IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

REMON SHIELDS,

Plaintiff, No. 2:11-cv-0015 JAM EFB P

vs.

D. FOSTON, et al.,

Defendants. FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defendants move to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and plaintiff moves to amend. For the reasons explained below, the court recommends that defendants' motion to dismiss be granted and plaintiff's motion to amend be denied.

I. Background

This action proceeds on the complaint filed on January 3, 2011. Dckt. No. 1. Plaintiff alleges that he is a Muslim prisoner serving a sentence of life without the possibility of parole ("LWOP") with the California Department of Corrections and Rehabilitation ("CDCR") in

////

////

California State Prison, Sacramento ("CSP-Sac"). *Id.* at 4.[1] Plaintiff alleges that his religion requires that those who want to marry get married and then consummate the marriage. *Id.* at 4 and 27 (declaration of Muslim Chaplain Daaiyallah Fardan). Plaintiff alleges that his requests for non-overnight "family visiting" were denied. *Id.* at 4. Documents attached to the complaint reveal that the request was denied pursuant to California Code of Regulations, title 15, § 3177 (hereinafter "§ 3177"), which provides that individuals serving an LWOP sentence are ineligible for CDCR's family visiting program.[2] *Id.* at 5, 10-25. Plaintiff seeks a declaration that this was unlawful and an injunction ordering CDCR to provide him with "Non-overnight Family visit to consummate his marriage and to add Non-overnight Family visiting to the [CDCR's] visiting program for Muslim 'Lifer' prisoners who are not eligible for overnight Family visiting." *Id.*

////

////

---

[1] Page numbers cited herein refer to those assigned by the court's electronic docketing system and not those assigned by the parties.

[2] As relevant here, § 3177 provides:

> Institution heads shall maintain family visiting policies and procedures. Family visits are extended overnight visits, provided for eligible inmates and their immediate family members as defined in Section 3000, commensurate with institution security, space availability, and pursuant to these regulations. . . .
>
> ***
>
> (b) Family visiting is a privilege. . . .
>
> ***
>
> (2) Family visits shall not be permitted for inmates who are in any of the following categories: sentenced to life without the possibility of parole; sentenced to life, without a parole date established by the Board of Parole Hearings; designated Close A or Close B custody; designated a condemned inmate; assigned to a reception center; assigned to an administrative segregation unit; assigned to a security housing unit; designated "C" status; guilty of one or more Division A or Division B offense(s) within the last 12 months; or guilty of narcotics distribution while incarcerated in a state prison.
>
> ***

II. Rule 12(b)(6) Standard

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id*. (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed. 2004)). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Dismissal is appropriate based either on the lack of cognizable legal theories or the lack of pleading sufficient facts to support cognizable legal theories. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421, *reh'g denied*, 396 U.S. 869 (1969).

The court may additionally consider facts established by exhibits attached to the complaint, facts which may be judicially noticed, and matters of public record, including pleadings, orders, and other papers filed with the court. *Durning v. First Boston Corp*., 815 F.2d 1265, 1267 (9th Cir. 1987); *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987); *Mack v. South Bay Beer Distribs*., 798 F.2d 1279, 1282 (9th Cir. 1986).

////

////

Similarly, the court may disregard allegations contradicted by the complaint's attached exhibits and is not required to accept as true allegations contradicted by judicially noticed facts. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987); *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir.1998); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985). However, the court's liberal interpretation of a pro se litigant's pleading may not supply essential elements of a claim that are not pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Furthermore, "[t]he court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). The court need not accept unreasonable inferences, or unwarranted deductions of fact. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). A pro se litigant is, however, entitled to notice of the deficiencies in the complaint and an opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

III. Analysis

A. Motion to Amend

The parties do not dispute that plaintiff has named the wrong individuals as defendants to this action. *Rouser v. White*, 707 F. Supp. 2d 1055, 1066 (E.D. Cal. 2010) (stating that the proper defendant for injunctive relief regarding implementation of a CDCR policy is the Secretary of the CDCR, in his official capacity). Plaintiff seeks to amend his complaint to name the Secretary of CDCR as sole defendant to cure this defect. Dckt. No. 35. Under Federal Rule of Civil Procedure 15(b), the court should freely grant leave to amend when justice so requires.

////

However, leave to amend is properly denied where amendment would be futile. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996). Because plaintiff's complaint is based on legal theories that are not viable, as set forth below, amending the complaint to add the proper defendant would be futile. Even if this action is deemed to be against the Secretary, it cannot proceed. Accordingly, the court recommends that plaintiff's motion to amend the complaint be denied.

B. Motions to Dismiss

Plaintiff's complaint does not identify the federal law under which he seeks to challenge section 3177. The complaint does mention the phrase "least restrictive means" repeatedly, however, in apparent reference to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (hereinafter, "RLUIPA"). Dckt. No. 1 at 5. Defendants' motion to dismiss also addresses the propriety of plaintiff's claim under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the court will address the validity of § 3177's application to married Muslim inmates serving an LWOP sentence under these three sources of law.

The First Amendment. The Free Exercise Clause of the First Amendment provides, "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST., Amend. I. Any assertion that § 3177 runs afoul of that clause is defeated by the U.S. Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). There, the Court held that generally-applicable laws that incidentally burden a religious practice do not violate the Free Exercise Clause. 494 U.S. at 878; *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Because section 3177 does not prohibit conjugal visitation solely for Muslim life inmates, but all life inmates regardless of religion, it does not violate the Free Exercise Clause. *Cf. Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that a prison inmate retains those constitutional rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system); *Noguera v. Rowland*, No. 90-15405, 1991 U.S. App. LEXIS 18367, at *1

(9th Cir. July 29, 1991) (holding that a condemned inmate's claim to a right to conjugal visits under the Free Exercise Clause failed because the inmate could not "show that the prison regulation prohibiting conjugal visits for condemned inmates is not rationally related to a valid penological interest.").

The 14th Amendment. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., Amend. XIV, § 1.

> When analyzing a discrimination claim under the Fourteenth Amendment, we must first determine the appropriate level of scrutiny to be applied. If the rule disadvantages a suspect class or impinges upon a fundamental right, the court will examine it by applying a strict scrutiny standard. If no such suspect class or fundamental rights are involved, the conduct or rule must be analyzed under a rational basis test.

Giannini v. Real, 911 F.2d 354, 358 (9th Cir. 1990). Prisoners serving an LWOP term do not constitute a suspect class and there is no fundamental right to conjugal visits. *Gerber v. Hickman*, 291 F.3d 617, 621-22, 623 (9th Cir. 2002) (stating that "it is well-settled that prisoners have no constitutional right while incarcerated to contact visits or conjugal visits" and applying rational-basis scrutiny to a life prisoner's claim that denial of conjugal visits violated the Equal Protection Clause). Accordingly, the court reviews § 3177 under the rational basis test. Under that test, § 3177's discrimination against prisoners serving an LWOP term does not violate the Equal Protection Clause if it bears some rational relationship to a conceivable legitimate state purpose. *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985).

In *Gerber*, the Ninth Circuit concluded that "it is completely rational for prison officials to decide that maintaining contact with those outside prison is more important for inmates who will eventually be released from prison than for those ineligible for parole." 291 F.3d at 623. Accordingly, the court affirmed the dismissal of an inmate's claim that California's prohibition on conjugal visits for life prisoners violated equal protection. *Id.* at 623-24. Defendants further identify the conceivable legitimate state interest in institutional security. *See Block v.*

Rutherford, 468 U.S. 576, 586 (1984) (noting the myriad security problems presented by contact visits). "That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion." *Id.* Thus, plaintiff's equal protection challenge to § 3177 fails.

RLUIPA. As relevant here, RLUIPA provides that "no [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling government interest" by "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2). "Religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). A "substantial burden" is one that imposes a significantly great restriction or onus on religious exercise. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). The law applies to institutions receiving federal funding (and there is no suggestion here that California prisons do not receive such funding). *Id.* § 2000cc-1(b)(1); *Cutter*, 544 U.S. at 715-16 n.4 (noting that all U.S. states receive federal funding for prisons).

Defendants argue that dismissal of plaintiff's RLUIPA claim is warranted because § 3177 does not place a substantial burden on the ability of Muslim inmates to enter into valid Muslim marriages. In support, defendants cite *Fuller v. Cate*, 481 Fed. Appx. 413 (9th Cir. 2012). In *Fuller*, as here, a Muslim LWOP inmate claimed that the prison's denial of conjugal visits to him deprived him of his right, under RLUIPA, to consummate his marriage and make it valid under Islam. *Id.* at 413. The district court dismissed the action, and the Ninth Circuit affirmed that dismissal, because "the attachments to Fuller's complaint show that the prison's prohibition on conjugal visits for inmates serving life sentences without parole did not substantially burden his ability to enter into a valid Islamic marriage." *Id.* Neither court held that, as a matter of law, § 3177 does not substantially burden the ability of Muslim LWOP inmates to enter into valid Islamic marriages. Rather, the courts' dismissal of the claim was based on an extremely case-

specific situation – the particular plaintiff in *Fuller* had attached particular documents to his complaint that contradicted his claim that consummation was necessary for a Muslim marriage to be valid. These particular facts are not present here. Instead, plaintiff has attached to his complaint a declaration of a Muslim Chaplain who attests that consummation *is* required. Dckt. No. 1 at 27. Accordingly, *Fuller* cannot be relied on to support dismissal of plaintiff's complaint.

Defendants' next argument – that section 3177 serves a compelling government interest by the least restrictive means – finds better footing. Defendants proffer the compelling state interest of prison security and argue that denial of conjugal visits to LWOP inmates is the least restrictive means of accomplishing that goal.

There is no doubt that prison security is a compelling state interest. *Cutter*, 544 U.S. at 725 n.13 ("[P]rison security is a compelling state interest" and "deference is due to institutional officers' expertise in this area."). And, as the U.S. Supreme Court has recognized, contact visits present "a host of security problems." *Block*, 468 U.S. at 586. Such visits

> open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.

Id. The High Court additionally recognized that contact visits for persons who have committed serious, violent offenses present additional risks. *Id.* at 586-87. A judge of this district has recognized California's conclusion, in promulgating § 3177, "that inmates with no parole dates were considered escape and security risks, such that allowing such inmates to have family visits was not compatible with public safety." *Tuvalu v. Woodford*, No. CIV S-04-1724 RRB KJM P, 2008 WL 619158, at 3 (E.D. Cal. Mar. 4, 2008), *affirmed* at 389 Fed. Appx. 735 (9th Cir. 2010).

In determining whether section 3177 is the "least restrictive means" of serving the state's compelling interest in prison security, the court must give "'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to

maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Cutter*, 544 U.S. at 722-23 (quoting an excerpt from the congressional history of RLUIPA). The court must not "elevate accommodation of religious observances over an institution's need to maintain order and safety" and must instead apply RLUIPA "in an appropriately balanced way, with particular sensitivity to security concerns." *Id.* at 722.

Neither the U.S. Supreme Court nor the Ninth Circuit has yet addressed whether a sincerely held religious belief necessitating conjugal visits must be accommodated under RLUIPA. *See Pouncil v. Tilton*, 704 F.3d 568 (9th Cir. 2012) (addressing a statute of limitations issue but not the merits in a case challenging a denial of conjugal visits under RLUIPA; the case is currently pending in the district court); *Fuller*, 481 Fed. Appx. 413 (concluding that attachments to plaintiff's complaint demonstrated that the prohibition on conjugal visits for LWOP inmates did not substantially burden plaintiff's right to enter into a valid Islamic marriage). The lower courts that have addressed the issue appear, thus far, to uniformly conclude that such beliefs must give way to the need for institutional security. *Robertson v. Kansas*, No. 07-3162-SAC, 2007 U.S. Dist. LEXIS 91266, at *5-7 (D. Kan. Dec. 10, 2007) (summarily denying plaintiff's claim for conjugal visits under RLUIPA because such visits would burden prison officials and present security risks); *Marsh v. Granholm*, No. 2:05-cv-134, 2006 U.S. Dist. LEXIS 59203, at * (W.D. Mich., Aug. 22, 2006) (granting summary judgment on plaintiff's RLUIPA claim because: (1) plaintiff, a murder convict, raised particular security concerns regarding his continued incarceration, (2) plaintiff's incarceration was at odds with his request to engage in private heterosexual procreation, and (3) the denial of conjugal visits was the least restrictive means of furthering the government's interest in institutional safety). Undoubtedly in recognition of these security concerns, courts have routinely and consistently recognized that loss of sexual intimacy with a spouse is simply "part and parcel" of imprisonment. *Gerber v. Hickman*, 291 F.3d 617, 620-22 (9th Cir. 2002); *see also Turner*, 482 U.S. at 95 ("The right to marry, like many other rights, is subject to substantial restrictions as a

result of incarceration."); *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) ("[E]ven though the right to marriage is constitutionally protected for inmates, the right to marital privacy and conjugal visits while incarcerated is not."); *Lucas v. Tilton*, No. 1:08-cv-00515-AWI-YNP PC, 2010 U.S. Dist. LEXIS 8347, at *4-5 (E.D. Cal. Feb. 2, 2010) (concluding that the balance of equities did not support plaintiff's request for a preliminary injunction allowing plaintiff to have a conjugal visit with his wife "because the loss of intimate association is a well-known aspect of being imprisoned for conviction of a crime.").

California prison administrators have determined that denying conjugal visits to inmates serving LWOP terms is necessary to ensure the compelling state interest in prison security. *Tuvalu*, 2008 U.S. Dist. LEXIS 16351, at *8-9. Applying appropriate deference to that conclusion and the state's costs and limited resources, as the court must (*Cutter*, 544 U.S. at 722-23), section 3177 is sufficiently narrowly-tailored that it does not violate RLUIPA. While plaintiff argues that it would be less restrictive for the state to provide daytime conjugal visits to him and other married Muslim LWOP inmates, such accommodation would not diminish the security threat posed by allowing inmates in high-risk categories unsupervised visitation and would impose additional administrative burdens on the state. *See Block*, 468 U.S. at 587-88 (recognizing that it is extremely difficult for prison administrators to determine, from a group of inmates, who poses a greater or lesser security risk, and thus concluding that, under the federal Constitution, prison officials may permissibly deny contact visits to an entire inmate population).

Because section 3177 is narrowly tailored to accomplish the compelling government objective of enhancing prison security, plaintiff's claim that the regulation violates RLUIPA fails.

////

////

////

////

IV. Recommendation

Accordingly, it is hereby recommended that defendants' September 12, 2012 and October 11, 2012 motions to dismiss (Dckt. Nos. 27 and 31) be granted. Because amendment can not salvage plaintiff's claims, it is further recommended that plaintiff's November 19, 2012 motion to amend (Dckt. No. 35 be denied).

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 9, 2013.

EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE