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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

OUSSAMA SAHIBI,  
Plaintiff,  
v.  
BORJAS GONZALES, et al.,  
Defendants.

CASE NO. 1:15-cv-01581-LJO-MJS (PC)  
**ORDER GRANTING LEAVE TO FILE  
SURREPLY**  
**(ECF No. 45)**  
**FINDINGS AND RECOMMENDATIONS TO  
DENY DEFENDANTS' MOTION FOR  
JUDGMENT ON THE PLEADINGS**  
**(ECF No. 31)**  
**FOURTEEN (14) DAY OBJECTION  
DEADLINE**

**I. Procedural History**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 28 U.S.C. § 1983. The action proceeds on Plaintiff's Eighth Amendment excessive force claim against Defendants Brandon Cope, Borjas Gonzales, Mario Lozano, Howard Smith, and Stan, and on a Fourteenth Amendment due process claim against Defendant Crouse.

Before the Court is Defendant Gonzales, Lozano, Smith, Stan, and Cope's July 1, 2016 motion for judgment on the pleadings.<sup>1</sup> (ECF No. 31.) Plaintiff filed an opposition

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<sup>1</sup> Defendant Crouse did not join in the motion.

1 (ECF No. 35), and Defendants filed a reply (ECF No. 37). Plaintiff sought leave to file a  
2 surreply and submitted a surreply therewith. (ECF No. 45.) Defendants opposed the  
3 request and responded to the surreply. (ECF No. 47.) These matters are submitted.  
4 Local Rule 230(*l*).

## 5 **II. Motion for Leave to File Surreply**

6 Absent leave of court, no briefing on Defendant's motion is permitted beyond the  
7 opposition and reply. However, the Court may allow a surreply where "a valid reason for  
8 such additional briefing exists." Thornton v. Cates, No. 1:11-cv-01145-GSA-PC., 2013  
9 WL 2902846, at \*1 (E.D. Cal. June 13, 2013); Hill v. England, No. CVF05869RECTAG,  
10 2005 WL 3031136, \*1 (E.D. Cal. Nov. 8, 2005).

11 Here, the Court finds valid reason for allowing the surreply. The law at issue on  
12 this motion has changed since the parties submitted their briefs. Nettles v. Grounds, No.  
13 12-16935, 2016 WL 4072465, at \*3 (9th Cir. July 26, 2016). Plaintiff's surreply addresses  
14 a matter pertinent to this change in law. Furthermore, Defendants have responded to the  
15 surreply and therefore are not prejudiced by it.

16 Plaintiff's motion for leave to file a surreply will be granted. Plaintiff's surreply and  
17 Defendants' response is considered herein.

## 18 **III. Plaintiff's Claims**

19 Plaintiff's claims arise out of a July 13, 2013 incident that occurred while he was  
20 incarcerated at California Correctional Institution. Plaintiff claims that, on that date, he  
21 was released from his cell for Ramadan services when Defendant Gonzales began to  
22 make disparaging remarks toward Plaintiff. An altercation occurred between Plaintiff and  
23 Defendant Gonzales. Plaintiff was subdued and handcuffed. Plaintiff alleges various acts  
24 by Defendant Gonzales and others were excessive. Based on these allegations, the  
25 Court has permitted Plaintiff to proceed on an excessive force claim against Defendants  
26 Gonzales, Smith, Cope, Lozano and Stan. Such claim, however, is limited to  
27 Defendants' actions after Plaintiff was handcuffed.

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1 Plaintiff received a Rules Violation Report (“RVR”) in relation to this incident. On  
2 November 14, 2013, he appeared before Defendant Crouse for his disciplinary hearing.  
3 He asked Defendant Crouse to call Defendants Gonzales, Smith, Stan, Cope and  
4 Lozano as witnesses. Defendant Crouse told Plaintiff that he would not be calling  
5 anyone, “as staff reports gave a full account of the incident.” Plaintiff was found guilty of  
6 the Rules Violation.

7 The Court has permitted Plaintiff to proceed on a Fourteenth Amendment claim  
8 against Defendant Crouse based on the denial of his right to call witnesses at his  
9 disciplinary hearing.

#### 10 **IV. Legal Standard – Motion for Judgment on the Pleadings**

11 A Rule 12(c) motion for judgment on the pleadings may be brought at any time  
12 after the pleadings are closed, but within such time so as not to delay trial. Fed. R. Civ.  
13 P. 12(c). Judgment on the pleadings is appropriate when, even if all material facts in the  
14 pleading are accepted as true, the moving party is entitled to judgment as a matter of  
15 law. Hal Roach Studios, Inc. V. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir.  
16 1989).

#### 17 **V. Discussion**

18 Defendants contend that they are entitled to judgment on the pleadings because  
19 Plaintiff’s claims are barred by the favorable termination rule, also known as the Heck  
20 bar, on two grounds: first, Plaintiff’s claims are inconsistent with the guilty finding  
21 resulting from his disciplinary proceeding for Battery on a Peace Officer Resulting in  
22 Serious Injury; and second, Plaintiff’s claims are inconsistent with his felony conviction  
23 for assault on a peace officer engaged in the performance of his duties.

##### 24 **A. Heck Bar**

25 The exclusive method for challenging the fact or duration of Plaintiff’s confinement  
26 is by filing a petition for a writ of habeas corpus. Wilkinson v. Dotson, 544 U.S. 74, 78  
27 (2005). See 28 U.S.C. § 2254(a). Such claims may not be brought in a section 1983  
28 action. Nor may Plaintiff seek to invalidate the fact or duration of his confinement

1 indirectly through a judicial determination that necessarily implies the unlawfulness of the  
2 State's custody. Wilkinson, 544 U.S. at 81. A section 1983 action is barred, no matter the  
3 relief sought, if success in that action would necessarily demonstrate the invalidity of  
4 confinement or its duration. Id. at 81-82; Heck v. Humphrey, 512 U.S. 477, 489 (1994)  
5 (unless and until favorable termination of the conviction or sentence, no cause of action  
6 under section 1983 exists).

7 **B. Analysis**

8 **1. Disciplinary Proceedings**

9 Plaintiff is a prisoner serving a life sentence. He contends that the loss of credits  
10 resulting from his disciplinary proceeding will have no effect on the duration of his  
11 confinement. Defendants offer no evidence to the contrary. Given these facts, and  
12 pursuant to recent Ninth Circuit case law, Plaintiff's section 1983 claims do not fall within  
13 the "core" of habeas corpus relief and therefore are not barred by his disciplinary  
14 proceedings. Nettles v. Grounds, No. 12-16935, 2016 WL 4072465, at \*3 (9th Cir. July  
15 26, 2016). Defendants concede as much. (ECF No. 47.)

16 Accordingly, Defendants' motion for judgment on the pleadings on this ground  
17 should be denied.

18 **2. Felony Conviction**

19 Defendants argue that allowing Plaintiff to proceed against them in this action  
20 would call into question the validity of Plaintiff's conviction for assault on a peace officer  
21 engaged in the performance of his duties. Defendants only argument in this regard is  
22 statutory.

23 Plaintiff was convicted under California Penal Code § 245(c). This provision  
24 punishes certain assaults on a peace officer "engaged in the performance of his or her  
25 duties." According to Defendants, an officer utilizing excessive force is not "engaged in  
26 the performance of his or her duties." Therefore, an excessive force claim is absolutely  
27 barred where an inmate has been convicted under Penal Code § 245(c). In support,  
28 Defendants rely on case law and CDCR regulations.

1           It is true that, under California law, a person may not be convicted under Penal  
2 Code § 245(c) if the involved officer utilized excessive force during the encounter. See  
3 Price v. Ollison, No. CV 07-569 DSF JC, 2011 WL 1883999, at \*13 (C.D. Cal. Feb. 25,  
4 2011), report and recommendation adopted as modified, No. CV 07-569 DSF JC, 2011  
5 WL 1883008 (C.D. Cal. May 17, 2011); People v. White, 101 Cal. App. 3d 161, 164  
6 (1980) (“[W]here excessive force is used in making what otherwise is a technically lawful  
7 arrest, the arrest becomes unlawful and a defendant may not be convicted of an offense  
8 which requires the officer to be engaged in the performance of his duties.”); Susag v.  
9 City of Lake Forest, 94 Cal. App. 4th 1401, 1409 (Cal. Ct. App. 2002) (holding that  
10 excessive force by a police officer is not a lawful performance of his or her duties). Thus,  
11 Plaintiff may not proceed on any claims relating to whether Defendants used excessive  
12 force at the time while the offense (assault on a peace officer) occurred.

13           Here, however, Plaintiff has been allowed to proceed only on those allegations  
14 occurring after he was handcuffed by the involved officers. A conclusion that Defendants  
15 used excessive force after the attack by Plaintiff and after Plaintiff was handcuffed does  
16 not undermine Plaintiff’s conviction. See Hooper v. County of San Diego, 629 F.3d 1127,  
17 1134 (9th Cir. 2011) (A “conviction under California Penal Code § 148(a)(1) does not bar  
18 a § 1983 claim for excessive force under Heck when the conviction and the § 1983 claim  
19 are based on different actions during ‘one continuous transaction.’”); Sanford v. Motts,  
20 258 F.3d 1117, 1120 (9th Cir. 2001) (“[I]f [the officer] used excessive force subsequent  
21 to the time Sanford interfered with [the officer’s] duty, success in her section 1983 claim  
22 will not invalidate her conviction. Heck is no bar.”).

23           Defendants may wish to argue that no such actions occurred after the  
24 commission of Plaintiff’s offense and that all of the alleged force occurred during the  
25 commission of Plaintiff’s assault on a peace officer engaged in the performance of his  
26 duties. However, this is contrary to Plaintiff’s allegations and thus cannot support a  
27 motion for judgment on the pleadings. See Sturgis v. Brady, No. C 08-5363 SBA (PR),  
28 2016 WL 924859, at \*6 (N.D. Cal. Mar. 11, 2016) (denying motion for judgment on the

1 pleadings where Plaintiff claimed he already was subdued when the excessive force was  
2 used). Instead, such matters must be resolved on summary judgment or, as is more  
3 likely in this matter, at trial.

4 Accordingly, Defendants' motion for judgment on the pleadings on this basis  
5 should be denied.

6 **VI. Conclusion, Order and Recommendation**

7 Based on the foregoing, Plaintiff's motion for leave to file a surreply (ECF No. 45)  
8 is HEREBY GRANTED. Furthermore, it is HEREBY RECOMMENDED that Defendants'  
9 motion for judgment on the pleadings (ECF No. 31) be DENIED.

10 These findings and recommendations will be submitted to the United States  
11 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C.  
12 § 636(b)(1). Within fourteen (14) days after being served with the findings and  
13 recommendations, the parties may file written objections with the Court. The document  
14 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."  
15 A party may respond to another party's objections by filing a response within fourteen  
16 (14) days after being served with a copy of that party's objections. The parties are  
17 advised that failure to file objections within the specified time may result in the waiver of  
18 rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter  
19 v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

20  
21 IT IS SO ORDERED.

22 Dated: September 19, 2016

23 /s/ Michael J. Seng  
24 UNITED STATES MAGISTRATE JUDGE  
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