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

SHARON BRIDGEWATER,	:	
	:	
Plaintiff,	:	
	:	**CIVIL ACTION FILE NO.**
v.	:	**1:10-CV-01082-ODE-AJB**
	:	
DEKALB COUNTY *by and through Vernon Jones, Chief, et al.,*	:	
	:	
Defendants.	:	

ORDER FOR SERVICE OF
REPORT AND RECOMMENDATION

Attached is the Report and Recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(1), FED. R. CIV. P. 72(b), N.D. Ga. R. 72.1(B), (D), and Standing Order 08-01 (N.D. Ga. June 12, 2008). Let the same be filed and a copy, with a copy of this order, be served upon counsel for the parties or, if a party is not represented, upon that party directly.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the Report and Recommendation within **fourteen (14)** days of service of this Order. Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to any transcripts if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for

obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay*, 714 F.2d 1093 (11th Cir. 1983).

The Clerk is directed to submit the Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

IT IS SO ORDERED and DIRECTED, this 12th day of July, 2010.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES MAGISTRATE JUDGE'S
ORDER AND FINAL REPORT AND RECOMMENDATION

Currently before the Court is Plaintiff's revised application to proceed *in forma pauperis*. [Doc. 7]. For the reasons that follow, the Court **GRANTS** Plaintiff's revised request to proceed *in forma pauperis*. Also, the undersigned **RECOMMENDS**, that Plaintiff's case be **DISMISSED** following a review pursuant to 28 U.S.C. § 1915(e)(2)(B).

Introduction

On April 12, 2010, Plaintiff sought to proceed *in forma pauperis* ("IFP") in a 42 U.S.C. § 1983 civil action against a number of Defendants, including DeKalb County, N.T. Martinelli, C. Schreiner, Detective George, Lieutenant Hamilton, and John Does "1 Thur [sic] 50." [Doc. 1]. After reviewing Plaintiff's initial affidavit in

support of her request to proceed *in forma pauperis*, the Court ordered Plaintiff to provide more information about her student loans and her income from Specialty Global Investments, Inc. [*See* Doc. 2 at 4]. Plaintiff has complied with the Court order by submitting a revised affidavit along with an explanation of her financial status. [*See* Doc. 7]. As a result, the Court examines whether the revised application entitles Plaintiff to proceed *in forma pauperis*.

In Forma Pauperis Application

Plaintiff currently lives alone in Detroit, Michigan. Plaintiff states that her only source of income is $674 per month in Social Security Income disability payments. Although Plaintiff received student loans, she has exhausted these loan proceeds. Plaintiff also states that she has no income from her business because Defendants took all business equipment including a laptop and tax receipts. Plaintiff has a bank account with $68. She does not own any major assets such as a home or a car. Plaintiff lists $455 in monthly expenses as follows: (1) $225 for rent; (2) $50 for utilities; (3) $50 for clothing; (4) $10 for laundry; (5) $10 for medical expenses; (6) $100 for transportation; and (7) $10 for entertainment.

The Court "may authorize the commencement . . . of any suit, action, or proceeding . . . without payment of fees and costs or security therefor, by a person who

submits an affidavit that includes a statement of all assets such prisoner[1] possesses that the person is unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a). This section is intended to provide indigent litigants with meaningful access to courts. *Adkins v. E.I. duPont de Nemours & Co.*, 335 U.S. 331, 342-43 (1948); *Neitzke v. Williams*, 490 U.S. 319, 324 (1988); *see also Attwood v. Singletary*, 105 F.3d 610, 612 (11th Cir. 1997) (Section 1915 is designed to ensure "that indigent persons will have equal access to the judicial system.").

Thus, § 1915 authorizes suits without the prepayment of fees and costs for indigent litigants. *Denton v. Hernandez*, 504 U.S. 25, 27 (1992). It bears emphasizing that § 1915 creates no absolute right to proceed in civil actions without payment of costs. Instead, the statute conveys only a privilege to proceed to those litigants unable to pay costs without undue hardship. *Startti v. United States*, 415 F.2d 1115 (5th Cir. 1969).[2] Moreover, while the privilege of proceeding *in forma pauperis* does not require a litigant to demonstrate absolute destitution, it is also clear that "something more than

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[1] Although Congress used the word "prisoner" here, Section 1915 applies to non-prisoner indigent litigants as well as prisoners. *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1306 n.1 (11th Cir. 2004).

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

mere statement and an affidavit that a man is 'poor' should be required before a claimant is allowed to proceed *in forma pauperis*." *Levy v. Federated Dept. Stores*, 607 F. Supp. 32, 35 (S.D. Fla. 1984); *Evensky v. Wright*, 45 F.R.D. 506, 507-08 (N.D. Miss. 1968). The affidavit required by the statute must show an inability to prepay fees and costs without foregoing the basic necessities of life. *Adkins*, 335 U.S. at 339; *Zuan v. Dobbin*, 628 F.2d 990, 992 (7th Cir. 1980).

Upon review of Plaintiff's revised application to proceed *in forma pauperis*, the Court concludes that Plaintiff cannot pay the costs associated with commencing her civil action. Plaintiff has limited income and no substantial assets. Accordingly, the Court **GRANTS** Plaintiff's revised request to proceed *in forma pauperis*. [Doc. 7]. Given this conclusion, the Court must perform a frivolity review of Plaintiff's civil action pursuant to 28 U.S.C. § 1915(e)(2)(B).

Review Pursuant to 28 U.S.C. § 1915(e)(2)(B)

Under§ 1915(e)(2)(B), a court must "*sua sponte* dismiss [an indigent non-prisoner's] complaint or any portion thereof which is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are immune." *Robert v. Garrett*, No. 3:07-cv-625, 2007 WL 2320064, *1 (M.D. Ala. Aug. 10, 2007); *see also* 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). A claim is frivolous under § 1915(e)(2)(B)(i) "if it is 'without

arguable merit either in law or fact.' " *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quoting *Bilal v. Driver*, 251 F.3d 1346, 1349 (11th Cir. 2001)). "Dismissal of a claim under 28 U.S.C. § 1915(e)(2)(B)(ii) is governed by the same standard as a dismissal under Federal Rule of Civil Procedure 12(b)(6)." *Shaarbay v. Palm Beach County Jail*, No. 09-11294, 2009 WL 3401423, *1 (11th Cir. Oct. 23, 2009) (citing *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997)). A complaint is subject to dismissal for failure to state a claim "[i]f the allegations [in the complaint] show that relief is barred by the applicable statute of limitations." *Jones v. Bock* , 549 U.S. 199, 215 (2007). As the following discussion demonstrates, the Court concludes that Plaintiff's claims cannot proceed following the § 1915(e)(2)(B) review.

A. Plaintiff's Complaint

Plaintiff states that she seeks to bring claims against Defendants pursuant to 42 U.S.C. § 1983 for violating her Fourth and Fourteenth Amendment rights. (*See* Complaint at 5 (¶ 2) in Doc. 1). She believes that in October 2007, DeKalb County officers illegally stopped her car for a drive out tag, illegally searched her home without

a warrant, and illegally arrested her. (*Id.* at 13 (¶ 24)). The basis for these allegations of constitutional improprieties stems from the following factual allegations.[3]

On October 31, 2007, Plaintiff was driving a newly purchased van with an unexpired drive out tag in plain view. (*Id.* at 8 (¶ 9)). Officer Schreinder initiated a traffic stop of Plaintiff's van because of the drive out tag. (*Id.* at 8-9 (¶¶ 10-11)). Schreinder then performed a visual inspection of the van and inquired about stainless steel appliances in the back of the van. (*Id.* at 9 (¶ 12)). When Plaintiff responded that the appliances belonged to her, the officer called for back up. Plaintiff was apparently not free to leave the scene. (*Id.*). Despite informing the officers that she had a valid California driver's license, Plaintiff was arrested for driving with a suspended license and was ticketed for driving with a suspended licence and driving with the tags. (*Id.* at 10 (¶ 13)). Plaintiff was held in the DeKalb County, Georgia, jail for two days.

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[3] In Plaintiff's May 10 letter to the undersigned, Plaintiff wrote, "My attorney have [sic] agreed to help me, he will follow up with an amended complaint. . . . The first complaint was filed in error, please disregard, my attorney will file a complaint I suspect within the next two weeks . . . ." (*See* May 10, 2010, Letter at unnumbered pages 3-4 in Doc. 7). Over two months have passed, and Plaintiff has not filed an amended complaint. As a result, the Court reviews the initial complaint pursuant to 28 U.S.C. § 1915(e)(2)(B).

Additionally, her van with the appliances was impounded, and the appliances were later lost because of the officer's conduct. (*Id.*)[4]

During the traffic stop, officers traveled to Plaintiff's business, entered the premises without a warrant and without her permission, and examined business papers. (*Id.* at 9 (¶ 12)). The officers removed Plaintiff's paper work, tax receipts, computers, and other items from her business without a warrant or Plaintiff's consent. (*Id.* at 10 (¶ 14)). In September or October of 2009, Plaintiff attempted to retrieve the paper work and items taken from her business and informed the officers of her intention to sue the department. (*Id.* at 11 (¶ 17)).

B. Discussion

"Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose." *Wallace v. Kato*, 549 U.S. 384, 387 (2007). State law supplies the length of the statute of limitations. *Id.* This limitations period may be tolled in § 1983 cases. *See Leal v. Ga. Dep't of Corrs.*, 254 F.3d 1276, 1279 (11th Cir. 2001). In determining whether tolling applies in § 1983 cases, State law again applies the rules for tolling. *See Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987) ("[I]n Section 1983 actions

[4] The case against Plaintiff was dismissed in April 2009. (*Id.* at 11).

'[o]nly the length of the limitations period, and the closely related questions of tolling and application, are to be governed by state law.' ") (quoting *Wilson v. Garcia*, 471 U.S. 261, 269 (1985)); *see also Camps v. City of Warner Robins*, 822 F. Supp. 724, 729-30 (M.D. Ga. 1993); *Seals v. Montgomery*, No. 7:08-cv-80, 2010 WL 2000021, *3 (M.D. Ga. Apr. 5, 2010) (R&R). Also, federal rules for equitable tolling may apply in § 1983 cases. *See Wallace*, 549 U.S. at 403 (Breyer, dissenting) ("If a given state court lacks the necessary tolling provision, [ ], § 1983, in my view, permits federal courts to devise and impose such principles.").[5] Although federal courts look to State law in many respects for § 1983 cases, federal courts do not look to State law for the issue of accrual, but instead, they apply federal law to determine when § 1983 claims begin to run. *Wallace*, 549 U.S. at 388 ("[T]he accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law.").

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[5] The majority in *Wallace* rejected Justice Breyer's proposal to create an equitable tolling rule when issues arising in a § 1983 claim were being pursued in state court, but the majority did not reject outright the use of federal equitable tolling. Instead, the Court noted that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *See Wallace*, 549 U.S. at 396. As a result, some federal courts following *Wallace* have also indicated that "federal law might also allow additional equitable tolling in rare circumstances." *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008); *see also Kach v. Hose*, 589 F.3d 626, 645 (3d Cir. 2009) (assuming that if federal tolling were available in § 1983 cases, it would only be used in "extraordinary cases").

Based on this case law, the Court makes three inquiries to determine whether Plaintiff's claims are time barred. First, the Court examines when Plaintiff's § 1983 claims began to run. Second, the Court examines whether Plaintiff has brought her claims within the statute of limitations period. Third, the Court examines whether tolling applies to those claims that are outside of this limitations period. The Court's conclusions are addressed below.

1. Accrual

Plaintiff's § 1983 claims appear to be premised on (1) an illegal stop of her vehicle; (2) an illegal seizure of her belongings; (3) an unlawful arrest and imprisonment; (4) an unlawful search of her home/business; and (5) the loss of appliances (and perhaps her van) "due to the reckless disregard of the Officers," (Complaint at 10 (¶ 15)). Generally, the statute of limitations for these claims "begins to run from the date '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.' " *Sneed v. Pan Am. Hosp.*, No. 09-14697, 2010 WL 971894, *1 (11th Cir. Mar. 18, 2010) (quoting *Brown v. Ga. Bd. of Pardons and Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003)). Although this general rule governs, the time of accrual for certain § 1983

claims is not always obvious, so the undersigned examines the federal law concerning the accrual of Plaintiff's § 1983 claims.

a. False Arrest

When evaluating a § 1983 claim, federal courts examine the common law tort claims that provide the closest analogy to the § 1983 claims. *Wallace*, 549 U.S. at 388. For a § 1983 claim premised on false arrest, "the torts of false arrest and false imprisonment" are the closest analogous tort claims. *Id.* A plaintiff may file suit for false arrest under § 1983 immediately upon the arrest. *See Wallace*, 549 U.S. at 388 ("The can be no dispute that [plaintiff] could have filed suit as soon as the allegedly wrongful arres occurred[.]"), 390 n.3. However, the statute of limitations begins to run for § 1983 false arrest claims "when the [parties'] false imprisonment [comes] to an end," *id.* at 389, which includes: (1) in cases where an arrest is followed by criminal proceedings, the time when a party becomes detained pursuant to legal process such as when the plaintiff is arraigned or seen by a magistrate, *id.* at 389-90, 397; or (2) in cases where there is no period of continuous custody, the time when the plaintiff is released from police custody, *Singleton v. Martin*, No. 4:05-cv-141, 2008 WL 80263, *4 & n.3 (S.D. Ga. Jan. 7, 2008).

Plaintiff has not pleaded allegations as to whether legal process was initiated against her, and it is not clear that her arrest was followed by criminal proceedings like the plaintiff in *Wallace*. Despite this uncertainty, the Court finds that the false arrest and false imprisonment claim accrued in November 2007. It was at this point when Plaintiff's imprisonment came to an end because she was released two days after her arrest. (*See* Complaint at 10 (¶ 13), 11 (¶ 16)). As a result, the § 1983 claims premised on false arrest and false imprisonment accrued in November 2007. *See Wallace*, 549 U.S. at 389; *Singleton*, 2008 WL 80263 at *4 & n.3.

b. Unlawful Traffic Stop, Unlawful Seizure, and Unlawful Search

Federal courts have determined that " '[c]laims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur.' " *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558 (10th Cir. 1999) (quoting *Johnson v. Johnson County Commission Board*, 925 F.2d 1299, 1301 (10th Cir. 1991)); *see also Singleton*, 2008 WL 80263 at *4 (finding unlawful stop and seizure accrued on the day it occurred); *Hilton v. Kronenfeld*, Civil Action No. 04-6420, 2008 WL 305276, *8 (D.N.J. Jan. 29, 2008) (concluding that "§ 1983 claims for false arrest, illegal search and seizure, [and] false imprisonment" accrued on date of traffic stop because plaintiff

knew that he was stopped and detained for no good reason on this date); *Mitchell-Bey v. City of Detroit*, Civil Action No. 06-11746, 2007 WL 674595, *2 (E.D. Mich. Feb. 28, 2007) (finding § 1983 claims based on traffic stop accrued at the time of his arrest or within the days that followed because he knew of the injuries at the this time); *Pendarvis v. Helms*, No. 8:04-cv-2261, 2006 WL 2724901, *2 n.3 (M.D. Fla. Sept. 22, 2006) (finding that § 1983 claims accrued when searches were conducted). As such, Plaintiff's claims relating to the traffic stop, seizure of the car and appliances, and search of the residence accrued in October or November 2007, which is the time when these events occurred.

c. Loss of Property

A claim for denial of due process in taking property accrues when the plaintiff "should have become aware that [her] rights had allegedly been violated." *Beck*, 195 F.3d at 559. Here, the allegations in Plaintiff's complaint indicate that she learned of the loss of stainless steel appliances after being released from jail. (*See* Complaint at 10 (¶¶ 13, 15). As a result, Plaintiff's loss of property claim also accrued in November 2007.

Accordingly, the Court concludes that the statute of limitations period for Plaintiff's § 1983 claims began to run in either late October 2007 or early November

2007. With this accrual finding, the Court turns to whether Plaintiff's claims fall within the statute of limitations period for bringing her § 1983 claims.

2. Statute of Limitations

The statute of limitations for 42 U.S.C. § 1983 claims arising in Georgia is two years. *See Bryant v. Jones*, --- F. Supp.2d ----, ----, 2010 WL 966574, *1 (N.D. Ga. Mar. 12, 2010) (Duffey, J.) (citing *Williams v. City of Atlanta*, 794 F.2d 624, 626 (11th Cir. 1986)); *see also Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003).

The Court concludes that Plaintiff's 42 U.S.C. § 1983 claims are untimely. Plaintiff sought permission to file her lawsuit on April 12, 2010. [*See* Doc. 1]. As discussed above, this lawsuit asserts violations of her constitutional rights based on claims that accrued in October and November 2007. Thus, Plaintiff seeks to bring claims approximately two years and five months after they accrued. Since Plaintiff only had two years to bring her § 1983 claims, Plaintiff's April 2010 civil action to bring § 1983 claims that accrued in October or November 2007 is untimely.

Plaintiff has anticipated this result because her complaint seeks to toll the two-year limitations period. Specifically, the complaint states:

> The Plaintiff seeks to toll the Statute of limitation due to an unfortunate incident of willful violation of the Plaintiff's conspiring to violate Plaintiff

> civil rights by "another" party occurred incident that occurred in Dec. 2007, which caused the Plaintiff "extensive" emotional damage.
>
> The case is pending before pending before the "criminal" Federal Judge Saundra Brown Armstrong in Northern District Federal Court of California.(see Northern District Court of California case # CV-0703, and CV-0704).(see exhibit 1)[.] Both incidents, has caused the Plaintiff extensive damage and a total collapse in mental and emotional stability due to the defendant, as well as the current case pending before the Honorable civil rights has been willfully, violated and the Plaintiff has mental scars, fears, suffers from fright, horror due to her Emotional distress includes suffering, anguish, grief(due to recent death of father),fright, horror, nervousness, anxiety, worry, shock, humiliation, and shame. Plaintiff relocates constantly due to her "horrible" experience of being forced out of her apartment, from a "conspiracy" to willfully violate Plaintiff's civil rights unable to file the complaint due to her the willful violations of Plaintiff civil rights. Plaintiff have been homeless and displaced, for nearly two years just obtained normal housing in June 2009, (see exhibit 2)[.] The Plaintiff was just able to finish the complaint.

(Complaint at unnumbered p. 3-4 in Doc. 1). As a result, the Court turns to whether the limitations period for Plaintiff's § 1983 claims should be tolled.

3. Tolling

As stated above, federal courts generally turn to state law to determine whether the statute of limitations should be tolled. *See Wallace*, 549 U.S. at 394 ("We have generally referred to state law for tolling rules[.]"). Under Georgia law, the limitations period may be tolled in the following circumstances: (1) the party is legally incompetent, O.C.G.A. § 9-3-90; (2) the person becomes legally incompetent after the

right accrues, O.C.G.A. § 9-3-91; (3) an estate becomes unrepresented, O.C.G.A. §§ 9-3-92, 9-3-93; (4) the defendant is absent from the State, O.C.G.A. § 9-3-94; (5) one party in a joint action is legally incompetent, O.C.G.A. § 9-3-95; (6) there is fraud by the defendant, O.C.G.A. 9-3-36; (7) there are counterclaims and cross claims, O.C.G.A. § 9-3-37; (8) the party is bringing a medical malpractice claim, O.C.G.A. § 9-3-97.1; (9) a tort arises from a crime, O.C.G.A. § 9-3-99; and (10) there is a non-statutory basis for equitable tolling, *State v. Private Truck Council, Inc.*, 258 Ga. 531, 371 S.Ed.2d 378, 380-81 (1988). Additionally, it appears that a party bringing a § 1983 claim may seek to have the limitations period equitably tolled under federal law. *See Wallace*, 549 U.S. at 396 (Scalia, J., writing for the majority), 403 (Breyer, dissenting); *see also* footnote 5 *supra*.

The Court does not discuss each of these bases for tolling because Plaintiff essentially asserts that tolling applies due to her mental state. As a result, the Court determines whether Plaintiff is entitled to have the limitations period tolled under (1) non-statutory equitable tolling and (2) Geogia's statutory provisions for equitable tolling involving disability / legal competence, O.C.G.A. § 9-3-90, and O.C.G.A. § 9-3-91.

1. Disability / Legal Competence (O.C.G.A. §§ 9-3-90, 9-3-91)

Under Georgia law, "persons who are legally incompetent because of . . . mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons." O.C.G.A. § 9-3-90(a). An action is also tolled when a person suffers a mental illness "after [her] right of action has accrued and the disability is not voluntarily caused or undertaken by the person claiming the benefit" of tolling. O.C.G.A. § 9-3-91. These statutes are "confined 'to situations where it is not fair to charge a [plaintiff] with the running of the clock, because of [her] mental condition.' " *Carter v. Glenn*, 243 Ga. App. 544, 548, 533 S.E.2d 109, 114 (2000) (quoting *Chapman v. Burks*, 183 Ga. App. 103, 105, 357 S.E.2d 832 (1987)).

Although Georgia courts confine the application of these tolling statutes on fairness grounds, these courts "[have] construed [the legally incompetent because of mental illness] category broadly." *Chapman v. Burks*, 183 Ga. App. 103, 105, 357 S.E.2d 832, 835 (1987). As a result, a plaintiff "need not be so mentally incompetent that he should be confined, or required a guardian," for the statutory tolling provision to apply. *Walker v. Brannan*, 243 Ga. App. 235, 236, 533 S.E.2d 129,

130 (2000). Georgia courts have not enunciated a test for mental impairment "in a few clear words . . . because the concept challenges crisp articulation." *Chapman*, 183 Ga. App. at 105, 357 S.E.2d at 835. In recent years, Georgia courts have consistently performed the following inquiry: "whether [plaintiff] suffered from such unsoundness of mind or imbecility as to be *incapable of managing the ordinary affairs of life*." *Anglin v. Harris*, 244 Ga. App. 140, 143, 534 S.E.2d 874, 877 (2000) (emphasis added); *see also Stone v. Radiology Servs., P.A.*, 206 Ga. App. 851, 853, 426 S.E.2d 663, 665 (1992); *Hickey v. Askren*, 198 Ga. App. 718, 721, 403 S.E.2d 225, 229 (1991); *Chapman*, 183 Ga. App. at 105, 357 S.E.2d at 835.

This test means that a person will not be deemed mentally impaired where she mismanages affairs, is unclear in her mind, or is not intelligent. *Walker*, 243 Ga. App. at 237, 533 S.E.2d at 131. Georgia courts have refused to expand the definition of incompetence under the tolling statute "to include a mental condition that renders one incompetent only as to assertion of the subject claim, rather than as to the ordinary affairs of life." *Carter*, 243 Ga. App. at 549-50, 533 S.E.2d at 115. Thus, the following evidence has been held insufficient to establish mental impairment for tolling purposes: (1) evidence that a plaintiff was not in proper frame of mind to give notice to defendant of a lawsuit, *id.*, 243 Ga. at 549, 533 S.E.2d at 115; and (2) evidence that plaintiff

suffered from "despondency, depression, and a borderline personality disorder," *Methodist Church v. Stewart*, 221 Ga. App. 748, 753, 472 S.E.2d 532, 535 (1996). Also, evidence indicating that a person can perform the following activities indicates that a person is not mentally incompetent: working, running a business, raising children, taking care of oneself, understanding what is happening, consulting with and hiring attorneys, traveling several times, moving into a residence, and negotiating a claim. *See Carter*, 243 Ga. at 549, 533 S.E.2d at 115; *Stone*, 206 Ga. App. at 853, 426 S.E.2d at 665; *Curlee v. Mock Enters., Inc.*, 173 Ga. App. 594, 599, 327 S.E.2d 736, 742 (1985). A court may determine whether a mental impairment tolls a statute of limitations as a matter of law. *Carter*, 243 Ga. App. at 549, 533 S.E.2d at 114.

The Court concludes that Plaintiff's complaint has alleged facts in her complaint which demonstrate that tolling does not apply as a matter of law. The Court recognizes that Plaintiff alleged that she was mentally disabled under the definitions of the Social Security Administration and that she suffered from anxiety, grief, and other psychological problems. (Complaint at 3 (¶ 6) and 4 in Doc. 1). However, other factual allegations in her complaint indicate that she did not meet the definition of mental impairment under Georgia's tolling statute as a matter of law. First, Plaintiff indicated that she is capable of "relocat[ing] constantly." (Complaint at 4 in Doc. 1).

Although this might be aberrant behavior given its constant nature, Plaintiff's ability to move suggests that she was capable of managing her own affairs. Also, Plaintiff has alleged that she contacted the police in September or October of 2009 to obtain the return of her property, at which time she told the police of her intention to sue. (*Id.* at 11). This allegation indicates that in September and October of 2009, Plaintiff was managing her own affairs if she was contacting police and informing police of her intent to sue. Further, Plaintiff has alleged that she has pursued other lawsuits in federal court. (Complaint at 4). Although Plaintiff states that this suit led to mental and emotional instability, it also demonstrates that Plaintiff was capable of managing her affairs if she was pursuing federal lawsuits. Finally (and most importantly), Plaintiff alleged that "at all times mentioned[, she] was a student working on a Master Degree." (*Id.* at 3). If Plaintiff was capable of doing graduate level school work at all relevant times, Plaintiff was capable of managing her own affairs.[6] Although Plaintiff

[6] The undersigned adds that Plaintiff has represented to this Court that she was receiving $674 per month in disability benefits from the Social Security Administration. [*See* Doc. 7]. That Plaintiff was personally receiving these payments also suggests that she was capable of managing her affairs because the Commissioner of Social Security will not pay disability benefits to someone who is "[l]egally incompetent or mentally incapable of managing benefit payments." 20 C.F.R. §§ 404.2010(a)(1), 416.610(a)(1) (stating that benefits are paid "to a representative payee on behalf of a beneficiary 18 years old or older when it appears to us that this method of payment will be in the interest of the beneficiary," *i.e.*, if the beneficiary is

seeks tolling based on her mental state and has alleged that she suffers from a mental impairment, the factual allegations of her complaint demonstrate that Plaintiff is capable of managing her affairs. As a result, Plaintiff is not legally incompetent for tolling purposes under Georgia law.[7]

2. Non-Statutory Equitable Tolling

a. Georgia Law

"Georgia's non-statutory doctrine of equitable tolling is extremely narrow. The only discussion of non-statutory equitable tolling in the Georgia courts occurred in the context of a class action lawsuit, which required equitable tolling in order to 'permit[ ] class member to rely on the class action to protect their rights without concern that the statute of limitations on their individual claims will have run should class certification ultimately be denied.' " *Hicks v. City of Savannah*, No. 4:08-cv-06, 2008 WL 2677128, *2 (S.D. Ga. July 8, 2008) (quoting *Private Truck Council, Inc.*, 258 Ga. at 371 S.E.2d

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legally incompetent or mentally incapable of managing benefit payments).

[7] The Court adds that to the extent that Plaintiff is contending that her mental problems prevented her from solely filing her lawsuit and had little effect on her lawsuit, this is insufficient under Georgia law. *Carter*, 243 Ga. App. at 549-50, 533 S.E.2d at 115 (refusing to expand the definition of incompetence under the tolling statute "to include a mental condition that renders one incompetent only as to assertion of the subject claim, rather than as to the ordinary affairs of life").

at380-81)).[8] The instant case is not a class action, so Plaintiff's § 1983 claims are not tolled through Georgia's non-statutory equitable tolling law.

b. Federal Law

A District Court in the Northern District of Georgia recently described the federal law on equitable tolling as follows:

> Federal courts "have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," but have not allowed "late filings where the claimant failed to exercise due diligence in preserving his legal rights."

Price v. Owens, 634 F. Supp. 2d 1349, 1355 (N.D. Ga. 2009) (Batten, J.) (quoting *Nat'l Cement Co. v. Fed. Mine Safety and Health Review Comm'n*, 27 F.3d 526, 530 (11th Cir. 1994)). In other words, equitable tolling is available only 'when a [party] untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.' " *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009).

When a plaintiff alleges equitable tolling based on mental incapacity, she must "establish a 'causal connection between [the plaintiff's] alleged mental incapacity and

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[8] The undersigned's research also was unable to identify any other Georgia cases applying non-statutory equitable tolling.

[her] ability to file a timely [civil action].' " *Hunter*, 587 F.3d at 1308 (quoting *Lawrence v. Florida*, 421 F.3d 1221, 1226 (11th Cir. 2005)). Thus, a "mental impairment is not *per se* a reason to toll a statute of limitations," and instead the "impairment must have affected the [plaintiff's] ability to file a timely" civil action. *Id.* The Eleventh Circuit has determined that colorable claim of mental impairment for tolling purposes exists where: (1) the party suffered from significant and irreversible mental retardation which prevented him from understanding his rights and obligations under the law and from acting on these rights in a timely manner; and (2) the party could not manage his affairs or his legal rights. *Id.* at 1309.

The Court concludes that Plaintiff is not entitled to tolling under federal law for similar reasons as those outlined above in relation to O.C.G.A. §§ 9-3-90, 9-3-91. First, Plaintiff cannot allege she suffers from mental retardation like the party in *Hunter*, *supra*, because she is in pursuit of a master's degree. Second, Plaintiff has filed lawsuits previously. *See Lingo v. Jones*, No. 2:08-cv-142, 2010 WL 1856089, *4 (M.D. Ala. Mar. 5, 2010) (rejecting equitable tolling argument by plaintiff in part because he had proceeded *pro se* in other lawsuits). Third, Plaintiff's long list of adverse mental states do not demonstrate that she was incapable of preparing her complaint for this lawsuit, especially given her work in attaining a master's degree "at

all times mentioned." (Complaint at 3 (¶ 5)). Fourth, Plaintiff's list of varying mental states (e.g., fear, horror, anxiety, shock) has not established a connection between her mental illness and her ability to timely file her civil action. *Varner v. Mosley*, No. 2:06-cv-1021, 2009 WL 103179, *4-5 (M.D. Ala. Jan. 14, 2009) (finding denial of cases which plaintiff alleged caused despondency and "mental stress" did not justify equitable tolling because there was no causal connection between the alleged mental stress and the ability to file the action). Finally, Plaintiff's allegations in her complaint do not demonstrate that her situation is one that involves the extraordinary circumstances necessary for the application of equitable tolling.

Accordingly, the Court concludes that the statute of limitations for Plaintiff's § 1983 claims should not be tolled under Georgia or federal law as a matter of law for the reasons outlined above.[9] Since tolling does not apply, Plaintiff's 42 U.S.C. § 1983 claims are time barred. As a result, the undersigned **RECOMMENDS** that Plaintiff's civil action be **DISMISSED**.

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[9] The Court also notes that the fact that criminal charges were pending against Plaintiff until April 2009 does not serve to toll the limitations period. "In *Wallace v. Kato*, [549] U.S. [384,392-94, 397] . . . (2007), the Supreme Court held that a plaintiff must bring a § 1983 action within the relevant statute of limitations period, even if the § 1983 action may impugn an anticipated future conviction." *Watts v. Epps*, 475 F. Supp. 2d 1367, 1368 (N.D. Ga. 2007) (Story, J.). As a result, Plaintiff still had two years from October 2007 to bring her civil action.

Conclusion

For the reasons discussed above, the Court **GRANTS** Plaintiff's revised application to proceed *in forma pauperis*. Following the statutorily-mandated review of Plaintiff's civil action pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court **RECOMMENDS** that Plaintiff's civil action be **DISMISSED** because her claims are time barred. The Clerk is **DIRECTED** to terminate the reference to the undersigned.

IT IS SO ORDERED, RECOMMENDED AND DIRECTED, this 12th day of July, 2010.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE