In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13534

DOVER DAVIS, JR.,

Plaintiff-Appellant,

versus

OFFICER AARON SWANN,
in his individual capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:21-cv-03311-SDG

App. 1

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before ROSENBAUM, BRASHER, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

App. 2

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13534

DOVER DAVIS, JR.,

Plaintiff-Appellant,

versus

THE CITY OF ATLANTA, GA et al.,

Defendants,

OFFICER AARON SWANN,
in his individual capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

App 3

D.C. Docket No. 1:21-cv-03311-SDG

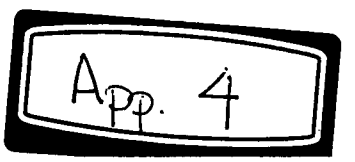
JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: February 19, 2025

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE: May 23, 2025



[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13534

Non-Argument Calendar

DOVER DAVIS, JR.,

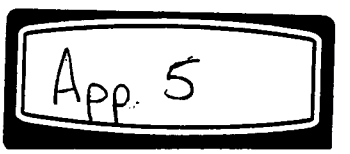
Plaintiff-Appellant,

versus

OFFICER AARON SWANN,
in his individual capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:21-cv-03311-SDG



Before ROSENBAUM, BRASHER, and TJOFLAT, Circuit Judges.

PER CURIAM:

Dover Davis, Jr., proceeding *pro se* and *in forma pauperis*, appeals the District Court's dismissal of his amended complaint. Davis sued Officer Aaron Swann of the Atlanta Police Department, an unnamed public defender, the Public Defender's Office, and an unspecified Atlanta prosecutor for a litany of constitutional violations arising from his arrest by Officer Swann and his subsequent prosecution. The District Court, conducting a 28 U.S.C. § 1915(e)(2) frivolity review of Davis's pleading, dismissed the amended complaint. After careful review, we affirm the District Court's judgment.

I[1]

On August 5, 2018, a resident of Davis's rooming house in Atlanta, Georgia, approached Officer Swann, who was responding to a nearby incident, and accused Davis of pointing a handgun at him. Officer Swann woke Davis and asked if he owned a firearm, which Davis denied. Davis's accuser, however, showed Officer Swann a picture, taken by their landlord Robert Davis, of a loaded handgun magazine in Davis's room.[2]

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[1] For purposes of reviewing the District Court's frivolity determination, we accept as true Davis's allegations. *See Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997).

[2] We refer to Robert Davis as "Robert" hereinafter to avoid confusion.

Apparently, Davis and Officer Swann had interacted the day before when Robert called Officer Swann to evict Davis from the residence. Officer Swann allegedly attempted to coerce Davis to leave the residence. In response, Davis filed a verbal complaint against Officer Swann. So, when Officer Swann aggressively confronted Davis about the firearm, Davis felt that Officer Swann was acting maliciously either to force an unlawful eviction or incite a violent altercation. Davis therefore exited the premises and began moving belongings into his car. Inside the car, Davis had forgotten, was the handgun he denied owning.

Officer Swann divided his attention between Davis's residence and the incident to which he was originally responding. As Davis waited to speak with Officer Swann about the forgotten handgun, a new dispute arose when the cotenant refused to allow Davis's reentry into their rooming house. Davis waited at his car's open trunk to show Officer Swann his gun stored there, but the cotenant shouted that Davis had just removed the gun from his pants and placed it in the car. When more investigators arrived, Officer Swann warrantlessly arrested Davis for aggravated assault with a deadly weapon. Davis was ultimately charged with aggravated assault with a deadly weapon and possession of a firearm during commission of a felony.

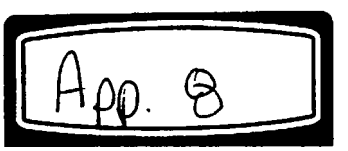
The next day, August 6, 2018, Davis was scheduled to attend a preliminary hearing on probable cause. But the Public Defender's Office did not send anyone to take Davis to the hearing and represent him. Nevertheless, on or about August 13, 2018, a

representative of the Public Defender's Office pressured Davis to sign a backdated waiver of his right to a preliminary hearing. Davis was released after his bond hearing on August 21, 2018.

When Davis was arraigned, his assigned public defender informed him of the prosecutor's plea offer. Davis refused the offer, so the public defender exited the courtroom and abandoned Davis at the hearing. And while charges were pending against Davis, the cotenant who accused Davis of aggravated assault was himself charged with aggravated assault. But unlike her treatment of Davis, the prosecutor dismissed the cotenant's charge. Davis alleges that the prosecutor not only treated them differently, but withheld evidence of the cotenant's charge from the judge even as the prosecutor relied on the cotenant as the primary witness against Davis. Further, Davis alleges that the prosecutor intentionally prolonged pretrial discovery until May 20, 2021, when a new prosecutor dismissed the charges against Davis. But during the pendency of the prosecution, Davis's felony charges had greatly disrupted his employment, finances, and housing.

* * *

Davis filed a complaint *pro se* and *in forma pauperis* in the District Court for the Northern District of Georgia on August 16, 2021. The complaint's caption identified the City of Atlanta, Officer Swann, and Davis's unnamed public defender as defendants. However, the complaint actually targeted the City of Atlanta under various theories of liability for the purported conduct of Officer Swann, Davis's public defender, the Public Defender's Office, and



Davis's prosecutor. The District Court conducted a frivolity review under 28 U.S.C. § 1915(e)(2)(B) and dismissed the complaint, but allowed Davis leave to amend. Davis's amended complaint largely repeated the complaint's factual allegations and claims, but removed the City of Atlanta as the liable party. The District Court again conducted a frivolity review and dismissed Davis's amended complaint with prejudice.

Davis timely appeals. We address each of his arguments, as we understand them, in turn.

II

As an initial matter, Davis argues on appeal that the District Court erred by construing his *pro se* pleadings too strictly. The gravamen of his argument is that he pleaded sufficient facts to state plausible claims, but the District Court held his pleadings to an erroneously harsh standard.

Certainly, "[p]ro se pleadings are to be held to a less stringent standard than pleadings drafted by attorneys." *Byrd v. Stewart*, 811 F.2d 554, 555 (11th Cir. 1987) (citing *Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976)). We see no evidence that the District Court failed to do so. The District Court twice acknowledged its role in conducting a frivolity review under § 1915(e)(2)(B) and the standards which it was required to apply to Davis's *in forma pauperis* filings. It then made a valiant effort to disentangle the legal and factual bases for Davis's claims—no easy task. It adequately addressed those bases and provided an opportunity for Davis to amend his initial complaint and remediate any deficiencies in light of how the District

Court leniently construed Davis's claims. We conclude that the District Court appropriately assessed Davis's pleadings with the utmost flexibility.

