NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3467

DAVE LAWRENCE,
Appellant

v.

IMMIGRATION & NATURALIZATION SERVICE;
DISTRICT ATTORNEY BELLEFONTE COUNTY;
ROBERT BASCOM

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 3:18-cv-00859)
District Judge: Honorable James M. Munley

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
on July 1, 2021

Before: GREENAWAY, JR., KRAUSE, and BIBAS, Circuit Judges

(Opinion filed: November 22, 2021)

Appendix A 16

OPINION*

PER CURIAM

Dave Lawrence appeals the District Court's order dismissing his complaint under 28 U.S.C. § 1915(e)(2)(B)(ii). For the reasons set forth below, we will affirm.

On April 20, 2018, Lawrence filed a complaint against the Department of Immigration and Naturalization Service ("INS"); the Centre County District Attorney's Office; and Attorney Robert Bascom.[1] The incidents giving rise to Lawrence's complaint occurred in 1997 and 1998 when Lawrence pled guilty to two controlled substance charges in Pennsylvania state court. He was sentenced on both cases in 1998. Lawrence alleges that he instructed his counsel to reject the plea deal and that he was not informed of the immigration consequences of his conviction. In 2000 he filed a PCRA petition, where he was first represented by Bascom and then by another attorney. Lawrence was deported while his PCRA petition was pending.[2] In his complaint, Lawrence alleged that he was denied due process during his criminal case and that the INS violated his rights by initiating

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

[1] Because we write primarily for the benefit of the parties, we summarize only those facts that are necessary for the discussion.

[2] The date of Lawrence's deportation is not certain but the District Court determined that Lawrence was deported by 2006, at the latest.

deportation proceedings and having him removed from the United States. Lawrence sought only damages.[3]

In a Report and Recommendation, the Magistrate Judge determined that the complaint was barred by the statute of limitations because the events in the complaint occurred more than two years before it was filed. The District Court agreed and dismissed the complaint. This timely appeal followed.[4]

We have jurisdiction under 28 U.S.C. § 1291 and exercise plenary review over the District Court's ruling. See Dooley v. Wetzel, 957 F.3d 366, 373-74 (3d Cir. 2020); Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000).

The District Court determined correctly that Lawrence's claims are barred by the statute of limitations. The statute of limitations for civil rights suits under § 1983 in Pennsylvania is two years. See Lake v. Arnold, 232 F.3d 360, 368 (3d Cir. 2000); 42 Pa. Cons. Stat. § 5524(7). The limitations period began to run when Lawrence became aware, or should have been aware, that the alleged constitutional violation occurred. Sameric Corp. v. City of Phila., 142 F.3d 582, 599 (3d Cir. 1998). Lawrence's claims regarding the arrest and subsequent deportation began to accrue, at the latest, in 2006. Lawrence filed his complaint

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[3] Lawrence did not assert a specific cause of action. However, because he sought only damages and because he had recently filed a habeas petition with similar allegations, the District Court appropriately construed his action as a being brought under 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[4] We construe Lawrence's objections to the Magistrate Judge's Report and Recommendations as a timely Notice of Appeal. See Smith v. Barry, 502 U.S. 244, 248 (1992); Witasick v. Minn. Mut. Life Ins. Co., 803 F.3d 184, 190 (3d Cir. 2015). Lawrence filed a brief and an "amended brief" in this Court. Both filings have been considered.

in 2018, well after the limitations period expired.[5] Lawrence has not challenged the District Court's timeliness analysis, either in his untimely Objections to the Report and Recommendation or in his briefs on appeal, let alone argued that he qualifies for equitable tolling or other relief from the statute of limitations.

Accordingly, we will affirm the judgment of the District Court.

[5] To the extent that Lawrence's complaint could be read to raise a malicious prosecution argument, his cause of action would not be cognizable under § 1983 because his conviction has not been invalidated or terminated favorably. Heck v. Humphrey, 512 U.S. 477, 489 (1994); McDonough v. Smith, 139 S. Ct. 2149, 2158 (2019).

