

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALEJANDRO JOSE MORALES,
Plaintiff,
vs.
H. SHERWOOD, et al.,
Defendants.

1:13-cv-01582-AWI-GSA-PC

FINDINGS AND RECOMMENDATIONS, RECOMMENDING THAT THIS CASE PROCEED WITH THE THIRD AMENDED COMPLAINT, ON PLAINTIFF'S CLAIMS AGAINST DEFENDANTS SHERWOOD, COONTZ, AND FELIX FOR EXCESSIVE FORCE; AGAINST DEFENDANT SHERWOOD FOR RETALIATION; AND AGAINST DEFENDANT COONTZ FOR FAILURE TO PROTECT PLAINTIFF; AND THAT ALL OTHER CLAIMS AND DEFENDANTS BE DISMISSED FROM THIS ACTION FOR FAILURE TO STATE A CLAIM
(Docket No. 25)

OBJECTIONS, IF ANY, DUE WITHIN THIRTY
DAYS

1. BACKGROUND

Alejandro Jose Morales (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on October 1, 2013. (Doc. 1.) On November 8, 2013, the court issued an order striking the Complaint for lack of Plaintiff’s signature, with leave to amend. (Doc. 8.) On December 2, 2013, Plaintiff filed the First Amended Complaint, bearing his signature. (Doc. 9.) The court screened the First Amended Complaint pursuant to 28 U.S.C. § 1915A and

1 issued an order on March 5, 2014, requiring Plaintiff to either file a Second Amended
2 Complaint or notify the court of his willingness to proceed with the claims found cognizable by
3 the court. (Doc. 12.) On April 23, 2014, Plaintiff filed the Second Amended Complaint. (Doc.
4 19.) On June 23, 2014, Plaintiff filed a motion for leave to amend, which was granted by the
5 court on June 24, 2014. (Docs. 22, 26.) On July 3, 2014, Plaintiff filed the Third Amended
6 Complaint, which is now before the court for screening. (Doc. 27.)

7 **II. SCREENING REQUIREMENT**

8 The court is required to screen complaints brought by prisoners seeking relief against a
9 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
10 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
11 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
12 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
13 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
14 paid, the court shall dismiss the case at any time if the court determines that the action or
15 appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

16 A complaint is required to contain “a short and plain statement of the claim showing
17 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
18 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
19 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,
20 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955
21 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge
22 unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)
23 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual
24 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal, 556 U.S.
25 at 678. While factual allegations are accepted as true, legal conclusions are not. Id.

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1 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to
2 state a plausible claim for relief. Id. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969
3 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility
4 standard. Id.

5 **III. SUMMARY OF THIRD AMENDED COMPLAINT**

6 Plaintiff is presently incarcerated at Ironwood State Prison in Blythe, California. The
7 events at issue in the Third Amended Complaint allegedly occurred at the California
8 Correctional Institution (CCI) in Tehachapi, California, when Plaintiff was incarcerated there.
9 Plaintiff names as defendants Correctional Officer (C/O) Hezekiah Sherwood, C/O Greg
10 Coontz, L. Gilera (R.N.), Nicki Gray (R.N.), and C/O Ruben S. Felix (collectively,
11 “Defendants”). Defendants were all employed by the California Department of Corrections
12 and Rehabilitation (CDCR) at CCI at the time of the events at issue. Plaintiff’s factual
13 allegations follow.

14 Plaintiff arrived at CCI on or about July 13, 2012. Approximately a minute after
15 arriving at his housing assignment, defendant Sherwood called to Plaintiff, “Hey, you long hair
16 faggot, come here.” (Third Amended Complaint (3ACP) at 6 ¶1.) Plaintiff complied and
17 defendant Sherwood ordered Plaintiff outside. Once outside, defendant Sherwood put on his
18 black leather gloves and ordered Plaintiff around the corner of the outside dorm. Out of sight
19 from anyone else, defendant Sherwood ordered Plaintiff up against the wall, kicked Plaintiff’s
20 legs apart, and slammed his head and face into the wall with enough force to chip his front
21 tooth. When Plaintiff told Sherwood about the tooth, Sherwood told Plaintiff that “if he did not
22 keep his mouth shut, him and his ‘boys’ would ‘f*** him up good.’” (Id.)

23 Plaintiff intended to file an inmate grievance against Sherwood, “but was told by other
24 inmates that they would in fact beat him.” (Id. at 6 ¶2.) The other inmates told Plaintiff that
25 there were correctional officers at CCI who still practiced “Green Wall” and beat inmates just
26 for mouthing off. Plaintiff took Sherwood’s threat seriously and did not file a staff complaint
27 for fear of being beaten.

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1 On or about July 23, 2012, after suffering severe pain from his chipped tooth, Plaintiff
2 filed a health care appeal to have the tooth fixed. The appeal was partially granted at the First
3 Level of Review, but nothing was done, so Plaintiff resubmitted the appeal on or about
4 September 13, 2012. The appeal was returned for no reason on September 13, 2012 and
5 September 17, 2012. Defendant Sherwood reviewed the appeal prior to returning it and
6 confronted Plaintiff, accusing him of snitching on him. Plaintiff tried to tell Sherwood that he
7 did not snitch and only wanted his tooth fixed, but Sherwood called Plaintiff to the center of the
8 dorm and started slapping him in the face. Plaintiff endured the assault and then went outside
9 to get some fresh air.

10 As Plaintiff came around the corner to Briggs Hall, defendant Sherwood called him
11 back, accusing him of trying to snitch to the Correctional Lieutenant. Before Plaintiff could
12 speak, Sherwood pulled out his O.C. pepper spray, sprayed Plaintiff in the face, and took him
13 to the ground. After Plaintiff was placed in handcuffs and posed no threat, Sherwood started
14 kicking and punching Plaintiff. Defendant Greg Coontz was there and looked on, refusing to
15 intervene.

16 After Plaintiff was placed in medical care, defendants Sherwood, Coontz, and Felix
17 starting beating him again, because Sherwood convinced them that Plaintiff had assaulted him.
18 Plaintiff was left in a holding cell for over an hour before he was allowed to have the pepper
19 spray washed off his face. Plaintiff could not breathe and passed out several times. Plaintiff
20 requested medical attention and told defendant R.N. Gilera that “his eyes were burning,” but
21 his request was overlooked when “he was seen after the beating.” (3ACP at 7 ¶5.) Plaintiff
22 could not identify the officers or medical staff present because he could not open his eyes.
23 Plaintiff washed his face with toilet water because he could not locate the sink.

24 In administrative segregation, Plaintiff coughed up blood and passed out several times
25 because he could not breathe. He complained to the medical staff and correctional officers and
26 was refused medical treatment for eight days. Plaintiff was seen by defendant R.N. Gray, and
27 then forced to wait fifteen days longer before being seen by a medical doctor. On October 2,
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1 2012, Plaintiff had x-rays taken of his chest, and on October 16, 2012, Plaintiff submitted
2 another Health Care Services Request Form complaining of shortness of breath.

3 Plaintiff alleges that defendant Sherwood's actions placed his life in grave danger
4 because several months before, Plaintiff underwent open chest surgery for severe pneumonia,
5 and Plaintiff had not fully recovered. Medical staff knew about Plaintiff's prior surgery when
6 he arrived at CCI.

7 Sherwood falsified a Rules Violation Report (RVR) in an attempt to cover up or justify
8 the pepper spray and beating. The Senior Hearing Officer, after hearing the RVR, reduced the
9 charge from "Assault on Staff" to "Resisting Staff," a charge not alleged in the RVR.

10 Another inmate, who had seen Plaintiff being beaten and pepper-sprayed, called
11 Plaintiff's family and informed them. The family called the prison and an attorney. The
12 attorney advised them to file a formal staff complaint, which the family did.

13 The family's complaint resulted in Plaintiff being interviewed at a video-taped session.
14 Plaintiff filed another inmate appeal concerning the false disciplinary charge and alleged he
15 was beaten for trying to seek medical attention for his teeth.

16 After being transferred to the California Substance Abuse Treatment Facility and State
17 Prison (SATF) in Corcoran, California, Plaintiff filed another staff complaint against the
18 correctional officers because his first complaint, together with the disciplinary appeal, was
19 never answered. Plaintiff was videotaped during an interview at SATF by Lieutenant Smith
20 [not a defendant]. This staff complaint was screened out later and Plaintiff appealed to the
21 Director of Corrections.

22 Plaintiff tried to obtain copies of his medical file through his correctional counselor and
23 was informed that the medical records had been purged.

24 Plaintiff seeks monetary damages, declaratory judgment, costs of suit, and reasonable
25 fees.

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1 **IV. PLAINTIFF'S CLAIMS**

2 The Civil Rights Act under which this action was filed provides:

3 Every person who, under color of [state law] . . . subjects, or
4 causes to be subjected, any citizen of the United States . . . to the
5 deprivation of any rights, privileges, or immunities secured by
6 the Constitution . . . shall be liable to the party injured in an
7 action at law, suit in equity, or other proper proceeding for
8 redress.

9 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal
10 Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)
11 (internal quotations omitted).

12 **A. Eighth Amendment Claims**

13 **1. Excessive Force**

14 "What is necessary to show sufficient harm for purposes of the Cruel and Unusual
15 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue . . ." Hudson
16 v. McMillian, 503 U.S. 1, 8 (1992). "The objective component of an Eighth Amendment claim
17 is . . . contextual and responsive to contemporary standards of decency." Id. (internal quotation
18 marks and citations omitted). The malicious and sadistic use of force to cause harm always
19 violates contemporary standards of decency, regardless of whether or not significant injury is
20 evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth
21 Amendment excessive force standard examines *de minimis* uses of force, not *de minimis*
22 injuries)). However, not "every malevolent touch by a prison guard gives rise to a federal cause
23 of action." Id. at 9. "The Eighth Amendment's prohibition of cruel and unusual punishments
24 necessarily excludes from constitutional recognition *de minimis* uses of physical force,
25 provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" Id. at
26 9-10 (internal quotations marks and citations omitted).

27 "[W]henever prison officials stand accused of using excessive physical force in
28 violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether
 force was applied in a good-faith effort to maintain or restore discipline, or maliciously and
 sadistically to cause harm." Id. at 7. "In determining whether the use of force was wanton and

1 unnecessary, it may also be proper to evaluate the need for application of force, the relationship
2 between that need and the amount of force used, the threat reasonably perceived by the
3 responsible officials, and any efforts made to temper the severity of a forceful response.” Id.
4 (internal quotation marks and citations omitted). “The absence of serious injury is . . . relevant
5 to the Eighth Amendment inquiry, but does not end it.” Id.

6 Plaintiff alleges that shortly after Plaintiff arrived at CCI, defendant Sherwood called to
7 him, “Hey, you long hair faggot, come here,” and when Plaintiff complied, Sherwood took him
8 outside, kicked his legs apart, and slammed his head and face into the wall. Plaintiff also
9 alleges that defendant Sherwood slapped him in the face, sprayed him with pepper spray, and
10 kicked and punched him because Plaintiff filed a health care appeal. Plaintiff also alleges that
11 defendants Coontz and Felix beat him because defendant Sherwood convinced them that
12 Plaintiff had assaulted Sherwood. The court finds that Plaintiff states cognizable claims against
13 defendants Sherwood, Coontz, and Felix for use of excessive force in violation of the Eighth
14 Amendment.

15 **2. Failure to Protect**

16 The Eighth Amendment protects prisoners from inhumane methods of punishment and
17 from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th
18 Cir. 2006). Although prison conditions may be restrictive and harsh, prison officials must
19 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety.
20 Farmer v. Brennan, 511 U.S. 825, 832-33, 114 S.Ct. 1970 (1994) (internal citations and
21 quotations omitted). Prison officials have a duty to take reasonable steps to protect inmates
22 from physical abuse. Id. at 833; Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005).

23 To establish a violation of this duty, the prisoner must establish that prison officials
24 were “deliberately indifferent to a serious threat to the inmates’s safety.” Farmer at 834. The
25 question under the Eighth Amendment is whether prison officials, acting with deliberate
26 indifference, exposed a prisoner to a sufficiently substantial ‘risk of serious damage to his
27 future health” Id. at 843 (citing Helling v. McKinney, 509 U.S. 25, 35 (1993)). The
28 Supreme Court has explained that “deliberate indifference entails something more than mere

1 negligence . . . [but] something less than acts or omissions for the very purpose of causing harm
2 or with the knowledge that harm will result." Farmer at 835. The Court defined this "deliberate
3 indifference" standard as equal to "recklessness," in which "a person disregards a risk of harm
4 of which he is aware." Id. at 836-37.

5 The deliberate indifference standard involves both an objective and a subjective prong.
6 First, the alleged deprivation must be, in objective terms, "sufficiently serious." Id. at 834.
7 Second, subjectively, the prison official must "know of and disregard an excessive risk to
8 inmate health or safety." Id. at 837; Anderson v. County of Kern, 45 F.3d 1310, 1313 (9th Cir.
9 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial
10 evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge.
11 Farmer, 511 U.S. at 842; Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995).

12 Plaintiff alleges that defendant Coontz was present and watched, without intervening,
13 when defendant Sherwood slapped Plaintiff in the face, sprayed him with pepper spray, and
14 kicked and punched him. The court finds that, liberally construed, Plaintiff states a claim
15 against defendant Coontz for failure to protect him in violation of the Eighth Amendment.

16 **3. Medical Claim**

17 "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
18 inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d
19 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976)).
20 The two-part test for deliberate indifference requires the plaintiff to show (1) "'a serious
21 medical need' by demonstrating that 'failure to treat a prisoner's condition could result in
22 further significant injury or the unnecessary and wanton infliction of pain,'" and (2) "the
23 defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096 (quoting
24 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX
25 Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations
26 omitted)). Deliberate indifference is shown by "a purposeful act or failure to respond to a
27 prisoner's pain or possible medical need, and harm caused by the indifference." Id. (citing
28 McGuckin, 974 F.2d at 1060). Deliberate indifference may be manifested "when prison

1 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by
2 the way in which prison physicians provide medical care." Id. Where a prisoner is alleging a
3 delay in receiving medical treatment, the delay must have led to further harm in order for the
4 prisoner to make a claim of deliberate indifference to serious medical needs. McGuckin at
5 1060 (citing Shapely v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.
6 1985)).

7 "Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d 1051,
8 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware of the
9 facts from which the inference could be drawn that a substantial risk of serious harm exists,' but
10 that person 'must also draw the inference.'" Id. at 1057 (quoting Farmer, 511 U.S. at 837). "If
11 a prison official should have been aware of the risk, but was not, then the official has not
12 violated the Eighth Amendment, no matter how severe the risk." Id. (quoting Gibson v.
13 County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). "A showing of medical
14 malpractice or negligence is insufficient to establish a constitutional deprivation under the
15 Eighth Amendment. Id. at 1060. "[E]ven gross negligence is insufficient to establish a
16 constitutional violation." Id. (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.
17 1990)).

18 "A difference of opinion between a prisoner-patient and prison medical authorities
19 regarding treatment does not give rise to a § 1983 claim." Franklin v. Oregon, 662 F.2d 1337,
20 1344 (9th Cir. 1981) (internal citation omitted). To prevail, plaintiff "must show that the course
21 of treatment the doctors chosen was medically unacceptable under the circumstances . . . and . . .
22 . that they chose this course in conscious disregard of an excessive risk to plaintiff's health."
23 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (internal citations omitted).

24 Plaintiff alleges that after he was assaulted, he was left in a holding cell for over an hour
25 before he was allowed to have the pepper spray washed off his face, during which time he could
26 not breathe and passed out several times. Plaintiff requested medical attention and told
27 defendant R.N. Gilera that his eyes were burning, but his request was overlooked. Plaintiff
28 alleges that in administrative segregation he coughed up blood and passed out several times

1 because he could not breathe. He complained to medical staff and correctional officers and was
2 refused medical treatment for eight days. Plaintiff was seen by defendant R.N. Gray and then
3 forced to wait fifteen more days before being seen by a medical doctor.

4 Plaintiff shows a serious medical need, because he could not breathe and passed out
5 several times from the pepper spray, coughed up blood, and suffered from burning eyes.
6 However, Plaintiff fails to allege facts demonstrating that any defendant acted, or failed to act,
7 against him with deliberate indifference. Plaintiff fails to show that any defendant failed to
8 afford him adequate medical care, while knowing and consciously disregarding an excessive
9 risk to his health. Therefore, the court finds that Plaintiff fails to state a claim for inadequate
10 medical care under the Eighth Amendment.

11 **B. Retaliation**

12 As discussed by the Ninth Circuit in Watison v. Carter:

13 “A retaliation claim has five elements. Brodheim v. Cry,
14 584 F.3d 1262, 1269 (9th Cir. 2009). First, the plaintiff must
15 allege that the retaliated-against conduct is protected. The filing
of an inmate grievance is protected conduct. Rhodes v.
Robinson, 408 F.3d 559, 568 (9th Cir. 2005).

16 Second, the plaintiff must claim the defendant took
17 adverse action against the plaintiff. Id. at 567. The adverse
18 action need not be an independent constitutional violation. Pratt
19 v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). “[T]he mere
threat of harm can be an adverse action....” Brodheim, 584 F.3d
at 1270.

20 Third, the plaintiff must allege a causal connection
21 between the adverse action and the protected conduct. Because
22 direct evidence of retaliatory intent rarely can be pleaded in a
23 complaint, allegation of a chronology of events from which
retaliation can be inferred is sufficient to survive dismissal. See
Pratt, 65 F.3d at 808 (“timing can properly be considered as
circumstantial evidence of retaliatory intent”); Murphy v. Lane,
833 F.2d 106, 108–09 (7th Cir. 1987).

24 Fourth, the plaintiff must allege that the “official’s acts
25 would chill or silence a person of ordinary firmness from future
26 First Amendment activities.” Robinson, 408 F.3d at 568 (internal
27 quotation marks and emphasis omitted). “[A] plaintiff who fails
28 to allege a chilling effect may still state a claim if he alleges he
suffered some other harm,” Brodheim, 584 F.3d at 1269, that is
“more than minimal,” Robinson, 408 F.3d at 568 n.11. That the
retaliatory conduct did not chill the plaintiff from suing the

alleged retaliator does not defeat the retaliation claim at the motion to dismiss stage. *Id.* at 569.

Fifth, the plaintiff must allege "that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution...." Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir.1985). A plaintiff successfully pleads this element by alleging, in addition to a retaliatory motive, that the defendant's actions were arbitrary and capricious, id., or that they were "unnecessary to the maintenance of order in the institution," Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir.1984)."

Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012).

Plaintiff alleges that defendant Sherwood assaulted him for filing a health care appeal, because Sherwood thought Plaintiff was snitching on him in the appeal. Plaintiff states a cognizable claim against defendant Sherwood for retaliation in violation of the First Amendment.

C. Due Process -- False Disciplinary Report

The falsification of a disciplinary report does not state a standalone constitutional claim. Canovas v. California Dept. of Corrections, 2014 WL 5699750, n.2 (E.D. Cal. 2014); see e.g., Lee v. Whitten, 2012 WL 4468420, *4 (E.D. Cal. 2012). There is no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the deprivation of a protected liberty interest. Sprouse v. Babcock, 870 F.2d 450, 452 (8th Cir. 1989); Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986)). “Specifically, the fact that a prisoner may have been innocent of disciplinary charges brought against him and incorrectly held in administrative segregation does not raise a due process issue. The Constitution demands due process, not error-free decisionmaking.” Jones v. Woodward, 2015 WL 1014257, *2 (E.D. Cal. 2015) (citing Ricker v. Leapley, 25 F.3d 1406, 1410 (8th Cir. 1994); McCrae v. Hankins, 720 F.2d 863, 868 (5th Cir. 1983)).

Plaintiff alleges that defendant Sherwood falsified Plaintiff's Rules Violation Report to cover up or justify beating Plaintiff and spraying him with pepper spray. To the extent that Plaintiff seeks to bring a due process claim for the falsification of records, Plaintiff is unable to do so because he has no protected liberty interest against having false information in his Rules Violation Report.

1 **V. CONCLUSION AND RECOMMENDATIONS**

2 The Court finds that Plaintiff states cognizable claims against defendants Sherwood,
3 Coontz, and Felix for use of excessive force under the Eighth Amendment; against defendant
4 Sherwood for retaliation under the First Amendment; and against defendant Coontz for failure
5 to protect Plaintiff in violation of the Eighth Amendment. However, Plaintiff fails to state any
6 other cognizable claims against any of the Defendants. The Court previously granted Plaintiff
7 leave to amend the complaint, with ample guidance by the Court. The Court finds that the
8 deficiencies outlined above are not capable of being cured by amendment, and therefore further
9 leave to amend should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d
10 1122, 1127 (9th Cir. 2000).

11 Accordingly, based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

- 12 1. This action be allowed to proceed with the Third Amended Complaint, against
13 defendants Sherwood, Coontz, and Felix for use of excessive force under the
14 Eighth Amendment; against defendant Sherwood for retaliation under the First
15 Amendment; and against defendant Coontz for failure to protect Plaintiff in
16 violation of the Eighth Amendment;
- 17 2. All other claims and defendants be dismissed from this action for Plaintiff's
18 failure to state a claim under § 1983;
- 19 3. Plaintiff's claims for inadequate medical care under the Eighth Amendment, and
20 for falsification of his disciplinary report under the Due Process Clause be
21 dismissed for Plaintiff's failure to state a claim under § 1983;
- 22 4. Defendants Gilera and Gray be dismissed from this action based on Plaintiff's
23 failure to state any claims against them; and
- 24 5. This case be referred back to the Magistrate Judge for further proceedings,
25 including initiation of service of process.

26 These Findings and Recommendations will be submitted to the United States District
27 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
28 thirty (30) days after being served with these Findings and Recommendations, Plaintiff may file

1 written objections with the Court. The document should be captioned "Objections to
2 Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
3 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
4 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
5 (9th Cir. 1991)).

6 IT IS SO ORDERED.
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8 Dated: April 15, 2015

/s/ Gary S. Austin

9 UNITED STATES MAGISTRATE JUDGE

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