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6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF CALIFORNIA**
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10 JERRY KING,

11 Plaintiff,

12 v.

13 R. VILLEGAS, et al.,

14 Defendants.
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Case No. 1:17-cv-00676-EPG (PC)

ORDER FINDING COGNIZABLE CLAIMS

ORDER FOR PLAINTIFF TO:

(1) NOTIFY THE COURT THAT HE IS WILLING TO PROCEED ONLY ON THE CLAIMS OF EXCESSIVE FORCE IN VIOLATION OF THE EIGHTH AMENDMENT AGAINST DEFENDANTS VILLEGAS AND CRUZ;

(2) FILE A FIRST AMENDED COMPLAINT; OR,

(3) NOTIFY THE COURT THAT HE WISHES TO STAND ON HIS COMPLAINT, SUBJECT TO THIS COURT ISSUING FINDINGS AND RECOMMENDATIONS TO A DISTRICT JUDGE CONSISTENT WITH THIS ORDER

(ECF No. 1)

THIRTY (30) DAY DEADLINE

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26 Plaintiff Jerry King (“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
27 commencing this action on May 17, 2017 (ECF No. 1), which is now before this Court for
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1 screening. Plaintiff alleges that correctional officers used excessive force against him and then
2 falsified reports that led to punitive confinement.

3 **I. SCREENING REQUIREMENT**

4 The Court is required to screen complaints brought by prisoners seeking relief against a
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
6 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
7 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
8 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
9 § 1915A(b)(1), (2). As Plaintiff is proceeding *in forma pauperis* (ECF No. 6), the Court may
10 also screen the complaint under 28 U.S.C. § 1915. “Notwithstanding any filing fee, or any
11 portion thereof, that may have been paid, the court shall dismiss the case at any time if the court
12 determines that the action or appeal fails to state a claim upon which relief may be granted.”
13 28 U.S.C. § 1915(e)(2)(B)(ii).

14 A complaint is required to contain “a short and plain statement of the claim showing
15 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
16 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
17 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
18 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient
19 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*
20 (quoting *Twombly*, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting
21 this plausibility standard. *Id.* at 679. While a plaintiff’s allegations are taken as true, courts
22 “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d
23 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). Additionally, a
24 plaintiff’s legal conclusions are not accepted as true. *Iqbal*, 556 U.S. at 678.

25 Pleadings of *pro se* plaintiffs “must be held to less stringent standards than formal
26 pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (holding that
27 *pro se* complaints should continue to be liberally construed after *Iqbal*).

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1 **II. SUMMARY OF PLAINTIFF’S COMPLAINT**

2 At the time of the relevant events, Plaintiff was incarcerated at Kern Valley State Prison
3 (“KVSP”). Defendants R. Villegas and P. Cruz are correctional officers at KVSP. Defendant
4 J. Curry is a correctional lieutenant in charge of California Men’s Colony and at all times
5 relevant to the complaint was responsible for conducting disciplinary hearings for prisoners.

6 On August 4, 2016, Plaintiff was transferred to KVSP and placed on orientation status
7 until he appeared before the Institutional Classification Committee (“ICC”). On August 17,
8 2016, Defendant R. Villegas and another unidentified correctional officer came to Plaintiff’s
9 unit in order to escort Plaintiff and approximately nine other inmates for classification
10 purposes. Villegas immediately placed Plaintiff in restraints. Villegas then instructed Plaintiff
11 to get in line with the other inmates, who were also in restraints. Villegas took the lead position
12 of the escort.

13 Plaintiff and the other inmates were then escorted to the Mental Health Department
14 building. Once at the building, an inmate behind Plaintiff asked Plaintiff a question and
15 Plaintiff responded. This happened while Villegas was instructing all inmates to line up against
16 the wall. Villegas approached Plaintiff and stated “What don’t you understand about shut your
17 fucking mouth?” Plaintiff responded that Villegas didn’t have to get directly in Plaintiff’s face
18 and talk to him that way.

19 Villegas then grabbed Plaintiff by the back of Plaintiff’s shirt with his left hand and,
20 with great force, pushed and rammed Plaintiff’s head into the wall using the back part of his
21 forearm. This caused Plaintiff’s head to bust open and bleed.

22 Plaintiff made a remark of “what the fuck.” Villegas then took one his feet and swept
23 Plaintiff off his feet, causing Plaintiff to fall forcefully to the ground. Villas yelled out “Code
24 #1 assault on staff.”

25 Defendant P. Cruz responded to the code #1 and ran to the scene. Plaintiff was lying on
26 the ground in compliance, and was not putting up any struggle or resistance. Cruz struck
27 Plaintiff with great force and a closed fist in his right eye, causing Plaintiff’s eye to bleed.
28 Plaintiff sustained numerous other injuries as a result of the misuse of force applied during the

1 incident.

2 To cover up the extent of Plaintiff's injuries, a KVSP correctional sergeant told medical
3 staff to document on the CDCR-7219 medical report that Plaintiff refused treatment.

4 Villegas and Cruz then filed a false Rules Violation Report ("RVR") against Plaintiff,
5 alleging battery on a peace officer. As a result of this false report, Plaintiff was placed in
6 punitive segregation.

7 On November 15, 2016, Plaintiff appeared before Defendant Curry, who acted as the
8 senior hearing officer. Curry failed to ask Villegas specific questions requested by Plaintiff.
9 Curry claimed that the questions were irrelevant.

10 Plaintiff was found guilty of battery on a peace officer.

11 **III. DISCUSSION**

12 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
13 under color of state law, and (2) the defendant deprived him of rights secured by the
14 Constitution or federal law. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir.
15 2006); *see also Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing
16 "under color of state law"). A person deprives another of a constitutional right, "within the
17 meaning of § 1983, 'if he does an affirmative act, participates in another's affirmative act, or
18 omits to perform an act which he is legally required to do that causes the deprivation of which
19 complaint is made.'" *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th
20 Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

21 **A. EXCESSIVE FORCE**

22 The Cruel and Unusual Punishments Clause of the Eighth Amendment protects
23 prisoners from the use of excessive physical force. *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010)
24 (per curiam); *Hudson v. McMillian*, 503 U.S. 1, 8–9 (1992). What is necessary to show
25 sufficient harm under the Eighth Amendment depends upon the claim at issue, with the
26 objective component being contextual and responsive to contemporary standards of decency.
27 *Hudson*, 503 U.S. at 8 (quotation marks and citations omitted). For excessive force claims, the
28 core judicial inquiry is whether the force was applied in a good-faith effort to maintain or

1 restore discipline, or maliciously and sadistically to cause harm. *Wilkins*, 559 U.S. at
2 37(quoting *Hudson*, 503 U.S. at 7) (quotation marks omitted).

3 In determining whether the use of force was wanton or and unnecessary, courts may
4 evaluate the extent of the prisoner's injury, the need for application of force, the relationship
5 between that need and the amount of force used, the threat reasonably perceived by the
6 responsible officials, and any efforts made to temper the severity of a forceful response.
7 *Hudson*, 503 U.S. at 7 (quotation marks and citations omitted).

8 The Court finds that, liberally construed, Plaintiff has stated a cognizable claim for
9 relief against Defendants R. Villegas and P. Cruz for excessive force in violation of the Eighth
10 Amendment. Plaintiff has alleged facts indicating that he was restrained when first R. Villegas
11 and then P. Cruz assaulted him without cause.

12 **B. PLAINTIFF'S DUE PROCESS CLAIMS**

13 The Due Process Clause of the Fourteenth Amendment protects prisoners from being
14 deprived of life, liberty, or property without due process of law. *Wolff v. McDonnell*, 418 U.S.
15 539, 556 (1974). However, “[a] due process claim is cognizable only if there is a recognized
16 liberty or property interest at stake.” *Coakley v. Murphy*, 884 F.2d 1218, 1220 (9th Cir.1989).
17 A liberty interest may arise from the Constitution itself, or from an expectation or interest
18 created by state law or prison regulations. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005);
19 *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

20 “Prison disciplinary proceedings are not part of a criminal prosecution, and the full
21 panoply of rights due a defendant in such proceedings does not apply.” *Wolff v. McDonnell*,
22 418 U.S. 539, 556 (1974). With respect to prison disciplinary proceedings, the minimum
23 procedural requirements that must be met are: (1) written notice of the charges; (2) at least 24
24 hours between the time the prisoner receives written notice and the time of the hearing, so that
25 the prisoner may prepare his defense; (3) a written statement by the fact finders of the evidence
26 they rely on and reasons for taking disciplinary action; (4) the right of the prisoner to call
27 witnesses in his defense, when permitting him to do so would not be unduly hazardous to
28 institutional safety or correctional goals; and (5) legal assistance to the prisoner where the

1 prisoner is illiterate or the issues presented are legally complex. *Id.* at 563–71.

2 In addition, “some evidence” must support the decision of the hearing officer,
3 *Superintendent v. Hill*, 472 U.S. 445, 455 (1985), and the evidence must have some indicia of
4 reliability, *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987). The “some evidence” standard
5 is not particularly stringent and the relevant inquiry is whether “there is *any* evidence in the
6 record that could support the conclusion reached....” *Hill*, 472 U.S. at 455–56 (emphasis
7 added).

8 Prisoners do not have a constitutional right to confront and cross-examine adverse
9 witnesses at disciplinary proceedings. *Ponte v. Real*, 471 U.S. 491, 510 (1985).

10 Plaintiff claims that Defendant Curry violated his due process rights by failing to ask
11 certain questions of Defendant Villegas. This allegation does not state a claim for a
12 constitutional violation under the legal standards explained above. Plaintiff does not have a
13 constitutional right to examine adverse witnesses nor have his specific questions asked.

14 The Court will give Plaintiff leave to amend his complaint if he believes that the
15 disciplinary proceeding failed to comport with the constitutional standards described above.

16 C. PERJURY

17 Plaintiff’s complaint alleges a claim for perjury based on the allegation that Defendants
18 Villegas and Cruz lied about the facts of the alleged incident in generating a rules violation
19 report. Plaintiff cites the California Penal Code, which prohibits making an unlawful statement
20 in a crime report.

21 The California Penal Code is a criminal statute. Violations of those laws are brought by
22 the executive branch, such as a district attorney or a United States Attorney. The penal code
23 does not provide a private right of action that would allow Plaintiff to prosecute defendants for
24 criminal conduct.

25 Making false statements, in and of itself, does not violate the U.S. Constitution. The
26 Ninth Circuit held in *Hernandez v. Johnston*, 833 F.2d 1316 (9th Cir. 1987) that inaccurate
27 information in a prison record did not violate the prisoner's due process rights. *Id.* at 1318
28 (“Magistrate Burgess did not discuss Hernandez’ separable claim of a due process right to

1 accurate information in his prison record. We address the issue, and hold that Hernandez was
2 not deprived of liberty by the presence of the challenged statements.”).

3 Although there is no Ninth Circuit case on point, the issue of when false allegations
4 give rise to a constitutional claim was thoroughly addressed in a decision of this district, which
5 was affirmed by the Ninth Circuit in an unpublished decision:

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7 A prisoner has no constitutionally guaranteed immunity from being falsely or
8 wrongly accused of conduct which may result in the deprivation of a protected
9 liberty interest. *See Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989);
10 *Freeman v. Rideout*, 808 F.2d 949, 951 (2d Cir. 1986). As long as a prisoner
11 receives procedural due process during his disciplinary hearing, a prisoner's
12 allegation of a fabricated prison disciplinary charge fails to state a cognizable
13 claim for relief under § 1983. *See Freeman*, 808 F.2d at 951 (the filing of a false
14 disciplinary charge against a prisoner is not actionable under § 1983 if prison
15 officials provide the prisoner with procedural due process protections);
16 *Hanrahan v. Lane*, 747 F.2d 1137, 1140–41 (7th Cir. 1984) (“[A]n allegation
17 that a prison guard planted false evidence which implicates an inmate in a
18 disciplinary infraction fails to state a claim for which relief can be granted where
19 the procedural due process protections as required in *Wolff v. McDonnell* are
20 provided.”).

21 Although the Ninth Circuit has not directly addressed this issue in a published
22 opinion, district courts throughout California relying on the cases cited above
23 have determined that a prisoner's allegation that prison officials issued a false
24 disciplinary charge against him fails to state a cognizable claim for relief under
25 § 1983. *See, e.g., Conner v. Winslow*, No. EDCV 07–218 AG (AN), 2009 WL
26 1549737 at *18 (C.D. Cal. June 1, 2009); *Williams v. Foote*, No. CV 08–2838
27 CJC (JTL), 2009 WL 1520029 at *7 (C.D. Cal. May 28, 2009); *Salisbury v.*
28 *Miller*, No. C 08–4680 MHP (pr), 2009 WL 743925 at *2 (N.D. Cal. Mar. 18,
2009); *Meraz v. Reppond*, No. C 08–4540 MHP (pr), 2009 WL 723841 at *2
(N.D. Cal. Mar. 18, 2009); *Rodgers v. Reynaga*, No. CV 1–06–1083 JAT, 2009
WL 62130 at *2 (E.D. Cal. Jan. 8, 2009); *Drake v. Berg*, No. C 07–3844 PJH
(PR), 2008 WL 4482848 at *1 (N.D. Cal. Oct. 1, 2008); *Moore v. Thomas*, No.
C 06–2105 SBA (PR), 2008 WL 4447726 at *4 (N.D. Cal. Sept. 30, 2008);
Deadmon v. Grannis, No. 06–cv–1382 LAB (WMC), 2008 WL 595883 at *10
(S.D. Cal. Feb. 29, 2008); *Carrillo v. Pena*, No. CIV S–06–2924 RRB DAD,
2007 WL 2994689 at *2 (E.D. Cal. Oct. 12, 2007); *Player v. Salas*, No. 04–cv–
1761 LAB (WMC), 2007 WL 2781102 at *7 (S.D. Cal. Sept. 21, 2007), *aff'd*
2009 WL 890967 (9th Cir. Apr.3, 2009); *Brookins v. Terhune*, No. CIV S–03–
0916 GEB JFM, 2005 WL 3262940 at *4 (E.D. Cal. Nov. 28, 2005), *adopted by*
2006 WL 647975, *aff'd* 2007 WL 2827544 (9th Cir. Sept.27, 2007).

1 *Harper v. Costa* (E.D. Cal., June 16, 2009, No. CIVS07-2149LKK DADP) 2009 WL 1684599,
2 at *2–3, *subsequently aff'd*, 393 Fed.Appx. 488 (9th Cir. 2010).

3 In light of these legal standards, Plaintiff fails to state a constitutional claim based on
4 the alleged false allegations against him. While the filing of false statements may constitute
5 perjury under criminal law, it does not independently violate the Constitution so long as
6 Plaintiff received due process before receiving punishment that rises to a deprivation of a
7 liberty interest. Based on the allegations in the complaint, it appears that Plaintiff was afforded
8 all the process that was due.

9 **IV. CONCLUSION AND ORDER**

10 The Court finds that Plaintiff's complaint states cognizable claims for excessive force in
11 violation of the Eighth Amendment against Defendants R. Villegas and P. Cruz. Plaintiff's
12 complaint fails to state any other claim.

13 Under Rule 15(a) of the Federal Rules of Civil Procedure, "leave to amend shall be
14 freely given when justice so requires." Accordingly, the Court will provide Plaintiff with time
15 to file an amended complaint curing the deficiencies identified above. *Lopez v. Smith*, 203 F.3d
16 1122, 1126-30 (9th Cir. 2000). Plaintiff is granted leave to file an amended complaint within
17 thirty days.

18 If Plaintiff chooses to file an amended complaint, the amended complaint must allege
19 constitutional violations under the law as discussed above. Specifically, Plaintiff must state
20 what each named defendant did that led to the deprivation of Plaintiff's constitutional or other
21 federal rights. Fed. R. Civ. P. 8(a); *Iqbal*, 556 U.S. at 678; *Jones v. Williams*, 297 F.3d 930,
22 934 (9th Cir. 2002). Plaintiff must also demonstrate that each defendant *personally*
23 participated in the deprivation of his rights. *Jones*, 297 F.3d at 934 (emphasis added). Plaintiff
24 should note that although he has been given the opportunity to amend, it is not for the purpose
25 of changing the nature of this suit or adding unrelated claims. *George v. Smith*, 507 F.3d 605,
26 607 (7th Cir. 2007) (no "buckshot" complaints).

27 Plaintiff is advised that an amended complaint supersedes the original complaint, *Lacey*
28 *v. Maricopa County*, 693 F.3d. 896, 907 n.1 (9th Cir. 2012) (*en banc*), and must be complete in

1 itself without reference to the prior or superseded pleading, Local Rule 220. Therefore, in an
2 amended complaint, as in an original complaint, each claim and the involvement of each
3 defendant must be sufficiently alleged. The amended complaint should be clearly and boldly
4 titled “First Amended Complaint,” refer to the appropriate case number, and be an original
5 signed under penalty of perjury.

6 Plaintiff may also choose to stand on this complaint, in which case the Court will issue
7 findings and recommendations to a district court judge, recommending that the case proceed
8 only on the excessive force claims described above and that all other claims and defendants be
9 dismissed. **If Plaintiff chooses to stand on his complaint, he must also file a signed copy of**
10 **the complaint** (while there was a page prepared for Plaintiff’s signature, the copy sent to the
11 Court was not signed).

12 Based on the foregoing, it is **HEREBY ORDERED** that:

- 13 1. Within **thirty (30) days** from the date of service of this order, Plaintiff shall
14 either:
 - 15 a. File a First Amended Complaint, which the Court will screen in due course;
 - 16 b. Notify the Court in writing that he does not wish to file an amended
17 complaint and is instead willing to proceed only on the claims found
18 cognizable by this order. If Plaintiff chooses this option he must also file a
19 signed copy of the complaint; or
 - 20 c. Notify the Court in writing that he does not agree to go forward on only the
21 claims found cognizable by this order or file an amended complaint, in
22 which case the Court will issue findings and recommendations to a district
23 judge consistent with this order.
- 24 2. Should Plaintiff choose to amend the complaint, Plaintiff shall caption the
25 amended complaint “First Amended Complaint” and refer to the case number
26 1:17-cv-00676-EPG; and

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