UNITED STATES COURT OF APPEALS
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No. 20-3467

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v.

IMMIGRATION & NATURALIZATION SERVICE;
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ROBERT BASCOM

(M.D. Pa. No. 3:18-cv-00859)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, and McKEE, AMBRO, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in

regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: January 25, 2022
CJG/cc: Dave Lawrence

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

DAVE LAWRENCE,

Plaintiff,

v.

I.N.S., et al.,

Defendants.

CIVIL ACTION NO. 3:18-CV-00859

(MUNLEY, J.)
(MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

Presently before the Court is a complaint seeking damages (Doc. 1) and a motion to proceed *in forma pauperis* (Doc. 2), submitted by *pro se* plaintiff Dave Lawrence (hereinafter referred to as "Lawrence"). When liberally construed, the complaint appears to assert federal civil rights claims under 42 U.S.C. § 1983 against the following defendants: the Department of Immigration and Naturalization Service ("INS")[1]; the Centre County District Attorney's Office (the "DA's Office"); and Attorney Robert Bascom ("Attorney Bascom"). (Doc. 1, at 1). Having conducted its statutory screening review of the complaint, the Court respectfully recommends that the motion to proceed *in forma pauperis* (Doc. 2) be **GRANTED**, but that the complaint (Doc. 1) be **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2).

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[1] Although Lawrence filed suit against the INS, this federal agency has not existed as of March 1, 2003 pursuant to the Homeland Security Act of 2002. *See* Pub.L. 107–296, 116 Stat. 2135; *Tavares v. Myers*, No. CIVA 04-0302 (WHW), 2006 WL 1644776, at *1 (D.N.J. June 8, 2006). Nonetheless, for the purposes of this Report and Recommendation, the Court will continue to refer to the Defendant as the INS, instead of its successor, the United States Department of Homeland Security.

I. BACKGROUND

On April 20, 2018, Lawrence, a citizen of Dominica in the West Indies, filed the instant complaint[2] along with a motion to proceed *in forma pauperis*. (Doc. 1; Doc. 2). Although not entirely clear, the complaint seems to arise from Lawrence's criminal proceedings in the Centre County Court of Common Pleas ("State Court") and his resulting deportation from the United States. *Commonwealth v. Long*, No. CP-14-CR-0000821-1997 (Centre Cnty. C.C.P.); *Commonwealth v. Long*, No. CP-14-CR-0000822-1997 (Centre Cnty. C.C.P.). Judges Joseph A. Hudock, John G. Brosky, and Peter Paul Olszewski of the Superior Court of Pennsylvania described some of the factual and procedural history of these criminal proceedings as follows:

> On August 4, 1997, [Lawrence] entered a guilty plea, at trial docket number 822, to one count of delivery of a controlled substance (cocaine). On March 31, 1998, he entered a guilty plea, at trial docket number 821, to one count of criminal attempt (delivery of marijuana). [Lawrence's] convictions were the result of his participation in drug trafficking activity, in the State College area, in April of 1997. On July 2, 1998, the trial court sentenced [Lawrence], at both trial docket numbers, to an aggregate term of two to four years of imprisonment.
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> (Doc. 1, at 72-74).

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[2] The Court notes that Lawrence has submitted copies of certain State Court records in support of his complaint. (Doc. 1). These records document the disposition of the following State Court cases: *Commonwealth v. Long*, No. CP-14-CR-0000821-1997 (Centre Cnty. C.C.P.); *Commonwealth v. Long*, No. CP-14-CR-0000822-1997 (Centre Cnty. C.C.P.); *Commonwealth v. Long*, No. 85 MDA 2011 (Pa. Super. Ct.). While these provide some background information regarding the State Court litigation efforts, other details are omitted. Thus, in addition to the pleadings in this case, the Court also considers the related state court dockets, opinions, and orders entered in Lawrence's State Court proceedings. These are all matters of public record of which the Court may properly take judicial notice in ruling on a motion to dismiss. *See Sands v. McCormick*, 502 F.3d 263, 268 (3d Cir. 2007); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (Finding that under Rule 12(b)(6) the Court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.").

In his complaint, Lawrence alleges that the DA's Office conducted an illegal investigation in violation of his fourth and fourteenth amendment rights, as Lawrence had no previous drug record before his arrest. (Doc. 1, at 3). Lawrence also asserts that he instructed his defense counsel to reject the plea deal set forth by the DA's Office, but that the attorney did not heed his request. (Doc. 1, at 2). As a consequence of his arrest and conviction, the INS subsequently commenced removal proceedings against Lawrence. (Doc. 1, at 77). However, instead of pursing a direct appeal of his sentence,[3] Lawrence filed a *pro se* petition under the Post-Conviction Relief Act ("PCRA") on November 8, 2000, alleging ineffective assistance of counsel. (Doc. 1, at 2); *Commonwealth v. Long*, No. CP-14-CR-0000821-1997 (Centre Cnty. C.C.P.); *Commonwealth v. Long*, No. CP-14-CR-0000822-1997 (Centre Cnty. C.C.P.); *Lawrence v. INS*, No. 3:17-CV-01506 (M.D. Pa. filed Aug. 8, 2017). Specifically, Lawrence averred his defense attorney did not inform the State Court of his desire to withdraw his guilty plea, or inform Lawrence of the potential immigration consequences that may arise by entering a guilty plea. (Doc. 1, at 33-34). Lawrence alleges that the State Court appointed Attorney Bascom to represent him during his PCRA proceedings. (Doc. 1, at 2). However, Lawrence complains that Attorney Bascom effectively "did nothing" with his PCRA petition, despite informing Lawrence that "the case was proceeding well." (Doc. 1, at 2). As a result, Lawrence states the court appointed a new attorney to represent him on July 18, 2002, but that her defense ultimately prejudiced his case. (Doc. 1, at 2). Nonetheless, before the resolution of his *pro se*

[3] Lawrence does not allege whether he attempted to challenge his removal proceedings before an Immigration Judge.

PCRA petition, the INS deported Lawrence due to his commission of an aggravated felony.[4] (Doc. 1, at 32).

Due to these acts that allegedly occurred during the initiation and litigation of his criminal case, Lawrence claims the named Defendants violated his rights under the Fourth and Fourteenth Amendment to the Constitution. (Doc. 1, at 1-3). Specifically, Lawrence claims he was denied due process during the pendency of his criminal and subsequent PCRA proceedings. (Doc. 1, at 1-3). When liberally construed, Lawrence also seems to bring a claim, presumably against the INS, for violations of his rights under federal immigration law.[5] (Doc. 1, at 1-5, 35). As for relief, Lawrence seeks damages against the Defendants.[6] (Doc. 1, at 4).

The matter is now before the Court pursuant to its statutory obligation under 28 U.S.C § 1915(e)(2) to dismiss a case brought *in forma pauperis* if it is frivolous or fails to state a claim upon which relief can be granted.

II. SECTION 1915(E)(2) STANDARD

A plaintiff proceeding *in forma pauperis* is subject to 28 U.S.C. § 1915(e)(2), which

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[4] As best can be gleaned from the complaint, the INS deported Lawrence at some point prior to his PCRA hearing held on July 17, 2006, although the actual date of his removal may have been sooner. (Doc. 1, at 18, 32).

[5] Lawrence cites to "Immigrations 460-465-890" as the nature of his suit. (Doc. 1, at 1. 5). Even when liberally construed, however, the Court cannot ascertain whether Lawrence references the alien number assigned to him by the INS during his removal proceedings or a specific federal immigration statute.

[6] The Court takes judicial notice of a recent action commenced by Lawrence, in which he seeks federal habeas relief for similar constitutional violations. *See eg. Lawrence v. INS*, No. 3:17-CV- 1506 (M.D. PA. filed Aug. 23, 2017). While the allegations in Lawrence's federal habeas petition mirror those in the instant complaint, it is of some significance to this Court that Lawrence requests damages in relation to alleged constitutional violations here, and does not, at least directly, seek to disturb his underlying conviction. (Doc. 1, at 4). Thus, without commenting on their merits of his claims, the Court liberally construes Lawrence's present federal action as being brought under 42 U.S.C. § 1983 and *Bivens*.

provides that a court "shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). "The legal standard for dismissing a complaint for failure to state a claim under § 1915(e)(2) is the same as that for dismissing a complaint pursuant to Fed. R. Civ. P. 12(b)(6)." *Brodzki v. Tribune Co.*, 481 Fed. App'x 705, 706 (3d Cir. 2012) (per curiam).

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The United States Court of Appeals for the Third Circuit has noted the evolving standards governing pleading practice in federal court, stating that:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), continuing with our opinion in *Phillips* [*v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008)] and culminating recently with the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.
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> *Fowler v. UPMC Shadyside*, 578 F.3d 203, 209–10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). A court "need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not assume that a plaintiff can prove facts that the plaintiff has not alleged. *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). In order to state a valid cause of action a plaintiff must provide some factual grounds for relief which

"requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When ruling on a motion to dismiss, a trial court must assess whether a complaint states facts upon which relief can be granted, and should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

In deciding a Rule 12(b)(6) motion, the court may consider the facts alleged on the face of the complaint, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Additionally, a document filed *pro se* is "to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). The Third Circuit has also instructed that if a complaint is vulnerable to dismissal for failure to state a claim, the district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002).

III. DISCUSSION

Although not expressly alleged, it appears Lawrence brought this action pursuant to 42 U.S.C. § 1983. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

> be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> 42 U.S.C. § 1983.

Section 1983 does not create substantive rights, but instead provides remedies for rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). To establish a § 1983 claim, a plaintiff must establish that the defendants, acting under color of state law, deprived the plaintiff of a right secured by the United States Constitution. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995). While Section 1983 only provides a private right of action against state actors, a *Bivens* claim may be filed against federal officials for alleged constitutional violations. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Thus, a *Bivens* claim is "simply the federal counterpart to § 1983 claims brought against state officials." *Egervary v. Young,* 366 F.3d 238, 246 (3d Cir.2004) (citing *Brown v. Philip Morris, Inc.,* 250 F.3d 789, 800 (3d Cir. 2001)).

A. LAWRENCE'S COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS

Upon conducting the statutorily-imposed screening review of the complaint, it is evident that Lawrence's claims should be dismissed as time-barred. (Doc. 1, at 1-3). A complaint is subject to dismissal for failure to state a claim on statute of limitations grounds if it is apparent on the face of the complaint that the action was untimely filed. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 n.1 (3d Cir. 1994); *Braun v. Gonzales*, 557 F. App'x 176, 179 (3d Cir. 2014) (non precedential) (finding that "where the statute of limitations] defense is obvious from the face of the complaint and no development of the record is necessary, a court may dismiss a time-barred complaint *sua sponte* under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim.") (quoting *Fogle v. Pierson,* 435 F.3d 1252, 1258 (10th Cir.2006)). Section § 1983

actions, as well as *Bivens* actions, are "governed by the statute of limitations that applies to personal injury tort claims in the state in which such a claim arises." *Kach v. Hose*, 589 F.3d 626, 639 (3d Cir. 2009); *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1087 (3d Cir. 1988); *see also Burnett v. Grattan,* 468 U.S. 42, 49 (1984) (holding that "[i]t is now settled that federal courts will turn to state law for statutes of limitations in actions brought under these civil rights statutes."). The actions forming the basis of the complaint occurred in the Commonwealth of Pennsylvania; thus, Pennsylvania's two-year statutory limitations period for personal injury tort claims applies to Lawrence's action. *See* 42 Pa. Cons. Stat. § 5524(7); *Kost v. Kozakiewicz*, 1 F.3d 176, 189-90 (3d Cir. 1993) (holding that Pennsylvania's two-year statute of limitations applies to claims for violations of constitutional rights brought under 42 U.S.C. § 1983 and *Bivens*).

"Under federal law, a cause of action accrues, and the statute of limitations begins to run, 'when the plaintiff knew or should have known of the injury upon which its action is based.'" *Kach*, 589 F.3d at 634 (quoting *Sameric Corp. v. City of Phila.*, 142 F.3d 582, 599 (3d Cir. 1998)). Here, even when taken as true in the light most favorable to Lawrence, none of the wrongful acts alleged occurred within two years of when he commenced this action on April 20, 2018. Specifically, Lawrence's claims against the DA's Office appear to be based on their decision to investigate and arrest him sometime in 1997, in violation of the fourth and fourteenth amendments as he "had no prior record for drugs." (Doc. 1, at 3). Lawrence further asserts that Attorney Bascom failed to provide him with meaningful representation as it pertained to his PCRA petition, despite being court appointed as Lawrence's counsel at some point before May 31, 2002. (Doc. 1, at 2, 72, 74). As a result, Lawrence obtained new representation on July 18, 2002, and seemingly claims that the new attorney prejudiced him by

not actively pursuing his case until the year 2006.[7] (Doc. 1, at 2-3). Additionally, although vague, the only factual allegations levied against the INS appear to relate to their commencement of removal proceedings, their unfavorable citizenship determination, and Lawrence's ultimate deportation.[8] (Doc. 1, at 2, 77-78). However, Lawrence's pleading reveals that the INS had already deported him from the United States by July 17, 2006. (Doc. 1, at 18, 32). Thus, upon careful review of the complaint, Lawrence does not allege any subsequent wrongful acts by the named Defendants after July 17, 2006. (Doc. 1, at 1-3). Moreover, additional development of the record is unnecessary, as the complaint does not present any plausible basis for equitable tolling.[9] It is therefore facially apparent that the instant action,

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[7] Although the complaint does not identify the new attorney, Stephanie Cooper, as a Defendant, she formally withdrew as Lawrence's counsel on August 16, 2006. *Commonwealth v. Long*, No. CP-14-CR-0000821-1997 (Centre Cnty. C.C.P.); *Commonwealth v. Long*, No. CP-14-CR-0000822-1997 (Centre Cnty. C.C.P.)

[8] The Court notes that insofar as Lawrence attempts to challenge the validity of his removal order, as the INS presumably entered one against him before his deportation, District Courts are without jurisdiction to consider such claims. As described by a District Court within this Circuit:

> In 1996, Congress amended the Immigration and Nationality Act (INA) by way of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) to preclude judicial review of any portion of a deportation proceeding other than final orders for removal, thereby vesting jurisdiction over orders for removal in the Circuit Courts of Appeal.
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> *Argueta v. U.S. Immigration & Customs Enf't*, No. CIV.A. 08-1652 (PGS), 2009 WL 1307236, at *12 (D.N.J. May 7, 2009) (citing *Reno v. Am.-Arab Anti–Discrimination Comm.*, 525 U.S. 471, 476, 119 S.Ct. 936, 142 L.Ed.2d 940 (2001)).

Thus, in deference to Lawrence's *pro se* status, Court construes his claims against the INS as if brought under *Bivens* for constitutional violations, independent of his ultimate removability or grounds for United States citizenship.

[9] "The doctrine of equitable tolling imposes on the plaintiff the obligation to exercise

(footnote continued on next page)

initiated by Lawrence on April 20, 2018, is untimely filed in light of Pennsylvania's two-year statute of limitations period. (Doc. 1); 42 Pa. Cons. Stat. § 5524(7).

Accordingly, as Lawrence commenced this lawsuit against the Defendants well beyond the two-year statute of limitations deadline for civil rights actions, the Court respectfully recommends the complaint be **DISMISSED WITH PREJUDICE** for failure to state a claim under § 1915(e)(2)(B)(ii).[10]

B. LEAVE TO AMEND

The Third Circuit has instructed that if a complaint is vulnerable to dismissal for failure to state a claim, the district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Grayson*, 293 F.3d at 108. "A district court has 'substantial leeway in deciding whether to grant leave to amend.'" *In re Avandia Mktg., Sales Practices & Products Liab. Litig.*, 564 F. App'x 672, 673 (3d Cir. 2014) (not precedential) (quoting *Lake v. Arnold*, 232 F.3d 360, 373 (3d Cir. 2000)). Here, leave to amend would be futile because it is clear from the face of complaint, even when construed in the light most favorable to Lawrence, that the statute of limitations lapsed more than eleven years ago. (Doc. 1). It is therefore respectfully recommended that Lawrence not be granted leave to file an amended complaint, and that all claims against each Defendant be dismissed with prejudice.

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reasonable diligence in not only investigating, but also bringing the claims." *McPherson v. United States*, 392 F. App'x 938, 945 (3d Cir. 2010) (citations omitted). Here, even if the alleged acts by the DA's Office, the INS, and Attorney Bascom all occurred on July 17, 2006, which is the last date alleged in the complaint, Lawrence still waited almost twelve years to initiate this action. Thus, even assuming without deciding that equitable tolling is warranted here, it would not cure Lawrence's failure to comply with the two-year statute of limitations requirement.

[10] As the Court finds this basis be dispositive of Lawrence's claims, it declines to determine whether alternative grounds for dismissal exist.

IV. RECOMMENDATION

Based on the foregoing, it is respectfully recommended that:

1. Plaintiff's motion to proceed *in forma pauperis* (Doc. 2) be **GRANTED**;
2. The complaint (Doc. 1) be **DISMISSED WITH PREJUDICE** for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii);
3. Leave to amend Plaintiff's complaint be **DENIED** as futile; and
4. The Clerk be directed to **CLOSE** this case.

BY THE COURT:

Dated: November 2, 2018

s/ Karoline Mehalchick

KAROLINE MEHALCHICK
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

DAVE LAWRENCE, Plaintiff, v. I.N.S., et al., Defendants.	CIVIL ACTION NO. 3:18-CV-00859 (MUNLEY, J.) (MEHALCHICK, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **November 2, 2018**. Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: November 2, 2018

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAVE LAWRENCE,	:	**No. 3:18cv859**
Plaintiff	:	
	:	**(Judge Munley)**
	:	
v.	:	**(Magistrate Judge Mehalchick)**
	:	
I.N.S., et al.,	:	
Defendants	:	

ORDER

AND NOW, to wit, this 17th day of April 2019, we have before us for disposition Magistrate Judge Karoline Mehalchick's report and recommendation, which proposes that the plaintiff's civil rights claim be dismissed.

No objections to the report and recommendation have been filed, and the time for such filing has passed. Therefore, in deciding whether to adopt the report and recommendation, we must determine if a review of the record evidences plain error or manifest injustice. FED. R. CIV. P. 72(b) 1983 Advisory Committee Notes ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record to accept the recommendation"); see also 28 U.S.C. § 636(b)(1); Sullivan v. Cuyler, 723 F.2d 1077, 1085 (3d Cir. 1983).

After a careful review, we find neither a clear error on the face of the record nor a manifest injustice. Accordingly, it is hereby **ORDERED** as follows:

1) The Magistrate Judge's report and recommendation (Doc. 3) is **ADOPTED**;

2) The plaintiff's civil rights claim (Doc. 1) is **DISMISSED** for failure to state a claim;

3) The plaintiff's motion to proceed *in forma pauperis* (Doc. 2) is **GRANTED**;

4) The motion for leave to amend the plaintiff's complaint is **DENIED** as moot; and

5) The Clerk of Court is directed to close this case.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court