

1 As previously stated, on October 14, 2019, Defendants filed a motion for summary judgment.
2 Plaintiff did not file an opposition and the time to do so has now expired. Accordingly, Defendants'
3 motion for summary judgment is deemed submitted for review without oral argument. Local Rule
4 230(l).

5 II.

6 LEGAL STANDARD

7 Any party may move for summary judgment, and the Court shall grant summary judgment if
8 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
9 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mut. Inc. v.
10 U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed
11 or undisputed, must be supported by (1) citing to particular parts of materials in the record, including
12 but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials
13 cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot
14 produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted).
15 The Court may consider other materials in the record not cited to by the parties, but it is not required
16 to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031
17 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

18 In judging the evidence at the summary judgment stage, the Court does not make credibility
19 determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984
20 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the light most
21 favorable to the nonmoving party and determine whether a genuine issue of material fact precludes
22 entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d at
23 942 (quotation marks and citation omitted).

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1 **III.**

2 **DISCUSSION**

3 **A. Summary of Plaintiff's Complaint**

4 1. Retaliation Claim

5 Plaintiff contends Defendant Johnson falsely found him guilty of a Rules Violation Report
6 (RVR), log number C-13-05-004, for possession of a controlled substance (marijuana). Plaintiff
7 contends Defendant Johnson falsified the RVR because he filed an inmate grievance.

8 On August 8, 2013, Defendant Johnson conducted the hearing on the rules violation report for
9 possession of a controlled substance. Plaintiff presented evidence that the contraband belonged to
10 Plaintiff because it was discovered on the upper locker that was assigned to him. Plaintiff stated that
11 he "didn't know anything about the drugs until 5-1-2013, when I was served with the notice of the 115
12 R.V.R. for drugs found on 2-5-2013. As far as I'm concerned the correctional officer could of planted
13 it and C.O. Ibbs logic of it belong [sic] to me due to my bunk assignment that is discredited by your
14 C.O. Welsh testimony."

15 Defendant Johnson opted to call officer Ibbs by way of a phone conference to ask "when you
16 discovered the controlled substance in [building] 5, [cell] 101 on the upper locked was it out in the
17 open where you didn't have to search for it because I'm hearing Blair's 115 for constructive
18 possession?" The Plaintiff interjected with, "you mind [sic] as well just tell him exactly what to say if
19 your[e] going to lead him like I'm some type of idiot." Johnson ended the telephone conversation
20 with Ibbs and informed Plaintiff, "I'm finding you guilty possession-constructive possession."
21 Plaintiff inquired as to the meaning of constructive possession. Johnson replied, "it means you had
22 knowledge of and access to the contraband and therefore guilty of constructive possession." Plaintiff
23 stated "that's crazy your telling me an inmate is guilty regardless of the circumstances. Even their
24 cellie admits guilt as long as they were in the cell ... I just testified that I had and still have no
25 knowledge of the drugs, where they came from, or even when they were discovered and your own
26 C.O. debunked your other C.O.'s logic and case, so now your using a loop hole which is basically
27 indisputable as long as I occupied the cell with another inmate. That being the case I'm requesting
28 single cell status because your rule places me in a position whether it is impossible to exist in a cell

1 with another inmate without the threat of violence. Due to the fact that I'm therefore obligated to
2 searched [sic] through all of my cellies personal property and dispose of whatever contraband they
3 may possess. Just search through a cellie's personal property is a violation of cell conduct which will
4 result in a physical altercation especially here on the high security facility on top of this your['e]
5 instructing us to dispose of them contraband or run to the staff to be labeled a rat... That's a death
6 sentence in here. It's already bad enough your['e] forcing us to house with rival gang members
7 against our will." Defendant Johnson responded "your['e] not obligated to house with rival gang
8 members, you can refuse incompatible cellies." Plaintiff informed Johnson, "yeah right, my last three
9 cellies were incompatible and we tried to inform your staff of our rival gang status each time we were
10 threatened with disciplinary reprisal for refusing to accept each other as cellies. Johnson indicated that
11 it was an exception and rarely happens. Plaintiff then informed Johnson that he and his current cellie
12 were rival gang members. In response, Johnson insulted Plaintiff by telling him to just "handle your
13 business [and] if your['e] scared go S.N.Y." Plaintiff replied "nah your['e] the bitch cuz [sic] back in
14 the dayz [sic] C.O.s would actually fight the inmates instead of waiting until we're handcuffed to
15 disrespect us. Now ya'll try to cause disruption amongst us so you can sit back and entertain yourselves
16 and write us up."

