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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARLIN PENN,
Plaintiff,
v.
WARDEN OF KERN VALLEY STATE
PRISON, *et al.*,
Defendant.

Case No. 1:18-cv-01482-AWI-HBK
FINDINGS AND RECOMMENDATIONS TO
DISMISS CERTAIN CLAIMS AND
DEFENDANTS¹
FOURTEEN-DAY OBJECTION PERIOD
(Doc. No. 19)

Plaintiff Marlin Penn (“Plaintiff” or “Penn”) is a state prisoner proceeding *pro se* in this rights action filed under 42 U.S.C. § 1983. Plaintiff’s second amended complaint is before the court for screening. (Doc. No. 19, “SAC”). The undersigned recommends Plaintiff be permitted to proceed with his cognizable claims and that all other non-cognizable claims and improper defendants be dismissed.

I. BACKGROUND

A. Procedural Posture

Penn filed his initial complaint on October 26, 2018. (Doc. No. 1). The then-assigned magistrate judge granted Penn’s motion for leave to proceed *in forma pauperis* on November 6,

¹ The undersigned submits these factual findings and recommendations to the District Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2019).

1 2018. (Doc. No. 7). On November 22, 2019, the Court adopted the then-assigned magistrate’s
2 findings and recommendations that determined that Penn stated a retaliation claim against
3 Defendants Lucas and Hernandez and that recommended all other claims and defendants be
4 dismissed. (Doc. No. 15). The Court also permitted Penn to file an amended complaint. (*Id.*)
5 Penn filed a first amended complaint. (Doc. No. 16, “FAC”). After screening, the then-assigned
6 magistrate judge found the FAC deficient because it was not freestanding but referenced
7 Plaintiff’s initial complaint and subsequent briefing. (Doc. No. 18). The Court directed Penn to
8 either file a second amended complaint that is complete on its face and without reference to prior
9 submissions, or to withdraw his FAC and proceed on the claims sanctioned by the court. (*Id.*).
10 Penn elected to file a second amended complaint. (Doc. No. 19, “SAC”).

11 **B. Summary of SAC**

12 Penn is currently incarcerated at Salinas Valley State Prison (“SVSP”) in Soledad,
13 California. (Doc. No. 10). The SAC alleges constitutional violations arising out of Penn’s
14 confinement at Kern Valley State Prison (“KVSP”). (Doc. No. 19 at 6). Plaintiff names six
15 defendants, all of whom are employed by the California Department of Corrections and
16 Rehabilitation (“CDCR”) at KVSP: A. Lucas, appeals coordinator; M. Hernandez, correctional
17 counselor II; the warden of KVSP;² G. Gebremedhin, correctional counselor I; Lt. Sotelo,
18 correctional lieutenant; M. Jimenez, correctional officer; and T. Howard, correctional officer. (*Id.*
19 at 2-4). Penn claims defendants violated his Sixth, Eighth, and Fourteenth Amendment rights.
20 (*Id.* at 4).

21 The facts in support are summarized as follows. On November 24 and 29, 2017, Jimenez
22 and Howard, at the direction of Hernandez, issued two false rules violation reports (“RVRs”),
23 which were then erroneously classified as “serious” by Hernandez. (*Id.* at 5, 7). Hernandez then
24 used the RVRs to place Penn on “c-status.” (*Id.* at 5-6). Upon filing an administrative appeal,
25 Penn claims Hernandez retaliated against him by personally warning him that he would “take
26 action” against him and, if he did not withdraw his administrative appeal, he would make Penn

27 _____
28 ² Plaintiff does not provide the name of the warden. Accordingly, the court will refer to this defendant as
“warden.” Plaintiff should provide notice to the court upon discovery of the warden’s name.

1 wish he had withdrawn it. (*Id.* at 6, 9). Further, Penn states that when Hernandez interviewed
2 him about his administrative appeal, he told him to withdraw his complaint or else Penn would
3 “regret it.” (*Id.* at 9). Lucas, Gebremedhin, and the Warden knew about Hernandez’s retaliation
4 and failed to intervene. (*Id.* at 6). Penn further states Hernandez “instructed” each defendant to
5 retaliate against him, assisted Jimenez and Howard in drafting the RVRs, instructed Gebremedhin
6 to place him on “c-status,” and asked Lucas and the warden to “cover all this up.” (*Id.*).

7 Penn contends that Hernandez directed Lucas to circumvent all his appeals. (*Id.* at 7).
8 Lucas refused to file Penn’s six staff complaints, thereby engaging in biased and prejudicial
9 behavior “geared to protect staff,” rather than protecting his due process rights. (*Id.* at 10). Lucas
10 also labeled Penn as an inmate who was abusing the appeals system. (*Id.* at 10). Sotelo falsified
11 an administrative segregation order which claimed Penn threatened staff. (*Id.* at 7). Penn states
12 that the Warden disregarded his due process rights and ignored his complaints against prison
13 staff. (*Id.* at 12). Instead of addressing his complaint, the Warden placed Penn in a housing unit
14 without electricity for two months, thereby subjecting him to cruel and unusual punishment. (*Id.*
15 at 12). Penn claims that all defendants deprived him of due process, loss of good time credits,
16 and inflicted cruel and unusual punishment on him. (*Id.* at 6).

17 As a result of defendants’ actions, Penn admits he suffered “no physical injury” but claims
18 he is under constant stress, takes medication to sleep, and was placed on a seven-day stress
19 assessment. (*Id.* at 7). As relief, Penn requests that all his complaints against staff and
20 administrative appeals be investigated, that a restraining order against Lucas be issued, and that
21 he be transferred to another prison. (*Id.*). Penn also seeks “actual and punitive” damages. (*Id.*).

22 **II. APPLICABLE LAW**

23 **A. Screening Requirements and Fed. R. Civ. P. 8**

24 Under 28 U.S.C. § 1915A, a court is required to screen a prisoner’s complaint that seeks
25 relief against a governmental entity, its officers, or its employees. *See* 28 U.S.C. § 1915A(a).
26 The court must identify any cognizable claims and dismiss any portion of the complaint that is
27 frivolous or malicious, that fails to state a claim upon which relief may be granted, or that seeks
28 monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C.

1 §§ 1915A(b)(1), (2); *see also* 28 U.S.C. § 1915(e)(2)(b)(ii) (governing actions proceeding *in*
2 *forma pauperis*).

3 A claim fails to state a claim upon which relief may be granted if it appears that the
4 plaintiff can prove no set of facts in support of the claim that would entitle him to relief. *Hishon*
5 *v. King & Spalding*, 467 U.S. 69, 73 (1984); *Palmer v. Roosevelt Lake Log Owners Ass’n, Inc.*,
6 651 F.2d 1289, 1294 (9th Cir. 1981). A claim is legally frivolous when it lacks an arguable basis
7 either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745
8 F.2d 1221, 1227-28 (9th Cir. 1984). The court may dismiss a claim as frivolous where it is based
9 on an indisputably meritless legal theory or where the factual contentions are clearly baseless.
10 *Neitzke*, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however
11 inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639,
12 640 (9th Cir. 1989); *Franklin*, 745 F.2d at 1227.

13 During screening, the court must accept as true the allegations of the complaint, *Hosp.*
14 *Bldg. Co. v. Rex Hosp. Tr.*, 425 U.S. 738, 740 (1976), construe the pleading in the light
15 most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v.*
16 *McKeithen*, 395 U.S. 411, 421 (1969); *Bernhardt v. L.A. County*, 339 F.3d 920, 925 (9th Cir.
17 2003) (the court must construe *pro se* pleadings liberally and afford the *pro se* litigant the benefit
18 of any doubt). The court is not required to accept as true conclusory allegations, unreasonable
19 inferences, or unwarranted deductions of fact. *Western Mining Council v. Watt*, 643 F.2d 618,
20 624 (9th Cir. 1981).

21 Plaintiff’s claims must be facially plausible to survive screening, which requires sufficient
22 factual detail to allow the court to reasonably infer that each named defendant is liable for the
23 misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, (2009) (quotation marks omitted); *Moss v.*
24 *U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant
25 acted unlawfully is not sufficient, and mere consistency with liability falls short of satisfying the
26 plausibility standard. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss*, 572 F.3d at 969.

27 A complaint must contain “a short and plain statement of the claim showing the pleader is
28 entitled to relief. . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but

1 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
2 statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citations omitted). Courts “are not required
3 to indulge unwarranted inferences,” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir.
4 2009) (internal quotation marks and citation omitted). While factual allegations are accepted as
5 true, legal conclusions are not. *Iqbal*, 556 U.S. at 678.

6 If the court determines that a pleading could be cured by the allegation of other facts, a
7 *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the action.
8 See *Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (en banc); *Lucas v. Department of*
9 *Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). A district court should not, however, advise the litigant
10 on how to cure the defects. Such advice “would undermine district judges’ role as impartial
11 decisionmakers.” *Pliler v. Ford*, 542 U.S. 225, 231 (2004); see also *Lopez*, 203 F.3d at 1131
12 n.13.

13 Examples of immunity from relief for consideration during screening, include, but are not
14 limited to, quasi-judicial immunity, sovereign immunity, or qualified immunity. Additionally, a
15 plaintiff may not recover monetary damages absent a showing of physical injury. See 42 U.S.C. §
16 1997e(e). In other words, to recover monetary damages, a plaintiff must allege physical injury
17 that need not be significant but must be more than *de minimis*, except when involving First
18 Amendment claims. *Oliver v. Keller*, 289 F.3d 623, 626-28 (9th Cir. 2002) (surveying other
19 circuit courts for the first time to address injury requirement for monetary damages, and agreeing
20 with the Second, Fifth, and Eleventh Circuits on Prison Litigation Reform Act’s injury
21 requirement).

22 Finally, the Federal Rules of Civil Procedure permit a complaint to include all *related*
23 *claims* against a party and permit joinder of all defendants alleged to be liable for the “same
24 transaction, occurrence, or series of transactions or occurrence” where “any question of law or
25 fact common to all defendants will arise in the action.” Fed. R. Civ. P. 18(a) and 20(a)(2)
26 (emphasis added). But the Rules do not permit conglomeration of unrelated claims against
27 unrelated defendants in a single lawsuit. Unrelated claims must be filed in separate lawsuits.
28

1 **B. Section 1983**

2 Section 1983 allows a private citizen to sue for the deprivation of a right secured by
3 federal law. *See* 42 U.S.C. § 1983; *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 916 (2017). To
4 state a claim under § 1983, a plaintiff must show that a defendant acting under color of state law
5 caused an alleged deprivation of a right secured by federal law. *See* 42 U.S.C. § 1983; *Soo Park*
6 *v. Thompson*, 851 F.3d 910, 921 (9th Cir. 2017). The plaintiff can satisfy the causation
7 requirement by showing either: (1) the defendant’s “personal involvement” in the alleged
8 deprivation or (2) a “sufficient causal connection” between the defendant’s conduct as a
9 supervisor and the alleged deprivation. *See King v. Cty. of Los Angeles*, 885 F.3d 548, 559 (9th
10 Cir. 2018).

11 The statute plainly requires that there be an actual connection or link between the actions
12 of the defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v.*
13 *Dep’t of Soc. Servs.*, 436 U.S. 658, (1978); *Rizzo v. Goode*, 423 U.S. 362, (1976). The Ninth
14 Circuit has held that “[a] person ‘subjects’ another to the deprivation of a constitutional right,
15 within the meaning of section 1983, if he does an affirmative act, participates in another’s
16 affirmative acts or omits to perform an act which he is legally required to do that causes the
17 deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

18 **III. ANALYSIS**

19 Plaintiff claims that his Sixth, Eighth, and Fourteenth Amendment rights were violated by
20 defendants. (Doc. No. 19 at 4). As discussed below, Penn has stated First and Eighth
21 Amendment claims but fails to state Sixth and Fourteenth Amendment violations.

22 **A. First Amendment Retaliation Claim as to Defendants Hernandez & Lucas**

23 “Prisoners have a First amendment right to file grievances against prison officials and to
24 be free from retaliation for doing so.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012)
25 (citing *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009)). To prevail on a retaliation claim
26 under the First Amendment, a plaintiff must show that: (1) he engaged in a protected conduct;
27 (2) a state actor took some adverse action against him; (3) the protected conduct was a
28 “substantial” or “motivating” factor behind the adverse action; (4) the adverse action would chill

1 a person of ordinary firmness from future exercise of First Amendment rights; and (5) the action
2 did not reasonably advance a legitimate correctional goal. *See Rhodes v. Robinson*, 408 F.3d 559,
3 567-68 (9th Cir. 2005).

4 Penn has stated retaliation claims against defendants Hernandez and Lucas. Penn alleges
5 Hernandez warned him that he would “take action” against him for filing an administrative appeal
6 and that if he did not withdraw his appeal, he would make plaintiff wish he had withdrawn it.
7 (Doc. No. 19 at 6, 9). Penn also states that Hernandez told him to withdraw his complaint or else
8 he would “regret it” and placed Penn on “c-status.” (*Id.* at 9., 5-6). As to Lucas, Penn alleges
9 that Lucas refused to file his six staff complaints, thereby engaging in biased and prejudicial
10 behavior “geared to protect staff.” (*Id.* at 10). Lucas then labeled Penn as an inmate who was
11 abusing the appeal system. (*Id.*). These allegations satisfy each of the five elements of a
12 retaliation claim. Filing administrative grievances is protected conduct. Hernandez and Lucas
13 acted adversely against Penn—assigning him a restrictive classification, refusing to file his
14 grievances, and implying that something bad would happen to Penn if he did not withdraw his
15 grievances. Filing a grievance is protected conduct. These actions would chill a person of
16 ordinary firmness from filing future appeals and staff complaints and lacked a legitimate
17 penological goal. Accordingly, Penn should be permitted to proceed on his First Amendment
18 retaliation claims against Hernandez and Lucas.

19 **B. Eighth Amendment and First Amendment as to Warden**

20 Penn claims that his Eighth Amendment right to be free from cruel and unusual punishment
21 was violated. (Doc. No. 19 at 6). To state an Eighth Amendment cruel and unusual punishment
22 claim based on conditions of confinement, the plaintiff must prove a denial of the “‘minimal
23 civilized measure of life’s necessities,’ occurring through ‘deliberate indifference’ by prison
24 personnel or officers.” *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (quoting *Rhodes v.*
25 *Chapman*, 452 U.S. 337, 347, (1981). “[E]xtreme deprivations are required to make out a[n]
26 [Eighth Amendment] conditions-of-confinement claim.” *Hudson v. McMillian*, 503 U.S. 1, 9
27 (1992) (citation omitted) (noting that “[b]ecause routine discomfort is part of the penalty that
28

1 criminal offenders pay for their offenses against society, only those deprivations denying the
2 minimal civilized measure of life’s necessities are sufficiently grave to form the basis of an Eighth
3 Amendment [conditions of confinement] violation”); *Farmer v. Brennan*, 511 U.S. 825, 832
4 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (“The Constitution ‘does not
5 mandate comfortable prisons.’”). “[A] prison official may be held liable under the Eighth
6 Amendment for denying humane conditions of confinement only if he knows that inmates face a
7 substantial risk of harm and disregards that risk by failing to take reasonable measures to abate
8 it.” *Farmer*, 511 U.S. at 835. To satisfy the first prong, the inmate must show that he is incarcerated
9 under conditions posing a substantial risk of serious harm. *See id.* To satisfy the second prong, the
10 official must know of and disregard an excessive risk to inmate safety. *See id.* at 837. The official
11 must both be aware of facts from which the inference could be drawn that a substantial risk of
12 serious harm exists, and he must also draw the inference. *See id.*

13 Here, Penn claims that Jimenez, Howard, and Sotelo “knowingly falsified state of California
14 documents with malicious & sadistic intent to inflict cruel and unusual punishment.” (Doc. No. 19
15 at 6). Plaintiff alleges that the falsified RVRs caused the loss of good time credits and privileges,
16 which ultimately caused cruel and unusual punishment. (*Id.* at 8). Penn also states that his seven-
17 day placement in administrative segregation and his two-month placement in a housing unit without
18 electricity constituted cruel and unusual punishment. (*Id.* at 11-12).

19 Penn’s loss of good time credits and privileges and his placement in administrative
20 segregation fails to state an Eighth Amendment cruel and unusual punishment claim. The loss of
21 good time credits and privileges does not rise to the level of cruel and unusual punishment. *See*
22 *Smith v. Daguio*, No. 18-06378, 2019 U.S. Dist. LEXIS 57749, 2019 WL 1472308, at *4 (N.D.
23 Cal. Apr. 1, 2019) (stating that “[t]here is no law that supports the claim that the loss
24 of privileges amounts to cruel and unusual punishment” and therefore dismissing the
25 plaintiff’s Eighth Amendment claim). And “[m]ere placement in administrative segregation or
26 isolation does not violate the Eighth Amendment.” *Salstrom v. Sumner*, No. 91-15689, 1992 U.S.
27 App. LEXIS 7911, at *3 (9th Cir. Apr. 10, 1992); *Berry v. Gomez*, No. 98-16357, 2000 U.S. App.
28 LEXIS 3622, at *2 (9th Cir. Mar. 3, 2000) (Plaintiff failed to state any facts “indicating that even

1 long exposure to the conditions alleged to exist in administrative confinement amounts to cruel and
2 unusual punishment within the meaning of the Eighth Amendment.”).

3 However, to the extent Penn was without electricity in his cell for two months, he has stated
4 a claim of Eighth Amendment cruel and unusual punishment. Penn claims that the Warden
5 “ordered his staff to place [plaintiff] in a housing unit that had no electricity and ordered [plaintiff]
6 to stay in that cell for two months.” (Doc. No. 19 at 12). Electricity provides lighting and
7 temperature control, which courts in this district have held to be attributes of adequate shelter under
8 the Eighth Amendment. “Adequate lighting is one of the fundamental attributes of adequate shelter
9 required by the Eighth Amendment.” *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985)
10 (plaintiff stated an Eighth Amendment claim where “the lighting was so poor that it was inadequate
11 for reading and caused eyestrain and fatigue and hindered attempts to ensure that basic sanitation
12 was maintained”); *see also Jackson v. Cash*, No. EDCV 14-02384-JVS (DTB), 2016 U.S. Dist.
13 LEXIS 150680, at *10 (C.D. Cal. Sept. 21, 2016) (plaintiff stated an Eighth Amendment claim
14 where prison cell had no electricity and therefore no fan to cool plaintiff’s cell from excessive heat);
15 *Adler v. McDonald*, No. 2:15-cv-0789 CKD P, 2015 U.S. Dist. LEXIS 69301, at *4 (E.D. Cal. May
16 28, 2015) (plaintiff stated an Eighth Amendment claim where prison cell had no adequate plumbing
17 or electricity).

18 Although there is no *respondeat superior* liability in § 1983 claims, *see Iqbal*, 556 U.S. at
19 678, here Penn alleges that the Warden personally ordered him to be placed in a cell without
20 electricity. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Accordingly, the Warden is the
21 proper defendant for this Eighth Amendment claim. Construing Penn’s electricity claim liberally,
22 he has shown that the conditions of his confinement posed a substantial risk of harm, and that the
23 Warden knew of and disregarded an excessive risk to his safety. *See Farmer*, 511 U.S. at 835, 837.
24 Further, these same actions raise a First Amendment retaliation claim to the extent Penn attributes
25 the Warden’s decision to place him in the cell without electricity because of his writing grievances.

26 **C. No Sixth Amendment Claim**

27 The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the
28 right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

1 shall have been committed, which district shall have been previously ascertained by law, and to
2 be informed of the nature and cause of the accusation; to be confronted with the witnesses against
3 him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance
4 of Counsel for his defense.” U.S Const. Amend. VI. Penn has not provided any facts that lead
5 the Court to find that he has stated a Sixth Amendment claim. Rather, Penn simply lists the Sixth
6 Amendment as one of his rights he alleges defendants violated but provides no facts to support
7 this claim. (Doc. No. 19 at 4). Accordingly, Penn’s Sixth Amendment claim should be
8 dismissed.

9 **D. No Fourteenth Amendment Due Process Claim**

10 Penn contends that Jimenez and Howard violated his due process rights when they
11 falsified two RVRs for a minor infraction. (Doc. No. 19 at 5). The filing of a false RVR by a
12 prison official against a prisoner is not a *per se* violation of the prisoner’s constitutional rights.
13 *See Muhammad v. Rubia*, No. C08-3209 JSW PR, 2010 WL 1260425, at *3 (N.D. Cal. Mar. 29,
14 2010) (“[A] prisoner has no constitutionally guaranteed immunity from being falsely or wrongly
15 accused of conduct which may result in the deprivation of a protected liberty interest.”); *Harper v.*
16 *Costa*, No. CIVS07-2149 LKK DAD P, 2009 WL 1684599, at *2-3 (E.D. Cal. June 16, 2009)
17 (“Although the Ninth Circuit has not directly addressed this issue in a published opinion, district
18 courts throughout California . . . have determined that a prisoner’s allegation that prison officials
19 issued a false disciplinary charge against him fails to state a cognizable claim for relief under
20 § 1983.”), *aff’d* 393 F. App’x 488 (9th Cir. 2010).

21 The filing of false allegations by itself does not violate a prisoner’s constitutional rights as
22 long as: “(1) the prisoner receives procedural due process before there is a deprivation of liberty
23 as a result of false allegations, and (2) the false allegations are not in retaliation for the prisoner
24 exercising constitutional rights.” *Richardson v. Tuman*, No. 1:18-cv-01166-EPG-PC2019, U.S.
25 Dist. LEXIS 26178, at *13 (E.D. Cal. Feb. 19, 2019); *see Muhammad*, 2010 WL 1260425, at *3
26 (“As long as a prisoner is afforded procedural due process in the disciplinary hearing, allegations
27 of a fabricated charge fail to state a claim under § 1983.”); *Freeman v. Rideout*, 808 F.2d 949,
28 951 (2d Cir. 1986) (holding that the filing of a false disciplinary charge against a prisoner is not

1 actionable under § 1983 if prison officials provide the prisoner with procedural due process
2 protections).

3 **1. Retaliation**

4 Although Penn states that the RVRs were issued in retaliation, Penn does not state what
5 protected activity he took part in prior to the issuance of the RVRs, thereby causing retaliation.
6 Unlike Penn’s retaliation claims *supra* based on his filing of grievance appeals, Penn does not
7 state what actions he took, if any, that triggered defendants Jimenez and Howard to file the false
8 RVRs. According to the timeline, the RVRs were issued on November 24, 2017 and November
9 29, 2017. The other acts of retaliatory conduct of which Penn complains occurred after the RVRs
10 were issued. Thus, the SAC fails to state a retaliation claim in relation to the RVRs.

11 **2. Fourteenth Amendment Due Process**

12 The Fourteenth Amendment to the U.S. Constitution provides that “[n]o State shall . . .
13 deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend.
14 XIV, § 1. A § 1983 claim based upon procedural due process has two elements: “We first ask
15 whether there exists a liberty or property interest of which a person has been deprived, and if so
16 we ask whether the procedures followed by the State were constitutionally sufficient.” *Swarthout*
17 *v. Cooke*, 562 U.S. 216, 219 (2011).

18 **a. The Liberty Interest**

19 A liberty interest which implicates the protections of due process arises from one of two
20 sources: The Due Process Clause of the Fourteenth Amendment or state law. *Wilkinson v. Austin*,
21 545 U.S. 209, 222 (2005). When deciding whether the Constitution itself protects an alleged
22 liberty interest of a prisoner, the court should consider whether the practice or sanction in
23 question “is within the normal limits or range of custody which the conviction has authorized the
24 State to impose.” *Meachum v. Fano*, 427 U.S. 215, 225 (1976); *accord Hewitt v. Helms*, 459
25 U.S. 460, 466-70 (1983), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472
26 (1995). The Supreme Court has concluded that the Due Process Clause itself does not grant
27 prisoners a liberty interest in good-time credits, *see Wolff v. McDonnell*, 418 U.S. 539, 557
28 (1974); in remaining in the general population, *see Sandin*, 515 U.S. at 485-86; *Hewitt*, 459 U.S.

1 at 468; or in not losing privileges, *Baxter v. Palmigiano*, 425 U.S. 308, 323 (1976).

2 With respect to liberty interests arising from state law, the existence of a liberty interest
3 created by prison regulations is determined by focusing on the nature of the deprivation. *Sandin*,
4 515 U.S. at 481-84. Liberty interests created by prison regulations are limited to freedom from
5 restraint which “imposes atypical and significant hardship on the inmate in relation to the
6 ordinary incidents of prison life.” *Id.* at 484. When conducting the *Sandin* inquiry, courts look to
7 three factors in determining whether an atypical and significant hardship exists: (1) whether the
8 challenged condition “mirrored those conditions imposed upon inmates in administrative
9 segregation and protective custody,” and thus comported with the prison’s discretionary
10 authority; (2) the duration and intensity of the conditions; and (3) whether the change in
11 confinement would “inevitably affect the duration of [the prisoner’s] sentence.” *Chappell v.*
12 *Mandeville*, 706 F.3d 1052, 1064 (9th Cir. 2013) (citation and internal quotation marks omitted).
13 Courts applying the *Sandin* factors have determined that, in certain circumstances, prisoners may
14 have a liberty interest in avoiding administrative segregation. *See Jackson v. Carey*, 353 F.3d
15 750, 755-57 (9th Cir. 2003). On the other hand, courts have held that prisoners have no liberty
16 interest in their classification status or in their eligibility for rehabilitative programs. *See Myron*
17 *v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007).

18 At this stage of the litigation, construing Penn’s SAC liberally, the Court finds that Penn
19 has alleged enough facts to indicate that he could have been deprived of a liberty interest arising
20 from state law. Penn alleges that Sotelo placed plaintiff in administrative segregation based on
21 Sotelo’s false claim that plaintiff threatened staff. (Doc. No. 19 at 7). Depending on the
22 circumstances of Penn’s administrative segregation, he may have a liberty interest in avoiding it.
23 Accordingly, the Court must inquire whether the procedures followed by the State [in placing
24 plaintiff in administrative segregation] were constitutionally sufficient.” *Swarthout*, 562 U.S. at
25 219.

26 **b. The Process That Is Due**

27 When a prisoner faces disciplinary charges, prison officials must provide the prisoner with
28 (1) a written statement at least twenty-four hours before the disciplinary hearing that includes the

1 charges, a description of the evidence against the prisoner, and an explanation for the disciplinary
2 action taken; (2) an opportunity to present documentary evidence and call witnesses, unless
3 calling witnesses would interfere with institutional security; and (3) legal assistance where the
4 charges are complex or the inmate is illiterate. *See Wolff v. McDonnell*, 418 U.S. 539, 563-70
5 (1974).

6 Penn does not sufficiently allege that he was deprived the process required under the
7 Fourteenth Amendment. Penn alleges only that he was placed in administrative segregation but
8 fails to state facts allowing the Court to determine whether the process he received was
9 constitutionally deficient under *Wolff*. For example, Penn fails to state who presided over his
10 hearing, whether he was provided with a statement describing the charges against him, and
11 whether he had an opportunity to present witnesses. Because Penn fails to allege any facts that he
12 was denied the procedures required by *Wolff*, the undersigned finds Penn has failed to state any
13 due process claim.

14 **IV. FINDINGS AND RECOMMENDATIONS**

15 Based on the above, the undersigned finds Plaintiff's SAC states a cognizable claim
16 against Defendants Hernandez and Lucas for retaliation in violation of the First Amendment and
17 Defendant Warden for Eighth Amendment cruel and unusual punishment and First Amendment
18 Retaliation. The SAC otherwise fails to state any other cognizable claim against any of the other
19 defendants. Despite being provided with the relevant pleading and legal standards, Plaintiff has
20 been unable to cure the remaining deficiencies and further leave to amend is not warranted.
21 *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

22 Accordingly, it is **RECOMMENDED**:

- 23 1. This action proceeds on Plaintiff's second amended complaint for violations of Plaintiff's
24 First Amendment rights against Defendants Hernandez and Lucas and Plaintiff's Eighth
25 and First Amendment rights against Defendant Warden. (Doc. No. 19).
- 26 2. All other claims and defendants be dismissed from this action based on Plaintiff's failure
27 to state claims upon which relief may be granted.

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NOTICE TO PARTIES

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, a party may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” 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)).

Dated: July 8, 2021


HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE