

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

HOWARD JOHNSON, husband of  
decedent Velma Jean Bess,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTION AND REHABILITATION;  
MATTHEW CATE, Secretary; ROBIN  
DEZEMBER, Correctional Healthcare  
Services Chief Deputy Secretary;  
MARY LATTIMORE, Acting Warden,  
California Corrections Woman's  
Facility; KENT EICHENBERGER,  
Warden, Valley State Prison For  
Women; SAMANTHA DENNIS, as  
Executor of the Estate of Decedent  
Velma Bess; and DOES 1 through  
100.

## Defendants.

1:09-CV-00502-OWW-SMS

ORDER RE DEFENDANTS' MOTION  
TO DISMISS UNDER RULE  
12(b)(1) AND 12(b)(6)

## I. INTRODUCTION

Before the court is a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. 32.) The motion is brought collectively by Defendants California Department of Corrections and Rehabilitation, Matthew Cate, Mary Lattimore, and Kent Eichenberger ("Defendants"). The motion is directed to all the claims asserted by Plaintiff Howard Johnson ("Plaintiff") in the First Amended Complaint ("FAC"). These claims arise from the incarceration of a female prisoner, Velma Jean Bess, at the Central California Women's Facility in Madera County, California. While incarcerated, Bess died from cancer. In the FAC, Plaintiff claims to be Bess' surviving husband.

1           The following background facts are taken from the FAC.<sup>1</sup>  
2

2           II. BACKGROUND

3           A. The Incarceration Of Velma Bess And Her Treatment

4           In 2000, Bess ("Decedent") was incarcerated for assaulting  
5 "Frank Miranda" with a deadly weapon. Allegedly, Decedent and  
6 Miranda were "never married." (Doc. 26 at 2.)<sup>2</sup>

7           Decedent was first incarcerated at the Valley State Prison for  
8 Women and then transferred to the Central California Women's  
9 Facility in Madera County. (*Id.*) In 2003, Decedent was diagnosed  
10 with tongue cancer. (*Id.*) She was transferred from the prison  
11 facility to a local hospital where she received radiation and  
12 chemotherapy. (*Id.*) Her cancer then went into remission for  
13 approximately six years. (*Id.*) Plaintiff alleges that the "prison  
14 facility failed to promptly monitor [Decedent's] cancer during the  
15 six years it was in remission to detect any early signs of  
16 recurrence so a recurrence could be properly treated." (*Id.*)

17           In August and September 2008, Decedent began passing out,  
18 sweating profusely, and suffering from chills, symptoms that  
19 Plaintiff alleges "were related to a recurrence and metastasis of  
20 her tongue cancer." (*Id.*) The "prison medical staff" allegedly  
21 "prescribed medications that were not related to [Decedent's]

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22           <sup>1</sup> The FAC is Document ("Doc.") 26.  
23

24           <sup>2</sup> In Plaintiff's original complaint, Plaintiff alleged that  
25 "Velma Bess was arrested for Domestic Violence and Assault on a  
26 spouse (Frank R. M[i]randa)." (Doc. 1 at 2) (emphasis added.) By  
27 contrast, in his FAC, Plaintiff alleges that Decedent and Miranda  
28 were "never married" and that Decedent was incarcerated for  
"assault w/a deadly weapon" without mentioning the part about  
"Domestic Violence and Assault on a spouse." Defendants contend  
that this change of pleading constitutes a "sham" amendment.

1 medical condition, and her symptoms proceeded to get worse." (*Id.*  
2 at 3.)

3 In September 2008, Decedent "pass[ed] out," "fell and broke  
4 her ankle," and was then transferred to a local hospital for  
5 treatment. (*Id.*) During her stay at the hospital, Decedent was  
6 diagnosed with "advanced tongue cancer that had metastasized into  
7 her lungs." (*Id.*) As alleged, "[t]he hospital, after stabilizing  
8 [Decedent's] broken ankle, returned her to the prison facility to  
9 die." (*Id.*)

10 On November 6, 2008, the prison facility transferred Decedent  
11 back to the hospital where she was placed on life support. (*Id.*)  
12 Later that day, Decedent was taken off life support and died. (*Id.*)  
13 Decedent's death certificate states that the "onset of the cause of  
14 her death" commenced "two months" prior to her death. (*Id.*)

15 Plaintiff asserts that Decedent's death certificate contains  
16 false information provided by Decedent's daughter, Defendant  
17 Samantha Dennis, that Decedent was "Divorced" at the time of her  
18 death. (*Id.*) Plaintiff alleges that he was the husband of Decedent  
19 at all times mentioned in the FAC. (*Id.* at 1.) Plaintiff alleges  
20 that Defendant Dennis has refused to allow the death certificate to  
21 be amended or corrected. (*Id.* at 3.)

22 **B. Claims In The FAC**

23 In the FAC Plaintiff asserts five claims. The first two  
24 claims are for a violation of Decedent's Eighth Amendment rights  
25 under 42 U.S.C. § 1983.

26 In the first claim, Plaintiff asserts an Eighth Amendment  
27 violation based on the "conditions of [Decedent's] prison  
28 confinement." Plaintiff alleges that "Defendants knew Velma Bess['']

conditions of imprisonment created a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to correct it." (Doc. 26 at 4.)

In the second claim, Plaintiff asserts an Eight Amendment violation based on the defendants alleged deliberate indifference to a serious medical need of Decedent. Plaintiff alleges that "Defendants acted with deliberate indifference to the serious medical need of plaintiff's wife Velma Bess." (*Id.* at 5.)

In both of the Eighth Amendment claims, Plaintiff specifically alleges he is "a beneficiary of the decedent's estate and successor in interest in decedent's causes of action and therefore has standing to maintain a survivor's action." (*Id.* at 4-5.)

The three remaining claims in the FAC are all state law claims. (Doc. 26 at 6-7.) Plaintiff's third claim is for "wrongful death" under California law.<sup>3</sup> Plaintiff alleges that he has "standing to bring a wrongful death action under California Civil Code § 377.60." (Doc. 26 at 6.) Plaintiff's fourth claim is for intentional infliction of emotional distress ("IIED") under California law, and Plaintiff's fifth claim is for negligent infliction of emotional distress ("NIED") under California law.

### III. STANDARD OF DECISION

A. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a motion to dismiss may be made if the plaintiff fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

<sup>3</sup> While Plaintiff has alleged a state law claim for wrongful death, Plaintiff's § 1983 claims are not alleged as wrongful death claims. Rather, they are specifically alleged as survival claims.

1 Dismissal under Rule 12(b)(6) is appropriate where the complaint  
2 lacks a cognizable legal theory or sufficient facts to support a  
3 cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901  
4 F.2d 696, 699 (9th Cir. 1990). A complaint is also "subject to  
5 dismissal for failure to state a claim if the allegations" on their  
6 face "show that relief is barred" for some legal reason. *Jones v.  
7 Bock*, 549 U.S. 199, 215 (2007); *see also Grotten v. California*, 251  
8 F.3d 844, 851 (9th Cir. 2001).

9 In deciding whether to grant a motion to dismiss, the court  
10 accepts all well-pleaded factual allegations of the complaint as  
11 true and draws all reasonable inferences in the light most  
12 favorable to the nonmoving party. *See Rowe v. Educ. Credit Mgmt.  
13 Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009); *see also Moss v.  
14 U.S. Secret Serv.*, \_\_ F.3d \_\_, 2009 WL 2052985, at \*6 (9th Cir.  
15 July 16, 2009).

16 **B. Rule 12(b)(1)**

17 Federal Rule of Civil Procedure 12(b)(1) provides that a  
18 motion to dismiss may be made on the basis of "lack of subject-  
19 mater jurisdiction." Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1)  
20 motion tests "whether the plaintiff has a right to be in the  
21 particular court." *Trs. of Screen Actors Guild-Producers Pension  
22 & Health Plans v. NYCA, Inc.*, \_\_ F.3d. \_\_, 2009 WL 2032464, at \*2  
(9th Cir. July 15, 2009) (internal quotation marks omitted). "Rule  
24 12(b)(1) attacks on jurisdiction can be either facial, confining  
25 the inquiry to allegations in the complaint, or factual, permitting  
26 the court to look beyond the complaint." *Savage v. Glendale Union  
27 High Sch.*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003). Federal courts  
28 are limited in jurisdiction; it is presumed that a case lies

1 outside the jurisdiction of the federal courts unless the plaintiff  
2 proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511  
3 U.S. 375, 377 (1994); *Stock W., Inc. v. Confederated Tribes*, 873  
4 F.2d 1221, 1225 (9th Cir. 1989).

5 **IV. DISCUSSION AND ANALYSIS**

6 **A. Section 1983 Claims - The First And Second Causes of Action**

7 In pertinent part, § 1983 provides that "[e]very person who,  
8 under color of any statute, ordinance, regulation, custom, or  
9 usage, of any State or Territory or the District of Columbia,  
10 subjects, or causes to be subjected, any citizen of the United  
11 States or other person within the jurisdiction thereof to the  
12 deprivation of any rights, privileges, or immunities secured by the  
13 Constitution and laws, shall be liable to the party injured in an  
14 action at law, suit in equity, or other proper proceeding for  
15 redress . . ." (Emphasis added.)

16 **1. A "Person" Under Section 1983 And Eleventh Amendment**  
17 **Immunity**

18 Defendants argue that the California Department of Corrections  
19 and Rehabilitation is not a "person" subject to suit under § 1983  
20 and that Eleventh Amendment immunity bars Plaintiff's claims  
21 against the Department. Defendants are correct.

22 "State agencies . . . are not 'persons' within the meaning of  
23 § 1983, and are therefore not amenable to suit under that statute."  
24 *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004) (citing *Will*  
25 *v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989)). The  
26 California Department of Corrections and Rehabilitation is a state  
27 agency and thus not a "person" under § 1983. See *Christman v.*  
28 *Micheletti*, 302 F. App'x 742, 743 (9th Cir. 2008) ("The district

1 court properly dismissed [the plaintiff's] claims against the  
2 California Department of Corrections and Rehabilitation because the  
3 state agency is not a 'person' under section 1983."); *see also*  
4 *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir.  
5 1991) ("[A]rms of the State such as the Arizona Department of  
6 Corrections are not 'persons' under section 1983.") (internal  
7 quotation marks omitted); *Coleman v. Cal. Dep't of Corr. & Rehab.*,  
8 No. CV 06-2606-JFW (PJW), 2009 WL 648987, at \*3 (C.D. Cal. Mar. 10,  
9 2009) (concluding that the California Department of Correction and  
10 Rehabilitation was not a "person" subject to suit under § 1983).

11 In addition, "[i]n the absence of a waiver by the state or a  
12 valid congressional override, [u]nder the eleventh amendment,  
13 agencies of the state are immune from private damage actions or  
14 suits for injunctive relief brought in federal court." *Dittman v.*  
15 *California*, 191 F.3d 1020, 1025 (9th Cir. 1999) (second alteration  
16 in original). "The State of California has not waived its Eleventh  
17 Amendment immunity with respect to claims brought under § 1983 in  
18 federal court . . . ." *Id.* at 1025-26; *see also* *Brown v. Cal. Dep't*  
19 *of Corr.*, 554 F.3d 747, 752 (9th Cir. 2009). Accordingly, the  
20 Eleventh Amendment bars the § 1983 claims asserted against the  
21 California Department of Corrections and Rehabilitation. See  
22 *Brown*, 554 F.3d at 752 (concluding that "[t]he district court  
23 correctly held that the California Department of Corrections and  
24 the California Board of Prison Terms were entitled to Eleventh  
25 Amendment immunity."); *see also* *Parra v. Hernandez*, No. 08-cv-0191  
26 H(CAB), 2009 WL 799065, at \*8 (S.D. Cal. Mar. 24, 2009) (concluding  
27 that the California Department of Corrections and Rehabilitation  
28 was entitled to Eleventh Amendment immunity and dismissing claims

1 asserted against it); *Goodman v. Cal. Dep't of Corr. & Rehab.*, No.  
2 CV 07-01776-CJC (VBK), 2008 WL 4610268, at \*6 (C.D. Cal. Oct. 14,  
3 2008) (same). In opposition to the motion to dismiss, Plaintiff  
4 concedes that the Department of Corrections and Rehabilitation is  
5 an improper party and should be dismissed.

6 Defendants argue that the individual defendants are not  
7 "persons" under § 1983 when they are sued for damages in their  
8 official capacities. Defendants argue further that Eleventh  
9 Amendment immunity precludes any § 1983 claims asserted against the  
10 individual defendants in their official capacities. Defendants are  
11 correct.

12 "State officials sued in their official capacities . . . are  
13 not 'persons' within the meaning of § 1983 . . . ." *Flint v.*  
14 *Dennison*, 488 F.3d 816, 825 (9th Cir. 2007); see also *Will*, 491  
15 U.S. at 71 ("[N]either a State nor its officials acting in their  
16 official capacities are 'persons' under § 1983."). In addition,  
17 "[t]he Eleventh Amendment bars actions for damages against state  
18 officials who are sued in their official capacities in federal  
19 court." *Dittman*, 191 F.3d at 1026. By contrast, a state official  
20 sued in his official capacity for "prospective injunctive relief"  
21 is considered a "person" under § 1983, and the Eleventh Amendment  
22 does not bar such claims. See *Flint*, 488 F.3d at 825.

23 Plaintiff's FAC seeks money damages, not prospective  
24 injunctive relief. (Doc. 26 at 7.) Accordingly, to the extent  
25 Plaintiff asserts § 1983 claims against individual state officers  
26 in their official capacities, they are not "persons" subject to  
27 suit under § 1983 and are entitled to Eleventh Amendment immunity.

28 In opposition to the motion, Plaintiff clarifies that he is

1 not suing the individual defendants in their official capacities.  
2 Rather he is suing them in their personal capacities because  
3 allegedly "they were personally derelict in their duties." (Doc. 56  
4 at 2.) Because Plaintiff, as he concedes, cannot assert § 1983  
5 claims against the California Department of Corrections and  
6 Rehabilitation and does not assert any official capacity claims  
7 against the individuals defendants, this leaves Plaintiff with  
8 Eight Amendment claims against the individuals in their personal  
9 capacities for damages.

10 The individual defendants, when sued in their personal  
11 capacities, are "persons" under § 1983, and Eleventh Amendment  
12 immunity does not attach to such claims. *Porter v. Jones*, 319 F.3d  
13 483, 491 (9th Cir. 2003). While the Eleventh Amendment does not  
14 preclude Plaintiff's personal capacity claims against the  
15 individual defendants, these claims (and all of Plaintiff's § 1983  
16 claims) are still barred for another reason.

17 2. Plaintiff Lacks Capacity To Bring The § 1983 Claims

18 Defendants argue that Plaintiff lacks "standing" to bring the  
19 Eight Amendment claims. Plaintiff alleges that he has "standing"  
20 to "maintain a survivor's action" for an Eighth Amendment violation  
21 because he is a "beneficiary of the [D]ecedent's estate and  
22 successor in interest in [D]ecedent's causes of action." (Doc. 26  
23 at 4.) In his FAC, Plaintiff cites § 377.32 of the California Code  
24 of Civil Procedure which pertains to survival actions maintained by  
25 successors in interest.

26 While both parties use the term "standing," they are not  
27 referring to "standing" in the constitutional sense of the word.  
28 Instead, they are referring to standing in terms of Plaintiff's

1 "capacity to sue" on behalf of Decedent's estate. See *Estate of*  
2 *Burkhart v. United States*, No. C 07-5467 PJH, 2008 WL 4067429, at  
3 \*10-11 (N.D. Cal. Aug. 26, 2008) (recognizing that whether the  
4 plaintiff is the proper party to bring a survival action is a  
5 matter of "capacity to sue" not standing).

6 A survivor cause of action is a "cause of action which  
7 belonged to the decedent before death but, by statute, survives  
8 that event. *Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256,  
9 1264 (2006). The survival statutes "prevent the abatement of the  
10 cause of action of the injured person, and provide for its  
11 enforcement by or against the personal representative of the  
12 deceased." *Id.* (internal quotation marks omitted).

13 "A claim under 42 U.S.C. § 1983 survives the decedent if the  
14 claim accrued before the decedent's death, and if state law  
15 authorizes a survival action." *Tatum v. City & County of San*  
16 *Francisco*, 441 F.3d 1090, 1093 n.2 (9th Cir. 2006) (citing 42  
17 U.S.C. § 1988(a); *Moreland v. Las Vegas Metro. Police Dep't*, 159  
18 F.3d 365, 369 (9th Cir. 1998)). In a § 1983 case, "[t]he party  
19 seeking to bring a survival action bears the burden of  
20 demonstrating that a particular state's law authorizes a survival  
21 action and that the plaintiff meets that state's requirements for  
22 bringing a survival action." *Moreland*, 159 F.3d 365, 369 (9th Cir.  
23 1998) (emphasis added); see also *Tatum*, 441 F.3d at 1093 n.2.

24 Plaintiff alleges that the conditions of Decedent's  
25 confinement and Defendants' deliberate indifference to her serious  
26 medical needs caused injury to Decedent before her death, i.e., her  
27 cancer came back and spread to her lungs, she "began passing out,  
28 sweating profusely, and suffering from chills," and, on one

1 occasion, she "pass[ed] out," "fell and broke her ankle." (Doc. 26  
2 at 2-3.) In addition, the California Code of Civil Procedure  
3 specifically authorizes survival actions. See Cal. Civ. Proc. Code  
4 § 377.20. No party disputes that the Eighth Amendment claims  
5 accrued before Decedent's death and that California law authorizes  
6 a survival action. The only dispute is whether Plaintiff meets  
7 California's requirements for bringing a survival action. He does  
8 not.

9 California Code of Civil Procedure § 377.30 provides that "[a]  
10 cause of action that survives the death of the person . . . may be  
11 commenced by the decedent's personal representative or, if none, by  
12 the decedent's successor in interest." (Emphasis added.) A  
13 "personal representative" means an "executor, administrator,  
14 administrator with the will annexed, special administrator,  
15 successor personal representative, public administrator acting  
16 pursuant to Section 7660, or a person who performs substantially  
17 the same function under the law of another jurisdiction governing  
18 the person's status." Cal. Prob. Code § 58(a) (emphasis added);  
19 *Garcia v. Adams*, No. F. 04-5999 AWI SMS, 2006 WL 403838, at \*11  
20 (E.D. Cal. Feb. 17, 2006). The "decedent's successor in interest,"  
21 which Plaintiff claims to be, "means the beneficiary of the  
22 decedent's estate or other successor in interest who succeeds to a  
23 cause of action or to a particular item of the property that is the  
24 subject of a cause of action." Cal. Civ. Proc. Code § 377.11.

25 Although Plaintiff alleges that he is a "successor in  
26 decedent's interest in decedent's causes of action," he also  
27 alleges that a personal representative exists. Specifically,  
28 Plaintiff alleges that "Samantha Dennis" is "acting as an executor

1 of the estate of Velma Bess." (Doc. 26 at 2) (emphasis added.)  
2 Plaintiff can only bring suit as a successor in interest if there  
3 is no personal representative. See Cal. Civ. Proc. Code § 377.30  
4 ("[A] cause of action that survives the death of the person . . .  
5 may be commenced by the decedent's personal representative or, if  
6 none, by the decedent's successor in interest") (emphasis added);  
7 see also *Tatum*, 441 F.3d at 1093 n.2 ("Where there is no personal  
8 representative for the estate, the decedent's 'successor in  
9 interest' may prosecute the survival action if the person  
10 purporting to act as successor in interest satisfies the  
11 requirements of California law . . . ."); *Garcia*, 2006 WL 403838 at  
12 \*12 ("If there is no personal representative, then a successor in  
13 interest may bring the survival suit."). Given that Plaintiff  
14 alleges the presence of a personal representative - Dennis acting  
15 as the executor of Decedent's estate - Plaintiff lacks capacity to  
16 bring the alleged § 1983 claims.<sup>4</sup>

17 Even assuming that Plaintiff did not allege the existence of  
18 a personal representative, Plaintiff still has not properly alleged  
19 his "successor in interest" status. To be considered a successor  
20 in interest under California law, Plaintiff must comply with the  
21 requirements of California Code of Civil Procedure § 377.32. This  
22 section requires a party who seeks to commence or maintain an  
23

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24 <sup>4</sup> Defendants also argue that Plaintiff lacks "standing" to  
25 assert his state law wrongful death claim because the pleadings  
26 call into question whether Plaintiff was really married to Decedent  
27 at the time of her death. While Plaintiff attempts to counter this  
28 argument in his opposition briefing, Plaintiff does not address the  
argument that he lacks "standing" to assert the § 1983 survival  
causes of action.

1 action as a "successor in interest" to execute and file an  
2 affidavit under penalty of perjury stating, among other things,  
3 that "[n]o other person has a superior right to commence the action  
4 or proceeding or to be substituted for decedent in the pending  
5 action or proceeding." Cal. Civ. Proc. Code § 377.32(a)(6).  
6 Plaintiff has not pled or otherwise demonstrated compliance with  
7 all the requirements of § 377.32. In any event, because a personal  
8 representative exists, Plaintiff lacks capacity to pursue the §  
9 1983 claims.

10 Plaintiff does not satisfy California's requirements for  
11 bringing a survival action. Accordingly, he lacks capacity to  
12 assert the § 1983 claims and these claims are DISMISSED.<sup>5</sup>

13 **B. State Law Claims - The Third, Fourth, And Fifth Causes Of**  
14 **Action**

15 Defendants also move to dismiss the three state law claims -  
16 wrongful death, IIED, and NIED - asserted by Plaintiff. The merits  
17 of Defendants' arguments, however, need not be reached.  
18 Jurisdiction in this case is premised on the existence of a federal  
19 question with supplemental jurisdiction over the state law claims,  
20 28 U.S.C. § 1337.

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21  
22 <sup>5</sup> At oral argument, the court indicated that it had concerns  
23 with the allegations regarding Plaintiff's purported marital  
24 relationship with the Decedent and suggested that leave would be  
25 given to amend the complaint to clarify this issue. Under state  
26 law, Plaintiff's marital relationship with the Decedent, or lack  
27 thereof, while relevant to the state law wrongful death claim, does  
28 not impact Plaintiff's § 1983 claims which are specifically alleged  
as survival causes of action (not wrongful death claims). Even if  
Plaintiff is the Decedent's surviving spouse, the existence of a  
personal representative - Dennis - precludes Plaintiff from  
maintaining his survival causes of action under § 1983.

1       Under 28 U.S.C. § 1337(c)(3), a district court may decline to  
2 exercise supplemental jurisdiction over state law claims if "the  
3 district court has dismissed all claims over which it has original  
4 jurisdiction." "When federal claims are dismissed before trial .  
5 . . pendant state claims also should be dismissed." *Religious Tech.*  
6 *Ctr. v. Wollersheim*, 971 F.2d 364, 367-68 (9th Cir. 1992) (internal  
7 quotation marks omitted); *see also Brown v. Lucky Stores, Inc.*, 246  
8 F.3d 1182, 1189 (9th Cir. 2001) (recognizing the propriety of  
9 dismissing supplemental state law claims without prejudice when the  
10 district court has dismissed the federal claims over which it had  
11 original jurisdiction); *Cook, Perkiss & Liehe, Inc. v. N. Cal.*  
12 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) ("[T]he  
13 proper exercise of discretion is to dismiss the pendent state law  
14 claims as well.").

15       Here, dismissal is warranted and ordered as to the § 1983  
16 claims - the only federal claims - in Plaintiff's FAC. Plaintiff  
17 cannot maintain these claims against the California Department of  
18 Corrections and Rehabilitation because it is not a "person" under  
19 § 1983 and Eleventh Amendment immunity shields it from suit.  
20 Plaintiff cannot maintain the § 1983 claims against the individual  
21 officers in their official capacities because, with respect to such  
22 claims, the individual officers are not "persons" under § 1983 and  
23 Eleventh Amendment immunity shields them from suit. Finally,  
24 Plaintiff cannot asserts the § 1983 claims against any defendant,  
25 regardless of the capacity in which they are sued, because  
26 Plaintiff does not satisfy the requirements for bringing a survival  
27 action under California law, and Plaintiff cannot satisfy these  
28

1 requirements as long as a personal representative exists.<sup>6</sup> These  
2 barriers to Plaintiff's § 1983 claims cannot be cured by simply  
3 amending the FAC. Accordingly, the federal claims in the FAC are  
4 dismissed and leave to amend the FAC is not appropriate.<sup>7</sup>

5 Having dismissed the federal claims, the court has no interest  
6 in the supplemental state law claims. No judicial resources have  
7 been spent on analyzing the merits of such claims, and they raise  
8 issues of state law which California state courts can readily and  
9 are best suited to address. There is no justification for  
10 expending federal resources on solely state claims.

11 V. CONCLUSION

12 For the foregoing reasons:

13 1. The § 1983 claims are DISMISSED; and  
14 2. The court declines to retain supplemental jurisdiction  
15 over the state law claims. These remaining claims are DISMISSED.  
16 Defendants' motion to dismiss the state law claims is DENIED as  
17 moot.

18  
19 IT IS SO ORDERED.

20 Dated: August 6, 2009

21 /s/ Oliver W. Wanger  
22 UNITED STATES DISTRICT JUDGE

23 <sup>6</sup> California Probate Code § 8500 sets forth the procedure for  
24 removing a personal representative. If Plaintiff so desires, he  
25 may petition to have Samantha Dennis removed as the executor of  
26 Decedent's estate by complying with § 8500. Whether such a petition  
27 is warranted or would be successful is not something which this  
28 court can address.

7 Defendants have raised other arguments in support of their  
motion to dismiss the § 1983 claims. In light of the ruling on the  
motion, however, these other arguments need not be addressed.