III

We next address the District Court's dismissal of Counts I through IV of Davis's amended complaint for failure to state a claim. The District Court summarily disposed of these four counts by noting that they are largely the same as alleged in Davis's original complaint, which it previously dismissed for failure to state a claim.

In Count I, Davis alleges under 42 U.S.C. § 1983 that Officer Swann violated his Fourth Amendment rights by arresting him without probable cause.[3] In Count II, Davis alleges under § 1983 that Officer Swann violated the Fourteenth Amendment's Equal Protection Clause by solely arresting Davis even though Officer

[3] Although Davis appears to state in his appellate brief that Officer Swann maliciously prosecuted him in violation of the Fourth Amendment, Davis nowhere mentions malicious prosecution in his amended complaint's claims targeting Officer Swann. We cannot retroject Davis's argument into Count I of his amended complaint because "we examine the plaintiff's cause of action for what it actually is, not for what the plaintiff would have it be." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007) (citing *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994)). True, he later alleges that his prosecutor engaged in malicious prosecution in violation of the Fourth and Fourteenth Amendments, but we cannot "serve as *de facto* counsel" or "rewrite an otherwise deficient pleading in order to sustain an action" against Officer Swann. *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014) (quotation marks omitted).

Swann was aware that Robert had also engaged in criminal activity. In Count III, Davis alleges under § 1983 that the Public Defender's Office violated his Fourteenth Amendment due process rights by failing to assure Davis's attendance at his preliminary hearing and requesting through a representative that he waive this hearing in a backdated document. And in Count IV, Davis alleges under § 1983 that his assigned public defender violated his Sixth Amendment right to counsel by abandoning Davis at his arraignment when Davis refused to accept the prosecutor's plea offer.

Davis originally pleaded that the City of Atlanta was vicariously liable for all four of these claims. The District Court dismissed Davis's original counts involving Officer Swann as failing to state a claim because the claims were time-barred and because Davis pleaded inappropriate theories of municipal liability. The Court construed Davis's original claims involving the Public Defender's Office and his assigned public defender as § 1983 claims against his public defender, dismissing them for failure to state a claim against a state actor. Davis's amended complaint removes any mention of the City of Atlanta from these four claims, but he otherwise retains the same allegations.

On appeal, Davis contends that the District Court erred in dismissing these claims. His brief, though divided into ostensibly separate sections, can be distilled into two arguments: (1) the District Court erred because he pleaded sufficient facts to state

plausible claims; and (2) the District Court erred in concluding his claims are time-barred.[4]

We "review de novo the district court's dismissal of the complaint for failure to satisfy the statute of limitations." *Karantsalis v. City of Miami Springs*, 17 F.4th 1316, 1319 (11th Cir. 2021) (citing *Fedance v. Harris*, 1 F.4th 1278, 1283 (11th Cir. 2021)). In addition, we review a district court's dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii) de novo, using the same standards that govern dismissals under Fed. R. Civ. P. 12(b)(6). *See Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008).

We conclude that Davis's first two counts against Officer Swann are time-barred. "All constitutional claims brought under § 1983 are tort actions, subject to the statute of limitations governing personal injury actions in the state where the § 1983 action has been brought." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) (citing *Wilson v. Garcia*, 471 U.S. 261, 275–76, 105 S. Ct. 1938, 1946–47 (1985)). In Georgia, the applicable statute of limitations is two years. Ga. Code Ann. § 9-3-33. And a claim of false arrest or imprisonment under the Fourth Amendment accrues when either the seizure ends or the plaintiff is held pursuant to legal process.

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[4] Any additional arguments Davis could have made concerning the District Court's summary dismissal of these four counts, including any arguments predicated on the District Court's construction of the claims in Davis's original complaint, are abandoned. *See Sapuppo v. Allstate Floridian Ins.*, 739 F.3d 678, 681 (11th Cir. 2014); *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).

Williams v. Aguirre, 965 F.3d 1147, 1158 (11th Cir. 2020) (citing *Wallace v. Kato*, 549 U.S. 384, 388–89, 127 S. Ct. 1091, 1095–96 (2007)).

Davis's claims against Officer Swann stem from Davis's arrest on August 5, 2018. At that time, Officer Swann arrested Davis but not Robert—who entered Davis's room and took photographs without permission—allegedly in violation of the Fourteenth Amendment. Davis would or should have been aware that the facts supporting this Fourteenth Amendment claim accrued on the date of his arrest. *See Karantsalis*, 17 F.4th at 1322 (citing *Rozar v. Mullis*, 85 F.3d 556, 561–62 (11th Cir. 1996)). He had two years under § 9-3-33 to bring this claim, but the statute had run by the time he filed his complaint on August 16, 2021.

Further, according to Davis, Officer Swann arrested him without probable cause in violation of the Fourth Amendment. Davis waived his preliminary hearing on probable cause on or about August 13, 2018, at which point he was held pursuant to legal process. His Fourth Amendment claim accrued at this point. *See Aguirre*, 965 F.3d at 1158. Even if we accept Davis's claims that this waiver was suspect and improper, Davis's incarceration ended after his bond hearing on August 21, 2018. Taking Davis's release as the latest time when his Fourth Amendment claim accrued, the two-year statute of limitations had run by the time he filed his complaint on August 16, 2021.

Davis's argument that Ga. Code Ann. § 9-3-99 tolled his claims is unconvincing. That statute tolls "any cause of action in tort that may be brought by the victim of an alleged crime which

arises out of the facts and circumstances relating to the commission of such alleged crime" until the prosecution of the crime is terminated or final, but no longer than six years. Ga. Code Ann. § 9-3-99. It applies to actions brought by crime *victims*. *Williams v. Durden*, 819 S.E.2d 524, 525 (Ga. Ct. App. 2018); *Harrison v. McAfee*, 788 S.E.2d 872, 876 (Ga. Ct. App. 2016); *Armstrong v. Cuffie*, 860 S.E.2d 504, 508 (Ga. 2021). It does not toll the statute of limitations for pending criminal charges against *the plaintiff*. *Toliver v. Dawson*, 896 S.E.2d 714, 718 (Ga. Ct. App. 2023). Davis therefore cannot rely on the statute to vivify his time-barred claims.

As to Davis's claims against the Public Defender's Office and his assigned public defender, we conclude that he has failed to state a claim under § 1983. "In order to prevail on a civil rights action under § 1983, a plaintiff must show that he or she was deprived of a federal right by a person acting under color of state law." *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1303 (11th Cir. 2001) (citing *Almand v. DeKalb Cnty., Ga.*, 103 F.3d 1510, 1513 (11th Cir. 1997)). "[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk Cnty. v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 453–54 (1981). Davis's claim that his assigned public defender abandoned him, though disconcerting, does not constitute a viable § 1983 claim absent sufficient allegations of conspiracy with a person who was acting under color of state law. *See Wahl v. McIver*, 773 F.2d 1169, 1173 (11th Cir. 1985). As to Davis's claim against the Public Defender's Office, Davis has not alleged any factual or legal basis that the Office was a state actor within the

meaning of § 1983 when it purportedly failed to take Davis to his preliminary hearing. To the extent his claim rests on the alleged conduct of the Office's representative, § 1983 does not support a claim based on *respondeat superior* nor has Davis alleged in his amended complaint the existence of any policy that could subject the Office to liability. *See Polk Cnty.*, 454 U.S. at 325–26, 102 S. Ct. at 453–54; *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037 (1978).

IV

Davis also appeals the District Court's dismissal of Count V of his amended complaint for failure to state a claim. In Count V, Davis alleges that his prosecutor engaged in malicious prosecution in violation of the Fourth and Fourteenth Amendments by withholding exculpatory evidence, discriminating against Davis by dismissing another defendant's aggravated assault charge but not dismissing Davis's aggravated assault charge, and intentionally prolonging Davis's prosecution without probable cause for three years before dropping the case.[5]

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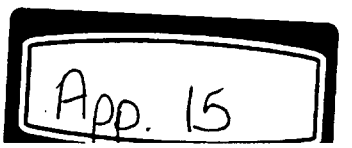
[5] The exact nature of Davis's intended claims is not entirely clear. He styles Count V of his amended complaint as a Fourth Amendment malicious prosecution claim and a Fourteenth Amendment malicious prosecution claim against the Prosecutor's Office. He then variously alleges that one prosecutor withheld evidence, prosecuted Davis without probable cause, treated Davis differently than another defendant charged with the same crime, deprived Davis of a speedy trial, and denied counsel to Davis. Davis further muddles his claims by stating that three different prosecutors handled his case and referring



The District Court construed Davis's Count V as alleging the prosecutor engaged in malicious prosecution and violated the Equal Protection Clause of the Fourteenth Amendment. It dismissed Davis's claims as barred by the doctrine of absolute immunity. It also determined that Davis failed to state an Equal Protection Clause claim. Again distilling Davis's arguments on appeal, we understand Davis as contending that the District Court erred in dismissing these claims because: (1) Davis pleaded sufficient facts to state a plausible claim; and (2) the District Court erroneously understood the required elements of a § 1983 claim that alleges violations of the Fourteenth Amendment's Equal Protection Clause.

However we construe Davis's amended complaint and appellate brief, we conclude that Davis has failed to challenge the basis of the District Court's dismissal of his claims against the prosecutor. "To obtain reversal of a district court judgment that is based on multiple, independent grounds, an appellant must convince us that every stated ground for the judgment against him is incorrect."

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to the targeted prosecutor with different names in his amended complaint and appellate brief.

The District Court construed Count V as only targeting an individual prosecutor, not the Prosecutor's Office. Given Davis's repeated emphasis throughout his amended complaint and appellate brief that an individual prosecutor engaged in the alleged misconduct, his failure to object to the District Court's characterization of his claims, the absence of any suggestion of vicarious liability, and the lack of any allegations anywhere against the Prosecutor's Office as an entity, we, too, construe Count V as targeting an individual prosecutor.

Sapuppo, 739 F.3d at 680. So "[w]hen an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." *Id.* (citing *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306 (11th Cir. 2012)). The District Court dismissed Davis's claims in Count V on the basis of the prosecutor's immunity; Davis nowhere in his appellate brief even mentions prosecutorial immunity. Davis instead addresses the District Court's supplementary discussion of the Equal Protection Clause and continues to argue that he pleaded sufficient facts to state a claim. Thus, Davis has abandoned any challenge to the District Court's overriding rationale for dismissing his claims against the prosecutor, and it follows that the District Court's dismissal must be affirmed.[6]

V

For these reasons, the District Court did not err in dismissing Davis's amended complaint. Therefore, we affirm the judgment of the District Court.

AFFIRMED.

[6] We also deny as moot Davis's Motion to Supplement the Record.

General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 23-13534
Nature of Suit: 3440 Other Civil Rights
Dover Davis, Jr. v. Aaron Swann
Appeal From: Northern District of Georgia
Fee Status: IFP Granted

Docketed: 10/24/2023
Termed: 02/19/2025

Case Type Information:
1) Private Civil
2) Federal Question
3) -

Originating Court Information:
District: 113E-1 : 1:21-cv-03311-SDG
Civil Proceeding: Steven D. Grimberg, U.S. District Judge
Secondary Judge: Justin S. Anand, U.S. Magistrate Judge
Date Filed: 08/13/2021
Date NOA Filed:
10/23/2023

Prior Cases:
None

Current Cases:
None

DOVER DAVIS, II	Plaintiff - Appellant	Dover Davis, II Direct: 470-618-2786 [NTC Pro Se] Firm: 678-485-9898 PO BOX 150485 ATLANTA, GA 30315
versus		
AARON SWANN	Defendant - Appellee	

P.

