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**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF CALIFORNIA**

MARLIN LATTEREAL ROYAL,  <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">S. KNIGHT, et al.,</p> <p style="text-align: center;">Defendants.</p>	) ) ) ) ) ) ) ) ) ) ) )	Case No.: 1:09-cv-01407-BAM (PC)  <b>ORDER GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT</b> (ECF No. 31)
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**I. Introduction**

Plaintiff Marlin Lattereal Royal (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff’s first amended complaint, filed on August 19, 2010, against Defendant Knight for excessive force in violation of the Eighth Amendment and retaliation in violation of the First Amendment, and against Defendant Clark for failure to protect in violation of the Eighth Amendment. (ECF Nos. 15, 36.) The parties have consented to Magistrate Judge jurisdiction. (ECF Nos. 5, 34.)

Currently pending before the Court is Defendants’ motion for summary judgment filed on October 30, 2012.<sup>1</sup> (ECF No. 40.) Plaintiff opposed the motion on February 11, 2013, and

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<sup>1</sup> Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment. (ECF No. 41); see Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1988); Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

1 Defendants replied on February 19, 2013. (ECF Nos. 48, 49, 50.) The motion is deemed submitted.  
2 Local Rule 230(l).

3 **II. Legal Standard for Summary Judgment**

4 Pursuant to Federal Rule of Civil Procedure 56(a) summary judgment is appropriate when the  
5 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to  
6 judgment as a matter of law. Summary judgment must be entered, “after adequate time for discovery  
7 and upon motion, against a party who fails to make a showing sufficient to establish the existence of  
8 an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”  
9 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). However, the court is to liberally construe the  
10 filings and motions of pro se litigants. Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010). The  
11 “party seeking summary judgment always bears the initial responsibility of informing the district court  
12 of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to  
13 interrogatories, and admissions on file, together with the affidavits, if any, which it believes  
14 demonstrate the absence of a genuine issue of material fact.” Celotex, 477 U.S. at 323 (internal  
15 quotations and citations omitted).

16 If the moving party meets its initial responsibility, the burden then shifts to the opposing party  
17 to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co.  
18 v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this  
19 factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to  
20 tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in  
21 support of its contention that the dispute exists. Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586  
22 n.11.

23 The parties bear the burden of supporting their motions and oppositions with the papers they  
24 wish the Court to consider and/or by specifically referencing any other portions of the record for  
25 consideration. Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001).  
26 The Court will not undertake to scour the record for triable issues of fact. Simmons v. Navajo County,  
27 Arizona, 609 F.3d 1011, 1017 (9th Cir. 2010).

1 In arriving at these findings and recommendations, the Court carefully reviewed and  
2 considered all arguments, points and authorities, declarations, exhibits, statements of undisputed facts  
3 and responses thereto, if any, objections, and other papers filed by the parties. Omission of reference  
4 to an argument, document, paper, or objection is not to be construed to the effect that this Court did  
5 not consider the argument, document, paper, or objection. This Court thoroughly reviewed and  
6 considered the evidence it deemed admissible, material, and appropriate.

7 **A. Summary of Relevant Allegations in First Amended Complaint**

8 Allegations against Defendant Knight

9 Plaintiff alleges that on January 28, 2009, Defendant Knight became verbally and physically  
10 abusive. When his personal property was delivered, Plaintiff informed Defendant Knight that his  
11 television was missing. Defendant Knight told Plaintiff to shut up the fuck up or his property would  
12 be taken back. Plaintiff asked Defendant Knight not to speak to him that way. Defendant Knight  
13 replied, "I told you to shut the fuck up. Your [sic] an inmate. I do not have to respect you. If you say  
14 another word you will not get your present property today." (ECF No. 15, p. 3.) Plaintiff replied,  
15 "I'm not a child. I'm a man. Please do not speak to me that way." Defendant Knight became very  
16 loud and screamed, "Fuck this shit. Go back to your cell. I'm not giving you your property." (Id.)  
17 While Plaintiff complied with the order, Defendant Knight grabbed Plaintiff's right shoulder and  
18 screamed, "I told you you're an inmate and I do not respect inmates." (Id.) Defendant Knight pushed  
19 Plaintiff into the cell frame, instantly causing pain to Plaintiff's shoulder, neck, head and back.  
20 Plaintiff was seen by medical, where it was confirmed that he had a swollen injured shoulder. Plaintiff  
21 was given Naproxen.

22 On March 25, 2009, Defendant Knight came to Plaintiff's cell and threatened that Plaintiff  
23 would be placed in the "hole" (Administrative Segregation) if he refused to withdraw a citizen  
24 complaint and a 602 complaint and if he refused to stop his family members from calling Warden  
25 Clark and Sergeant Turner. Plaintiff became worried and sent letters to his family.

26 On April 1, 2009, Defendant Knight carried out his threat by filing a bogus 115 Rule Serious  
27 Violation Report. While confined in the program office, Defendant Knight bragged to Plaintiff that he  
28

1 had his television and that Plaintiff would never see it. Defendant Knight swore that if Plaintiff  
2 continued with the complaints, then he would hurt Plaintiff in isolation.

3 Allegations against Defendant Clark

4 In February and March 2009, Plaintiff filed a staff assault appeal/complaint/citizen complaint  
5 to the Warden, Defendant Clark. In March 2009, Plaintiff wrote a letter to Defendant Clark notifying  
6 him of a staff assault by Defendant Knight. Plaintiff's mother and family members contacted  
7 Defendant Clark by telephone to express their concerns. Plaintiff's mother was assured that threats  
8 and future assaults would stop, but Defendant Knight continued his threats, including isolation and  
9 television set denial.

10 **B. Statement of Undisputed Material Facts ("UMF")**

11 Defendant Knight

12 1. In January 2009, Defendant Knight was a Search & Escort (S&E) officer in Facility D  
13 at California Substance Abuse Treatment Facility ("SATF"). (Knight Dec. ¶ 2.)

14 2. Among Defendant Knight's duties as an S&E officer were escorting prisoners to and  
15 from their cells to medical, dental, or other appointments, or to new housing locations within SATF;  
16 and providing prisoners with their personal property after their return from administrative segregation.  
17 (Knight Dec. ¶ 3.)

18 3. On January 22, 2009, Plaintiff was moved from a cell in the Administrative  
19 Segregation Unit in Facility E to a cell in Facility D. (Knight Dec. ¶ 4.)

20 4. Shortly after Plaintiff's move to Facility D, he asked Defendant Knight about personal  
21 property that he had not yet received, and Defendant Knight told Plaintiff that he would see about his  
22 property. (Knight Dec. ¶ 5.)

23 5. On or around January 28, 2009, Defendant Knight located three boxes of Plaintiff's  
24 personal property in the property office, put the boxes on a hand cart, and brought them to the Facility  
25 D office. (Knight Dec. ¶ 7.)

26 Although Plaintiff disagrees with the date, he does not provide any admissible evidence to  
27 create a genuine dispute or to suggest a different date. The Court therefore treats this fact as  
28 undisputed.

1           6.       Once into the Facility D office with the boxes containing Plaintiff's property,  
2 Defendant Knight asked the control booth officer to let Plaintiff into the Facility D office. (Knight  
3 Dec. ¶ 7.)

4           7.       When a prisoner takes possession of his property, he must sign a property inventory  
5 receipt (Form CDCR 1083). (Knight Dec. ¶ 8.)

6           Plaintiff attempts to dispute this fact by contending that an inmate has the right to refuse to  
7 sign the form if his property is not all there or to note discrepancies. (ECF No. 49.) Plaintiff's  
8 contention does not raise a genuine dispute regarding the requirement that inmates must sign the form  
9 when they take actual possession of their property. The Court therefore treats this fact as undisputed.

10          8.       After looking at the property in the three boxes, Plaintiff told Defendant Knight that a  
11 package was missing. (Knight Dec. ¶ 9.)

12          9.       Plaintiff refused to sign the property receipt. (Knight Dec. ¶ 10.)

13          10.      At that time, Defendant Knight had other duties requiring his attention that precluded  
14 spending more time with Plaintiff concerning his personal property. (Knight Dec. ¶ 11.)

15          Plaintiff attempts to deny this fact by asserting that Defendant Knight had no other duties other  
16 than his immediate duty as a property officer. (ECF No. 49.) Plaintiff has not provided any credible  
17 evidence to support this statement. The Court therefore treats this fact as undisputed.

18          11.      Defendant Knight told Plaintiff that he did not have time then to discuss his property  
19 issues and gave him two options: take the property that was in the three boxes and sign the property  
20 receipt or take nothing. (Knight Dec. ¶ 12.)

21          12.      Plaintiff did not agree to either option. (Knight Dec. ¶ 12.)

22          13.      Plaintiff became agitated. (Knight Dec. ¶ 14.)

23          14.      Defendant Knight repeatedly ordered him to leave the office without any of his  
24 property and lock up. (Knight Dec. ¶ 15.)

25          15.      After refusing several of Defendant Knight's orders to leave the office, Plaintiff finally  
26 got up, and Defendant Knight escorted him to his cell. (Knight Dec. ¶ 16.)

27          Plaintiff attempts to deny this fact by general citation to his declaration. Plaintiff's declaration  
28 does not contain any information to dispute this fact. (ECF No. 48, pp. 30-31.)

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2           16.     After Plaintiff was locked in his cell, Defendant Knight took the three boxes of his  
3 property back to the property office. (Knight Dec. ¶ 18.)

4           17.     After Defendant Knight's encounter with Plaintiff on January 28, 2009, Defendant  
5 Knight had nothing more to do with Plaintiff's property. (Knight Dec. ¶ 20.)

6           Although Plaintiff attempts to dispute this fact by stating that Defendant Knight spitefully held  
7 his TV package by citing his 602 complaint, Plaintiff provides no credible evidence to raise a genuine  
8 dispute of fact.

9           18.     On January 29, 2009, Plaintiff submitted a Health Care Service Request, in which he  
10 complained that he could not control his breathing as a result of Defendant Knight's pushing him in  
11 his cell. (Defs' Ex. 3.)

12          19.     On January 31, 2009, Plaintiff saw a nurse concerning pain in his right shoulder and  
13 difficulty in controlling his breathing. (Defs' Ex. 3.)

14          20.     The nurse observed no wheezing or shortness of breath in Plaintiff, and no bruising or  
15 dislocation in his right shoulder. (Defs' Ex. 3.)

16          21.     X-rays taken of Plaintiff's right shoulder on February 19, 2009, were negative for acute  
17 displaced fracture or dislocation. (Defs' Ex. 4.)

18          22.     On March 10, 2009, Plaintiff was notified that the x-ray results were within normal  
19 limits and no physician follow up was required. (Defs' Ex. 5.)

20          23.     On April 1, 2009, an inmate told Defendant Knight that Plaintiff had shown him an  
21 affidavit and threatened him with physical harm if he didn't sign it. (Knight Dec. ¶ 21.)

22                 Plaintiff's assertion that Defendant Knight lied, without more, is not sufficient to raise a  
23 genuine dispute of material fact.

24          24.     As a result of information provided by the inmate, Defendant Knight issued a Rules  
25 Violation Report to Plaintiff, charging him with threatening an inmate, and resulting in Plaintiff's  
26 placement in administrative segregation pending an investigation of the charge. (Knight Dec. ¶ 22.)

27          25.     On April 3, 2009, after Plaintiff had been placed in administrative segregation, another  
28 inmate approached Defendant Knight with information that Plaintiff had pressured the inmate to sign

1 an affidavit falsely stating that the inmate had witnessed an officer assault Plaintiff. (Knight Dec. ¶  
2 23.)

3 Plaintiff admits that another inmate came forward, but denies pressuring the inmate. Plaintiff's  
4 denial of the accusation and citation to the declaration of Inmate Elmore do not provide competent  
5 evidence to raise a genuine dispute of fact that an inmate approached Defendant Knight with  
6 information.

7 26. On April 9, 2009, Defendant Knight prepared a confidential memorandum to Captain  
8 Cronjager, including statements signed by the two inmates providing the information concerning  
9 Plaintiff's attempts to coerce or threaten them into signing false affidavits. (Knight Dec. ¶ 24.)

10 Although Plaintiff denies that he attempted to coerce or threaten inmates to sign affidavits, this  
11 does not raise a genuine dispute of material fact regarding the preparation of the confidential  
12 memorandum or the contents of the memorandum.

13 27. Occasionally, the evidence used to support a disciplinary charge against an inmate is  
14 confidential information from a source (typically, another inmate) whose identity, if disclosed, would  
15 put into jeopardy the informant's safety and the security of the institution. (Declaration of Akin  
16 ("Akin Dec.") ¶ 3.)

17 28. When confidential information from an inmate is the basis for the disciplinary charge,  
18 the confidential information itself (usually in the form of a memorandum or chrono stating the  
19 information, the identity of the confidential source, and the circumstances from which the information  
20 was obtained) is not given to the inmate. (Akin Dec. ¶ 4.)

21 29. Instead of providing the confidential information to the inmate, the inmate is given a  
22 Confidential Information Disclosure (Form CDC 1030) that indicates that (1) receipt of confidential  
23 information that has been considered in the disciplinary charge, (2) the reasons that the information is  
24 considered reliable, (3) as much of the confidential information that can be disclosed without  
25 identifying its source, and (4) the reason why the source of the confidential information cannot be  
26 disclosed. (Akin Dec. ¶ 5.)

27 30. When a disciplinary charge was based on confidential information, the responsibilities  
28 of the hearing officer for the disciplinary charge included assuring that the Confidential Disclosure

1 form given to the inmate in lieu of the confidential document itself contained sufficient information to  
2 apprise the inmate of the nature of the evidence that would be used against him, and that the  
3 confidential information met the criteria for reliability set forth in title 15, section 3321 of the  
4 California Code of Regulations. (Akin Dec. ¶ 6.)

5 31. Evidence from confidential informants that did not meet the criteria in section 3321  
6 would not be considered in deciding a disciplinary charge against an inmate. (Akin Dec. ¶ 7.)

7 32. On May 20, 2009, Lieutenant Akin was the hearing officer for the disciplinary charge  
8 against Plaintiff for making threats against an inmate. (Akin Dec. ¶ 8.)

9 33. The evidence supporting the charge against Plaintiff consisted of only confidential  
10 information from two inmates. (Akin Dec. ¶ 9.)

11 34. Lt. Akin reviewed the information provided by the confidential sources and noted that  
12 the Confidential Disclosure forms did not supply Plaintiff with enough information to ensure his due  
13 process rights. (Akin Dec. ¶ 10.)

14 35. In addition, Lt. Akin was not satisfied that the confidential information met the criteria  
15 for reliability set forth in section 3321(c). (Akin Dec. ¶ 11.)

16 36. Because Lt. Akin determined that the Confidential Disclosure forms were deficient and  
17 the confidential information did not meet the criteria for reliability, he was unwilling to consider the  
18 confidential information in deciding the disciplinary charge against Plaintiff. (Akin Dec. ¶ 12.)

19 37. Because the disciplinary charge against Plaintiff was based solely on the confidential  
20 information, once Lt. Akin discarded that evidence, no evidence remained to support the charge.  
21 (Akin Dec. ¶ 13.)

22 38. Absent any evidence to support the charge against Plaintiff, Lt. Akin found him not  
23 guilty, dismissed the charge, and ordered that the Rules Violation Report be removed from his central  
24 file. (Akin Dec. ¶ 14.)

25 39. In rejecting the confidential information in Plaintiff's disciplinary hearing, Lt. Akin  
26 made no finding on the veracity of the confidential information; the confidential information may have  
27 been true, but it did not comport with regulatory requirements. (Akin Dec. ¶ 15.)

28



1           40.     None of the information Lt. Akin reviewed for Plaintiff’s disciplinary hearing  
2 suggested that the confidential information was fabricated or misrepresented by the informants or  
3 Defendant Knight, who first obtained and reported the information. (Akin Dec. ¶ 16.)

4           Defendant Clark

5           41.     In 2009, Defendant Clark was the Warden at SATF in Corcoran, California.  
6 (Declaration of Clark (“Clark Dec.”) ¶ 2.)

7           42.     Among Defendant Clark’s primary responsibilities as SATF’s Warden were overseeing  
8 the daily operations; assuring the security of the institution and the safety of staff, and preparing the  
9 budget. (Clark Dec. ¶ 3.)

10          43.     As SATF’s Warden, two Chief Deputy Wardens, each of whom were responsible for  
11 different parts of the institution, and an Administrative Assistant, reported directly to Defendant Clark;  
12 seven to eight Associate Wardens reported to one or other of the two Chief Deputy Wardens. (Clark  
13 Dec. ¶ 4.)

14          44.     As SATF’s Warden, Clark did not customarily receive or respond to letters or other  
15 written communications from inmates or their family members concerning issues they had with prison  
16 conditions or complaints about SATF’s staff, even when such communications were addressed to him.  
17 (Clark Dec. ¶ 5.)

18           Plaintiff attempts to dispute this statement by claiming that Defendant Clark was informed by  
19 Plaintiff and his mother. (Ex. B to ECF No. 48.) The declaration of Plaintiff’s mother states,  
20 “Defendant Clark was informed on March 2009 of defendant (S. Knight) assault on my son and  
21 harassment, and refusing to give my son (television).” (ECF No. 48, p. 27, ¶ 4.) Defendants object  
22 based on lack of personal knowledge. Fed. R. Evid. 602. Defendants’ objection is SUSTAINED.  
23 This is a conclusory statement lacking foundation and personal knowledge. As such, this statement is  
24 not competent evidence sufficient to raise a genuine dispute of fact.

25           Plaintiff’s declaration states that “Defendant Clark (Warden) had knowledge of Knight’s  
26 threats and harassment prior to Knight excessive force attack.” (ECF No. 48, p. 30, ¶ 7.) Defendants’  
27 object based on lack of personal knowledge. Fed. R. Evid. 602. Defendants’ objection is  
28 SUSTAINED. This statement is conclusory and lacks both foundation and personal knowledge.

1 Plaintiff further declares, “Plaintiff’s mother has call Defendant Clark in reference to  
2 Defendant S. Knight threats and harassment on Plaintiff.” (ECF No. 48, p. 31, ¶ 15.) Defendants’  
3 again object based on lack of personal knowledge. Fed. R. Evid. 602. Defendants’ objection is  
4 SUSTAINED. Plaintiff’s statement lacks foundation, lacks personal knowledge, provides no  
5 information regarding the date of the call or whether Plaintiff’s mother spoke to Defendant Clark  
6 directly, and is not supported by the declaration of his mother. Plaintiff’s declaration does not  
7 provide evidence to raise a genuine dispute.

8 45. When Defendant Clark was SATF’s Warden, his Administrative Assistant customarily  
9 reviewed each letter or other written communication addressed to him from inmates or their family  
10 members and, if she found that a response was appropriate, would forward the writing to the Facility  
11 Captain where the concerned inmate was housed with a request that the Captain respond to the inmate  
12 or family member who authored the letter or other writing. (Clark Dec. ¶ 6.)

13 46. Based on Defendant Clark’s custom and practice, he would not have personally  
14 received, reviewed, or responded to, any letters from Plaintiff or his family members in 2009 or any  
15 time that he served as SATF’s Warden. (Clark Dec. ¶ 7.)

16 Plaintiff claims that Defendant Clark was placed on notice and cites pages 4 and 5 of Exhibit  
17 A. Page 5 of Exhibit A is a letter to Plaintiff from Stephen Smith, an Administrative Assistant, dated  
18 March 10, 2009. Mr. Smith stated that the letter was “written in response to a recent letter, addressed  
19 to Warden Clark, which ha[d] been forwarded to [him] for response.” (ECF No. 48, p. 21.) This  
20 evidence does not raise a genuine dispute regarding Defendant Clark’s custom and practice. It also  
21 does not demonstrate that Defendant Clark was “on notice” as the letter does not indicate that  
22 Defendant Clark received the letter and personally forwarded it to Mr. Smith.

### 23 **III. Discussion**

#### 24 **A. Excessive Force**

25 Plaintiff claims that Defendant Knight used excessive force in violation of the Eighth  
26 Amendment when Defendant Knight pushed Plaintiff into a cell frame on January 28, 2009.

27 The relevant inquiry for this claim is “whether force was applied in a good-faith effort to  
28 maintain or restore discipline, or maliciously and sadistically to cause harm.” Hudson v. McMillian,

1 503 U.S. 1, 6-7, 112 S. Ct. 995, 998 (1992); Whitley v. Albers, 475 U.S. 312, 320, 106 S. Ct. 1078,  
2 1085 (1986). In making this determination, the court may evaluate “the need for the application of  
3 force, the relationship between the need and the amount of force that was used, [and] the extent of  
4 injury inflicted.” Whitley, 475 U.S. at 321, 106 S. Ct. at 1085; Marquez v. Gutierrez, 322 F.3d 689,  
5 692 (9th Cir. 2003).

6 However, “not every malevolent touch by a prison guard gives rise to a federal cause of  
7 action.” Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S.Ct. 1175, 1178 (2010) (quoting Hudson, 503 U.S.  
8 at 9, 112 S. Ct. at 1000). The Eighth Amendment’s prohibition of cruel and unusual punishments  
9 “necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that  
10 the use of force is not of a sort repugnant to the conscience of mankind.” Id. at 37-38. “An inmate  
11 who complains of a push or shove that causes no discernible injury almost certainly fails to state a  
12 valid excessive force claim.” Id. at 38.

13 Here, the parties dispute whether Defendant Knight pushed Plaintiff into the cell frame.  
14 However, even if the Court assumes that Defendant Knight pushed Plaintiff into the cell frame, the  
15 Court finds that the amount of force was *de minimis* and does not rise to the level of a constitutional  
16 violation. At best, Defendant Knight pushed Plaintiff a single time, which did not result in bruising or  
17 other discernible injury. (UMF 19-21.) Plaintiff’s assertion that he suffered injury by reference to  
18 pain medication and his shoulder popping out of place does not raise a genuine dispute of material  
19 fact. (ECF No. 48, p. 1.) Plaintiff does not provide medical records supporting his assertions; the  
20 available medical records identify only a one-time prescription for Ibuprofen and the absence of any  
21 physical injury to Plaintiff’s shoulder. (Defs’ Ex. 3.) Plaintiff also contends that he endured mental  
22 pain and suffering as a result of the incident, but Plaintiff’s psychiatric records do not support this  
23 contention. Rather, according to the records, Plaintiff’s psychiatric complaints stemmed from his  
24 purported loss of property. (Ex. A to ECF No. 48, p. 16.)

25 The Court therefore concludes that the single push by Defendant Knight, which did not result  
26 in injury, fails to rise to the level of an Eighth Amendment violation. See, Wilkins, 559 U.S. at 38,  
27 Hudson, 503 U.S. at 9; see also Washington v. Duncan, 2011 WL 2020703, \*2 (N.D. Cal. May 2,  
28 2011) (inmate pushed a single time against a chain-link fence, resulting only in a scratch or abrasion,

1 did not rise to the level an Eighth Amendment violation). Defendants’ motion for summary judgment  
2 shall be granted on Plaintiff’s Eighth Amendment claim against Defendant Knight.

3 **B. Retaliation**

4 Plaintiff claims that Defendant Knight retaliated against him by filing a false Rule Violation  
5 Report.

6 Within the prison context, a viable claim of First Amendment retaliation consists of five  
7 elements: “(1) An assertion that a state actor took some adverse action against an inmate (2) because  
8 of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his  
9 First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.”  
10 Rhodes v. Robinson, 408 F.3d 559, 567 (9th Cir. 2005); accord Watison v. Carter, 668 F.3d 1108,  
11 1114 (9th Cir. 2012); Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009).

12 A plaintiff suing for retaliation under section 1983 must allege that “he was retaliated against  
13 for exercising his constitutional rights and that the retaliatory action does not advance legitimate  
14 penological goals, such as preserving institutional order and discipline.” Barnett v. Centoni, 31 F.3d  
15 813, 816 (9th Cir. 1994). The plaintiff does not need to show actual inhibited or suppressed speech,  
16 but that there was a chilling effect upon his speech. Rhodes, 408 F.3d at 569. The burden is on the  
17 plaintiff to plead and prove the absence of any legitimate correctional goals for the alleged conduct.  
18 Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995).

19 Plaintiff has not raised a genuine dispute of material fact sufficient to withstand summary  
20 judgment on his claim of retaliation against Defendant Knight. As indicated by Defendants, Plaintiff  
21 has established only two of the five elements necessary for his retaliation claim. The undisputed  
22 evidence establishes that Defendant Knight took an adverse action against Plaintiff by charging him  
23 with a rule violation and Plaintiff engaged in protected conduct by filing a complaint about Defendant  
24 Knight’s treatment.

25 However, Plaintiff has not established the required element that the adverse action was taken  
26 because of Plaintiff’s protected conduct. Although the timing of the incidents can properly be  
27 considered as circumstantial evidence of retaliatory intent, see, e.g., Soranno’s Gasco, Inc. v. Morgan,  
28 874 F.2d 1310, 1316 (9th Cir.1989), there is no additional evidence to raise a genuine dispute

1 regarding the motive for the Rule Violation Report. Plaintiff has not submitted any admissible  
2 evidence to raise a genuine dispute of fact regarding Defendant Knight's declaration that he received a  
3 report from an inmate that Plaintiff had shown the inmate an affidavit and threatened the inmate with  
4 physical injury if he did not sign it and that Defendant Knight submitted the Rules Violation Report  
5 for this reason. (UMF 23-24.) Plaintiff claims that Defendant Knight lied in the report, but does not  
6 provide any evidentiary support. (ECF No. 48, p. 30, ¶ 6) ("Defendant Knight lied in Rule Violation  
7 Report 115 by first claiming threaten his informant's [sic] then changing plaintiff threaten inmates in  
8 report (Elmore) and (Robbins) to sign affidavit.") Plaintiff's declaration is devoid of any statement  
9 under penalty of perjury that he did not threaten or pressure any inmates to sign an affidavit.

10 Plaintiff believes that dismissal of the disciplinary charge supports his claim and defeats  
11 summary judgment. Plaintiff's belief is unsupported. Although the undisputed evidence reflects that  
12 Lt. Akin dismissed the charge because he was not satisfied that the information met the criteria for  
13 reliability, Lt. Akin made no finding on the veracity of the confidential information. (UMF 39.)  
14 Plaintiff has not created a triable issue concerning the motive for the actions of Defendant Knight.

15 As a final matter, in his opposition, Plaintiff has not disputed the Defendants' position  
16 regarding the remaining elements of his retaliation claim. Specifically, Plaintiff has not disputed that  
17 charging an inmate with a rules violation for threatening inmates serves the legitimate prison goal of  
18 preventing conflict and violence among prisoners. Plaintiff also does not argue that his rights were  
19 chilled by Defendant Knight's disciplinary charge against him.

20 For these reasons, Defendants' motion for summary judgment shall be granted on Plaintiff's  
21 First Amendment retaliation claim against Defendant Knight.

### 22 **C. Failure to Protect Claim**

23 Plaintiff contends that Defendant Clark failed to protect Plaintiff in violation of the Eighth  
24 Amendment. A prison official may be held liable under the Eighth Amendment "only if he knows that  
25 inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable  
26 measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994). "[T]he official must be both  
27 aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,  
28 and he must also draw the inference. Id. at 837.

1 Plaintiff alleges that Defendant Clark failed to protect him from staff misconduct by Defendant  
2 Knight after Plaintiff and his mother had communicated with Defendant Clark. However, the  
3 undisputed evidence reflects that Defendant Clark did not personally receive or respond to  
4 communications from inmates or their families. (UMF 44-45.) Based on his custom and practice, he  
5 would not have personally reviewed, or responded to any letters from Plaintiff or his family members.  
6 (UMF 46.)

7 Plaintiff has not presented any competent evidence to raise a genuine dispute that Defendant  
8 Clark received any written or oral communications from Plaintiff or his mother. Neither Plaintiff nor  
9 his mother attests to direct communications with Defendant Clark. As discussed above, Plaintiff's  
10 mother declared that "Defendant Clark was informed on March 2009 of defendant (S. Knight) assault  
11 on my son and harassment, and refusing to give my son (television)." (ECF No. 48, p. 27, ¶ 4.)  
12 Similarly, Plaintiff declared that "Defendant Clark (Warden) had knowledge of Knight's threats and  
13 harassment prior to Knight excessive force attack." (ECF No. 48, p. 30, ¶ 7.) Plaintiff also declares  
14 that "Plaintiff's mother has call Defendant Clark in reference to Defendant S. Knight threats and  
15 harassment on Plaintiff." (ECF No. 48, p. 31, ¶ 15.) These statements are not based on personal  
16 knowledge or corroborated by other evidence. Instead, they are conclusory assertions and do not raise  
17 a genuine dispute of fact sufficient to defeat summary judgment. Rivera v. Nat'l R.R. Passenger  
18 Corp., 331 F.3d 1074, 1078 (9th Cir.2003) ("Conclusory allegations unsupported by factual data  
19 cannot defeat summary judgment.").

20 Plaintiff attempts to support his claim that Defendant Clark was on notice by reference to a  
21 letter that he received from Stephen Smith. (ECF No. 48, Ex. A.) Mr. Smith stated that the letter was  
22 "written in response to a recent letter, addressed to Warden Clark, which ha[d] been forwarded to  
23 [him] for response." (ECF No. 48, p. 21.) At best, this statement in the letter supports Defendant  
24 Clark's position that he did not personally respond to letters. It does not establish that Defendant  
25 Clark personally received the letter or that he was on notice of any action by Defendant Knight.

26 In sum, Plaintiff has failed to raise a triable issue of fact demonstrating that Defendant Clark  
27 knew of any risk of harm to Plaintiff from Defendant Knight and failed to protect Plaintiff from such  
28

1 harm. Accordingly, Defendants' motion for summary judgment shall be granted on Plaintiff's Eighth  
2 Amendment claim against Defendant Clark.

3 **IV. Conclusion and Order**

4 For the reasons discussed above, IT IS HEREBY ORDERED as follows:

- 5 1. Defendants' motion for summary judgment, filed on August 10, 2012, is GRANTED; and
- 6 2. The Clerk of the Court is directed to enter summary judgment in favor of Defendants  
7 Knight and Clark and close this file.

8  
9 IT IS SO ORDERED.

10 Dated: December 19, 2013

/s/ Barbara A. McAuliffe  
11 UNITED STATES MAGISTRATE JUDGE