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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 MARK RAYMOND FRISBY,

12 Plaintiff,

13 vs.

14 STATE OF CALIFORNIA, et al.,

15 Defendants.
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1:20-cv-00228-DAD-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED WITH PREJUDICE FOR
FAILURE TO STATE A CLAIM
(ECF No. 15.)**

**OBJECTIONS DUE WITHIN FOURTEEN
DAYS**

20 **I. BACKGROUND**

21 Mark Raymond Frisby (“Plaintiff”) is a former state prisoner proceeding *pro se* and *in*
22 *forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. On February 10, 2020,
23 Plaintiff filed the Complaint commencing this action in the Sacramento Division of the United
24 States District Court of the Eastern District of California. (ECF No. 1.) On February 13, 2020,
25 the case was transferred to this court. (ECF No. 4.)

26 On March 4, 2020, the court screened the Complaint and dismissed it for failure to state
27 a claim, with leave to amend. (ECF No. 11.) On April 28, 2020, Plaintiff filed the First Amended
28 Complaint, which is now before the court for screening. 28 U.S.C. § 1915A. (ECF No. 1.)

1 **II. SCREENING REQUIREMENT**

2 The court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
4 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
7 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
8 dismiss the case at any time if the court determines that the action or appeal fails to state a claim
9 upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

10 A complaint is required to contain “a short and plain statement of the claim showing that
11 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
12 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
14 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken
15 as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores,
16 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). To state
17 a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim
18 to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,
19 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as true, legal
20 conclusions are not. Id. The mere possibility of misconduct falls short of meeting this
21 plausibility standard. Id.

22 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

23 Plaintiff is presently housed at Walden House in Los Angeles, California. The events at
24 issue in the First Amended Complaint allegedly took place at California City Correctional
25 Facility, in California City, California, when Plaintiff was incarcerated there in the custody of
26 the California Department of Corrections and Rehabilitation (CDCR). Plaintiff names as
27 defendants California City Correctional Facility and the State of California (collectively,
28 “Defendants”).

1 Plaintiff's allegations follow:

2 On April 11, 2018, Plaintiff was beaten by officers at California City State Prison (*sic*).
3 Plaintiff suffered a broken elbow and bruised arm. On April 13, 2018, Plaintiff was beaten by
4 officers at California State Prison, California City State Prison (*sic*). Plaintiff suffered broken
5 ribs, a concussion, a broken nose, a cracked orbital socket, and a traumatic brain injury from the
6 assault. Plaintiff has not recovered from the assault and suffered a speech impediment, dizziness,
7 and trouble breathing from the assault by California City Correctional Facility officers on April
8 11 and April 13 of 2018. Plaintiff was injured severely due to the negligence of California City
9 State Prison officials and the State of California.

10 Plaintiff is currently being held illegally and 42 U.S.C. is the only means to seek monetary
11 relief available through the legal system at this time. Plaintiff would like this report served to
12 the U.S. Marshal so that criminal charges may be filed against California City Prison (*sic*)

13 Plaintiff requests as relief monetary damages, including punitive damages.

14 **IV. PLAINTIFF'S CLAIMS**

15 The Civil Rights Act under which this action was filed provides:

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

22 42 U.S.C. § 1983.

23 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
24 method for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386,
25 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman v.
26 Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697 F.3d
27 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012); Anderson v.
28 Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). “To the extent that the violation of a state law
amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the
federal Constitution, Section 1983 offers no redress.” Id.

1 To state a claim under § 1983, a plaintiff must allege that (1) the defendant acted under
2 color of state law and (2) the defendant deprived him or her of rights secured by the Constitution
3 or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); see also
4 Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing “under color of
5 state law”). A person deprives another of a constitutional right, “within the meaning of § 1983,
6 ‘if he does an affirmative act, participates in another’s affirmative act, or omits to perform an act
7 which he is legally required to do that causes the deprivation of which complaint is made.’”
8 Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting
9 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite causal connection may be
10 established when an official sets in motion a ‘series of acts by others which the actor knows or
11 reasonably should know would cause others to inflict’ constitutional harms.” Preschooler II, 479
12 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of causation “closely resembles
13 the standard ‘foreseeability’ formulation of proximate cause.” Arnold v. Int’l Bus. Mach. Corp.,
14 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City of Los Angeles, 533 F.3d 1010,
15 1026 (9th Cir. 2008).

16 **A. Eleventh Amendment Immunity**

17 Plaintiff names as defendants the California City Correctional Facility in California City,
18 California, and the State of California. The Eleventh Amendment bars any suit for monetary
19 damages or injunctive relief against a state or state agency absent a valid waiver or abrogation of
20 its sovereign immunity. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996); Dittman
21 v. California, 191 F.3d 1020, 1025 (9th Cir. 1999). “The State of California has not waived its
22 Eleventh Amendment immunity with respect to claims brought under § 1983 in federal court[.]”
23 Id. at 1025-26. Further, the Supreme Court has held that “§ 1983 was not intended to abrogate a
24 State’s Eleventh Amendment immunity[.]” Kentucky v. Graham, 473 U.S. 159, 167 n.17 (1985).
25 Additionally, Eleventh Amendment immunity also extends to suits against an arm of the state,
26 such as prisons within the California Department of Corrections and Rehabilitation. See Brown
27 v. Cal. Dep’t of Corr., 554 F.3d 747 (9th Cir. 2009). Therefore, Defendants California City
28 Correctional Facility and State of California are immune from liability for Plaintiff’s claims

1 pursuant to the Eleventh Amendment, and Plaintiff cannot state a cognizable § 1983 claim against
2 either of those two Defendants.

3 **B. Linkage Requirement**

4 The Civil Rights Act under which this action was filed provides:

5 Every person who, under color of [state law] ... subjects, or causes to be subjected,
6 any citizen of the United States . . . to the deprivation of any rights, privileges, or
7 immunities secured by the Constitution . . . shall be liable to the party injured in
8 an action at law, suit in equity, or other proper proceeding for redress.

9 42 U.S.C. § 1983. The § 1983 statute plainly requires that there be an actual connection or link
10 between the actions of the defendants and the deprivation alleged to have been suffered by
11 Plaintiff. See Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S.
12 362 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a
13 constitutional right, within the meaning of section 1983, if he does an affirmative act, participates
14 in another’s affirmative acts or omits to perform an act which he is legally required to do that
15 causes the deprivation of which complaint is made.” Johnson, 588 F.2d at 743.

16 Here, Plaintiff fails to adequately link any individual defendant to any constitutional
17 deprivation suffered by Plaintiff.

18 **C. Excessive Force – Eighth Amendment Claim**

19 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual
20 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue” Hudson
21 v. McMillian, 503 U.S. 1, 8 (1992). “The objective component of an Eighth Amendment claim
22 is . . . contextual and responsive to contemporary standards of decency.” Id. (internal quotation
23 marks and citations omitted). The malicious and sadistic use of force to cause harm always
24 violates contemporary standards of decency, regardless of whether or not significant injury is
25 evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth Amendment
26 excessive force standard examines *de minimis* uses of force, not *de minimis* injuries)). However,
27 not “every malevolent touch by a prison guard gives rise to a federal cause of action.” Id. at 9.
28 “The Eighth Amendment’s prohibition of cruel and unusual punishments necessarily excludes
from constitutional recognition *de minimis* uses of physical force, provided that the use of force

1 is not of a sort ‘repugnant to the conscience of mankind.’ Id. at 9-10 (internal quotations marks
2 and citations omitted).

3 “[W]henver prison officials stand accused of using excessive physical force in violation
4 of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was
5 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to
6 cause harm.” Id. at 7. “In determining whether the use of force was wanton and unnecessary, it
7 may also be proper to evaluate the need for application of force, the relationship between that
8 need and the amount of force used, the threat reasonably perceived by the responsible officials,
9 and any efforts made to temper the severity of a forceful response.” Id. (internal quotation marks
10 and citations omitted). “The absence of serious injury is . . . relevant to the Eighth Amendment
11 inquiry, but does not end it.” Id.

12 Plaintiff fails to state a claim for excessive force because he fails to name any individual
13 defendant, or allege facts showing that any named individual defendant used excessive force
14 against him. Nor can Plaintiff state a claim for excessive force against either of his named
15 Defendants, California City Correctional Facility and State of California, because, as stated
16 above, these two Defendants are immune from suit under the Eleventh Amendment.

17 **D. Negligence – State Law Claim**

18 Plaintiff alleges that the State of California and officials at California City Correctional Facility
19 were negligent. Negligence is a state law tort claim. Plaintiff is informed that violation of state
20 tort law, state regulations, rules and policies of the CDCR, or other state law is not sufficient to
21 state a claim for relief under ' 1983. Section 1983 does not provide a cause of action for violations
22 of state law. See Galen v. Cnty. of Los Angeles, 477 F.3d 652, 662 (9th Cir. 2007). To state a
23 claim under § 1983, there must be a deprivation of federal constitutional or statutory rights. See
24 Paul v. Davis, 424 U.S. 693 (1976); also see Buckley v. City of Redding, 66 F.3d 188, 190 (9th
25 Cir. 1995); Gonzaga University v. Doe, 536 U.S. 273, 279 (2002). Although the court may
26 exercise supplemental jurisdiction over state law claims, Plaintiff must first have a cognizable
27 claim for relief under federal law. See 28 U.S.C. § 1367.

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1 Although the court may exercise supplemental jurisdiction over state law claims, Plaintiff
2 must first have a cognizable claim for relief under federal law. See 28 U.S.C. § 1367. In this
3 instance, the Court fails to find any cognizable federal claims in the Complaint. Therefore,
4 Plaintiff's state claims fail.

5 Moreover, Plaintiff has not sufficiently pleaded the claim presentation requirement
6 contained in California Government Code § 900 *et seq.* California's Government Claims Act
7 establishes certain conditions precedent to the filing of a lawsuit against a public entity. State v.
8 Superior Court (Bodde), 32 Cal. 4th 1234, 1237, 90 P.3d 116, 118 (2004). "[A] plaintiff must
9 timely file a claim for money or damages with the public entity, (§ 911.2.), and the failure to do
10 so bars the plaintiff from bringing suit against that entity, (§ 945.4.)." Id.

11 Compliance with the claim presentation requirement is an element of the cause of action,
12 Bodde, 32 Cal.4th at 1240, and is required, Mangold v. California Public Utilities Com'n, 67
13 F.3d 1470, 1477 (9th Cir. 1995), and "failure to file a claim is fatal to a cause of action," Hacienda
14 La Puente Unified School Dist. Of Los Angeles v. Honig, 976 F.2d 487, 495 (9th Cir. 1992);
15 City of Stockton v. Superior Court, 42 Cal.4th 730, 738 (Cal. 2007) at 738; Shirk v. Vista Unified
16 Sch. Dist., 42 Cal.4th 201, 208-09 (Cal. 2007).

17 The government claim must be filed or presented to the public entity no later than six months
18 after the cause of action accrues. California Government Code § 911.2. A plaintiff "must allege
19 facts demonstrating or excusing compliance with the claim presentation requirement." Robinson
20 v. Alameda Cty., 875 F. Supp. 2d 1029, 1043 (N.D. Cal. 2012) (quoting Bodde, 32 Cal.4th at
21 1243; Mangold, 67 F.3d at 1477 (quoting Snipes v. City of Bakersfield, 145 Cal.App.3d 861,
22 865, 193 Cal.Rptr. 760 (1983) ("Where compliance with the [CGCA] is required, the plaintiff
23 must allege compliance or circumstances excusing compliance, or the complaint is subject to
24 general demurrer.")); D.K. ex rel. G.M. v. Solano County Office of Education, 667 F.Supp.2d
25 1184, 1195 (E.D. Cal. 2009); Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621,
26 627 (9th Cir. 1988); Flanagan v. Benicia Unified School District, 2008 WL 435355 (E.D. Cal.
27 Feb. 14, 2008)). Plaintiff has not done so.

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1 **E. Fourth Amendment Search and Seizure**

2 Plaintiff brings a Fourth Amendment claim against Defendants for violating his rights
3 against unlawful search and seizure. However, Plaintiff has not alleged facts in the First
4 Amended Complaint showing that anyone conducted an unlawful search or seizure against him.

5 Even if Plaintiff alleged facts of a search or seizure, Plaintiff’s Fourth Amendment claim
6 fails as a matter of law because Plaintiff does not have a right to be free from a search and seizure
7 of his personal property. Hudson v. Palmer, 468 U.S. 517, 536, 104 S.Ct. 3194 (1984); Taylor
8 v. Knapp, 871 F.2d 803, 806 (9th Cir. 1989) (“Lawful incarceration necessarily entails limitations
9 upon many of the rights enjoyed by ordinary citizens. Id. at 524; Pell v. Procunier, 417 U.S. 817,
10 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). An inmate’s Fourth Amendment rights are
11 among the rights subject to curtailment. In particular, the Fourth Amendment does not protect
12 an inmate from the seizure and destruction of his property. Hudson, 468 U.S. at 528 n. 8, 104
13 S.Ct. at 2808 n. 8.”) It is well-settled that a state prisoner has no reasonable expectation of
14 privacy in his cell and is not entitled to Fourth Amendment protection against unreasonable
15 searches and seizures. See id. at 527-28; Nakao v. Rushen, 766 F.2d 410, 412 (9th Cir.1985).

16 Therefore, based on the foregoing, Plaintiff fails to state a cognizable Fourth Amendment
17 claim.

18 **F. Criminal Charges**

19 Plaintiff seeks to bring criminal charges against officers at the California City
20 Correctional Facility. As a rule, criminal actions may only be brought by the state and not by
21 individuals. Indeed, with limited exceptions, none which apply to § 1983 actions, federal law
22 does not allow a private citizen to bring a criminal prosecution against another citizen. Therefore,
23 Plaintiff is unable to bring a criminal action in this § 1983 case against defendants.

24 **V. CONCLUSION AND ORDER**

25 For the reasons set forth above, the court finds that Plaintiff fails to state any cognizable
26 claims in the First Amended Complaint against defendants State of California or California City
27 Correctional Facility. Therefore, the court shall recommend that this case be dismissed, with
28 prejudice, for failure to state a claim.

1 Under Rule 15(a) of the Federal Rules of Civil Procedure, “[t]he court should freely give
2 leave to amend when justice so requires.” Here, the court previously granted Plaintiff leave to
3 amend the complaint, with ample guidance by the court, and Plaintiff has not stated any claims
4 upon which relief may be granted under § 1983. The court is persuaded that Plaintiff is unable
5 to allege any facts, based upon the circumstances he challenges, that would state a cognizable
6 claim under section 1983. “A district court may deny leave to amend when amendment would
7 be futile.” Hartmann v. CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013). The court finds that the
8 deficiencies outlined above are not capable of being cured by amendment, and therefore further
9 leave to amend should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d
10 1122, 1127 (9th Cir. 2000).

11 Accordingly, **IT IS HEREBY RECOMMENDED** that:

- 12 1. This case be dismissed, with prejudice, for failure to state a claim; and
- 13 2. The Clerk be directed to close this case.

14 These findings and recommendations will be submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen days**
16 after the date of service of these findings and recommendations, Plaintiff may file written
17 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
18 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
19 specified time may result in waiver of the right to appeal the district court’s order. Wilkerson v.
20 Wheeler, 772 F.3d 834, 839 (9th Cir. Nov. 18, 2014) (citing Baxter v. Sullivan, 923 F.2d 1391,
21 1394 (9th Cir. 1991)).

22
23 IT IS SO ORDERED.

24 Dated: July 14, 2021

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE