

**DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

KEITA JONES,	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 2023-13
	)	
RAY MARTINEZ, <i>et al.</i> ,	)	
	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION and ORDER

This matter is before the Court on the application of *pro se* plaintiff Keita Jones to proceed *in forma pauperis* (“IFP”) under 28 U.S.C. § 1915(a)(1), and for an initial screening of his pleading pursuant to 28 U.S.C. § 1915(e)(2). The Court finds plaintiff has properly demonstrated his inability to pay the required court costs. However, for the reasons set forth below, the Court recommends that the complaint be dismissed.

I. FACTUAL ALLEGATIONS¹

Plaintiff brings this action against the Virgin Islands Police Department (“VIPD”), Police Commissioner Ray Martinez, and VIPD Officers Shera Joseph, Patricia Simmonds, and Dwayne Walters.² [ECF 1]. The complaint asserts federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction under 28 U.S.C. § 1367, and indicates that the events giving rise to plaintiff’s claims took place on St. Thomas and St. Croix. *Id.* at 2. Plaintiff alleges state law and

¹ The Court sets forth the facts in the light most favorable to plaintiff because “th[e] initial assessment of the *in forma pauperis* plaintiff’s factual allegations must be weighted in favor of the plaintiff.” *Ball v. Famiglio*, 726 F.3d 448, 452 n.2 (3d Cir. 2013) (alteration in original) (quoting *Denton v. Hernandez*, 504 U.S. 25, 32 (1992)).

² In the caption of his complaint, plaintiff names Martinez, Joseph, Simmonds and Walters each in their official and individual capacities. [ECF 1] at 1. In the balance of his complaint, he does not plead any cause of action against Martinez in his official capacity.

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constitutional violations relating to his arrest and the confiscation of his firearm and firearms license.

Specifically, plaintiff states that on January 19, 2021, he drove his grandmother to Banco Popular at the Sunny Isles Shopping Center and sat in his parked vehicle to wait for her. *Id.* ¶ 10. Plaintiff saw two police vehicles circling the parking lot and staring at him, and then two female police officers and a man wearing dark clothing approached his vehicle. *Id.* ¶¶ 11–12. He later learned these individuals were Officers Joseph, Simmonds, and Walters. *Id.* ¶ 13. According to the complaint, Officer Walters aimed his firearm at plaintiff’s head and ordered him not to move, then screamed “gun.” *Id.* ¶ 16. Plaintiff was carrying his licensed handgun in a holster in his front right pocket, and had his Virgin Islands concealed firearms license in his left front pocket. *Id.* ¶¶ 17–18. He informed the officers that he had his firearms license, and showed it to Officers Joseph and Simmonds. *Id.* ¶¶ 20, 22. Officer Walters then entered the vehicle and grabbed plaintiff’s firearm and exited the vehicle with it. *Id.* ¶ 23. Plaintiff feared for his life and reversed out of the parking space, and Walters reentered the vehicle and began punching him. *Id.* ¶¶ 24–26. Walters turned the car off and exited the vehicle, plaintiff restarted his car, and Walters tased him as he drove off. *Id.* ¶¶ 27–30.

Later that day, plaintiff went to the police command center for questioning, and officers confiscated his firearms license. *Id.* ¶¶ 36–37. At his January 20, 2021 advice of rights hearing, the Virgin Islands Department of Justice withdrew its probable cause fact sheet and dropped the charges, the case was closed, and Magistrate Judge Camacho ordered the return of plaintiff’s firearm and license. *Id.* ¶¶ 53–54.³ Following several attempts by plaintiff to retrieve his firearm and license, including a motion for return of property, plaintiff’s license was returned on January

³ Superior Court Case No. SX-2021-CR-25

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22, 2021, and his firearm was returned on January 26, 2021. *Id.* ¶¶ 55–60.

On February 19, 2021, Officer Joseph submitted an affidavit regarding the January 19, 2021 incident, and the court issued a warrant on February 23, 2021. *Id.* ¶¶ 71, 85.⁴ Plaintiff was arrested at the Cyril E. King International Airport on St. Thomas on June 23, 2021, and VIPD seized his firearm and license. *Id.* ¶¶ 90–91. The prosecution subsequently filed a motion to dismiss, and on October 20, 2021, Judge Brady dismissed the case with prejudice and ordered plaintiff’s property be returned to him. *Id.* ¶¶ 92, 94.

Plaintiff attempted to retrieve his firearm and license from VIPD headquarters on October 22, 2021, but the firearms supervisor refused. *Id.* ¶ 95. Plaintiff then filed a motion for order to show cause and a motion for return of property, and the court held a show cause hearing on January 12, 2022. *Id.* ¶¶ 97–98. In a January 14, 2022 order, the court stated VIPD’s actions in failing to comply with the court’s orders and return plaintiff’s property were without justification or any proffered basis. *Id.* ¶¶ 105–06. The court found Commissioner Martinez in contempt of court, and reiterated that its October 20, 2021 order that plaintiff’s property be returned was still in full force and effect. *Id.* ¶ 108.

Plaintiff presented the January 14, 2022 order to VIPD headquarters on January 18 and 19, 2022, but VIPD refused to return his property or to allow him to speak with Commissioner Martinez. *Id.* ¶¶ 109–11. Plaintiff avers that “[f]rom January 20, 2022 to the present, [he] has made numerous calls to VIPD, requesting that the Commissioner . . . contact him to arrange for return of his personal property, but Plaintiff’s calls have not been returned.” *Id.* ¶ 112.

Plaintiff filed the instant action on March 21, 2023, and brings five counts for relief. Count I is for aggravated assault and battery concerning the January 19, 2021 incident. [ECF 1]

⁴ Superior Court Case No. SX-2021-CR-53

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at 18–19. In Count II, plaintiff alleges deprivation of property by confiscation and of liberty by false arrest, without due process, in violation of 42 U.S.C. § 1983.⁵ *Id.* at 21. Count III is for deprivation of property by confiscation and of liberty by second false arrest, without due process, in violation of § 1983. *Id.* at 23. Count IV alleges continuing deprivation of property in violation of court order and § 1983. *Id.* at 24. Lastly, Count V seeks a coercive injunction to return plaintiff’s property. *Id.* at 25–27. Plaintiff also seeks compensatory, punitive, consequential, and treble damages, and damages arising under statute and common law. *Id.* at 27–28.

II. MOTION TO PROCEED *IN FORMA PAUPERIS*

A plaintiff bringing a civil action must either pay the requisite filing fee of \$402.00,⁶ or, in the alternative, file an application and affidavit to proceed IFP under 28 U.S.C. § 1915, which permits an indigent litigant to commence suit in federal court without prepayment of fees. Section 1915(a)(1) provides that:

[A]ny court of the United States may authorize the commencement . . . of any suit, action or proceeding, . . . without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] possesses that the person is unable to pay such fees or give security therefor.

See Rodriguez v. Wawa Inc., 2020 WL 1332006, at *1 (D.N.J. Mar. 23, 2020) (“although § 1915 refers to ‘prisoners,’ federal courts apply § 1915 to non-prisoner IFP applications”), *aff’d*, 833 F. App’x 933 (3d Cir. 2021). “The decision to grant or deny an IFP application is based solely on the economic eligibility of the litigant.” *Cuello v. Dist. of New Jersey*, 2016 WL 2349592, at *1 (D.N.J. May 2, 2016). A party need not be “absolutely destitute to enjoy the benefit of the

⁵ Plaintiff cites to 42 V.I.C. § 1983 throughout the complaint, but no such statute exists. The Court presumes plaintiff intended to cite the federal civil rights statute, 42 U.S.C. § 1983.

⁶ Parties filing civil complaints in federal court are charged a \$402.00 fee. This consists of the \$350.00 statutory filing fee plus a \$52.00 administrative fee. 28 U.S.C. § 1914.

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statute.” *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948) (“[A]n affidavit is sufficient which states that one cannot because of his poverty ‘pay or give security for the costs * * * and still be able to provide’ himself and dependents ‘with the necessities of life.’”).

The Court finds that plaintiff’s application demonstrates his indigency. Plaintiff avers he is employed at 7-Eleven and his net pay is \$1,176.00 per month. [ECF 8] at 1. He receives no other income and has \$0.59 in his checking account, and owes \$15,941.00 in debt. *Id.* at 1–2. His monthly expenses for his car, insurance, rent, utilities, and groceries exceed his income, and he also provides for his child and child’s mother. *Id.* at 2. Accordingly, the Court will grant plaintiff’s motion to proceed IFP.

III. STATUORY SCREENING

When a plaintiff has applied for leave to proceed IFP, the court must review the complaint for cognizable claims and *sua sponte* dismiss the action or any portion thereof that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B) (requiring dismissal of the case “at any time”). In addition, a court may consider the statute of limitations, personal jurisdiction, and venue *sua sponte* “when the defense is obvious from the face of the complaint and no further factual record is required to be developed.” *Trujillo v. Williams*, 465 F.3d 1210, 1217 (10th Cir. 2006) (citation omitted); *Boldrini v. Ammerman*, 629 F. App’x 172, 175 n.3 (3d Cir. 2015); *McPherson v. United States*, 392 F. App’x 938, 943 (3d Cir. 2010) (“when a statute-of-limitations defense is apparent from the face of the complaint, a court may sua sponte dismiss the complaint pursuant to 28 U.S.C. § 1915 or 28 U.S.C. § 1915A”).

A complaint is frivolous when it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Thus, dismissal of a claim as frivolous is proper “where

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it depends on an indisputably meritless legal theory or a clearly baseless or fantastic or delusional factual scenario.” *Dooley v. Wetzel*, 957 F.3d 366, 374 (3d Cir. 2020) (internal quotations and citation omitted). A complaint is malicious when it “duplicates a pending suit,” *Johnson v. City of Philadelphia*, 664 F. App’x 130, 131 (3d Cir. 2016); accord *Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir. 1993) (“[I]t is ‘malicious’ for a pauper to file a lawsuit that duplicates allegations of another pending federal lawsuit by the same plaintiff.”), or when “the action is an attempt to vex, injure or harass the defendant.” *Deutsch v. United States*, 67 F.3d 1080, 1086 (3d Cir. 1995); see also *Lindell v. McCallum*, 352 F.3d 1107, 1109 (7th Cir. 2003) (stating that “malicious” in the context of §§ 1915(e) and 1915A(b) “is more usefully construed as intended to harass”).

Whether a complaint fails to state a claim for purposes of § 1915(e)(2)(B) is governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). *Schreane v. Seana*, 506 F. App’x 120, 122 (3d Cir. 2012) (citing *Allah v. Seiverling*, 229 F.3d 220, 223 (3d Cir. 2000)). Accordingly, a court must determine whether the complaint includes “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citation omitted). “[A] civil rights complaint is adequate where it states the conduct, time, place, and persons responsible.” *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005). When these elements are met, a complaint “is sufficiently precise to give notice of the claims asserted.” *Hall v. Pa. State Police*, 570 F.2d 86, 89 (3d Cir. 1978). While courts construe *pro se* pleadings liberally, *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), “there are limits to [this] procedural flexibility.” *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013). The litigant must still allege sufficient facts to support a valid claim, *id.*, and “[t]here is no duty on the part of the trial court to create a claim which [the plaintiff] has not spelled out in his [or her] pleading.” *Caldwell v. United States*, 2016 WL 1178717, at *2 (Fed. Cl. Mar. 25,

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2016) (alterations in original) (citation omitted).⁷ In addition, the “Court need not . . . credit a *pro se* plaintiff’s ‘bald assertions’ or ‘legal conclusions.’” *Purpura v. JPMorgan Chase*, 2017 WL 1250993, at *3 (D.N.J. Mar. 24, 2017) (citation omitted).

Finally, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction . . . [and] it is to be presumed that a cause lies outside this limited jurisdiction . . .”).⁸

IV. DISCUSSION

A. Section 1983 Claims

Section 1983 provides a remedy to redress violations of federal law grounded in federal constitutional provisions or statutes. *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979); *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006). In relevant part, the statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983. Thus, to state a claim for relief under § 1983, a plaintiff must allege, first, the

⁷ Hence, the Supreme Court has “never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.” *McNeil v. United States*, 508 U.S. 106, 113 (1993); *see also Silver v. Queen’s Hosp.*, 53 F.R.D. 223, 225 (D. Haw. 1971) (“Every plaintiff filing a complaint in a Federal District Court must prepare his complaint in conformity with Fed. R. Civ. Rule 8(a). It is not the function of trial judges to redraft, edit or otherwise conform complaints to the requirements of the cited rule.”).

⁸ Under 28 U.S.C. § 1331, the district courts have federal question jurisdiction over civil actions “arising under the Constitution, laws, or treaties of the United States.” For a claim to arise under the Constitution, laws, or treaties of the United States, a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff’s claim. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974). The complaint here alleges civil rights and constitutional violations by territorial officials, and seeks damages based, in part, on 42 U.S.C. § 1983.

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violation of a right secured by the Constitution or laws of the United States and, second, that the alleged deprivation was committed or caused by a person acting under color of state or territorial law. *Groman v. Twp. of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995) (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). Here, the complaint names VIPD Commissioner Martinez and VIPD Officers Joseph, Simmonds, and Walters in their individual and official capacities.⁹

1. Deprivation of Property and Liberty Without Due Process

As an initial matter, plaintiff's Count II claim for deprivation of property by confiscation and of liberty by false arrest is barred by the statute of limitations. Plaintiff brings this claim against Officers Joseph, Simmonds, and Walters in their individual capacities, and alleges defendants violated his constitutional right to bear arms by unlawfully taking his firearm without probable cause, violating due process. [ECF 1] at 21–22.¹⁰

A claim brought pursuant to 42 U.S.C. § 1983 is subject to the same statute of limitations as a personal injury claim in the state where the claim arose. *Wallace v. Kato*, 549 U.S. 384, 387 (2007); *Cito v. Bridgewater Twp. Police Dep't*, 892 F.2d 23, 25 (3d Cir. 1989). Plaintiff's claims against the defendants arose in the Virgin Islands; thus, the applicable statute of limitations is the Virgin Islands' statute of limitations for personal injury actions, which is two years. 5 V.I.C. § 31(a)(5)(A). The statute of limitations period begins to run “when the plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action.” *Genty v. Resolution Tr. Corp.*, 937 F.2d 899, 919 (3d Cir. 1991). Plaintiff alleges the events giving rise to his Count

⁹ “The ‘color of state law element is a threshold issue’ and thus there is no liability under § 1983 if the defendant is not acting under color of state law.” *Vaughn v. Markey*, 813 F. App'x 832, 833 (3d Cir. 2020) (quoting *Groman*, 47 F.3d at 638). The complaint alleges defendants are employees of the Government of the Virgin Islands and acted under color of territorial law. [ECF 1] at 2–3, 21, 23, 25.

¹⁰ While plaintiff cites both the Fifth and Fourteenth Amendments in support of his due process claims, only the latter applies to the territory. *See* U.S. Const. amend. XIV, § 1 (no “State [shall] deprive any person of life, liberty, or property, without due process of law”).

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II claim occurred on January 19, 2021. [ECF 1] at 21. Because plaintiff did not file this action until more than two years later, on March 21, 2023, Count II is barred by the statute of limitations, and this claim should therefore be dismissed. *See Boldrini*, 629 F. App'x at 175 n.3.¹¹

The Court further finds that Count III, deprivation of property by confiscation and of liberty by second false arrest, brought against Commissioner Martinez in his individual capacity,¹² fails to state a claim upon which relief may be granted.

Count III alleges Martinez “unconstitutionally deprived Plaintiff of his right to bear arms, and his liberty and property, without due process of law,” when, “[o]n June 23, 2021, despite

¹¹ To the extent plaintiff argues the deadline for this claim should be tolled by his March 5, 2021 Tort Claim Notice, *see* [ECF 1] ¶ 119, such argument is foreclosed by statute.

The Revised Organic Act grants sovereign immunity to the Government of the Virgin Islands for tort claims. 48 U.S.C. § 1541(b). By enacting the Virgin Islands Tort Claims Act (“VITCA”), the government waived its immunity for certain tort claims “caused by the negligent or wrongful act or omission of an employee of the Government of the United States Virgin Islands while acting within the scope of his office or employment.” 33 V.I.C. § 3408(a). To sue the government in tort, a claimant must strictly comply with certain procedural requirements. Relevant to the instant case, within 90 days of the accrual of a personal injury claim, a claimant must either file his tort claim or file written notice of his intention to file such claim. 33 V.I.C. § 3409(c). If the claimant gives notice of his intention, he must file his claim within two years after the claim accrues. *Id.* The claim or notice of intention must be filed in the Office of the Governor and a copy served on the Attorney General. 33 V.I.C. § 3410. The VITCA further provides that “[n]o judgment shall be awarded to any claimant or any claim which, as between private litigants, would be barred by the statute of limitations.” 33 V.I.C. § 3411(b).

Here, plaintiff provides a copy of a March 5, 2021 letter addressed to the Governor, Lieutenant Governor, and Attorney General giving notice of his intent to file a claim regarding the January 19, 2021 incident. [ECF 1-2] at 8, 10. Assuming the VITCA applies to plaintiff’s § 1983 due process claim, and assuming further that this letter complied with the statute’s procedural requirements, *see* 33 V.I.C. §§ 3409, 3410, the VITCA still does not toll the limitations period for plaintiff’s § 1983 claim against Officers Joseph, Simmonds, and Walters: The VITCA does not apply to claims against government officers sued in their individual capacities, *see President v. Gov’t of Virgin Islands*, 2023 WL 2185722, at *4 (D.V.I. Feb. 23, 2023) (collecting cases), and even if it did, the statute still requires a tort claim to be filed within two years of accrual. Moreover, the statute prohibits a claimant from recovering damages on a claim that would be barred as untimely as between private litigants—exactly the situation in the present case.

¹² “[S]tate officials sued in their individual capacities are ‘persons’ for purposes of § 1983.” *Hafer v. Melo*, 502 U.S. 21, 23 (1991); *see also Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (“Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.”). To state a claim against a government official in his individual capacity under § 1983, a plaintiff must allege that the defendant was personally involved in the events or occurrences on which the claims are based. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (“liability cannot be predicated solely on the operation of *respondeat superior*”); *see Graham*, 473 U.S. at 166. “Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence,” but such allegations “must be made with appropriate particularity.” *Rode*, 845 F.2d at 1207.

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VIPD's and the Justice Department's knowledge that the arrest of Plaintiff was improper, and based upon a spurious warrant, Defendants VIPD and Martinez seized Plaintiff's firearm, firearm transport case, and firearms license, and caused Plaintiff to be held at the Bureau of Corrections in St. Thomas for approximately three days." *Id.* ¶¶ 159–60. Plaintiff's own exhibits, however, preclude a finding of plausible unconstitutional injury.¹³

"In the ordinary criminal case, arrest and detention of a suspect is reasonable if it is supported by probable cause, as determined by the judge who . . . issues an arrest warrant" *Coley v. Lord*, 2013 WL 3801664, at *4 (D. Del. June 27, 2013) (citing *Gerstein v. Pugh*, 420 U.S. 103, 111–14 (1975) and *Burt v. Ferrese*, 871 F.2d 14 (3d Cir. 1989)); *see also Fiore v. City of Bethlehem*, 510 F. App'x 215, 220 (3d Cir. 2013) ("[T]he fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in 'objective good faith.'" (quoting *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012))). Here, on February 23, 2021, Magistrate Judge Camacho issued a warrant for plaintiff's arrest.¹⁴ That warrant was supported by Officer Joseph's sworn affidavit of probable cause.¹⁵ The warrant was executed on June 23, 2021, when plaintiff was arrested at the Cyril E. King Airport on St. Thomas, and VIPD seized his firearm and license.¹⁶ Based on these facts, it cannot be reasonably inferred that the arresting officers lacked probable cause to seize and

¹³ In assessing the viability of a complaint, the court may consider not only the allegations themselves, but any attachments to the complaint that are incorporated therein. *See White v. SP Plus Corp.*, 858 F. App'x 488, 489 (3d Cir. 2021) (when screening pleading under § 1915(e)(2)(B), courts may consider documents attached to the complaint); *Fields v. Venable*, 674 F. App'x 225, 229 (3d Cir. 2016) (same; finding that where exhibits attached to complaint undermined plaintiff's allegations, complaint failed to state a plausible claim); *see also* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

¹⁴ *See* [ECF 1-16] Ex. F (copy of warrant); [ECF 1-19] at 16 (superior court docket for SX-2021-CR-53).

¹⁵ *See* [ECF 1-4] at 17 (partial copy of affidavit); [ECF 1-19] at 16.

¹⁶ *See* [ECF 1] ¶¶ 90–91; [ECF 1-16] Ex. F.

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detain plaintiff. And, even if the warrant was, as plaintiff contends, based on false statements in Joseph's affidavit, the complaint pleads no facts showing Martinez's personal involvement in these events. For example, plaintiff does not allege that Martinez directed Joseph to provide false information, or that Martinez personally seized plaintiff's firearm and license based on information he knew to be false. *See Santiago v. Warminster Twp.*, 629 F.3d 121, 129 (3d Cir. 2010) (supervisor might be liable under § 1983 "if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations").

Accordingly, plaintiff cannot state a plausible claim against Martinez for the wrongful deprivation of his liberty or his firearm and license when that property was seized incident to his arrest on a warrant that issued on a finding of probable cause. *See Hall*, 570 F.2d at 89 (a plaintiff's mere assertion that his rights have been violated "without facts upon which to assess the substantiality of the claim" is insufficient). The Court therefore recommends that Count III be dismissed for failure to state a claim, permitting plaintiff to replead only if he possesses a factual and legal basis to do so.¹⁷

2. Continuing Deprivation of Property

As to plaintiff's Count IV claim for continuing deprivation of property, brought against Commissioner Martinez in his individual capacity, the complaint fails to state a claim upon which relief may be granted.

Count IV alleges Martinez's refusal to comply with the superior court's orders violates

¹⁷ *Pro se* litigants are to be granted leave to file a curative amended complaint "even when a plaintiff does not seek leave to amend . . . unless such an amendment would be inequitable or futile." *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004). Conversely, a complaint that sets forth facts which affirmatively demonstrate that the *pro se* plaintiff has no right to recover is properly dismissed without leave to amend. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002); *Askew v. Jones*, 160 F. App'x 140, 143 n.4 (3d Cir. 2005).

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plaintiff's constitutional right to bear arms and prevents him from working as an armed security guard. [ECF 1] ¶¶ 167, 169. Plaintiff further states that “[o]n March 21, 2022, in open and defiant violation of the Direct Orders of Judge Brady, . . . Defendant Martinez sent Plaintiff a letter purporting to suspend Plaintiff's firearms license.” *Id.* ¶ 168. While the complaint fails to tell the whole story, plaintiff's exhibits fill in the gaps:

As detailed above, on October 20, 2021, Judge Brady dismissed SX-2021-CR-053 and ordered that plaintiff's firearm, firearm lockbox, and firearms license be returned. [ECF 1-4] at 33; [ECF 1-5] at 2. In a January 14, 2022 order, Judge Brady stated that the October 20, 2021 order directing the return of plaintiff's property “remains in full force and effect and shall be complied with forthwith.” [ECF 1-6] at 11.

On January 19, 2022, the Commissioner held a firearms administrative hearing via Teams, and plaintiff appeared and gave testimony. *See* [ECF 1-4] at 1; [ECF 1-6] at 3.¹⁸ In a March 21, 2022 letter, Commissioner Martinez notified plaintiff that his firearms license was suspended for one year. [ECF 1-4] at 1.¹⁹ VIPD also gave notice of its decision to the superior court. *See* [ECF 1-19] at 11, 13. In a March 28, 2022 order, Judge Brady found that: “By the VIPD March 21, 2022 Firearms Administrative Hearing Decision report, [plaintiff] was notified that his firearm license has been suspended . . . based upon facts underlying the [criminal] charges brought [against him] . . . with legal authority set forth therein.” [ECF 1-19] at 12. Judge Brady therefore vacated

¹⁸ In a filing related to his petition for writ of review of the administrative hearing decision, plaintiff states that a Detective Jones emailed him an invitation to the video call. [ECF 1-15] at 3–4.

¹⁹ The administrative hearing decision was based on plaintiff's failure to display his firearms license during the January 19, 2021 incident, as required by 23 V.I.C. § 454B. *See* [ECF 1-4] at 1. The decision also cited Firearms Rules and Regulations Section S485-9, providing that a firearms license “is the property of the USVI Police Department and can be revoked at any time,” and Section S485-11C, grounds and procedures for cancellation/suspension. *Id.* at 1, 3.

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the October 20, 2021 order in its entirety, and further vacated the final paragraph of the January 14, 2022 order directing the return of plaintiff's firearm and license. *Id.*

Thus, while plaintiff alleges an unlawful continuing deprivation of his firearm and license, such claim is simply not supported by the record.²⁰

Further, while “[t]he Second Amendment enshrines an ‘individual right to possess and carry weapons in case of confrontation[,]’ [t]hat right, like most rights, ‘is not unlimited.’” *Drummond v. Robinson Twp.*, 9 F.4th 217, 225 (3d Cir. 2021) (quoting *D.C. v. Heller*, 554 U.S. 570, 592, 626 (2008)). The Virgin Islands Police Commissioner is vested by law with the authority to issue, revoke, or suspend a firearms license, *see* 23 V.I.C. §§ 454, 454a, 456, 458, 459, and enjoys broad discretion in making licensing decisions. *See* 23 V.I.C. § 459(a)(3) (the Commissioner may suspend a license when it “appear[s] to [his] satisfaction . . . that the licensee commits any act in violation of the terms of the license, or of any provisions of this chapter warranting the cancellation of the license”); 23 V.I.C. § 458(a) (the Commissioner may deny a license “to any person who for justifiable reasons is deemed to be an improper person by the Commissioner”). And, while plaintiff here may dispute the factual basis for the Commissioner’s decision, the law affords a remedy: Any person whose license is denied or revoked may seek judicial review by timely filing an appeal in superior court, but such appeal does “not operate to stay the action of the Commissioner.” 23 V.I.C. § 472. Plaintiff filed a petition for writ of review of the firearms administrative hearing disposition, and the superior court issued a writ and entered a briefing schedule. *See* [ECF 1-6] at 1 (appeal filed April 20, 2022); [ECF 1-17] at 2–4.

²⁰ The Commissioner’s March 21, 2022 administrative hearing disposition stated plaintiff’s suspension was for one year and that he may be eligible to reapply for his license after one year from the date of the hearing. *See* [ECF 1-4] at 3. The hearing was on January 19, 2022, making plaintiff eligible to reapply as of January 19, 2023. Plaintiff filed this action on March 21, 2023, but did not indicate at that time whether he had taken any action to reapply for his license.

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Plaintiff also appealed Judge Brady’s March 28, 2022 order to the Virgin Islands Supreme Court. *See* [ECF 1-13] at 1 (appeal filed May 4, 2022). Plaintiff’s appeals of the administrative hearing disposition and Judge Brady’s order are still pending; thus, those decisions remain valid and in effect.²¹ It is not the province of this Court to interfere with matters properly brought and pending in the local courts.

In sum, plaintiff cannot state a plausible claim for continuing deprivation of property where his firearms license was revoked pursuant to the Commissioner’s statutory authority, and based on that administrative decision, the superior court vacated its prior orders directing the return of plaintiff’s firearm and license. Moreover, the Virgin Islands Code provides for a procedure to challenge the Commissioner’s decision, and plaintiff’s appeals remain pending in the local courts. Count IV should therefore be dismissed for failure to state a claim.

3. Injunctive Relief

For the same reasons that Count IV fails to state a claim, plaintiff’s Count V claim for injunctive relief must also be dismissed.

Count V repeats the allegation that, contrary to multiple superior court orders, “Commissioner Martinez has failed and refused to return Plaintiff’s property,” violating the constitutional protection against deprivation of property without due process and plaintiff’s right to bear arms. [ECF 1] ¶¶ 174, 176–77. Plaintiff contends he is likely to prevail on the merits of this case, and requests that the Court issue a coercive injunction requiring the Commissioner to immediately return plaintiff’s property. *Id.* ¶¶ 178, 183. As set forth above, plaintiff’s firearms license was revoked following an administrative hearing at which he appeared and gave testimony,

²¹ This Court’s review of the Virgin Islands Supreme Court and Superior Court dockets indicates that both of plaintiff’s appeals are still pending, and neither court has stayed or otherwise vacated the challenged rulings.

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and, in light of the administrative decision, the superior court vacated its prior orders directing that plaintiff's property be returned. Plaintiff cannot, therefore, state a plausible claim for injunctive relief, nor show entitlement to such relief under Fed. R. Civ. P. 65.²²

B. State Law Claims

Lastly, the Court finds that plaintiff's Count I claim for aggravated assault and battery should be dismissed for lack of jurisdiction, and further because it is barred by the statute of limitations. Plaintiff brings this claim against Officers Walters, Simmonds, and Joseph in their individual and official capacities, and VIPD. [ECF 1] at 18.

Where a case is properly brought in district court pursuant to federal question jurisdiction or diversity jurisdiction, the court may have supplemental jurisdiction over local claims arising out of the same case or controversy as the underlying federal claims. 28 U.S.C. § 1367(a); *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 308 (3d Cir. 2003) ("a district court may exercise supplemental jurisdiction where state-law claims share a 'common nucleus of operative fact' with the claims that supported the district court's original jurisdiction" (citation omitted)). Supplemental jurisdiction "is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Relevant to the instant case, a court may decline to exercise its jurisdiction over a state law claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). As set forth above, the Court recommends that plaintiff's federal claims be dismissed. The Court should therefore decline to exercise jurisdiction

²² A request for injunctive relief is not a cause of action to be brought as a separate count in a complaint; it is a remedy a party may seek under Rule 65. A court must determine whether the movant has shown: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004); *see also Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003) ("The court's ability to grant effective relief lies at the heart of the mootness doctrine. . . . The availability of declaratory [and injunctive] relief depends on whether there is a live dispute between the parties." (alteration in original) (citation omitted)).

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over plaintiff's state law tort claim.

The Court further finds that even if jurisdiction over this claim were proper, it is barred by the statute of limitations. The Virgin Islands Code provides that a civil action for assault or battery must be commenced within two years after the cause of action accrues. 5 V.I.C. § 31(a)(5)(A). Plaintiff alleges the events giving rise to his Count I claim occurred on January 19, 2021. [ECF 1] at 19–20. However, this action was not filed until March 21, 2023, and is thus well outside the two-year limitations period.²³ For this reason also, Count I should be dismissed.

V. CONCLUSION

Accordingly, for the foregoing reasons, the Court RECOMMENDS that the complaint be DISMISSED.

Any objections to this Report and Recommendation must be filed in writing within 14 days of receipt of this notice. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. 28 U.S.C. § 636(b)(1); LRCi 72.3.

In addition, it is ORDERED as follows:

1. Plaintiff's application to proceed IFP is GRANTED. [ECF 8].
2. The Clerk of Court shall not issue summons or direct service of plaintiff's complaint until further Order of the Court.

Dated: February 13, 2024

S_____
RUTH MILLER
United States Magistrate Judge

²³ To the extent plaintiff contends that the government's waiver of sovereign immunity under the VITCA tolls the limitations period for his assault and battery claim, this argument fails. *See supra* note 11.