

1 On November 9, 2017, the Ninth Circuit Court of Appeals ruled that 28 U.S.C. § 636(c)(1)
2 requires the consent of all named plaintiffs and defendants, even those not served with process, before
3 jurisdiction may vest in a Magistrate Judge to dispose of a civil case. Williams v. King, __ F.3d __,
4 Case No. 15-15259, 2017 WL 5180205, *3 (9th Cir. Nov. 9, 2017). Accordingly, the Court did not
5 have jurisdiction to dismiss the claims and Defendants in its April 17, 2017 order.

6 Based upon the foregoing, the undersigned will now recommend to the District Judge that this
7 case continue to proceed only on Plaintiff’s cognizable claims, and that the claims and Defendants
8 described below be dismissed, for the reasons explained herein.

9 **I.**

10 **SCREENING REQUIREMENT**

11 The Court is required to screen complaints brought by prisoners seeking relief against a
12 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
13 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
14 “frivolous or malicious,” that “fails to state a claim on which relief may be granted,” or that “seeks
15 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).

16 A complaint must contain “a short and plain statement of the claim showing that the pleader is
17 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
18 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
19 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
20 550 U.S. 544, 555 (2007)). Plaintiff must demonstrate that each named defendant personally
21 participated in the deprivation of his rights. Iqbal, 556 U.S. at 676-677; Simmons v. Navajo County,
22 Ariz., 609 F.3d 1011, 1020-1021 (9th Cir. 2010).

23 Prisoners proceeding pro se in civil rights actions are still entitled to have their pleadings
24 liberally construed and to have any doubt resolved in their favor, but the pleading standard is now
25 higher, Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted), and to survive
26 screening, Plaintiff’s claims must be facially plausible, which requires sufficient factual detail to allow
27 the Court to reasonably infer that each named defendant is liable for the misconduct alleged. Iqbal,
28 556 U.S. at 678-79; Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). The “sheer

1 possibility that a defendant has acted unlawfully” is not sufficient, and “facts that are ‘merely
2 consistent with’ a defendant’s liability” falls short of satisfying the plausibility standard. Iqbal, 556
3 U.S. at 678; Moss, 572 F.3d at 969.

4 II.

5 COMPLAINT ALLEGATIONS

6 On Saturday, January 9, 2016, Plaintiff, along with his cellmate Hill, were confined to their
7 cell and were engaging in the exercise of their religious practices. At approximately 0732 hours,
8 correctional officers Robles and Hernandez approached their cell stating, “Get the fuck down
9 motherfucker.” Without any further promoting, delay or hesitation, Hernandez began administering
10 chemical restraints for a prolonged period of time.

11 Correctional officer Legaspi opened the cell door allowing the chemical agent to be
12 administered. Plaintiff was placed in “a submissive lock, one knee was placed in the center of [his]
13 back, while the other knee rested on [his] outer back thigh, and it appeared to be a forearm positioned
14 on my neck.” Plaintiff was experiencing difficulties breathing, decrease in circulation of blood flow
15 and his heart rated dropped causing him to feel on the brink of death. Officer Hernandez applied
16 extreme pressure and force showing him further into the concrete floor causing Plaintiff to lose
17 consciousness. When he awake, Plaintiff was unreasonable forced to his feet then escorted by officer
18 Robles. Robles elevated Plaintiff’s arms and his hands were physically restrained by handcuffs that
19 were unreasonably tight around his wrists, restricting the circulation of blood flow. Both of Plaintiff’s
20 hands grew completely numb causing him to lose any sense of feeling, while Robles was
21 simultaneously applying an unreasonable amount of force to the back of his neck causing unbearable
22 pain.

23 Although Plaintiff was escorted by Robles to the shower area, he never received a
24 decontamination shower. Officer Hernandez entered the shower area alone, and he forcibly turned
25 Plaintiff around placing him in a compromising position. He then yanked down Plaintiff garments and
26 trousers and forcibly spread his buttocks probing his anal area with a cellphone.

27 After the intrusion, Plaintiff was escorted to the program office where he made contact with
28 sergeant W. Sullivan and before securing Plaintiff in a holding cell he refused to comply with the

1 officer's orders to conduct an unclothed body search. Plaintiff also refused to open his mouth as
2 directed by the officer.

3 On January 12, 2016, Plaintiff began experiencing depression. Days later, Plaintiff had to go
4 on crisis bed/watch because he was experiencing suicidal thoughts.

5 On January 13, 2016, Plaintiff submitted an emergency inmate appeal alleging the use of
6 excessive force and sexual misconduct.

7 On January 17, 2016, Plaintiff received a visit from his wife and he told her about the incident
8 on January 9, 2016.

9 On January 19, 2016, Plaintiff's wife called the Kern Valley State Prison program office
10 because she was concerned about Plaintiff's welfare regarding the incident of excessive force and
11 sexual misconduct, and the information was relayed to the investigative services unit.

12 On January 20, 2016, Plaintiff was seen by Dr. Camaco of the mental health department, and
13 on January 21, 2016, Plaintiff was transferred to the mental health crisis bed.

14 On February 2, 2016, Plaintiff received legal mail which had been unreasonable ransacked and
15 searched outside of his presence. Plaintiff believes this action was an indirect message sent by prison
16 officials that he can be touched for alleging officer's misconduct. Plaintiff perceived this as an
17 immediate threat and filed an emergency inmate appeal on February 3, 2016.

18 On February 4, 2016, Plaintiff was transferred to California State Prison, LAC enhanced
19 outpatient program to receive mental health treatment.

20 On February 23, 2016, Plaintiff submitted a claim to the internal affairs office. On this same
21 date, a video interview was conducted regarding the alleged use of excessive force and sexual
22 misconduct.

23 On February 28, 2016, Plaintiff's submitted a claim to the Victim's Advocate.

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III.
DISCUSSION

A. Excessive Force

The unnecessary and wanton infliction of pain violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 5 (1992) (citations omitted). For claims arising out of the use of excessive physical force, the issue is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Wilkins v. Gaddy, 559 U.S. 34, 37 (2010) (per curiam) (citing Hudson, 503 U.S. at 7) (internal quotation marks omitted); Furnace v. Sullivan, 705 F.3d 1021, 1028 (9th Cir. 2013). The objective component of an Eighth Amendment claim is contextual and responsive to contemporary standards of decency, Hudson, 503 U.S. at 8 (quotation marks and citation omitted), and although *de minimis* uses of force do not violate the Constitution, the malicious and sadistic use of force to cause harm always violates contemporary standards of decency, regardless of whether or not significant injury is evident, Wilkins, 559 U.S. at 37-8 (citing Hudson, 503 U.S. at 9-10) (quotation marks omitted); Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002).

Viewing Plaintiff’s allegations liberally as this Court must, Plaintiff states a cognizable claim for excessive force against Defendants Robles and Hernandez. However, Plaintiff does not state a cognizable claim against any of the other named Defendants. The mere fact that officer Legaspi opened the cell door to allow Defendants Robles and Hernandez to enter Plaintiff’s cell does not demonstrate active involvement in the alleged use of force. Accordingly, Plaintiff states a cognizable claim for excessive force against Defendants Robles and Hernandez only.

B. Supervisory Liability

Plaintiff contends that sergeant W. Sullivan should have been present during the initial search to ensure the order and maintenance of safety and security.

Supervisory personnel may not be held liable under section 1983 for the actions of subordinate employees based on *respondeat superior*, or vicarious liability. Crowley v. Bannister, 734 F.3d 967, 977 (9th Cir. 2013); accord Lemire v. California Dep’t of Corr. and Rehab., 726 F.3d 1062, 1074-75 (9th Cir. 2013); Lacey v. Maricopa County, 693 F.3d 896, 915-16 (9th Cir. 2012) (en banc). “A

1 supervisor may be liable only if (1) he or she is personally involved in the constitutional deprivation,
2 or (2) there is a sufficient causal connection between the supervisor’s wrongful conduct and the
3 constitutional violation.” Crowley, 734 F.3d at 977 (citing Snow, 681 F.3d at 989) (internal quotation
4 marks omitted); accord Lemire, 726 F.3d at 1074-75; Lacey, 693 F.3d at 915-16. “Under the latter
5 theory, supervisory liability exists even without overt personal participation in the offensive act if
6 supervisory officials implement a policy so deficient that the policy itself is a repudiation of
7 constitutional rights and is the moving force of a constitutional violation.” Crowley, 734 F.3d at 977
8 (citing Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)) (internal quotation marks omitted).

9 Plaintiff has not alleged sufficient factual allegations to give rise to a cognizable claim against
10 Defendant sergeant W. Sullivan. The only basis for such a claim would be respondeat superior, which
11 is precluded under section 1983. Accordingly, Plaintiff fails to state a cognizable claim against
12 Defendant W. Sullivan.

13 **C. State Law Claims of Battery and Intentional Infliction of Emotional Distress**

14 “A battery is any willful and unlawful use of force or violence upon the person of another.”
15 Cal. Penal Code § 240, 242 (West 2005); 5 B. E. Witkin, Summary of California Law, Torts § 346
16 (9th ed. 1988). For battery, a plaintiff must show that (1) the defendant intentionally did an act that
17 resulted in harmful or offensive contact with the plaintiff’s person; (2) the plaintiff did not consent to
18 the contact; and (3) the contact caused injury, damage, loss, or harm to the plaintiff. Id. (citation and
19 quotations omitted).

20 Under California law, the elements of intentional infliction of emotional distress are: (1)
21 extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard
22 of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme
23 emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s
24 outrageous conduct. Corales v. Bennett, 567 F.3d 554, 571 (9th Cir. 2009) (quotation marks omitted);
25 Tekkle v. United States, 567 F.3d 554, 855 (9th Cir. 2007); Simo v. Union of Needletrades, Industrial
26 & Textile Employees, 322 F.3d 602, 621-22 (9th Cir. 2003). Conduct is outrageous if it is so extreme
27 as to exceed all bounds of that usually tolerated in a civilized community. Corales, 567 F.3d at 571;
28 Tekkle, 511 F.3d at 855; Simo, 322 F.3d at 622.

1 Plaintiff alleges a claim under state law for battery and intentional infliction of emotional
2 distress. However, the Government Claims Act requires exhaustion of those claims with the
3 California Victim Compensation and Government Claims Board, and Plaintiff is required to
4 specifically allege compliance in his complaint. Shirk v. Vista Unified Sch. Dist., 42 Cal.4th 201,
5 208-09 (Cal. 2007); State v. Superior Court of Kings Cnty. (Bodde), 32 Cal.4th 1234, 1239 (Cal.
6 2004); Mabe v. San Bernardino Cnty. Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1111 (9th Cir. 2001);
7 Mangold v. California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995).

8 Plaintiff has not alleged compliance with the claims process and therefore cannot state a tort
9 claim under California law.

10 **D. Violation of Title 15 of the California Code of Regulations**

11 Plaintiff seeks to impose liability based on the violation of Title 15 prison regulations.
12 However, there is no authority for the proposition that there exists a private right of action available to
13 Plaintiff for violation of Title 15 regulations and there exist ample district court decisions holding to
14 the contrary. Vasquez v. Tate, No. 1:10-cv-1876 JLT (PC), 2012 WL 6738167, at *9 (E.D. Cal. Dec.
15 28, 2012); Davis v. Powell, 901 F.Supp.2d 1196, 1211 (S.D. Cal. 2012); Meredith v. Overley, No.
16 1:12-cv-00455-MJS (PC), 2012 WL 3764029, at *4 (E.D. Cal. Aug. 29, 2012); Parra v. Hernandez,
17 No. 08cv0191-H (CAB), 2009 WL 3818376, at *8 (S.D.Cal. Nov. 13, 2009); Davis v. Kissinger, No.
18 CIV S-04-0878 GEB DAD P, 2009 WL 256574, at *12 n.4 (E.D.Cal. Feb. 3, 2009), *adopted in full*,
19 2009 WL 647350 (Mar. 10, 2009). Plaintiff's Title 15 claims shall be dismissed for failure to state a
20 claim.

21 **E. Defendants Waddles, Chanelo, and Gaddis-Inmate Appeal Process**

22 Although Plaintiff names Defendants Waddles, Chanelo and Gaddis as Defendants in the
23 caption of his complaint, Plaintiff fails to state a cognizable claim against any of these individuals.

24 Section 1983 provides a cause of action for the violation of Plaintiff's constitutional or other
25 federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d 1087, 1092
26 (9th Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); Jones v.
27 Williams, 297 F.3d 930, 934 (9th Cir. 2002). "Section 1983 is not itself a source of substantive rights,
28 but merely provides a method for vindicating federal rights elsewhere conferred." Crowley v. Nevada

1 ex rel. Nevada Sec’y of State, 678 F.3d 730, 734 (9th Cir. 2012) (citing Graham v. Connor, 490 U.S.
2 386, 393-94 (1989)) (internal quotation marks omitted). To state a claim, Plaintiff must allege facts
3 demonstrating the existence of a link, or causal connection, between each defendant’s actions or
4 omissions and a violation of his federal rights. Lemire v. California Dep’t of Corr. and Rehab., 726
5 F.3d 1062, 1074-75 (9th Cir. 2013); Starr v. Baca, 652 F.3d 1202, 1205-08 (9th Cir. 2011).

6 To the extent, Plaintiff seeks to hold these Defendants liable for their involvement in the
7 appeals process, Plaintiff fails to state a cognizable claim for relief. “The Fourteenth Amendment’s
8 Due Process Clause protects persons against deprivations of life, liberty, or property; and those who
9 seek to invoke its procedural protection must establish that one of these interests is at stake.”
10 Wilkinson v. Austin, 545 U.S. 209, 221 (2005). Plaintiff does not have protected liberty interest in
11 the processing his appeals, and therefore, he cannot pursue a claim for denial of due process with
12 respect to the handling or resolution of his appeals. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir.
13 2003) (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)).

14 Accordingly, Plaintiff fails to state a cognizable claim against Defendants Waddles, Chanelo,
15 and Gaddis.

16 IV.

17 RECOMMENDATIONS

18 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 19 1. For screening purposes only, this action proceed against Defendants Robles and
20 Hernandez for excessive force; and
- 21 2. All other claims and Defendants be dismissed from the action for failure to state a
22 cognizable claim for relief.

23 These Findings and Recommendations will be submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14) days**
25 after being served with these Findings and Recommendations, the parties may file written objections
26 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and
27 Recommendations.” The parties are advised that failure to file objections within the specified time
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1 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
2 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

Dated: November 29, 2017


UNITED STATES MAGISTRATE JUDGE