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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JAMES E. SMITH,  
Plaintiff,  
v.  
RUDY MIRELEZ, et al.,  
Defendants.

CASE NO. 1:15-cv-1343-AWI-MJS  
**FINDINGS AND RECOMMENDATION TO  
DISMISS CASE WITHOUT LEAVE TO  
AMEND**  
**(ECF NO. 10)**  
**FOURTEEN-DAY DEADLINE**

Plaintiff is proceeding pro se and in forma pauperis in this action brought pursuant to 42 U.S.C. § 1983. Plaintiff’s original and First Amended Complaints were dismissed with leave to amend on January 12, 2016, and February 26, 2016, respectively.<sup>1</sup> (ECF Nos. 6, 9.) In the last screening order, Plaintiff was given one final opportunity to state a claim. His November 9, 2016, Second Amended Complaint is now before the Court for screening.

**I. Screening Requirement**

The in forma pauperis statute provides, “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if

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<sup>1</sup> This case was reassigned to the undersigned on January 9, 2017. (ECF No. 11.)

1 the court determines that . . . the action or appeal . . . fails to state a claim upon which  
2 relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

3 **II. Pleading Standard**

4 A complaint must contain “a short and plain statement of the claim showing that  
5 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
6 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
7 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.  
8 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).  
9 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to relief  
10 that is plausible on its face.” Id. Facial plausibility demands more than the mere  
11 possibility that a defendant committed misconduct and, while factual allegations are  
12 accepted as true, legal conclusions are not. Id. at 677-78.

13 **III. Plaintiff’s Allegations**

14 Plaintiff brings this action against Defendants Officer Rudy Mirelez, Devan M.  
15 Portillo, Prosecutor Eugene Action, Natalie N. Gilbertson, Steve Dahlem, and the  
16 Mariposa County Council.

17 Plaintiff’s allegations may be fairly summarized as follows:

18 Plaintiff alleges that on June 27, 2013, he was arrested for unspecified conduct  
19 against his stepdaughter. During his arrest, Plaintiff was not given a Miranda warning  
20 and was forced to provide a DNA sample. He was then transferred to the county jail  
21 where he was refused medication for his diabetes, and he had to use his credit cards to  
22 make bail.

23 Plaintiff denies the charges brought against him. On December 3, 2013, a  
24 preliminary hearing was held during which the victim changed her original statement.  
25 The three “court officers” did not question the victim about this changed testimony. When  
26 Plaintiff asked his attorney why they had not yet gone to trial, the attorney told Plaintiff

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1 that he waived his right to a speedy trial. Plaintiff claims he did not know he had waived  
2 this right.

3 On September 2, 2014, a trial was held resulting in a mistrial, and a second trial  
4 was then scheduled for May 15, 2015. Plaintiff did not believe his attorney had his best  
5 interest at heart and sought to remove him. Plaintiff ultimately plead No Contest and was  
6 assessed a \$250 fine.

7 As a result of the charges brought against him and the delayed criminal  
8 proceedings, Plaintiff experienced emotional stress, he lost 70 pounds, and his  
9 relationship with his wife and stepdaughter suffered.

10 Plaintiff claims his Fifth Amendment rights were violated when he was forced to  
11 evacuate his home; his Eighth Amendment rights were violated by the continued  
12 postponement of his trial; and his Fourteenth Amendment rights were violated because  
13 he was not provided due process and equal protection. Plaintiff seeks \$175,000 in  
14 damages.

#### 15 **IV. Analysis**

##### 16 **A. Linkage**

17 Section 1983 “provides a cause of action for the deprivation of any rights,  
18 privileges, or immunities secured by the Constitution and laws of the United States.”  
19 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).

20 Section 1983 is not itself a source of substantive rights, but merely provides a method for  
21 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94  
22 (1989).

23 To state a claim under § 1983, a plaintiff must allege two essential elements:  
24 (1) that a right secured by the Constitution or laws of the United States was violated and  
25 (2) that the alleged violation was committed by a person acting under the color of state  
26 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d  
27 1243, 1245 (9th Cir. 1987).

1 Plaintiff must also demonstrate that each named defendant personally  
2 participated in the deprivation of his rights. Iqbal, 556 U.S. 662, 676-77 (2009); Simmons  
3 v. Navajo Cnty., Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton,  
4 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297 F.3d 930, 934 (9th Cir.  
5 2002). Generally, private parties are not acting under color of state law, and their  
6 conduct does not constitute state action. See Price v. Hawaii, 939 F.2d 702, 707-08 (9th  
7 Cir.1991).

