



1           The proposed SAC flatly acknowledges that plaintiff “can’t prove the ‘excessive force’  
2 claim,” ECF No. 43 at 6, and instead seeks to challenge plaintiff’s arrest on other grounds. First,  
3 plaintiff contends that his arrest by Officer Eliston for failure to register as a sex offender violated  
4 the Eighth Amendment’s prohibition of cruel and unusual punishment, because he is brain  
5 damaged and schizophrenic.<sup>1</sup> Second, plaintiff claims that his arrest in his home, without a  
6 warrant, violated the Fourth Amendment. Plaintiff alleges that “even if probable cause existed  
7 Officer Eliston . . . failed to secure an arrest warrant because he has no respect for me, or the  
8 law.” ECF No. 43 at 3-4.

9           In response to plaintiff’s proposed SAC, defendant has filed a statement of non-opposition  
10 on grounds that plaintiff’s concession relieves defendant of the only claim against him. See ECF  
11 No. 45. As defendant notes, the claims proposed in the SAC were previously screened out. See  
12 ECF Nos. 20, 25 (dismissing original complaint with leave to amend); ECF Nos. 27, 31  
13 (authorizing this action to proceed on the FAC only on plaintiff’s excessive force claim against  
14 defendant Eliston).

15           As this court has previously noted, plaintiff has filed “more than *forty* other cases . . .  
16 challeng[ing] his arrest and the underlying warrant based on his failure to comply with  
17 California’s sex offender registration requirements.” ECF No. 20 at 5 (emphasis added). In none  
18 of these cases were plaintiff’s putative claims found cognizable in federal court. See e.g., Humes  
19 v. Sacramento County et al., Case No. 2:18-cv-0243 KJM CMK P, ECF No. 10 (finding that  
20 plaintiff’s allegations failed to state a cognizable civil rights claim because he does not allege that  
21 any of his state convictions for failing to register as a sex offender have been overturned or  
22 expunged, citing Heck v. Humphrey, 512 U.S. 477, 483-84 (1994)), ECF No. 13 (order of  
23 dismissal).

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25 <sup>1</sup> Plaintiff relies on People v. Sorden, 36 Cal. 4th 65 (2005). There California Supreme Court  
26 held that “the willfulness element of the offense [failing to register under Cal. Penal Code 290]  
27 may be negated by evidence that an involuntary condition – physical or mental, temporary or  
28 permanent – deprived a defendant of actual knowledge of his or her duty to register. Only the  
most disabling of conditions, we emphasize, would qualify under the standard we announce  
today. Severe Alzheimer’s disease is one example that comes to mind; general amnesia induced  
by severe trauma is another.” Sorden, 36 Cal. 4th at 69.

1 Plaintiff's concession that he cannot prove his excessive force claim against defendant  
2 Eliston, the omission of that claim from plaintiff's proposed SAC, and the re-assertion of claims  
3 in the proposed SAC that have been dismissed in this and plaintiff's several other cases, all  
4 support a recommendation that this action be dismissed without further leave to amend.

5 A further factor supporting dismissal of this case is plaintiff's complete failure to respond  
6 to defendant's discovery requests. Defendant states that on June 17, 2019, he served plaintiff by  
7 mail with special interrogatories (set one), requests for production of documents (set one) and  
8 requests for admissions (set one). See ECF No. 40. Plaintiff's responses were due August 1,  
9 2019, but plaintiff "failed to provide[] either objections or verified responses to the written  
10 discovery propounded by defendant." ECF No. 40-2 at 2. Thus, on August 16, 2019, prior to  
11 plaintiff filing his proposed SAC, defendant filed the pending motion to compel, seeking an order  
12 of this court compelling plaintiff to provide written discovery responses<sup>2</sup> and \$600 in sanctions  
13 for attorney fees in bringing this motion.

14 Plaintiff's opposition or response to defendant's discovery motion was due within 21 days  
15 after service of the motion. Local Rule 230(l). Allowing three additional days for service of both  
16 defendant's motion and plaintiff's response, Fed. R. Civ. P. 6(d) (a total of six days), plaintiff's  
17 response should have been received in this court by September 12, 2019. It was not. Plaintiff's  
18 failure to respond to defendant's motion" may be deemed a waiver of any opposition to the  
19 granting of the motion and may result in the imposition of sanctions." Local Rule 230(l). Under  
20 Rule 37, Federal Rules of Civil Procedure, dismissal of an action is among the authorized  
21 sanctions for a party's failure to participate in discovery. See Fed. R. Civ. P. 37(b)(2)(A)(v),  
22 (c)(1)(C), (d)(3).

23 Moreover, plaintiff's total failure to respond to defendant's discovery requests is in  
24 violation of this court's Discovery and Scheduling Order, which provided that "[r]esponses to  
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26 <sup>2</sup> Pursuant to Rule 36(a)(3), Federal Rules of Civil Procedure, plaintiff's failure to timely respond  
27 to defendant's requests for admissions constitutes an admission on plaintiff's part. Thus, were  
28 this court to direct plaintiff to serve written responses, such order would address only defendant's  
interrogatories and production request.

1 written discovery requests shall be due forty-five (45) days after the request is served.” ECF No.  
2 33 at 4.

3 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an  
4 action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258,  
5 1260 (9th Cir. 1992), cert. denied, 506 U.S. 915 (1992). “In determining whether to dismiss a  
6 case for failure to comply with a court order the district court must weigh five factors including:  
7 (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its  
8 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of  
9 cases on their merits; and (5) the availability of less drastic alternatives.” Id. at 1260-61 (citations  
10 and internal quotation marks omitted).

11 These factors weigh in favor of dismissing the instant case. The first two factors – the  
12 public’s interest in expeditious resolution of litigation, and the court’s need to manage its docket  
13 – strongly support dismissal. In addition to flooding this court with repetitive complaints, each  
14 requiring the court’s specific attention, plaintiff now seeks to wholly modify the allegations and  
15 claims in the instant case with matters that have already been dismissed. The third factor, risk of  
16 prejudice to defendant, also weighs in favor of dismissal. Defendant has already been prejudiced  
17 because required to defend against a claim plaintiff now concedes he cannot prove; allowing  
18 plaintiff to proceed on previously dismissed allegations against defendant would clearly be  
19 further prejudicial. The fourth factor, the public policy favoring disposition of cases on their  
20 merits, has been rendered meaningless by plaintiff’s present effort to transform the basis of this  
21 action, and thus weighs in favor of dismissal. Finally, the court finds that no sanction less drastic  
22 than dismissal is warranted under these circumstances. In sum, the undersigned finds that all five  
23 Ferdik factors weigh in favor of dismissing this case.

24 In conclusion, the court finds that plaintiff’s complete failure to cooperate in discovery in  
25 this case, together with plaintiff’s express abandonment of his only potential claim against the  
26 defendant, warrant immediate dismissal of this case.<sup>3</sup> Any further time spent by the court on this

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27 <sup>3</sup> Due to plaintiff’s prolific and repetitive filings in this court, the undersigned has determined  
28 that it would be a waste of judicial resources to first issue an order to show cause why this action

1 case would needlessly consume scarce judicial resources. See Fed. R. Civ. P. 41(b); see also  
2 Local Rule 110 (“Failure of counsel or of a party to comply with these Rules or with any order of  
3 the Court may be grounds for imposition by the Court of any and all sanctions authorized by  
4 statute or Rule or within the inherent power of the Court.”); Local Rule 183(a) (a pro se party’s  
5 failure to comply with the Federal Rules of Civil Procedure, the court’s Local Rules, and other  
6 applicable law may be ground for dismissal).

7 Accordingly, IT IS HEREBY RECOMMENDED that:

- 8 1. This action be dismissed with prejudice; and
- 9 2. Plaintiff’s motion to compel discovery and for sanctions, ECF No. 40, be denied as  
10 moot.

11 These findings and recommendations are submitted to the United States District Judge  
12 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
13 days after being served with these findings and recommendations, any party may file written  
14 objections with the court and serve a copy on all parties. Such a document should be captioned  
15 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that  
16 failure to file objections within the specified time may waive the right to appeal the District  
17 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 DATED: September 16, 2019

19   
20 ALLISON CLAIRE  
21 UNITED STATES MAGISTRATE JUDGE

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28 should not be dismissed. Plaintiff will have the opportunity to file objections to the  
recommendation of dismissal.