17 2. Failure to Protect Claim

18 On this same date, Defendants Franco and O'Daniels began telling other inmates that Plaintiff
19 was a snitch and needed to be dealt with. On or about August 29, 2013, Franco and O'Daniels began
20 telling other inmates to "deal with" Plaintiff, because he was a snitch and had snitched on his former
21 cellmate for a drug possession charge. In early September 2013, Plaintiff and his cellmate Baker told
22 O'Daniels that they needed to be separated, to which O'Daniels replied that they should handle their
23 business and fight each other.

24 On September 5, 2013, officers Franco and O'Daniels approached Plaintiff's cell claiming
25 Baker was scheduled to have a conference with his psychologist. As a result, both Plaintiff and Baker
26 were handcuffed, and Plaintiff was advised that he was being moved because Baker was passing love
27 letters to his psychologist claiming to be from Plaintiff.

1 After Plaintiff and inmate Baker advised officer O'Daniels of the need to be separated,
2 O'Daniels stated "stop acting like bitches and handle your business, that's why ya'll were moved over
3 here where can't nobody hear the screams."

4 On September 11, 2013, Plaintiff and inmate Baker had a physical altercation inside the cell,
5 and Plaintiff suffered permanent injuries to his lower back, neck, black eye, and an asthma attack due
6 to the responding officers' use of pepper spray to break up the fight.

7 On November 7, 2013, Plaintiff and inmate Badelle were housed together and were compatible
8 cellmates. However, officer O'Daniels approached Plaintiff's cell to initiate a swap of cellmates.
9 After threatening to take all of inmate Badelle's property, Plaintiff and Badelle signed the chrono as
10 directed and as soon as Plaintiff was uncuffed he attacked inmate Dawson.

11 3. Due Process Claim

12 On September 28, 2013, Plaintiff received a RVR log no. ASE-13-09-018 for delaying a peace
13 officer and refusing a cellmate. On October 8, 2013, Plaintiff requested Defendant Sanchez, Sergeant
14 Chan, and inmates Jones, Baker, Young, and Gardner be present at the hearing. On October 10, 2013,
15 Defendant Santos was assigned as Plaintiff's Investigative Employee (IE). Plaintiff refused to have
16 Santos as his IE. The next day, Defendant Esqueda was assigned as Plaintiff's IE.

17 On October 10, 2013, officer Santos introduced himself as the Investigative Employee (IE)
18 assigned to the rules violation report log numbers ASE-13-09-018 (delaying officer and refusing a
19 cellmate) and ASE-13-09-002 (fighting), and asked Plaintiff "what task the Plaintiff wanted him to
20 carry out in preparation of his defense?" Plaintiff submitted a list of witnesses to be questioned and
21 Santos directed Plaintiff "just plead guilty, you were caught fighting and you refused a celly."
22 Plaintiff replied, "nah I want to present the mitigating factors to the committee in an attempt to get the
23 mid or low disciplinary sanction." Santos began arguing with Plaintiff yelling, "just take the guilty
24 plea." No matter how calm the Plaintiff remained Santos continued to yell at him trying to force him
25 to "just plead guilty."

26 On October 11, 2013, officer Esqueda introduced himself as the working IE, and after opening
27 the file stated, "This is odd, I've never seen this before. Lt. Ybarra is say [sic] I can't question these
28 witnesses for you. Now did he even know what you wanted to ask them." Officer Esqueda asked

1 Lieutenant Ybarra about the witness interviews and Ybarra stated “it looks as if your line of questions
2 are in preparation of a lawsuit. Your cellie already filed a government claims and he’s not about to
3 assist ya’ll or help build your case.”

4 Officer Esqueda spoke with Lieutenant Ybarra again and then stated “I will question all your
5 witnesses and type this.” However, Esqueda never questioned Plaintiff’s inmate or staff witnesses and
6 only typed the Plaintiff’s affidavit, and purposely falsified in writing that Plaintiff was “sensitive
7 needs yard status.”

8 During the two rules violation hearings conducted by Lieutenant Ybarra, he refused to allow
9 Plaintiff to speak in his defense.

10 **B. Statement of Undisputed Facts¹**

11 1. On August 8, 2013, a disciplinary hearing was conducted on the RVR log no. C-13-05-
12 004, issued to Plaintiff, and Plaintiff was found guilty as charged of possession of a controlled
13 substance. (Johnson Decl. ¶ 3, Ex. A.)

14 2. Plaintiff was present and testified at the RVR log no. C-13-05-004 hearing on August 8,
15 2013. He stated that marijuana had been found in his cell was not his, but was his cellmate’s. He
16 further stated that he did not know about the marijuana, and that he told all of his cellmates that if they
17 had marijuana, he did not want to see it. (Johnson Decl. ¶ 3, Ex. B.)

18 3. Defendant Lieutenant Johnson was the Senior Hearing Officer (SHO) for the RVR log
19 no. C-13-05-004 hearing on August 8, 2013. Johnson made notes of the statements made by Plaintiff
20 at the hearing, and Plaintiff was found guilty based on the evidence that was presented at the hearing.
21 (Johnson Decl. ¶¶ 2-3, Ex. B.)

22 4. Plaintiff believes that Johnson falsified his (Plaintiff’s) statements made at the hearing

23
24 ¹ Plaintiff did not file an opposition and neither filed his own separate statement of disputed facts nor admitted or denied
25 the facts set forth by defendant as undisputed. Local Rule 56-260(b). Therefore, Defendants’ statement of undisputed
26 facts is accepted except where brought into dispute by Plaintiff’s verified complaint. Jones v. Blanas, 393 F.3d 918, 923
27 (9th Cir. 2004) (verified complaint may be used as an opposing affidavit if it is based on pleader’s personal knowledge of
28 specific facts which are admissible in evidence). A verified opposition to a motion for summary judgment may also be
considered as an opposing affidavit for purposes of the summary judgment rule if it is based on facts within the pleader’s
personal knowledge. Johnson v. Meltzer, 134 F.3d 1393, 1399-1400 (9th Cir. 1998). However, because plaintiff’s
opposition was not verified, it cannot be treated as an opposing affidavit. Moran v. Selig, 447 F.3d 948, 759-60 (9th Cir.
2006).

1 on RVR log no. C-13-05-004 because Plaintiff and Johnson got into an argument during the hearing
2 about Plaintiff's position on whether the marijuana was his. That is the only reason Plaintiff is aware
3 of why Johnson would falsify his statements. (Mathison Decl., Ex. A at pp. 46-47, 49.)

4 5. Controlled substances such as marijuana are contraband that is prohibited to be used or
5 possessed by inmates. Inmate possession of controlled substances poses serious safety and security
6 risks within the institution. The RVR proceeding process, such as that which occurred for RVR log
7 number C-13-05-004 issued to Plaintiff, is intended to preserve institutional order, discipline and
8 security. (Johnson Decl., ¶ 5.)

9 6. Johnson had never met or encountered Plaintiff prior to the August 8, 2013, RVR
10 hearing. (Johnson Decl. ¶ 4; Mathison Decl. Ex. A at pp. 48-49.)

11 7. At the time of the August 8, 2013 hearing, Johnson was unaware of whether or not
12 Plaintiff had filed any prisoner administrative grievances, which are commonly referred to as Form
13 602 appeals. (Johnson Decl., ¶ 4.)

14 8. During the time he was housed at the Substance Abuse Treatment Facility and State
15 Prison, Corcoran (SATF), Plaintiff filed one 602 administrative appeal prior to the August 8, 2013,
16 hearing on RVR log no. C-13-05-004. The appeal, log no. SATF-C-12-03197, concerned his access to
17 the prison law library. (Mathison Decl., Ex. B.)

18 9. After the August 8, 2013, RVR hearing, Plaintiff filed twelve administrative grievances
19 while housed at SATF and he subsequently filed fifty-three administrative grievances while housed at
20 other prisons. (Mathison Decl., Ex. B.)

21 10. More than twenty-four hours in advance of the hearing, Plaintiff received written notice
22 of RVR log no. ASE-013-018, for offenses of delaying a peace officer and refusing a cellmate,
23 concerning events that occurred on September 28, 2013. (Mathison Decl., Ex. C., pp. 1, 8.)

24 11. On October 8, 2013, Plaintiff requested officer Sanchez, sergeant Chan and inmates
25 Jones, Baker Young and Gardner be present at the hearing. (Mathison Decl., Ex. C, p. 9.)

26 12. On October 10, 2013, Defendant Santos was assigned as Plaintiff's Investigative
27 Employee (IE). (Mathison Decl., Ex. C, pp. 2, 5.)

28 13. Plaintiff refused to have Santos as his IE. (Mathison Decl., Ex. C, pp. 2, 5, and Ex. A

1 p. 42.)

2 14. On October 11, 2013, Defendant Esqueda was assigned as Plaintiff's IE. (Mathison
3 Decl., Ex. C, pp. 2, 5.)

4 15. At the October 24, 2013, RVR hearing, Plaintiff elected to waive the presence of the
5 witnesses he had requested on October 8, 2013. Instead, he requested that inmate Russ be present at
6 the hearing. The request was granted, and Russ was present and made a statement. Plaintiff himself
7 made a statement. (Mathison Decl., Ex. C, pp. 5, 6, 9.)

8 16. Esqueda as the IE prepared a report which was submitted at the hearing. The report
9 included a written statement by Plaintiff. The report included a statement by Esqueda that he had read
10 the RVR and interviewed Plaintiff and all pertinent staff. (Mathison Decl., Ex. C. pp. 5-7.)

11 17. The Senior Hearing Officer (SHO), Defendant Ybarra, found Plaintiff guilty of
12 "Delaying a Peace Officer by Refusing Assigned Housing." This finding included a written statement
13 of the specific evidence supporting the finding and the reasons for the finding. (Mathison Decl., Ex.
14 C, pp. 8-10.)

15 18. More than twenty-four hours in advance of the hearing, Plaintiff received written notice
16 of RVR log no. ASE-013-09-002, for the offense of fighting, concerning events that occurred on
17 September 11, 2013. (Mathison Decl., Ex. D, pp. 1, 6.)

18 19. On October 10, 2013, Defendant Santos was assigned as Plaintiff's IE. (Mathison
19 Decl., Ex. D, pp. 2, 4.)

20 20. Plaintiff refused to have Santos as his IE. (Mathison Decl., Ex. D, p. 4.)

21 21. On October 11, 2013, Defendant Esqueda was assigned as Plaintiff's IE. (Mathison
22 Decl., Ex. D, pp. 2, 4.)

23 22. At the RVR hearing Plaintiff was given the opportunity to present witnesses, but he
24 declined to do so. (Mathison Decl., Ex. D, p. 7.)

25 23. At the RVR hearing Plaintiff pled guilty to the charged offense of "Fighting" and
26 declined to make a statement. (Mathison Decl., Ex. D, p. 7.)

27 24. Ybarra was the Senior Hearing Officer for the RVR hearing. (Mathison Decl., Ex. D,
28 pp. 6-8.)

1 25. Plaintiff was found guilty based on his guilty plea and on the information in the RVR
2 report. (Mathison Decl., Ex. D, pp. 7-8.)

3 26. On July 14, 2013, Plaintiff and inmate Baker (T30691) signed a compatibility chrono,
4 stating that they agreed to be assigned as cellmates and indicating they were compatible as cellmates.
5 After a review of the case factors in each inmates C-file, it was determined that there was information
6 available to indicate that they were incompatible as cellmates. Plaintiff and Baker were cellmates
7 from July to September 2013. (Mathison Decl., Ex. A at p. 53 and Ex. F.)

8 27. Defendants Franco and O'Daniels were not involved in deciding whether to house
9 inmates, or whether or not to move them to or from a cell. Nor were they involved in screening
10 inmates for housing with other inmates. When they moved inmates to different cells, it was always at
11 the direction of the sergeant or other staff person in charge of making the decision to move the inmate,
12 and they were merely following orders. (Franco Decl., ¶ 3; O'Daniels Decl., ¶ 3.)

13 28. Franco and O'Daniels were not present when Plaintiff and Baker fought in their cell on
14 September 11, 2013. (Franco Decl., ¶ 5; O'Daniels Decl., ¶ 5.)

15 29. On November 7, 2013, Plaintiff and inmate Dawson (T30691) signed a compatibility
16 chrono, stating that they agreed to be assigned as cellmates and indicating they were compatible as
17 cellmates. After a review of the case factors in each inmates C-file, it was determined that there was
18 no information available to indicate that they were incompatible as cellmates, and they were assigned
19 as cellmates. (Mathison Decl., Ex. A, pp. 73-74 and Ex. J (within Ex. A).)

20 30. When Plaintiff and Dawson were placed in their cells, Plaintiff attacked Dawson, once
21 Plaintiff was un-handcuffed and while Dawson remained handcuffed. Franco was able to stop
22 Plaintiff from continuing to attack Dawson. (Franco Decl., ¶ 6 and Ex. A.)

23 31. Plaintiff was not injured when he attacked inmate Dawson on November 7, 2013.
24 (Mathison Decl., Ex. E, pp. 2, 12.)

25 32. Franco assisted in moving Plaintiff to his new cell assignment with Dawson on
26 November 7, 2013. (Franco Decl., ¶ 6.)

27 33. O'Daniels was not present when Plaintiff attacked Dawson on November 7, 2013.
28 (O'Daniels Decl., ¶ 6.)

1 34. Plaintiff does not allege that he was ever attacked by another inmate as a result of being
2 labelled a “rat” or “snitch” by SATF custody staff. There is no evidence that Plaintiff was attacked by
3 another inmate under such circumstances. (Sec. Amd. Compl., ECF No. 14.)

4 **C. Analysis of Claims**

5 Defendants argue that Plaintiff cannot demonstrate that Johnson’s actions were retaliatory;
6 there was no due process violation for the disciplinary hearings of the RVRs issued to Plaintiff; and
7 Franco and O’Daniels were not substantively deliberately indifferent to Plaintiff’s safety with regard
8 to the attack incidents between Plaintiff and his cellmates, Baker and Dawson. In the alternative,
9 Defendants contend they are entitled to qualified immunity.

10 1. Retaliation Claim

11 Plaintiff contends that Defendant Johnson falsely found him guilty of RVR, log number C-13-
12 05-004, for possession of a controlled substance (marijuana) because Plaintiff filed an inmate
13 grievance.

14 “Prisoners have a First Amendment right to file grievances against prison officials and to be
15 free from retaliation for doing so.” Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing
16 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). Also protected by the First Amendment is the
17 right to pursue civil rights litigation in federal court without retaliation. Silva v. Di Vittorio, 658 F.3d
18 1090, 1104 (9th Cir. 2011). “Within the prison context, a viable claim of First Amendment retaliation
19 entails five basic elements: (1) An assertion that a state actor took some adverse action against an
20 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
21 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a
22 legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

23 Here, Johnson noted Plaintiff’s statements during the RVR hearing and then presented them,
24 from his notes, in the record of the RVR. (Johnson Decl., ¶¶ 2-3, Ex. B.) Plaintiff was found guilty of
25 the RVR based on the evidence presented at the hearing, including his own statements, which were not
26 falsified. (Johnson Decl., ¶ 3, Exs. A & B.) Johnson declares that he was not aware that Plaintiff had
27 filed any grievances. (Johnson Decl., ¶ 4.) In fact, it is undisputed that Plaintiff had not filed any
28 grievances against Johnson, or any other SATF staff, and the sole grievance he had filed at SATF

1 concerned the prison law library. (Mathison Decl., Ex. B.) In addition, it is undisputed that Johnson
2 and Plaintiff had never even met or encountered one another prior the hearing. (Johnson Decl., ¶ 4;
3 Mathison Decl., Ex. A pp. 48-49.) In fact, at his deposition, Plaintiff admitted that the only reason
4 Johnson acted to allegedly falsify his statements was because he and Johnson got into an argument
5 during the RVR hearing. (Mathison Decl., Ex. A at pp. 46-47, 49.)

6 Moreover, there is no showing that there was not a legitimate penological purpose in issuing
7 the RVR. Plaintiff must also demonstrate “that there were no legitimate correctional purposes
8 motivating the actions he complains of,” Pratt, 65 F.3d at 808, and the Court must “‘afford appropriate
9 deference and flexibility’ to prison officials in the evaluation of proffered legitimate penological
10 reasons for conduct alleged to be retaliatory,” id. at 807 (quoting Sandin v. Conner, 515 U.S. 472, 482
11 (1995)). It is undisputed that controlled substances such as marijuana are contraband that is prohibited
12 to be used or possessed by inmates. (Johnson Decl., ¶ 5.) Inmate possession of controlled substances
13 poses serious safety and security risks within the institution. (Id.) The issuance of a rules violation
14 report for possession of contraband is intended to preserve institutional order, discipline and security.
15 (Id.)

16 There is no evidence to controvert the conclusion that Plaintiff constructively possessed the
17 contraband found in his cell and the issuance of the rules violation served a legitimate correctional
18 goal of ensuring safety and security of the institution, correctional officers, and inmates. Plaintiff has
19 failed to provide any evidence establishing that Defendant’s actions did not reasonably advance a
20 legitimate correctional goal. Therefore, he has not met his burden of showing a triable issue of fact as
21 to his claim of retaliation and Defendant Johnson is entitled to summary judgment.

22 2. Due Process Claim

23 Plaintiff contends that his due process rights were violated by Defendants Santos, Esqueda and
24 Ybarra based on the alleged denial of the opportunity to present witnesses at his disciplinary hearing
25 for RVR, log numbers ASE-013-09-018 and ASE-13-09-002.²

26
27
28 ² The claim against Ybarra as to RVR log number ASE-13-09-002 was dismissed for failure to exhaust administrative remedies. (ECF No. 126 at 2.)

1 “Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of
2 rights due a defendant in such proceedings does not apply.” Wolff v. McDonnell, 418 U.S. 539, 556,
3 (1974). With respect to prison disciplinary proceedings, the minimum procedural requirements that
4 must be met are: (1) written notice of the charges; (2) at least 24 hours between the time the prisoner
5 receives written notice and the time of the hearing, so that the prisoner may prepare his defense; (3) a
6 written statement by the fact finders of the evidence they rely on and reasons for taking disciplinary
7 action; (4) the right of the prisoner to call witnesses in his defense, when permitting him to do so
8 would not be unduly hazardous to institutional safety or correctional goals; and (5) legal assistance to
9 the prisoner where the prisoner is illiterate or the issues presented are legally complex. Id. at 563-71.
10 As long as the five minimum Wolff requirements are met, due process has been satisfied. Walker v.
11 Sumner, 14 F.3d 1415, 1420 (9th Cir. 1994), abrogated on other grounds by Sandin v. Connor, 515
12 U.S. 472 (1995). In addition “[s]ome evidence” must support the decision of the hearing officer.
13 Superintendent v. Hill, 472 U.S. 445, 455 (1985). The standard is not particularly stringent and the
14 relevant inquiry is whether “there is any evidence in the record that could support the conclusion
15 reached” Id. at 455-56.

16 At the hearing on ASE-013-09-018, Plaintiff waived his right to present witnesses he had
17 previously requested, and the one witness he did request was present and testified at the hearing.
18 (Mathison Decl., Ex. C, pp. 5, 6, 9.) Further, Plaintiff submitted a detailed written statement
19 responding to the charges. (Mathison Decl., Ex. C, pp. 5, 6, 9.) In addition, Esqueda as his IE
20 prepared and submitted a report with evidence at the hearing, which included Plaintiff’s lengthy
21 statement. (Mathison Decl., Ex. C. pp. 5-7.) Any claim by Plaintiff that Esqueda failed to perform his
22 duties as an IE does not state a potentially colorable due process claim as there is no constitutional
23 right to an IE. See Larkin v. Davey, No. 2:14-cv-2497-TLN-GGH, 2015 WL 1440616, at *6 (E.D.
24 Cal. Mar. 27, 2015) (“[T]here is no right to a thorough investigative report or even an investigation,
25 nor even a right to assignment of an investigative employee, which was provided to petitioner in this
26 case); Fuqua v. Swarthout, No. 2:12-cv-02045-TLN DAD P, 2013 WL 5493373, at *5 (E.D. Cal. Oct.
27 2, 2013 (no right to investigative employee); Tolliver v. Santoro, No. 15-09562-VSF (AS), 2016 WL
28 8732347, at *11 (C.D. Cal. May 20, 2016), report and recommendation adopted, 2016 WL 4035958

1 (C.D. Cal. July 8, 2016) (“[T]he Court has been unable to locate, any authority, federal or otherwise,
2 establishing that an inmate is guaranteed the effective assistance of his assigned investigative
3 employee.”) Indeed, unlike a staff assistant, an IE is appointed to assist the hearing officer, not the
4 inmate. Cal. Code Regs. tit. 15, § 3318(a). It is undisputed that Plaintiff was allowed to call inmate
5 Russ at the hearing—who was his cellmate at the time of the incident. Thus, Plaintiff was not placed in
6 the position in which only his testimony was the basis on which he could change the charge.

7 At the hearing on ASE-13-09-002, Plaintiff was given the opportunity to present witnesses, but
8 he declined to do so. (Mathison Decl., Ex. D, p. 7.) Further, Plaintiff pled guilty, and declined to
9 make a statement. (Mathison Decl., Ex. D, p. 7.) Plaintiff was therefore found guilty based on his
10 plea along with the information in the RVR report. (Mathison Decl., Ex. D, pp. 7-8.) Thus, Plaintiff
11 has failed to demonstrate a due process violation with regard to this hearing.

12 3. Failure to Protect Claim

13 Plaintiff claims that Defendants Franco and O’Daniels housed him with incompatible
14 cellmates, and labeled him a “snitch” and a “rat” to other inmates.

15 The Eighth Amendment protects prisoners from inhumane methods of punishment and from
16 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006).
17 Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with
18 food, clothing, shelter, sanitation, medical care, and personal safety. Farmer v. Brennan, 511 U.S.
19 825, 832-33 (1994). Prison officials have a duty under the Eighth Amendment to protect prisoners
20 from violence at the hands of other prisoners because being violently assaulted in prison is simply not
21 part of the penalty that criminal offenders pay for their offenses against society. Farmer, 511 U.S. at
22 833-34 (quotation marks omitted); Clem v. Lomeli, 566 F.3d 1177, 1181 (9th Cir. 2009); Hearns v.
23 Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). However, prison officials are liable under the Eighth
24 Amendment only if they demonstrate deliberate indifference to conditions posing a substantial risk of
25 serious harm to an inmate; and it is well settled that deliberate indifference occurs when an official
26 acted or failed to act despite his knowledge of a substantial risk of serious harm. Farmer, 511 U.S. at
27 834, 841; Clem, 566 F.3d at 1181; Hearns, 413 F.3d at 1040. In addition, if failure to protect is
28 alleged, the defendant must have had a reasonable opportunity to intervene. Orwat v. Maloney, 360

1 F.Supp.2d 146, 155 (D. Mass. 2005), citing Gaudreault v. Municipality of Salem, 923 F.2d 203, 207 at
2 n.3 (1st Cir. 1991). Prison officials must provide prisoners with personal safety. See Toussaint v.
3 McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986), abrogated in part on other grounds by Sandin v.
4 Conner, 515 U.S. 472 (1995).

5 **a. Cellmate Baker**

6 On July 14, 2013, Plaintiff and inmate Baker signed a compatibility chrono, stating that they
7 agreed to be assigned as cellmates and indicated they were compatible as cellmates. (Mathison Decl.,
8 Ex. A at p. 53 and Ex. F.) On September 11, 2013, Plaintiff and Baker had a physical altercation
9 inside the cell. It is undisputed that Defendants Franco and O’Daniels were not involved in deciding
10 where to house inmates or in screening inmates for housing, and when they moved inmates to different
11 cells they were merely following orders to do so. (Franco Decl., ¶ 3; O’Daniels Decl., ¶ 3.) It is
12 further undisputed that neither Defendant Franco nor O’Daniels did not have the opportunity to
13 intervene in the fight between Plaintiff and inmate Baker. Neither Franco nor O’Daniels were present
14 when the fight occurred, and they had no involvement in the events pertaining to the fight. (Franco
15 Decl., ¶ 5; O’Daniels Decl., ¶ 5.)

16 **b. Cellmate Dawson**

17 On November 7, 2013, Plaintiff and inmate Dawson (T30691) signed a compatibility
18 chrono, stating that they agreed to be assigned as cellmates and indicating they were compatible as
19 cellmates. After a review of the case factors in each inmates C-file, it was determined that there was
20 no information available to indicate that they were incompatible as cellmates, and they were assigned
21 as cellmates. (Mathison Decl., Ex. A, pp. 73-74 and Ex. J (within Ex. A).) It is undisputed that
22 Defendants Franco and O’Daniels were not involved in deciding where to house inmates or in
23 screening inmates for housing, and when they moved inmates to different cells they were merely
24 following orders to do so. (Franco Decl., ¶ 3; O’Daniels Decl., ¶ 3.) It is undisputed that inmate
25 Dawson did not attack Plaintiff; rather, it was Plaintiff who attacked inmate Dawson while Dawson
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1 was handcuffed.³ Defendant O’Daniels was not present and had no involvement in the incident.
2 (O’Daniels Decl. ¶ 35.) Defendant Franco was present, but the inmates had been placed in the locked
3 cell together, and when Plaintiff’s handcuffs were removed through the food port, Plaintiff
4 immediately attacked Dawson within the locked cell. (Franco Decl., ¶ 6 and Ex. A.) Franco was able
5 to stop Plaintiff from continuing to attack Dawson. (Id.)

6 **c. Labeling Plaintiff a Snitch**

7 With regard to Plaintiff being attacked by other inmates due to having been labeled as a
8 “snitch” or a “rat,” Plaintiff does not allege, and there is no evidence that, he was attacked by other
9 inmates under such circumstances. (Sec. Amd. Compl., ECF No. 14.) Thus, there was no harm to
10 Plaintiff, even had there been such labelling. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)
11 (deliberate indifference can be established “by showing (a) a purposeful act or failure to respond to a
12 prisoner’s pain or possible medical need and (b) harm caused by the indifference.”); Wood v.
13 Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990) (delay in treatment does not constitute deliberate
14 indifference unless it causes substantial harm); see also Lemire v. California, 726 F.3d 1062, 1074 (9th
15 Cir. 2013) (a plaintiff must “demonstrate that the defendants’ actions were both an actual and
16 proximate cause of their injuries.”). Accordingly, Plaintiff has failed to state a claim for relief, and
17 Defendants are entitled to summary judgment.

18 **IV.**

19 **RECOMMENDATION**

20 Based on the foregoing, it is HEREBY RECOMMENDED that Defendants’ motion for
21 summary judgment be granted, and judgment be entered in favor of Defendants.

22 This Findings and Recommendation will be submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-one (21)**
24 **days** after being served with this Findings and Recommendation, the parties may file written
25 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
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27 ³ As to the objective component of deliberate indifference, this demonstrates that there was no substantial risk of harm to
28 Plaintiff, from Dawson, regarding this incident. (Franco Decl., Ex. A.) Indeed, Plaintiff was not even injured. (Mathison
Decl., Ex. E, pp. 2, 12.)

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Findings and Recommendation.” The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: January 29, 2020


UNITED STATES MAGISTRATE JUDGE