8 Plaintiff's Second Amended Complaint does not affirmatively link the conduct of  
9 any of the named Defendants to a violation of Plaintiff's constitutional rights. In addition,  
10 while the Court has gleaned from the pleading that Defendant Rudy Mirelez is an officer  
11 and Eugene Action is an attorney, there are no facts identifying what role, if any,  
12 Defendants Devan M. Portillo, Natalie N. Gilbertson, and Steve Dahlem had in the  
13 pursuit of criminal charges against Plaintiff. He was previously informed of these  
14 requirements. For these reasons alone, Plaintiff's pleading must be dismissed.

15 **B. Fifth Amendment**

16 The Fifth Amendment provides, in relevant part, that "No person shall be ...  
17 deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V.  
18 Plaintiff claims his Fifth Amendment rights were violated when he was forced to  
19 evacuate his home, presumably after he was arrested. This claim fails not only because  
20 it is not directed against any particular Defendant, but also because it fails to allege how  
21 Plaintiff was denied due process.

22 **C. Sixth Amendment**

23 Plaintiff asserts his "Eighth Amendment" rights were violated by the continued  
24 postponement of his trial. This claim is more accurately classified as a Sixth Amendment  
25 claim, which states:

26 In all criminal prosecutions, the accused shall enjoy the  
27 right to a speedy and public trial, by an impartial jury of  
28 the State and district wherein the crime shall have been  
committed, which district shall have been previously

1           ascertained by law, and to be informed of the nature  
2           and cause of the accusation; to be confronted with the  
3           witnesses against him; to have compulsory process for  
          obtaining witnesses in his favor, and to have the Assistance  
          of Counsel for his defence.

4 U.S. Const., amend. 6.

5           The speedy trial “right may attach before an indictment and as early as the time of  
6           arrest and holding to answer a criminal charge[.]” United States v. Gouveia, 467 U.S.  
7           180, 190 (1984) (quotations and citations omitted). “[I]n determining whether a particular  
8           defendant has been deprived of his right” to a speedy trial, the Supreme Court has  
9           “identif[ied] four factors: Length of delay, the reason for the delay, the defendant’s  
10          assertion of his right, and prejudice to the defendant.” Barker v. Wingo, 407 U.S. 514,  
11          530 (1972). But “none of the four factors [is a] necessary or sufficient condition to the  
12          finding of a deprivation of the right of speedy trial. Rather, they are related factors and  
13          must be considered together with such other circumstances as may be relevant.” Id. at  
14          533. The “courts must still engage in a difficult and sensitive balancing process.” Id.

15          Plaintiff’s bare allegations are insufficient to proceed on this claim. He provides no  
16          details concerning the cause for the delay or what transpired during the delay between  
17          his arrest and the entry of his plea. No information is given about whether Plaintiff  
18          asserted his right to a speedy trial and whether he received an unfavorable decision.  
19          And no information is given about whether he appealed the unfavorable decision to the  
20          appellate division of the Mariposa County Superior Court. Such information is necessary  
21          in determining whether, at this juncture, this Court is the proper venue to address  
22          Plaintiff’s case. See D.C. Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983)  
23          (quotations and citations omitted) (“it was very early established that the Court will not  
24          decide federal constitutional issues raised here for the first time on review of state court  
25          decisions”).

1           **D.     Fourteenth Amendment**

2           The Fourteenth Amendment states in pertinent part: “No State shall . . . deprive  
3 any person of life, liberty, or property, without due process of law; nor deny to any  
4 person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. 14, §  
5 1. “Because the Amendment is directed at the States, it can be violated only by conduct  
6 that may be fairly characterized as state action.” Lugar v. Edmondson Oil Co., 457 U.S.  
7 922, 923-24 (1982) (quotations omitted).

8                     **1.     Due Process Claim**

9           “[T]he Due Process Clause of the Fourteenth Amendment was intended to  
10 prevent government from abusing [its] power, or employing it as an instrument of  
11 oppression[.]” DeShaney v. Winnebago Cty. Dep’t of Soc. Servs., 489 U.S. 189, 196  
12 (1989) (quotations and citations omitted and modification in original). A claim of due  
13 process may be substantive or procedural. “To establish a violation of substantive due  
14 process, a plaintiff must first show a deprivation of some fundamental right or liberty  
15 interest[.]” Tutor-Saliba Corp. v. City of Hailey, 452 F.3d 1055, 1061 (9th Cir. 2006); see  
16 Reno v. Flores, 507 U.S. 292, 302 (1993). And “[t]o establish a violation of procedural  
17 due process a plaintiff must demonstrate: (1) a deprivation of a constitutionally protected  
18 liberty or property interest, and (2) a denial of adequate procedural protections.” Tutor-  
19 Saliba Corp., 452 F.3d at 1061 (citation omitted)

20           As to Plaintiff’s due process claim, he fails to identify a fundamental or protected  
21 right or liberty interest which was deprived by Defendants without fair process. See  
22 Bagent v. Pierce, 2008 WL 5135761, at \*4 (E.D. Cal. Dec. 8, 2008), report and  
23 recommendation adopted, 2009 WL 250526 (E.D. Cal. Feb. 2, 2009) (No.  
24 1:06CV01842LJOSMSPC) (“Plaintiff has neither identified the existence of a protected  
25 interest at stake, nor alleged the deprivation of that interest by either Defendant without  
26 fair process.”). The allegations are conclusory, scant of factual matter, and fall short of  
27 stating a due process claim.

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1                                   **2. Equal Protection Claim**

2                   “[T]he purpose of the equal protection clause of the Fourteenth Amendment is to  
3 secure every person within the State’s jurisdiction against intentional and arbitrary  
4 discrimination, whether occasioned by express terms of a statute or by its improper  
5 execution through duly constituted agents.” Vill. of Willowbrook v. Olech, 528 U.S. 562,  
6 564 (2000). “To state a claim . . . for a violation of the Equal Protection Clause of the  
7 Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or  
8 purpose to discriminate against the plaintiff based upon membership in a protected  
9 class.” Survine v. Cottle, 609 F. App’x 515, 516 (9th Cir. 2015) (quotations and citation  
10 omitted). But:

11                                   [i]f the action in question does not involve a suspect  
12 classification, a plaintiff may establish an equal protection  
13 claim by showing that similarly situated individuals were  
14 intentionally treated differently without a rational relationship  
15 to a legitimate state purpose. Village of Willowbrook v. Olech,  
16 528 U.S. 562, 564 (2000); San Antonio School District v.  
17 Rodriguez, 411 U.S. 1 (1972); Squaw Valley Development  
18 Co. v. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004); SeaRiver  
19 Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 679 (9th Cir.  
20 2002). To state an equal protection claim under this  
21 theory, a plaintiff must allege that: (1) the plaintiff is a  
22 member of an identifiable class; (2) the plaintiff was  
23 intentionally treated differently from others similarly situated;  
24 and (3) there is no rational basis for the difference in  
25 treatment. Village of Willowbrook, 528 U.S. at 564.

26 Lee v. Scribner, 2010 WL 1328691, at \*5-6 (E.D. Cal. Apr. 2, 2010).

27                   Plaintiff’s equal protection claim also fails. He does not allege membership with a  
28 protected or identifiable class, he does not link this claim to any Defendant, and he does  
not claim that he was treated differently without a legitimate purpose.

**E. Conclusory Allegations**

Plaintiff was previously informed that his many conclusory allegations are  
insufficient to state a claim. (See ECF No. 9 at 12.) Plaintiff’s Second Amended  
Complaint continues to include those same allegations without providing further detail.

1 These allegations include that Plaintiff was not given a Miranda warning, Plaintiff was  
2 forced to provide a DNA sample, and Plaintiff was denied medication for his diabetes  
3 while at county jail. Without more, they continue to fail to set forth cognizable claims.  
4 Iqbal, 556 U.S. at 678.

5 **VI. Conclusion and Order**

6 In the Court's last screening order, Plaintiff was informed that he would be  
7 provided one last opportunity to state a claim. For the reasons set forth above, his  
8 complaint fails for a third time to assert a viable claim against any Defendant.

9 A party's "repeated failure to cure deficiencies" constitutes "a strong indication  
10 that the [party] has no additional facts to plead" and "that any attempt to amend would be  
11 futile[.]" See Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 988, 1007 (9th Cir.  
12 2009) (internal quotation marks omitted) (upholding dismissal of complaint with prejudice  
13 when there were "three iterations of [the] allegations — none of which, according to [the  
14 district] court, was sufficient to survive a motion to dismiss"); see also Simon v. Value  
15 Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir. 2000) (affirming dismissal without  
16 leave to amend where plaintiff failed to correct deficiencies in complaint, where court had  
17 afforded plaintiff opportunities to do so, and had discussed with plaintiff the substantive  
18 problems with his claims), amended by 234 F.3d 428, overruled on other grounds by  
19 Odom v. Microsoft Corp., 486 F.3d 541, 551 (9th Cir. 2007); Plumeau v. Sch. Dist. # 40  
20 Cnty. of Yamhill, 130 F.3d 432, 439 (9th Cir. 1997) (denial of leave to amend appropriate  
21 where further amendment would be futile).

22 Accordingly, it is HEREBY RECOMMENDED that this action be dismissed without  
23 leave to amend.

24 These Findings and Recommendations are submitted to the United States District  
25 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
26 fourteen (14) days after being served with these Findings and Recommendations, any  
27 party may file written objections with the Court and serve a copy on all parties. Such a  
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1 document should be captioned "Objections to Magistrate Judge's Findings and  
2 Recommendations." Any reply to the objections shall be served and filed within fourteen  
3 (14) days after service of the objections. The parties are advised that failure to file  
4 objections within the specified time may result in the waiver of rights on appeal.  
5 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
6 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: March 21, 2017

/s/ Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE