

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TOMMY MACKEY,  
Plaintiff,  
v.  
D. GOSS, *et al.*,  
Defendants.

Case No. 1:18-cv-00988-DAD-JDP  
SCREENING ORDER  
FINDINGS AND RECOMMENDATIONS  
THAT PLAINTIFF BE PERMITTED TO  
PROCEED ON COGNIZABLE CLAIMS  
AND THAT NON-COGNIZABLE CLAIMS  
BE DISMISSED WITH LEAVE TO AMEND  
OBJECTIONS, IF ANY, DUE IN 14 DAYS  
ECF No. 1

Plaintiff Tommy Mackey is a state prisoner proceeding without counsel in this civil rights action brought under 42 U.S.C. § 1983. Plaintiff’s complaint, filed July 24, 2018, ECF No. 1, is before the court for screening under 28 U.S.C. § 1915A. The court finds that plaintiff has stated excessive force claims against defendants R. Rodriguez, D. Rodriguez, Pompa, Garcia, Schulte, and Martinez. The court will recommend that plaintiff’s remaining claims and defendants be dismissed without prejudice and that he be granted leave to amend the complaint.

**I. SCREENING AND PLEADING REQUIREMENTS**

A district court is required to screen a prisoner’s complaint seeking relief against a governmental entity, its officer, or its employee. *See* 28 U.S.C. § 1915A(a). The court must identify any cognizable claims and dismiss any portion of a complaint that is frivolous or

1 malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a  
2 defendant who is immune from such relief. *See* 28 U.S.C. §§ 1915A(b)(1), (2).

3 A complaint must contain a short and plain statement that plaintiff is entitled to relief,  
4 Fed. R. Civ. P. 8(a)(2), and provide “enough facts to state a claim to relief that is plausible on its  
5 face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard does not  
6 require detailed allegations, but legal conclusions do not suffice. *See Ashcroft v. Iqbal*, 556 U.S.  
7 662, 678 (2009). If the allegations “do not permit the court to infer more than the mere  
8 possibility of misconduct,” the complaint states no claim. *Id.* at 679. The complaint need not  
9 identify “a precise legal theory.” *Kobold v. Good Samaritan Reg’l Med. Ctr.*, 832 F.3d 1024,  
10 1038 (9th Cir. 2016) (quoting *Skinner v. Switzer*, 562 U.S. 521, 530 (2011)). Instead, what  
11 plaintiff must state is a “claim”—a set of “allegations that give rise to an enforceable right to  
12 relief.” *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 n.2 (9th Cir. 2006) (en banc)  
13 (citations omitted).

14 The court must construe a pro se litigant’s complaint liberally. *See Haines v. Kerner*, 404  
15 U.S. 519, 520 (1972) (per curiam). The court may dismiss a pro se litigant’s complaint only “if it  
16 appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which  
17 would entitle him to relief.” *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017)  
18 (quoting *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014)).

## 19 **II. COMPLAINT<sup>1</sup>**

20 Plaintiff is currently incarcerated at Kern Valley State Prison (“KVSP”) in Delano,  
21 California. *Id.* at 1. Plaintiff names nine defendants: eight individuals and the State of California.  
22 *Id.* at 2. Plaintiff sues the individuals, all of whom are employed at KVSP, in their official and  
23 individual capacities. *Id.* at 3-4. They are Captain D. Goss, Sgt. R. Rodriguez, Correctional  
24 Officer (“CO”) D. Rodriguez, CO M. Pompa, CO J. Garcia, CO E. Schulte, CO Martinez, and  
25 Licensed Vocational Nurse (“LVN”) N. Buschbacher. *Id.*

26 Plaintiff alleges:

27 \_\_\_\_\_  
28 <sup>1</sup> The court draws the facts of this section from plaintiff’s complaint, ECF No. 1, and accepts  
them as true for purposes of screening.

1                   On 3-16-16, excessive force by numerous . . . CDCR  
2 officers was used on me. On [that day,] I was experiencing mental  
3 health issues, I was decompensating due to acute depression. I  
4 requested to go to the crisis bed due to I was feeling suicidal. C/O  
5 Martine, came to my cell . . . and placed me in restraints on my  
6 arms and legs. Instead of being afforded to go to the mental health  
7 treatment center, I was [forced] to go to the C/O's program office.  
8 Once I got inside the program office, Sgt. R. Rodriguez, C/O M.  
9 Pompa, C/O J. Garcia, C/O D. Rodriguez, C/O E. Schulte, [and]  
10 C/O Martinez, all acting in concert/conspiratorial agreement, began  
11 using unnecessary . . . excessive force against me by punching and  
12 kicking me in the head + face. I was then shoved out of my  
13 wheelchair to the floor and the all above officers and Sgt.  
14 [continued] kicking my whole body. These officers did this  
15 excessive force to me to inflict harm and pain to me. The  
16 unnecessary use of excessive force . . . inflicted upon my person  
17 was not applied in a good faith effort but maliciously + sadistically  
18 with one intent: to hurt me. This was an [unjust, intentional] illegal  
19 act . . . which was cruel and unusual punishment by way of  
20 [deliberate] indifference to my health.

21 ECF No. 1 at 5 (punctuation and capitalization altered).

22                   Plaintiff further alleges that “Captain D. Goss had a fiduciary duty to stop the said brutal  
23 attack . . . [and his failure to do so] was the proximate cause to all the injuries.” *Id.* at 6. Finally,  
24 plaintiff alleges that “LVN N. Buschbacher violated my 14<sup>th</sup> US Constitutional rights by failing to  
25 . . . document any of my injuries.” *Id.*

### 26                   **III.     DISCUSSION**

#### 27                   **A.     Requirements Under 42 U.S.C. § 1983**

28                   Section 1983 allows a private citizen to sue for the deprivation of a right secured by  
federal law. *See* 42 U.S.C. § 1983; *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 916 (2017). To  
state a claim under § 1983, a plaintiff must show that a defendant acting under color of state law  
caused an alleged deprivation of a right secured by federal law. *See* 42 U.S.C. § 1983; *Soo Park*  
*v. Thompson*, 851 F.3d 910, 921 (9th Cir. 2017). The plaintiff can satisfy the causation  
requirement by showing either (1) the defendant’s “personal involvement” in the alleged  
deprivation or (2) a “sufficient causal connection” between the defendant’s conduct as a  
supervisor and the alleged deprivation. *See King v. Cty. of Los Angeles*, 885 F.3d 548, 559 (9th

1 Cir. 2018). As for the second method, the plaintiff can establish a causal connection by showing  
2 that the defendant “set[] in motion a series of acts by others, or by knowingly refus[ing] to  
3 terminate a series of acts by others,” which the defendant “knew or reasonably should have  
4 known would cause others to inflict a constitutional injury.” *Id.*

5 “The Eleventh Amendment prohibits federal courts from hearing suits brought against an  
6 unconsenting state.” *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053 (9th  
7 Cir. 1991) (internal citations omitted). This prohibition extends to state agencies and suits  
8 seeking monetary damages for past injury. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy,*  
9 *Inc.*, 506 U.S. 139, 144 (1993); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100  
10 (1984). Considering the foregoing, defendant State of California is immune from suit under the  
11 Eleventh Amendment. On the other hand, the eight remaining defendants—state prison  
12 employees who can be inferred to have acted under color of state law—are proper defendants.  
13 *See Paeste v. Gov’t of Guam*, 798 F.3d 1228, 1238 (9th Cir. 2015) (“[G]enerally, a public  
14 employee acts under color of state law while acting in his official capacity or while exercising his  
15 responsibilities pursuant to state law.” (quoting *West v. Atkins*, 487 U.S. 42, 50 (1988))).

16 We next consider whether plaintiff has alleged that each of these eight defendants—Goss,  
17 R. Rodriguez, D. Rodriguez, Pompa, Garcia, Schulte, Martinez, and Buschbacher—personally  
18 participated in the alleged constitutional deprivations as required by § 1983. *See Preschooler II*,  
19 479 F.3d at 1183. Plaintiff plausibly alleges that seven of the eight defendants personally  
20 participated in the alleged deprivations. Plaintiff alleges that defendants R. Rodriguez, Pompa,  
21 Garcia, D. Rodriguez, Schulte, and Martinez personally used excessive physical force on him.  
22 Plaintiff further alleges that defendant Buschbacher personally failed to document plaintiff’s  
23 injuries.

24 Plaintiff does not plausibly allege that defendant Goss personally participated in or caused  
25 the alleged deprivations; instead, plaintiff seems to rely on a theory of vicarious liability. *See*  
26 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (“[V]icarious liability is inapplicable to *Bivens*  
27 and § 1983 suits[;] a plaintiff must plead that each Government-official defendant, through the  
28 official’s own individual actions, has violated the Constitution.”). Plaintiff alleges only that Goss

1 is a “Correctional Captain” who had duties (1) to stop the alleged attack and (2) to train the  
2 correctional officers under his watch to refrain from excessive force. ECF No. 1 at 3, 6.

3 However, plaintiff fails to allege that Goss was present during the attack or that he was in charge  
4 of the named defendants who allegedly perpetrated the attack. Accordingly, plaintiff has not  
5 stated sufficient facts for the court to find personal participation by defendant Goss.

6 The remaining question is whether the other individual defendants violated federal law.  
7 Plaintiff seeks to bring a variety of claims, including for cruel and unusual punishment, due  
8 process violations, and equal protection violations. ECF No. 1 at 5-6. Plaintiff’s allegations do  
9 not support all the claims he seeks to bring. For instance, there is no Fourteenth Amendment  
10 right to have your injuries documented by a state official, so his claim against LVN Buschbacher  
11 must be dismissed. However, the alleged facts do implicate cruel and unusual punishment; we  
12 will analyze whether plaintiff has stated such a claim below against defendants R. Rodriguez, D.  
13 Rodriguez, Pompa, Garcia, Schulte, and Martinez.

#### 14 **B. Excessive Force**

15 The Eighth Amendment prohibits those who operate our prisons from using “excessive  
16 physical force” against inmates. *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam); *Hudson v.*  
17 *McMillian*, 503 U.S. 1, 8-9 (1992). For claims arising out of the use of excessive physical force,  
18 the core inquiry is “whether force was applied in a good-faith effort to maintain or restore  
19 discipline, or maliciously and sadistically to cause harm.” *Wilkins*, 559 U.S. at 37  
20 (quoting *Hudson*, 503 U.S. at 7). To facilitate this inquiry, the Supreme Court has articulated five  
21 factors to consider: “(1) the extent of injury suffered by an inmate; (2) the need for application of  
22 force; (3) the relationship between that need and the amount of force used; (4) the threat  
23 reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity  
24 of a forceful response.” *Hudson*, 503 U.S. at 7.

25 While the extent of injury suffered by an inmate is one of the factors to be considered in  
26 determining whether the use of force is wanton and unnecessary, the absence of serious injury  
27 does not end the Eighth Amendment inquiry. *See id.* Whether the alleged wrongdoing is  
28 objectively “harmful enough” to establish a constitutional violation is contextual and responsive

1 to contemporary standards of decency. *Id.* at 8 (citing *Estelle v. Gamble*, 429 U.S. 97, 103  
2 (1976)). Such standards are always violated when prison officials maliciously and sadistically  
3 use force to cause harm, whether or not significant injury is evident. *See id.*; *see also Schwenk v.*  
4 *Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (holding no lasting injury required for an act to  
5 qualify as sexual assault because sexual assault was deeply offensive to human dignity); *Felix v.*  
6 *McCarthy*, 939 F.2d 699, 701-02 (9th Cir. 1991) (holding that it is not the degree of injury that  
7 makes out a violation of the Eighth Amendment but rather use of official force or authority that is  
8 intentional, unjustified, brutal and offensive to human dignity). That is not to say that every  
9 malevolent touch by a prison guard gives rise to a federal cause of action; the Eighth  
10 Amendment’s prohibition of cruel and unusual punishment necessarily excludes from  
11 constitutional recognition *de minimis* uses of physical force. *Hudson*, 503 U.S. at 9-10  
12 (concluding that blows directed at inmate which caused bruises, swelling, loosened teeth and a  
13 cracked dental plate were not *de minimis*).

14 Here, plaintiff has stated excessive force claims against defendants R. Rodriguez, D.  
15 Rodriguez, Pompa, Garcia, Schulte, and Martinez. Plaintiff alleges that all these defendants,  
16 “acting in concert/conspiratorial agreement, [used] unnecessary . . . excessive force against me by  
17 punching and kicking [him] in the head + face” without good cause. ECF No. 1 at 5.

#### 18 **IV. CONCLUSION**

19 The court has screened plaintiff’s complaint and finds that plaintiff has stated excessive  
20 force claims against defendants R. Rodriguez, D. Rodriguez, Pompa, Garcia, Schulte, and  
21 Martinez. The court will recommend that plaintiff’s remaining claims and defendants be  
22 dismissed without prejudice and that he be granted leave to amend the complaint.

23 Should plaintiff choose to amend the complaint, the amended complaint should be brief,  
24 Fed. R. Civ. P. 8(a), but must state what each named defendant did that led to the deprivation of  
25 plaintiff’s constitutional or other federal rights. *See Iqbal*, 556 U.S. at 678; *Jones v. Williams*,  
26 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff must set forth “sufficient factual matter . . . to ‘state a  
27 claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S.  
28 at 570). There is no *respondeat superior* liability, and each defendant is only liable for his or her

1 own misconduct. *See id.* at 677. Plaintiff must allege that each defendant personally participated  
2 in the deprivation of his rights. *Jones*, 297 F.3d at 934 (emphasis added). Plaintiff should note  
3 that a short, concise statement of the allegations in chronological order will assist the court in  
4 identifying his claims. Plaintiff should name each defendant and explain what happened,  
5 describing personal acts by the individual defendant that resulted in the violation of plaintiff’s  
6 rights. Plaintiff should also describe any harm he suffered from the violation of his rights.  
7 Plaintiff should not fundamentally alter his complaint or add unrelated issues. *See Fed. R. Civ. P.*  
8 *18; George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (“Unrelated claims against different  
9 defendants belong in different suits . . .”).

10 Any amended complaint will supersede the original complaint, *Lacey v. Maricopa*  
11 *County*, 693 F. 3d 896, 907 n.1 (9th Cir. 2012) (en banc), and it must be complete on its face  
12 without reference to the prior, superseded pleading, *see E.D. Cal. Local Rule 220*. Once an  
13 amended complaint is filed, the original complaint no longer serves any function in the case.  
14 Therefore, in an amended complaint, as in an original complaint, each claim and the involvement  
15 of each defendant must be sufficiently alleged. The amended complaint should be titled “First  
16 Amended Complaint,” refer to the appropriate case number, and be an original signed under  
17 penalty of perjury.

## 18 **V. RECOMMENDATIONS**

19 Under 28 U.S.C. § 636(c)(1), all parties named in a civil action must consent to a  
20 magistrate judge’s jurisdiction before that jurisdiction vests for “dispositive decisions.” *Williams*  
21 *v. King*, 875 F.3d 500, 504 (9th Cir. 2017). No defendant has appeared or consented to a  
22 magistrate judge’s jurisdiction, so any dismissal of a claim requires an order from a district judge.  
23 *Id.* Thus, the undersigned submits the following findings and recommendations to a United  
24 States District Judge under 28 U.S.C. § 636(b)(1):

- 25 1. Plaintiff states excessive force claims against defendants R. Rodriguez, D. Rodriguez,  
26 Pompa, Garcia, Schulte, and Martinez.
- 27 2. Plaintiff’s remaining claims and defendants should be dismissed without prejudice,  
28 and plaintiff should be granted leave to amend the complaint.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. If plaintiff files an amended complaint, defendants R. Rodriguez, D. Rodriguez, Pompa, Garcia, Schulte, and Martinez should not be required to respond until the court screens the amended complaint.

Within fourteen days of service of these findings and recommendations, plaintiff may file written objections with the court. If plaintiff files such objections, he should do so in a document captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: April 3, 2019

  
UNITED STATES MAGISTRATE JUDGE

No. 203.