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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

Case No. 1:11-cv-00921-LJO-JLT (PC)

DWAYNE L. BURGESS,  
Plaintiff,  
v.  
RAYA, et al.,  
Defendants.

**ORDER SETTING BRIEFING SCHEDULE  
REGARDING WHETHER THE CASE IS  
BARRED BY HECK v. HUMPHREY, 512 U.S. 477  
(1994) ADOPTING FINDINGS and HOLDING  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT IN ABEYANCE FOR DECISION ON  
THAT ISSUE**  
**(Doc. 60)**

Plaintiff, Dwayne L. Burgess, is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff, Dwayne L. Burgess, is a state prisoner proceeding *pro se* and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff is proceeding on his claims against Defendants Raya, Garcia, Polanco, and Fernandez for excessive force in violation of the Eight Amendment and against Defendants Raya and Polanco under the additional claims of conspiracy and retaliation in violation of the First Amendment as stated in the Third Amended Complaint. (Docs. 29, 32, 49.) In the Third Amended Complaint, Plaintiff alleges that, based on the acts which infringed on his rights and upon which the above claims were found cognizable, he was issued a rules violation report that was decided against him and lost "90 days of both goodtime credits and privileges." (Doc. 27, at ¶43.)

When a prisoner challenges the legality or duration of his custody, or raises a

1 constitutional challenge which could entitle him to an earlier release, his sole federal remedy is a  
2 writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Young v. Kenny*, 907 F.2d 874  
3 (9th Cir. 1990), *cert. denied* 11 S.Ct. 1090 (1991). Moreover, when seeking damages for an  
4 allegedly unconstitutional conviction or imprisonment, “a § 1983 plaintiff must prove that the  
5 conviction or sentence has been reversed on direct appeal, expunged by executive order, declared  
6 invalid by a state tribunal authorized to make such determination, or called into question by a  
7 federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” *Heck v. Humphrey*, 512  
8 U.S. 477, 487-88 (1994). “A claim for damages bearing that relationship to a conviction or  
9 sentence that has not been so invalidated is not cognizable under § 1983.” *Id.* at 488.

10 The Third Amended Complaint does not contain any allegations to show that the  
11 disciplinary hearing, which Plaintiff alleges was based on the above incident upon which he is  
12 proceeding, has been reversed, expunged, declared invalid, or called into question by a writ of  
13 habeas corpus. This issue was not raised in the motion for summary judgment that is currently  
14 pending. (*See* Doc. 60.) However, the Court has determined, *sua sponte*, that review of this issue  
15 under Rule 56 is necessary and appropriate. *See Norse v. City of Santa Cruz*, 629 F.3d 966, 971-  
16 72 (9th Cir. 2010) (en banc) (district courts have power to review and may grant summary  
17 judgment *sua sponte*, subject to providing notice and opportunity to be heard).

18 Accordingly, it is HEREBY ORDERED that:

- 19 (1) **within 30 days** from the date of service of this order, Defendants must file a brief,  
20 in compliance with Rule 56, addressing the application of *Heck v. Humphrey*, 512  
21 U.S. 477 (1994) and its progeny to this action;
- 22 (2) **within 30 days** of the filing of Defendants' brief, Plaintiff must file an opposition  
23 or a statement of non-opposition;
- 24 (3) if Plaintiff files an opposition, **within 7 days** from the date Plaintiff's opposition  
25 is filed, Defendants must file a reply to his opposition;
- 26 (4) Defendants need not file a reply if Plaintiff files a statement of non-opposition;  
27 and
- 28 (5) Defendants' motion for summary judgment, filed on February 6, 2015 (Doc. 60),

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is held in abeyance until this issue is resolved.

IT IS SO ORDERED.

Dated: July 14, 2015

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE