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

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

**Case No. 1:11-cv-00921-LJO-JLT (PC)**  
**ORDER DIRECTING PARTIES TO ADVISE  
WHETHER DISCOVERY IS REQUIRED ON  
EIGHT AMENDMENT CLAIM**  
**(Doc. 82)**

Plaintiff initially proceeded in this action 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.) The Court granted the Defendants because Plaintiff’s claims were found barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), *Edwards v. Balisok*, 520 U.S. 641, 643-647 (1997) since Plaintiff had neither challenged nor invalidated the disciplinary finding prior to filing suit. (Docs. 73, 75.)

On appeal, the Ninth Circuit found that, “to the extent Burgess alleged he was exposed to pepper spray for a prolonged period of time despite alerting defendants to his health issues,” he is not barred by *Heck* and remanded for further proceedings on that claim only. (Doc. 82, p. 3.) These allegations were included in Plaintiff’s excessive force and retaliation claims, but Plaintiff

1 did not state a claim on this basis and appeared to rely upon these facts only as evidence of his  
2 damage related to the excessive force claim that *was* stated. Consequently, the parties did not  
3 address this issue in the motion for summary judgment.

4 Thus, the Court **ORDERS** that within twenty-one days of the date of service of this order,  
5 the parties shall file statements indicating whether they need discovery to be reopened solely on  
6 this claim and why, whether they believe a new deadline for dispositive motions on this claim  
7 should be permitted and whether they are prepared to engage in a settlement conference and, if  
8 so, when.

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10 IT IS SO ORDERED.

11 Dated: April 27, 2017

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

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