App. 18

10/24/2023	☐ 1 15 pg, 546.84 KB	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Dover Davis, Jr. on 10/23/2023. Fee Status: IFP Pending. USDC motion pending: APPLICATION to Appeal in forma pauperis DE#17 MOTION for Leave to File Appeal DE#18. Awaiting Appellant's Certificate of Interested Persons due on or before 11/09/2023 as to Appellant Dover Davis Jr. [Entered: 10/26/2023 11:41 AM]
11/09/2023	☐ 2 2 pg, 685.9 KB	TRANSCRIPT INFORMATION form filed by Party Dover Davis, Jr.. No hearings. [Entered: 11/16/2023 08:27 AM]
11/09/2023	☐ 3 2 pg, 794.51 KB	Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Dover Davis, Jr.. [Entered: 11/16/2023 08:28 AM]
02/06/2024	☐ 4 3 pg, 168.15 KB	USDC order granting IFP as to Appellant Dover Davis, II was filed on 01/31/2024. Docket Entry 22. [Entered: 02/06/2024 11:26 AM]
02/06/2024	☐ 5 2 pg, 87.89 KB	Briefing Notice issued to Appellant Dover Davis, II. The appellant's brief is due on or before 03/11/2024. The appendix is due no later than 7 days from the filing of the appellant's brief. [Entered: 02/06/2024 11:28 AM]
02/17/2024	☐ 6 4 pg, 192.39 KB	*MOTION for appointment of counsel filed by Dover Davis, II. Opposition to Motion is Unknown. [6]* [23-13534] (ECF: Dover Davis) [Entered: 02/17/2024 04:02 PM]
02/21/2024	☐ 7 1 pg, 84.23 KB	The briefing schedule issued to Appellant Dover Davis, II is hereby rescinded for the following reason(s): MOTION for appointment of counsel filed by Appellant. When the above matter(s) is resolved, the clerk will issue a notice advising counsel and the parties of the new schedule for filing briefs in this appeal. [Entered: 02/21/2024 10:18 AM]
06/14/2024	☐ 8 3 pg, 128.15 KB	ORDER: Dover Davis, Jr.'s motion for appointment of counsel is DENIED. [6] ELB [Entered: 06/14/2024 10:35 AM]
07/10/2024	☐ 9 3 pg, 222.11 KB	*MOTION for reconsideration of single judge's order filed by Dover Davis, II. Opposition to Motion is Unknown. [9]* [23-13534]–[Edited 07/10/2024 by OCK to correct docket text] (ECF: Dover Davis) [Entered: 07/10/2024 02:18 PM]
07/19/2024	☐ 10	An over the phone extension has been granted by the clerk as to Party Dover Davis, II. Appellant's brief due on 08/23/2024 as to Appellant Dover Davis II. The Appendix is due 7 days after the filing of the brief. **Any request for a second or subsequent extension of time shall be subject to 11th Cir. R. 31-2(d).** [Entered: 07/19/2024 09:29 AM]
07/19/2024	☐ 11 2 pg, 20.42 KB	ORDER: Dover Davis, Jr., has filed a motion for reconsideration of this Court's order dated June 14, 2024, denying his motion for appointment of counsel. Because Davis has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, this motion for reconsideration is DENIED. [9] ELB and BL (See attached order for complete text) [Entered: 07/19/2024 09:39 AM]
08/23/2024	☐ 12 75 pg, 3.15 MB	Appellant's brief filed by Dover Davis, II. [23-13534] (ECF: Dover Davis) [Entered: 08/23/2024 06:09 PM]
08/26/2024	☐ 13 6 pg, 193.22 KB	Returned Mail was received for Party Dover Davis, II. IN RE: 06/14/2024 Order. [Entered: 08/28/2024 09:33 AM]
08/29/2024	☐ 14 162 pg, 7.32 MB	Appendix filed [1 VOLUMES] by Appellant Dover Davis, II. [23-13534] (ECF: Dover Davis) [Entered: 08/29/2024 05:09 PM]
08/30/2024	☐ 15 5 pg, 170.43 KB	*MOTION to correct or amend brief filed by Dover Davis, II. Opposition to Motion is Unknown. [15]* [23-13534] (ECF: Dover Davis) [Entered: 08/30/2024 01:10 PM]
08/30/2024	☐ 16 75 pg, 3.14 MB	Corrected Appellant's Brief filed by Appellant Dover Davis, II. [23-13534] (ECF: Dover Davis) [Entered: 08/30/2024 01:12 PM]
08/30/2024	☐ 17 166 pg, 7.84 MB	Corrected Appendix filed [1 VOLUMES] by Appellant Dover Davis, II. [23-13534] (ECF: Dover Davis) [Entered: 08/30/2024 01:13 PM]
08/30/2024	☐ 18 3 pg, 290 KB	Notice of receipt: Notice of Address Change as to Appellant Dover Davis, II. NO ACTION WILL BE TAKEN: Once a non-incarcerated pro se party has registered to use the ECF system, such party is required to do so unless the court grants the partys request to not use the system. See 11th Cir. R. 25-3 (c). You may update your address via PACER. [Entered: 09/04/2024 01:52 PM]
09/05/2024	☐ 19	ORDER: Motion to correct or amend brief and appendix filed by Appellant Dover Davis, II is GRANTED by clerk [15]. [Entered: 09/05/2024 08:11 AM]
10/18/2024	☐ 20	Notice of deficient Brief and Appendix filed by Dover Davis, II. The required paper copies have not been received. Please promptly submit the paper copies. [Entered: 10/18/2024 09:53 AM]
12/30/2024	☐ 21	NOTICE: Notice to Parties from Appellant Appellant is sending in 4 briefs and 1 appendix within 10 days.. [Entered: 12/30/2024 08:53 AM]
01/15/2025	☐ 22	Received 4 paper copies of Brie[redacted] II. [Entered: 02/03/2025 10:02 AM]
01/15/2025	☐ 23	Received 1 paper copy of Appe[redacted]vis, II. [Entered: 02/03/2025 10:07 AM]

App 19

19.

02/19/2025	☐ 25 15 pg, 179.79 KB	Opinion issued by court as to Appellant Dover Davis, II. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam. Motion to supplement the record filed by Appellant Dover Davis, II is DENIED as MOOT. [24]. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions. [Entered: 02/19/2025 03:59 PM]
02/19/2025	☐ 26 2 pg, 26.58 KB	Judgment entered as to Appellant Dover Davis, II. [Entered: 02/19/2025 04:01 PM]
03/05/2025	☐ 27 3 pg, 120.38 KB	*MOTION for extension of time to file a Motion for Reconsideration to 03/05/2025 filed by Dover Davis, II. Motion is Unopposed. [27]* [23-13534] (ECF: Dover Davis) [Entered: 03/05/2025 05:33 PM]
03/06/2025	☐ 28	ORDER: Motion for extension of time to file request for rehearing filed by Appellant Dover Davis, II, is GRANTED by clerk to and including 04/02/2025. [27]. [Entered: 03/06/2025 08:34 AM]
03/06/2025	☐ 29 8 pg, 360.71 KB	*MOTION for extension of time to file request for rehearing to 03/05/2025 filed by Dover Davis, II. Motion is Unopposed. [29]* [23-13534] (ECF: Dover Davis) [Entered: 03/06/2025 11:11 AM]
03/07/2025	☐ 30	NOTICE TO APPELLANT: The motion for a 21-day extension of time to file rehearing was granted on 03/06/2025. Appellant's rehearing is due 04/02/2025. [Entered: 03/07/2025 10:51 AM]
04/02/2025	☐ 31 30 pg, 1.19 MB	Petition for rehearing en banc (with panel rehearing) filed by Appellant Dover Davis, II. [23-13534] (ECF: Dover Davis) [Entered: 04/02/2025 01:50 PM]
04/07/2025	☐ 32	Notice of deficient motion filed by Dover Davis, II. The motion for appointment of counsel must be separately filed from the petition for panel rehearing and rehearing en banc. No action will be taken on the motion unless it is separately filed. [Entered: 04/07/2025 09:45 AM]
04/08/2025	☐ 33 7 pg, 294.38 KB	*MOTION for appointment of counsel filed by Dover Davis, II. Opposition to Motion is Unknown. [33]* [23-13534] (ECF: Dover Davis) [Entered: 04/08/2025 01:37 PM]
04/08/2025	☐ 34	Received paper copies of E-PFR filed by Appellant Dover Davis, II. [Entered: 04/11/2025 08:23 AM]
05/14/2025	☐ 35 3 pg, 104.61 KB	ORDER: The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40. [35] [Entered: 05/14/2025 02:31 PM]
05/23/2025	☐ 36 3 pg, 118.55 KB	Mandate issued as to Appellant Dover Davis, II. [Entered: 05/23/2025 08:52 AM]
05/23/2025	☐ 37 2 pg, 19.9 KB	ORDER: Motion for appointment of counsel filed by Appellant Dover Davis, II is DENIED as MOOT. [33] ENTERED FOR THE COURT - BY DIRECTION. (See attached order for complete text) [Entered: 05/23/2025 11:37 AM]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOVER DAVIS, JR., Plaintiff, vs. OFFICER AARON SWANN, Defendant.	CIVIL ACTION FILE NO. 1:21-cv-03311-SDG

JUDGMENT

This action having come before the court, Honorable Steven D. Grimberg, United States District Judge, for a frivolity determination pursuant to 28 U.S.C. §1915, and the court having made such determination, it is

Ordered and Adjudged that the action be **DISMISSED** as frivolous.

Dated at Atlanta, Georgia, this 29th day of September, 2023.

KEVIN P. WEIMER
CLERK OF COURT

By: s/ T. Tran
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 29, 2023
Kevin P. Weimer
Clerk of Court

By: s/ T. Tran
Deputy Clerk

App 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOVER DAVIS, JR.,
Plaintiff,

v.

OFFICER AARON SWANN, *in his individual capacity*,
Defendant.

Civil Action No.
1:21-cv-03311-SDG

OPINION AND ORDER

This matter is before the court on a frivolity review of Plaintiff's Amended Complaint [ECF 10] pursuant to 28 U.S.C. § 1915(e)(2), as well as Plaintiff's motion to reopen his case [ECF 11] and motion to appoint counsel [ECF 9]. The Court finds that Plaintiff's Amended Complaint does not survive frivolity review and must be dismissed. Plaintiff's motion to appoint counsel and motion to reopen his case are therefore **DENIED AS MOOT.**

I. BACKGROUND

In his original Complaint, Plaintiff alleged several Section 1983 violations.[1] Specifically, Plaintiff complained that his public defender, "Officer Swann," and

[1] ECF 3, at 19–32.

the City of Atlanta violated his Fourth, Fifth, Sixth, and Fourteenth Amendment rights.[2]

In an Opinion and Order issued on September 29, 2022, the Court dismissed Plaintiff's original Complaint for failure to state a claim.[3] The Court dismissed Plaintiff's case without prejudice and granted Plaintiff thirty days to amend.[4] Plaintiff timely filed his Amended Complaint on October 28, 2022.[5] Plaintiff also filed a separate "Response to the Court's Opinion and Order."[6] Plaintiff has since filed two additional motions: a motion to appoint counsel[7] and a motion to reopen the case.[8] Plaintiff's Amended Complaint technically names only "Officer Aaron Swann", in his individual capacity, as a defendant, but nonetheless includes claims against other parties throughout the complaint.[9]

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2 *Id.*

3 ECF 7.

4 *Id.*

5 ECF 10.

6 ECF 8. Plaintiff's filing identifies two reasons he believes this Court erred in its September 2022 Order. However, this is a procedurally improper way to lodge objections to a Court order. If Plaintiff wishes to challenge the Court's judgment, he must raise these arguments on appeal.

7 ECF 9.

8 ECF 11.

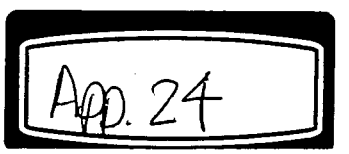
9 ECF 10; ECF 8, at 2.

Because Plaintiff's Amended Complaint alleges the same facts as his original Complaint, this Order incorporates the "Background" section of the September Order.[10]

II. LEGAL STANDARD

An *in forma pauperis* complaint must be dismissed "if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). The purpose of § 1915(e)(2) is "to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989), *superseded by statute on other grounds as recognized in Christiansen v. Clarke*, 147 F.3d 655, 658-59 (8th Cir. 1998). *See also Ahumed v. Fed. Nat'l Mortg. Ass'n*, No. 1:11-cv-2175-ODE-RGV, 2011 WL 13318915, at *2 (N.D. Ga. Dec. 13, 2011) ("[T]he purpose of the frivolity review is to filter non-paying litigants' lawsuits through a screening process functionally similar to the one created by the financial

[10] ECF 7, at 1-5.



disincentives that help deter the filing of frivolous lawsuits by paying litigants.") (citing *Cofield v. Ala. Pub. Serv. Comm'n*, 936 F.2d 512, 515 (11th Cir. 1991)).

A *sua sponte* dismissal by the Court is authorized under § 1915(e)(2) prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering frivolous complaints. *Neitzke*, 490 U.S. at 324. In the context of a frivolity determination, the Court's authority to "pierce the veil of the complaint's factual allegations" means that it is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. *Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (quoting *Neitzke*, 490 U.S. at 327).

A claim is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke*, 490 U.S. at 325. "Arguable means capable of being convincingly argued." *Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991) (per curium) (internal quotation marks omitted) (citations omitted). A claim that is arguable, "but ultimately will be unsuccessful, . . . should survive frivolity review." *Cofield*, 936 F.2d at 515. But a complaint is frivolous when it appears "from the face of the complaint that the factual allegations are 'clearly baseless' or that the legal theories are 'indisputably

meritless.'" *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (citations omitted). *See also Neitzke*, 490 U.S. at 327.

III. ANALYSIS

Plaintiff largely asserts the same legal claims in the Amended Complaint as he did in the original Complaint. The only addition is Count V, which asserts a malicious prosecution claim in violation of the Fourth and Fourteenth Amendments.[11] Specifically, Plaintiff asserts that the use of Boyd's testimony throughout his prosecution and the dismissal of Boyd's assault charge before Plaintiff's criminal charges were dismissed constitute malicious prosecution.[12]

First, Plaintiff argues his Fourth Amendment rights were violated by the prosecutor in his case who "hid exculpatory evidence that would have proven his innocence, while discriminating against him and prosecuting his case for three years without evidence."[13] Plaintiff argues that information regarding Boyd's criminal history was "exculpatory,"[14] so "[t]he court should have been informed [of Boyd's arrest] and an assessment of Boyd's credibility should have been

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11 *See* ECF 10, at 42–44.

12 *Id.*

13 *Id.* at 44.

14 *Id.*

undertaken." However, such "an assessment was not done[,] and Boyd's criminal behavior was not mentioned."[15]

The full extent to which information regarding Boyd's criminal record was shared with Plaintiff's criminal counsel is unclear. The Amended Complaint states that information relating to Boyd's criminal history "was either withheld by the prosecutor or shared with the plaintiff's attorney who didn't file one motion or formerly object, which leads the plaintiff to conclude that the prosecutor...and his Attorney...plotted and conspired to suppress this evidence."[16] Plaintiff also argues his "attorney...knew or should have known or been informed of Boyd's crimes and motioned for dismissal, but he did not."[17] Finally, Plaintiff states that he notified his public defender "that Boyd lied and had an extensive record in Florida, the public defender said 'Boyd's criminal record is not admissible.'"[18] Plaintiff's malicious prosecution claim appears to be rooted in his contention that the judge in Plaintiff's criminal case should have been notified of Boyd's arrest and was not.

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15 *Id.*

16 *Id.* ¶ 48.

17 *Id.* ¶ 53.

18 *Id.* ¶ 46.

Second, Plaintiff argues that the prosecutor's actions violated the Equal Protection Clause of the Fourteenth Amendment.[19] Plaintiff alleges he was "treated differently 'under the law' because his charges of Aggravated Assault were not dismissed when Boyd's charges of Aggravated Assault were dismissed."[20] He contends that this difference amounts to malicious prosecution.

A. Plaintiff cannot bring a claim against the prosecutor pursuant to Section 1983.

As a preliminary matter, Plaintiff's malicious prosecution claim is not time-barred. Plaintiff had two years from the date his charges were dismissed to file a malicious prosecution action under Section 1983. *See Smith v. Mitchell*, 856 F. App'x 248, 249 (11th Cir. 2021). Plaintiff's criminal case was dismissed on May 20, 2021,[21] and he brought his first claim for malicious prosecution in his Amended Complaint less than two years later, on October 28, 2022.[22] Consequently, Plaintiff's malicious prosecution claim is not time-barred.

Plaintiff's malicious prosecution claim fails nonetheless as it is barred by the doctrine of absolute immunity. Prosecutors have absolute immunity under Section

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19 *See id.* at 43–44.

20 *Id.* at 43.

21 ECF 10, ¶ 48.

22 ECF 10.

1983 for "initiating a prosecution and presenting the State's case," for appearing before a court, and for conduct in the courtroom. *Hart v. Hodges*, 587 F.3d 1288, 1295 (11th Cir. 2009) (citations omitted). They are entitled to absolute immunity for acts (1) "undertaken in preparing for the initiation of judicial proceedings or for trial" and (2) that occur "in the course of the prosecutor's role as an advocate for the State." *Maps v. Miami Dade State Att'y*, 693 F. App'x 784, 786 (11th Cir. 2017). A prosecutor's entitlement to absolute immunity does not change even when "filing a baseless detainer, offering perjured testimony, *suppressing exculpatory evidence*, refusing to investigate . . . complaints about the prison system, [and] threatening . . . further criminal prosecutions . . . ." *Hart*, 587 F.3d at 1295 (emphasis added) (quotations removed) (quoting *Henzel v. Gerstein*, 608 F.2d 654, 657 (5th Cir. 1979)).

In short, a prosecutor "enjoys absolute immunity from allegations stemming from the prosecutor's function as advocate." *Hart*, 587 F.3d at 1295 (quoting *Jones v. Cannon*, 174 F.3d 1271, 1281 (11th Cir. 1999)). Because Plaintiff's claim in this case relate only to the prosecutor's conduct as an advocate, the prosecutor is entitled to absolute prosecutorial immunity.

B. Plaintiff fails to state a claim for a violation of equal protection.

Although it is unnecessary for the Court to decide the legal sufficiency of Plaintiff's equal protection claims, these allegations would not survive a Rule 12(b)(6) analysis in any event. Plaintiff has not sufficiently alleged that *similarly situated* individuals were treated differently.

Plaintiff alleges that the dismissal of Boyd's charges before his own "constitutes [i]ntentional [d]iscrimination against the plaintiff who is in a protected class."[23] However, Plaintiff does not identify the protected class of which he is allegedly a member.[24] Plaintiff's conclusory assertion that his Fourteenth Amendment rights were violated by the dismissal of Boyd's aggravated assault charge before his own is not sufficiently particularized to state a claim. *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1275 (11th Cir. 2008) ("Douglas must do more than assert that other, unidentified contractors were given better treatment . . . ."); *see also GJR Invs., Inc. v. Cnty. of Escambia,* 132 F.3d 1359, 1367-68 (11th Cir. 1998), *overruled on other grounds by Peers v. Brown,* No. 21-13089, 2023 WL 3613667 (11th Cir. May 24, 2023) ("Bare allegations that 'other' applicants, even 'all other'

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23 *Id.*

24 *See id.*

applicants, were treated differently do not state an equal protection claim . . . ."). Consequently, Plaintiff's Equal Protection claim fails.

C. Plaintiff's motion to appoint counsel is denied.

Plaintiff first requested appointment of counsel on February 18, 2022.[25] This Court denied that request, finding that "the facts and legal issues are not so novel or complex at this stage as to require the appointed assistance of counsel."[26] On October 28, 2022, Plaintiff again requested the appointment of counsel.[27] Nothing in the Amended Complaint changes the Court's previous analysis nor its decision to deny the appointment of counsel. Since the Amended Complaint is frivolous and the case will be dismissed, Plaintiff's motion to appoint counsel is moot.

D. Plaintiff's motion to reopen the case is denied.

After this Court dismissed Plaintiff's original Complaint, it directed the Clerk to administratively close the case pending Plaintiff's timely submission of an amended complaint.[28] Plaintiff timely filed his Amended Complaint.[29] He then moved to reopen his case for the purpose of considering his Amended Complaint,

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25 ECF 6.

26 ECF 7, at 13.

27 ECF 9.

28 ECF 7, at 13.

29 ECF 10.

which was not necessary considering the Court's instruction that his case would only be closed pending submission of an amended complaint. His motion was therefore unnecessary and denied as moot.

IV. CONCLUSION

The Court finds that Plaintiff's Amended Complaint fails to state a claim and orders that this case be **DISMISSED WITH PREJUDICE** under Section 1915(e). Plaintiff's motion to appoint counsel [ECF 9] and Plaintiff's motion to reopen his case [ECF 11] are **DENIED AS MOOT.** The Clerk of Court is **DIRECTED** to close this case.

SO ORDERED this 29th day of September, 2023.

Steven D. Grimberg
United States District Court Judge

App. 32

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOVER DAVIS, JR.,
Plaintiff,

v.

THE CITY OF ATLANTA, GA, *et al.*,
Defendants.

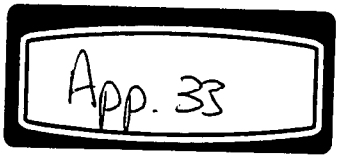
Civil Action No.
1:21-cv-03311-SDG

OPINION AND ORDER

This matter is before the Court on a frivolity review of Plaintiff's Complaint [ECF 3] pursuant to 28 U.S.C. § 1915(e)(2) as well as Plaintiff's motion to appoint counsel [ECF 6]. The Court finds that Plaintiff has failed to state a claim for relief. Additionally, Plaintiff's motion to appoint counsel is **DENIED without prejudice.**

I. BACKGROUND

On August 16, 2022, *pro se* Plaintiff's application to proceed *in forma pauperis* was granted and he filed the instant complaint. That pleading details a litany of events taking place over the course of about two years. His Complaint begins with a description of an altercation that occurred in August 2018 and ends with an explanation of the deficiencies in the subsequent related criminal proceedings in state court.



The following allegations are taken from Plaintiff's Complaint and assumed to be true for purposes of this Order. On August 4, 2018, Officer Aaron Swann was called to Plaintiff's home by his landlord, Robert Davis.[1] Officer Swann attempted to evict Plaintiff at the request of Davis, who was personal friends with Officer Swann. After a number of alleged threats and intimidating tactics, Plaintiff ultimately agreed that he would vacate his house, though he did not specify a time.[2] However, Plaintiff was upset by Officer Swann's unprofessional behavior and filed a verbal complaint with Officer Swan's precinct later that same day.[3]

The following day, while Plaintiff was sleeping in his bedroom, he was awoken by Officer Swann banging on his bedroom door and shouting "Police!" Apparently, Plaintiff's neighbor, Fredrick Bushau Boyd, told Officer Swann that Plaintiff had "pointed a gun."[4] When Plaintiff opened his door, Officer Swann began repeatedly asking him if he had a gun. Plaintiff answered "no," at which point Officer Swann "became furious, yelling and screaming," which scared Plaintiff.[5] Because he was frightened, Plaintiff walked out of his house with Officer

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1 ECF 3, ¶ 7.

2 *Id.* ¶ 10.

3 *Id.* ¶ 11.

4 *Id.* ¶ 13.

5 *Id.* ¶ 17.

Swann and got in his (Plaintiff's) car. At this point, Plaintiff remembered that he did have a gun in his trunk and planned to inform Officer Swann, but Officer Swann had left to deal with a situation at Plaintiff's neighbor's house. When Officer Swann returned, a bystander as well as Boyd had already alerted Officer Swann to the gun.[6] Officer Swann called for backup and upon their arrival, arrested Plaintiff on two felony charges: aggravated assault with a deadly weapon and possession of a firearm during the commission of a felony.[7] According to Plaintiff, the police report states that he "pointed a handgun."[8]

The next day, on August 6, 2018, Plaintiff was scheduled for a Preliminary Hearing in Fulton County Superior Court. According to Plaintiff, his public defender did not show up to take him to the hearing.[9] A few days later, a "representative" from the public defender's office asked him to sign a document, which was backdated to August 6, waiving his preliminary hearing. Plaintiff signed it because he "did not have an attorney."[10]

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6 *Id.* ¶ 20.

7 *Id.* ¶ 21.

8 *Id.* ¶ 24.

9 *Id.* ¶ 25.

10 *Id.* ¶ 26.

On August 24, 2018, Plaintiff was indicted, though he alleges that his attorney "did not listen . . . closely" and so he believes she made no effort to defend him.[11] Then, at his November 19, 2018 arraignment, Plaintiff claims that his public defender "abandoned him and disappeared."[12] The attorney simply "exited the courtroom leaving the Plaintiff without representation." Plaintiff then alleges that the prosecutor and his attorney played "discovery tag," where they each claimed the other had discovery. According to Plaintiff, this went on until February 2020, when the court scheduled a hearing to discuss the status of the case.[13] Plaintiff claims that his attorney did not allow him to enter the courtroom and he does not know what was discussed during this hearing.

Ultimately, after being frustrated that the public defender had not filed a motion or made an attempt to resolve his case, Plaintiff hired a new attorney in April 2021 and the prosecutor was replaced. He alleges that his new attorney talked to the new prosecutor, who agreed to dismiss his case since there was "no

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11 *Id.* ¶ 30.

12 *Id.* ¶ 31.

13 *Id.* ¶ 35.

evidence."[14] Plaintiff then filed this case on August 13, 2021, bringing Section 1983 claims against the City of Atlanta, Officer Swann, and his public defender.

II. LEGAL STANDARD

An *in forma pauperis* complaint must be dismissed "if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). The purpose of § 1915(e)(2) is "to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989), *superseded by statute on other grounds as recognized in Christiansen v. Clarke*, 147 F.3d 655, 658–59 (8th Cir. 1998). *See also Ahumed v. Fed. Nat'l Mortg. Ass'n*, No. 1:11-cv-2175-ODE-RGV, 2011 WL 13318915, at *2 (N.D. Ga. Dec. 13, 2011) ("[T]he purpose of the frivolity review is to filter non-paying litigants' lawsuits through a screening process functionally similar to the one created by the financial

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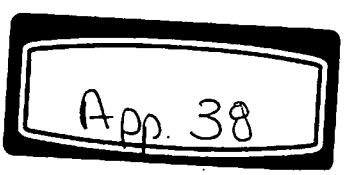
[14] *Id.* ¶ 37.

disincentives that help deter the filing of frivolous lawsuits by paying litigants.") (citing *Cofield v. Ala. Pub. Serv. Comm'n*, 936 F.2d 512, 515 (11th Cir. 1991)).

A *sua sponte* dismissal by the Court is authorized under § 1915(e)(2) prior to the issuance of process, so as to spare prospective defendants the inconvenience and expense of answering frivolous complaints. *Neitzke*, 490 U.S. at 324. In the context of a frivolity determination, the Court's authority to "pierce the veil of the complaint's factual allegations" means that it is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations. *Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (quoting *Neitzke*, 490 U.S. at 327).

A claim is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke*, 490 U.S. at 325. "Arguable means capable of being convincingly argued." *Sun v. Forrester*, 939 F.2d 924, 925 (11th Cir. 1991) (per curium) (internal quotation marks omitted) (citations omitted). A claim that is arguable, "but ultimately will be unsuccessful, . . . should survive frivolity review." *Cofield*, 936 F.2d at 515. But a complaint is frivolous when it appears "from the face of the complaint that the factual allegations are 'clearly baseless' or that the legal theories are 'indisputably



meritless.'" *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (citations omitted). *See also Neitzke*, 490 U.S. at 327.

III. ANALYSIS

Following a detailed review of the complaint and attached exhibits, the Court finds that Plaintiff has failed to state a Section 1983 claim. The Court will address the claims in turn.

a. Claims against Officer Swann and the City of Atlanta based on the August 2018 altercation are time barred.

Plaintiff brings claims against Officer Swann and the City of Atlanta pursuant to 42 U.S.C. § 1983 for violations of his Fourth and Fourteenth Amendment rights. All allegations of wrongdoing by Officer Swann stem from an August 2018 altercation in Atlanta, Georgia. Plaintiff argues that Officer Swann wrongfully evicted him and "arrested him based on the word of a convicted felon, whom he befriended and showed preferential treatment."[15] However, Plaintiff is time barred from bringing any claims pursuant to Section 1983 based on the August 2018 event.

Congress did not prescribe a statute of limitations or rule for tolling a limitations period for Section 1983 cases. Courts are therefore required to apply

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15 *Id.* ¶ 20.

state statutes of limitations as well as state tolling periods. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Specifically, courts look to the state statute "governing an analogous cause of action under state law." *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). "The statute of limitations in a § 1983 suit is that provided by the State for personal-injury torts." *Wallace v. Kato*, 549 U.S. 384, 384 (2007). And, even when a federal court borrows a state's limitations period, the court is nonetheless applying federal law. "Accordingly, although state law specifies the duration of the limitations period, federal law determines the date on which that period begins." *Witt v. Metro. Life Ins. Co.*, 772 F.3d 1269, 1275 (11th Cir. 2014) (quoting *Harrison v. Digital Health Plan*, 183 F.3d 1235, 1238 (11th Cir. 1999)). "The general federal rule is that the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights," and so the court is required "first to identify the alleged injuries, and then to determine when plaintiffs could have sued for them." *Karantsalis v. City of Miami Springs*, 17 F.4th 1316, 1322-23 (11th Cir. 2021).

According to Plaintiff, on August 5, 2018, Officer Swann entered his home in Atlanta, Georgia without a warrant, beat on his bedroom door while shouting "Police," and asked him multiple times if he possessed or owned a handgun.

Plaintiff was then arrested without a warrant. If true, the nature of these alleged offenses is neither inconspicuous nor ambiguous. A reasonably prudent person should have become aware of the facts supporting a violation of his Fourth Amendment rights immediately upon the occurrence of such an event. Therefore, the statute of limitations began to run that same day, August 5, 2018.

Plaintiff alleges that the altercation took place in Atlanta, Georgia. Accordingly, this Court will look to Georgia's personal injury statute to determine the limitations period. O.C.G.A. § 9-3-33 states that "actions for injuries to the person shall be brought within two years after the right of action accrues." Plaintiff filed the instant complaint on August 16, 2021, more than three years after the alleged altercation. Therefore, these claims are time barred and cannot state a viable claim.

b. Failure to establish *Monell* liability for claims against the City of Atlanta.

Plaintiff asserts that the City of Atlanta is vicariously liable for the acts of various state actors under a theory of respondeat superior. However, this theory of liability is not available for claims against cities. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978). Municipalities can, however, be held liable under the so-called *Monell* doctrine. Municipalities—such as the City of

Atlanta—are considered "persons" for purposes of Section 1983. *Id.* "To impose § 1983 liability on a municipality, a plaintiff generally must show: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004). Plaintiffs can establish a city's unconstitutional custom or policy by showing that the city had an unconstitutional ordinance or regulation, or that a violation stemmed from the delegation of final policymaking authority from one official to another and the ratification of a subordinate's actions by a final policymaker. *Mandel v. Doe*, 888 F.2d 783, 791 (11th Cir. 1989) (citing *City of Okla. City v. Tuttle*, 471 U.S. 808 (1985)).

For Plaintiff to state a claim against the City of Atlanta, therefore, he must comply with the requirements of *Monell*. While Plaintiff does identify various violations to his constitutional rights, he fails to identify a custom or policy that constituted deliberate indifference to that constitutional right or sufficiently allege that the policy or custom caused the violation. Plaintiff has failed to state a claim against the City of Atlanta for this additional reason.

Generally, a *pro se* "plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Silberman*

v. Miami Dade Transit, 927 F.3d 1123, 1132 (11th Cir. 2019) (quoting *Woldeab v. DeKalb Cnty. Bd. of Educ.*, 885 F.3d 1289, 1291 (11th Cir. 2018)). Because it is possible for Plaintiff to cure these deficiencies and state a claim against the City of Atlanta for non-time-barred claims,[16] the Court will grant him leave to amend his Complaint in this regard. Of course, Plaintiff is still subject to the statute of limitations and cannot bring time-barred claims pursuant to *Monell* or otherwise.

c. Plaintiff cannot bring a claim against his public defender pursuant to Section 1983.

Plaintiff also attempts to bring Section 1983 claims against his public defender. Section 1983 provides a cause of action for violations of federal law by persons acting as state actors. The Supreme Court has held that a public defender "does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk Cnty. v. Dodson*, 454 U.S. 312, 312 (1981). That is largely because "[a] public defender is not amenable to administrative direction in the same sense as other state employees. And equally important, it is the State's constitutional obligation to respect the professional independence of the public defenders whom it engages." *Id.* at 322.

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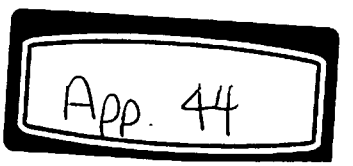
16 For example, for malicious prosecution against the City of Atlanta or Officer Swann.

Here, Plaintiff has not alleged that his public defender acted outside of a lawyer's traditional functions in representing him in his criminal proceeding. Most of the deficiencies identified by Plaintiff regarding his attorney are within the scope of the attorney's role as public defender. While these deficiencies are certainly troublesome if true, they do not suggest that the public defender was under the control or direction of the state such that he could be considered a state actor for purposes of Section 1983. Accordingly, Plaintiff cannot bring a Section 1983 claim against his public defender as Plaintiff has not pled facts sufficient to allege the lawyer was acting under color of state law.

d. Plaintiff's motion to appoint counsel is denied.

"A plaintiff in a civil case has no constitutional right to counsel." *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999). Courts have broad discretion in whether to appoint counsel for indigent plaintiffs; it is a "privilege" justified only in "exceptional circumstances." *Dean v. Barber*, 951 F.2d 1210, 1216 (11th Cir. 1992) (citing *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987)). Such circumstances exist when "the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner." *Dean*, 951 F.2d at 1216. Here, Plaintiff is attempting to bring straightforward Section 1983 claims based on constitutional



violations. The Court concludes that the facts and legal issues are not so novel or complex at this stage as to require the appointed assistance of counsel.

IV. CONCLUSION

Plaintiff has failed to state a claim. This case is **DISMISSED without prejudice**. Plaintiff's motion to appoint counsel [ECF 6] is **DENIED without prejudice**. Plaintiff is granted leave to amend his complaint within 30 days of this Order. If he does so, the Clerk is **DIRECTED** to submit the Amended Complaint to the undersigned for frivolity review. In the interim, the Clerk is **DIRECTED** to administratively close this case.

SO ORDERED this 29th day of September, 2022.

Steven D. Grimberg
United States District Court Judge