to 42 U.S.C. § 1983. On September 4, 2018, he filed a Motion to Amend and lodged a proposed first amended complaint. In a November 16, 2018 Order, the Court denied as moot the Motion for Leave to Extend Page Limit, granted the Application to Proceed and Motion to Amend, and dismissed the First Amended Complaint because Plaintiff's claims appeared to be barred by the statutes of limitations. The Court gave Plaintiff 30 days to file a second amended complaint. On December 3, 2018, Plaintiff filed a Second Amended Complaint (Doc. 11). The Court will dismiss the Second Amended Complaint and this action.

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....

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1 **I. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief
 3 against a governmental entity or an officer or an employee of a governmental entity. 28
 4 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff
 5 has raised claims that are legally frivolous or malicious, that fail to state a claim upon which
 6 relief may be granted, or that seek monetary relief from a defendant who is immune from
 7 such relief. 28 U.S.C. § 1915A(b)(1)–(2).

8 A pleading must contain a “short and plain statement of the claim *showing* that the
 9 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
 10 not demand detailed factual allegations, “it demands more than an unadorned, the-
 11 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 12 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere
 13 conclusory statements, do not suffice.” *Id.*

14 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
 15 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,
 16 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
 17 that allows the court to draw the reasonable inference that the defendant is liable for the
 18 misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for
 19 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 20 experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual
 21 allegations may be consistent with a constitutional claim, a court must assess whether there
 22 are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

23 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
 24 must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 342
 25 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent
 26 standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551
 27 U.S. 89, 94 (2007) (per curiam)).

28

1 **II. Second Amended Complaint**

2 In his eight-count First Amended Complaint, Plaintiff asserts two constitutional
3 claims pursuant to the Fourth and Fourteenth Amendments and six claims arising under
4 state law. Plaintiff names the Goodyear Police Department, Goodyear Police Chief Jerry
5 Geier, Sergeants James Dougal and Noah Yeo, and Crime Scene Technician Lori Ohrt as
6 Defendants. He seeks compensatory and punitive damages.

7 Each count in the First Amended Complaint is premised on the following
8 allegations:

9 On the evening of March 26, 2015, Plaintiff was arrested and taken to a Goodyear
10 police precinct for questioning. (Doc. 11 at 5.)¹ When Plaintiff arrived at the precinct,
11 officials took his shoes and all his clothing, with the exception his underwear. (*Id.*)
12 Plaintiff was given a “tex-suit” and shoe covers to wear instead. (*Id.*) Plaintiff was
13 subsequently placed in an interrogation room, where he was questioned by Defendants
14 Dougal and Yeo about an incident that had occurred previously at his residence. (*Id.*)
15 When Plaintiff refused to speak to Dougal and Yeo without an attorney, Dougal and Yeo
16 grew “visibl[y] upset” and left the room. (*Id.*) They returned a short time later with a
17 search warrant authorizing the collection of blood samples, DNA samples, and photographs
18 of Plaintiff’s naked body, including his genitalia and buttock. (*Id.*) A female officer,
19 Defendant Ohrt, proceeded to collect DNA samples from Plaintiff’s hand, mouth, and feet
20 with Plaintiff’s consent. (*Id.*) After collecting Plaintiff’s DNA, Ohrt instructed Plaintiff
21 to stand up so she could photograph him. (*Id.*) Plaintiff complied with this demand, and
22 photographs were taken. (*Id.*) Ohrt then instructed Plaintiff to remove his tex-suit, which
23 he did, and she proceeded to photograph Plaintiff in his underwear. (*Id.*) Next, Ohrt
24 instructed Plaintiff to remove his underwear. (*Id.*) Plaintiff advised that he did not want
25 naked photographs taken of him and told Ohrt that he was uncomfortable with the idea of
26 her taking such photographs. (*Id.*) Ohrt told Plaintiff “he did not have a choice.” (*Id.*)

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¹ The citation refers to the document and page number generated by the Court’s Case Management/Electronic Case Filing system.

1 When Plaintiff refused to remove his underwear, Defendants Dougal and Yeo, who were
2 also present, “threaten[ed] Plaintiff with physical force,” telling Plaintiff they would
3 “forcefully remove” his underwear if he refused to comply with Ohrt’s instruction. (*Id.* at
4 5-6.) Plaintiff, “traumatized [by] what [had] transpired at his residence” and fearing for
5 his safety, removed his underwear against his will. (*Id.* at 6.) Ohrt then took several
6 photographs of Plaintiff’s naked body, including his genitalia and buttock. (*Id.*) According
7 to Plaintiff, Defendants Dougal and Yeo, who are both male, “w[ere] perfectly capable of
8 taking photo[]s of Plaintiff’s naked body,” and there was no emergency situation that
9 would have justified the taking of such photographs by a cross-gender official. (*Id.*)
10 Therefore, according to Plaintiff, “such acts can be inferred as being done intentionally to
11 humiliate and degrade [him] . . . because [he] exercised his *Miranda* right.” (*Id.*) As a
12 result of Defendants’ conduct, Plaintiff has allegedly suffered physical, emotional, and
13 mental injuries including, “constant stress,” anxiety, paranoia, insomnia, nightmares, night
14 sweats, depression, withdrawal, eating disorders, and emotional and “psychological
15 debilitat[ion].” (*Id.* at 5, 14.)

16 Plaintiff claims that the statute of limitations should be tolled because (1) at the time
17 of the incident, he believed that Defendants had legal authority to photograph him in the
18 manner described above and (2) he suffered from repressed memory. (*Id.* at 10.)

19 According to the Second Amended Complaint, Plaintiff “was completely ignorant
20 as to his rights” at the time of the incident, “as he was under the impression that Police
21 Officers were to protect and serve the community and not once did [he] think that
22 Defendants would intentionally violate the law . . .” (*Id.*) He also believed that the search
23 warrant gave Defendants legal authority to obtain photographs of his naked body. (*Id.*) In
24 addition, because Plaintiff had just suffered a traumatic event at his residence, “he was not
25 in a sound state of mind to comprehend that Defendants were breaking the law.” (*Id.*) The
26 further trauma he suffered when forced to remove his clothing in front of an opposite-
27 gender official caused him to “repress[] the traumatic event” until January 9, 2018, when
28

1 it was triggered by legal research he came across in connection with another case.² (*Id.*)
2 “It was at that point that Plaintiff realized that Defendant intentionally violated his rights
3 by forcing him to strip naked in the presence of an opposite-gender, absen[t] an emergency,
4 and allowing her to photograph his naked body.” (*Id.*)

5 On the basis of these allegations, Plaintiff asserts claims under the Fourth and
6 Fourteenth Amendments of the United State Constitution (Counts One and Two) and
7 article II, §§ 4 and 15 of the Arizona Constitution (Counts Seven and Eight). Plaintiff also
8 asserts state-law claims for assault and battery (Count Three), intentional infliction of
9 emotional distress (Count Four), negligent infliction of emotional distress (Count Five),
10 and negligence (Count Six).

11 III. Failure to State a Claim

Failure to state a claim includes circumstances where a defense is complete and obvious from the face of the pleadings. *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984). In the absence of waiver, the Court may raise the defense of statute of limitations *sua sponte*. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993). *See also Hughes v. Lott*, 350 F.3d 1157, 1163 (11th Cir. 2003) (upholding *sua sponte* dismissal under 28 U.S.C. § 1915(e)(2)(B)(i) of prisoner's time-barred complaint); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 956 (4th Cir. 1995) (same); *Pino v. Ryan*, 49 F.3d 51, 53-54 (2d Cir. 1995) (same); *Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir. 1994) (same); *Johnson v. Rodriguez*, 943 F.2d 104, 107-108 (1st Cir. 1991) (same). Because the Court finds that Plaintiff's § 1983 and state-law claims are barred by the relevant statutes of limitations, the Second Amended Complaint will be dismissed for failure to state a claim.

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27 ² According to Plaintiff, the authority in question was *Thomas v. Jabe*, 760 F.Supp.
28 120 (E.D. Mich. 1991). There, the court denied defendants' motion for summary judgment
on a claim that plaintiff's Eighth Amendment rights were violated when he was videotaped
naked by a female prison guard. *Id.*, 760 F.Supp. at 123.

1 **A. Relevant Statutes of Limitations**

2 The applicable statute of limitations in an action under 42 U.S.C. § 1983 is the forum
 3 state's statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261,
 4 276 (1985). The Arizona statute of limitations for personal injury actions is two years. *See*
 5 Ariz. Rev. Stat. § 12-542(1). Under federal law, which governs the accrual of § 1983
 6 claims, *Wallace v. Kato*, 549 U.S. 384, 388 (2007), a claim accrues when a plaintiff ‘has
 7 knowledge of the injury and its cause, and not when the plaintiff has knowledge of legal
 8 fault.’’’ *Tunac v. United States*, 897 F.3d 1197, 1206 (9th Cir. 2018) (quoting *Rosales v.*
 9 *United States*, 824 F.2d 799, 805 (9th Cir. 1987). ‘‘As the Supreme Court has made clear,
 10 accrual does not wait until the plaintiff has ‘reason to suspect or was aware of facts that
 11 would have alerted a reasonable person to the possibility that a legal duty to him had been
 12 breached.’’’ *Id.* at 1206-07 (quoting *Winter v. United States*, 244 F.3d 1088, 1090 (9th Cir.
 13 1988)).

14 Plaintiff’s state-law claims, meanwhile, are subject to Arizona’s one-year statute of
 15 limitations on actions brought against a public entity or public employee. *See* Ariz. Rev.
 16 Stat. § 12-821; *Mayer Unified Sch. Dist. v. Winkleman*, 201 P.3d 523, 527 (2009). A cause
 17 of action against a public entity or public employee accrues when the plaintiff ‘‘discovers
 18 or reasonably should have discovered that an injury was caused by the government’s
 19 action.’’ *Canyon del Rio Investors, L.L.C. v. City of Flagstaff*, 258 P.3d 154, 158 (Ariz.
 20 Ct. App. 2011) (citing Ariz. Rev. Stat. § 12-8201.01(B)). For a claim to accrue, a plaintiff
 21 must have ‘‘reason to connect the ‘what’ to a particular ‘who’ in such a way that a
 22 reasonable person would be on notice to investigate whether the injury might result from
 23 fault.’’ *Walk v. Ring*, 378 P.3d 990, 996 (Ariz. 2002) (citing *Doe v. Roe*, 955 P.2d 951
 24 (1998)). Under Arizona law, a plaintiff ‘‘cannot hide behind his or her ignorance when
 25 reasonable investigation would have alerted the plaintiff to the claim; instead, the plaintiff
 26 must affirmatively and timely investigate if any basis exists for legal action.’’ *Shafer v.*
 27 *McCombs*, No. 1 CA-CV 17-0467, 2018 WL 17500496, at *3 (Ariz. Ct. App. Apr. 12,
 28 2018) (citing *Elm Ret. Center, LP v. Callaway*, 246 P.3d 938, 941 (Ariz. Ct. App. 2010)

1 **B. Discussion**

2 Plaintiff did not commence this action until August 16, 2018, more than three years
3 after the incident that forms the basis for his claims. He asserts two separate grounds for
4 why his claims are not barred by the relevant statute of limitations, both premised on a
5 theory of delayed accrual.

6 Plaintiff's first contention, that he was "ignorant as to his rights" until January 9,
7 2018, is irrelevant for purpose of this analysis. As discussed above, the date on which
8 Plaintiff identified the legal basis for his claims does not affect the accrual of those claims.
9 Thus, Plaintiff's failure to appreciate the purportedly unlawful character of Defendants'
10 conduct did not stop the clock from running on his § 1983 or state-law claims.

11 Plaintiff's second contention, that he suffered from memory repression, is similarly
12 deficient. When viewed as a whole, his allegations show that he is not claiming to have
13 repressed *all* memory of Defendant Ohrt's search until January 9, 2018. Rather, he is
14 claiming that the trauma of that search, combined with the incident that occurred previously
15 at his residence, prevented him from "*comprehend[ing] that Defendant[]s were breaking*
16 *the law.*" Such awareness was not necessary for the statutes of limitations to begin running,
17 however. And Plaintiff has not alleged any other basis for believing that he was unaware
18 of his injury at the time the search occurred. Accordingly, the statutes of limitations began
19 to run on Plaintiff's claims on March 26, 2015, and his claims are therefore time-barred.

20 **IV. Dismissal without Leave to Amend**

21 Because Plaintiff has failed to state a claim in his Second Amended Complaint, the
22 Court will dismiss his Second Amended Complaint. "Leave to amend need not be given
23 if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express,*
24 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is
25 particularly broad where Plaintiff has previously been permitted to amend his complaint.
26 *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).
27 Repeated failure to cure deficiencies is one of the factors to be considered in deciding
28 whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

1 Plaintiff has made two efforts at crafting a viable complaint and appears unable to
2 do so despite specific instructions from the Court. The Court finds that further
3 opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss
4 Plaintiff's Second Amended Complaint without leave to amend.

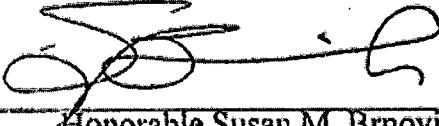
5 **IT IS ORDERED:**

6 (1) Plaintiff's Second Amended Complaint (Doc. 11) and this action are
7 **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment
8 accordingly.

9 (2) The Clerk of Court must make an entry on the docket stating that the
10 dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

11 (3) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3)
12 and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal
13 of this decision would be taken in good faith and finds Plaintiff may appeal in forma
14 pauperis.

15 Dated this 10th day of April, 2019.

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19 Honorable Susan M. Brnovich
20 United States District Judge
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APPENDIX D

United States District Court For the District of Arizona
JUDGMENT IN A CIVIL CASE

Document #15

April 10th, 2019

Rec'd
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

John Leo Davis,

Plaintiff,

v.

Goodyear Police Department, et al.,

Defendants.

NO. CV-18-02603-PHX-SMB (CDB)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order filed April 10, 2019, Plaintiff to take nothing, and the complaint and action are dismissed without leave to amend for failure to state a claim. This dismissal may count as a "strike" under 28 U.S.C. § 1915(g).

Brian D. Karth
District Court Executive/Clerk of Court

April 10, 2019

By s/ Rebecca Kobza
Deputy Clerk

APPENDIX E

United States District Court For The District Of Arizona
ORDER

Document #18

May 1st, 2019

Rec'd
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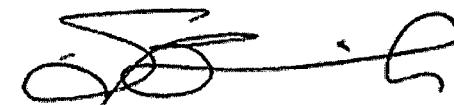
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 John Leo Davis, No. CV-18-02603-PHX-SMB (CDB)
10 Plaintiff, **ORDER**
11 v.
12 Goodyear Police Department, et al.,
13 Defendants.

14
15 The Court has read and considered Plaintiff's Motion for Reconsideration. (Doc.
16 17). No good cause appearing,

17 **IT IS ORDERED** Plaintiff's Motion for Reconsideration is **DENIED**.

18 Dated this 1st day of May, 2019.

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20 
21 Honorable Susan M. Brnovich
22 United States District Judge

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APPENDIX F

United States Court Of Appeals For The Ninth Circuit
ORDER

Document # 10

June 26th, 2020

FILED

JUN 26 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOHN LEO DAVIS,

Plaintiff-Appellant,

v.

GOODYEAR POLICE DEPARTMENT, et
al.,

Defendants-Appellees.

No. 19-15857

D.C. No. 2:18-cv-02603-SMB-
CDBDistrict of Arizona,
Phoenix

ORDER

Rec'd
7/3/20

Before: MURGUIA, CHRISTEN, and BADE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no
judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R.

App. P. 35.

Davis's petition for panel rehearing and petition for rehearing en banc
(Docket Entry No. 9) are denied.

No further filings will be entertained in this closed case.

APPENDIX G

United States District Court For The District Of Arizona

MOTION TO AMEND AS A MATTER OF COURSE

PLAINTIFF'S ORIGINAL CIVIL RIGHT COMPLAINT

Document #6

September 4th, 2018

**Additional material
from this filing is
available in the
Clerk's Office.**