UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCUS R. ELLINGTON, Plaintiff, v. E.S. ALAMEIDA, *et al*., Defendants.	CASE NO. 2:04-cv-00666-RSL-JLW REPORT AND RECOMMENDATION

I. INTRODUCTION

Plaintiff is a state prisoner who is currently incarcerated at the Kern Valley State Prison in Delano, California. He proceeds pro se and in forma pauperis ("IFP") in this 42 U.S.C. § 1983 civil rights action. Plaintiff alleges that the two remaining defendants in this case, correctional officers Sweeten and Barron, violated plaintiff's First Amendment rights by soliciting inmates at the High Desert State Prison ("HDSP") to harm plaintiff in retaliation for his litigation and grievance activity, and violated plaintiff's Eighth Amendment rights by housing him in the same cell as gang-affiliated inmates, as well as soliciting several of plaintiff's cellmates to physically harm him.[1] (*See* Docket 195 at 3.) Now pending before the

[1] Aside from the claims against defendants Sweeten and Barron, all of plaintiff's claims were denied by the Court prior to referral of this action to the undersigned. (*See* Dkts. 78, 99, 138, 152, 175, 182, 192, 194, 214, and 216.) There is also a Report and Recommendation dated April 13, 2010, from the previous magistrate judge pending in this case. (*See* Dkt. 238.)

Court are defendants' motion to dismiss on the grounds that plaintiff does not qualify for IFP status, and motion for summary judgment. (*See* Dkts. 230 and 232.) Plaintiff has filed opposition to defendants' motions, and defendants have filed a reply to plaintiff's opposition. (*See* Dkts. 234, 235, and 239.) For the reasons set forth below, the Court recommends DENYING defendants' motion to dismiss on IFP status, GRANTING defendants' motion for summary judgment on the merits, and DISMISSING this case with prejudice.

II. BACKGROUND

A. *Procedural History*

Plaintiff commenced this action in the U.S. District Court for the Northern District of California in 2002, but the case was transferred to this Court on April 2, 2004. (*See* Dkt. 1.) By Order dated November 19, 2004, this Court dismissed plaintiff's initial complaint because plaintiff admitted that he had, on three or more prior occasions, brought an action in a court of the United States that had been dismissed as frivolous, malicious, or failed to state a claim upon which relief could be granted. (*See* Dkt. 9.) In other words, plaintiff admitted that he had "struck out" within the meaning of the "three strikes" provision of the Prisoner Litigation Reform Act ("PLRA"). *See* 28 U.S.C. § 1915(g). The Court, however, also noted that several claims in plaintiff's complaint appeared to allege "imminent danger of serious physical injury," which could trigger an exception to the "three strikes" provision that would allow plaintiff to proceed IFP notwithstanding the fact that he had previously "struck out." *See id.* The Court gave plaintiff leave to amend his complaint, and deferred resolution of plaintiff's request to proceed IFP until an amended complaint was filed. (*See* Dkt. 9.)

Plaintiff filed his first amended complaint on December 13, 2004. (*See* Dkt. 14.) Because the Court found that portions of the first amended complaint satisfied the "imminent danger" exception to the PLRA's "three strikes" provision, and also stated a cognizable claim for relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1915A, the Court granted plaintiff leave to proceed IFP in this action. (*See* Dkt. 21 at 1-2.) The Court then ordered service of the first amended complaint on three named defendants, members of the HDSP medical staff who plaintiff alleged violated his Eighth Amendment rights. (*See id*. at 2.) Although the Court subsequently granted the motions of those three defendants for summary judgment, the Court also gave plaintiff leave to file a second amended complaint because "it appears that Plaintiff may plead sufficient facts upon which relief may be granted against defendants Sweeten and Barron." (Dkt. 182 at 3; *see* Dkt. 152.)

Plaintiff filed his second amended complaint on April 3, 2008. (*See* Dkt. 187.) Due to plaintiff's persistent disregard of the Court's admonishments regarding plaintiff's excessive filings, however, the Court dismissed the complaint on September 5, 2008. (*See* Dkts. 192 and 194.) Plaintiff was granted leave to file a third amended complaint that complied with the twenty-five page limit, as well as other requirements set forth by the Court. (*See* Dkt. 194.) On September 22, 2008, plaintiff filed his third amended complaint alleging violations of his constitutional rights under the First and Eighth Amendments by defendants Sweeten and Barron. (*See* Dkt. 195.)

By Order dated February 3, 2009, the Court found that the complaint stated cognizable claims for relief, and ordered service on both defendants. (*See* Dkts. 196 and 198.) Defendants filed an answer denying plaintiff's claims on May 18, 2009. (*See* Dkt. 201.) As

mentioned above, currently before this Court are defendants' motion to dismiss this action on the grounds that plaintiff does not qualify for IFP status, and defendants' motion for summary judgment on the merits. (*See* Dkts. 230 and 232.)

B. *Contentions of the Parties*

This case proceeds on plaintiff's Third Amended Complaint, which sets forth claims arising from incidents plaintiff alleges took place in 2003 and 2004 during his incarceration at HDSP. (*See* Dkt. 195 at 3.) Although plaintiff does not specifically state which constitutional rights were violated, plaintiff's claims appear to arise from the First and Eighth Amendments to the U.S. Constitution. Specifically, plaintiff claims that defendants (1) violated his First Amendment rights by soliciting other inmates to physically assault him or steal from him in retaliation for plaintiff's litigation and grievance activity against correctional and medical staff at HDSP, (2) violated his Eighth Amendment rights by housing plaintiff in a cell with gang-affiliated inmates, thereby disregarding an excessive risk to plaintiff's health and safety; and (3) violated his Eighth Amendment rights by soliciting inmates to physically harm him, because he alleges one inmate assaulted him at defendants' urging. (*See id*.; Dkt. 234 at 2-3.)

Defendants contend that plaintiff is a vexatious litigant whose IFP status should be revoked pursuant to 28 U.S.C. § 1915(g), and that this case should therefore be dismissed. (*See* Dkt. 230.) Alternatively, defendants assert that they are entitled to summary judgment on the claims set forth in plaintiff's Third Amended Complaint because plaintiff has not established a genuine issue of material fact for trial, and in any event, they are entitled to qualified immunity. (*See* Dkts. 232 and 239.)

C. *Undisputed Facts*

The following facts, which were primarily set forth by properly signed declarations provided by defendants, remain uncontroverted by plaintiff.

In 2003 and 2004, plaintiff was housed in HDSP Facility B, Building 1, where defendants worked as correctional floor officers and were responsible for supervising inmate activities, assisting with determining inmate housing assignments, and ensuring the safety and security of inmates, officers, and staff within the building. (*See* Dkt. 232, Sweeten Declaration; Barron Decl.) Correctional staff at HDSP completed an initial housing review form for plaintiff on June 5, 2001, which indicated that plaintiff had a "Gang/Disruptive Group Affiliation" with the Crips at that time.[2] (*See id*., Ex. B; Barron Decl.; Vervoort Decl.)

Custody staff at HDSP attempt to house compatible inmates with each other, which frequently includes housing inmates affiliated with the same gang in a cell together if possible, as well as housing non-affiliated inmates in a cell together. (*See id.*, Sweeten Decl.; Barron Decl.) Sometimes institutional need, such as lack of available bed space, may require gang-affiliated inmates to be housed with non-affiliated inmates. (*See id*.) When an inmate requests a cell move due to lack of compatibility with a cellmate, custody staff completes the cell move once bed space becomes available. (*See id*.) Upon receipt of an inmate's request for a new cellmate, custody staff will first ask the inmates to find other compatible cellmates within the building. (*See id*.) If an inmate does not identify a compatible cellmate, custody staff will attempt to identify one and complete the cell move as soon as possible. (*See id*.)

[2] Plaintiff asserts that he "has never been a Crip," and provides evidence that by December 2005, HDSP and the Kern Valley State Prison both recognized him as a non-affiliated inmate. (*See* Dkt. 234 at 2; *id*. Ex. A; Dkt. 233, Ellington Deposition at 52.)

While plaintiff lived at HDSP, plaintiff shared his cell without incident with several Crip-affiliated inmates, including Alton Allen, Anthony Goodman, and Eugene Jones, as well as several unaffiliated inmates, including Antoine Thompson and Isaiah Williams. (*See* Dkt. 232, Defendant's Statement of Undisputed Facts ("DSUF") at 3-4; Dkt. 233, Ellington Dep. at 71-72, 82-91.) He was also on friendly terms with several Crip-affiliated inmates living in the building, including Phillip Joseph and Charles Norwood. (*See* Dkt. 232, DSUF at 3; Dkt. 233, Ellington Dep. at 73-78.) Although plaintiff or his current cellmate at HDSP requested a cell move due to incompatibility on several occasions, on every occasion the cell move was completed before any kind of physical altercation or disturbance took place. (*See* Dkt. 232, DSUF at 4.) For example, when plaintiff requested a cell move from Crip-affiliated inmate Jones based upon incompatibility, correctional staff completed the move within two weeks, even though plaintiff and Jones failed to identify any potentially compatible cellmates for correctional staff. (*See id*., Ex. E; Sweeten Decl; Dkt. 233, Ellington Dep. at 87-89.)

The only inmate at HDSP with whom plaintiff had a physical altercation in 2003 or 2004 was Savon Dennis, a Crip-affiliated inmate.[3] (*See* Dkt. 232, Ex. C; Dkt. 233, Ellington Dep. at 91.) Specifically, when defendant Sweeten inspected plaintiff's cell on August 9, 2003, he found that plaintiff and Dennis had both sustained physical injuries, and concluded they had engaged in a physical altercation.[4] (*See* Dkt. 232, Sweeten Decl.; *id*., Ex. C.)

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[3] Whereas defendants characterize plaintiff's altercation with Dennis as mutual in nature, plaintiff maintains that "Mr. Dennis assaulted me. I didn't get into a fight with him." (Dkt. 233, Ellington Dep. at 91; *see also* Dkt. 232 at 4-5.) Thus, this fact is in dispute.

[4] The parties also dispute the time of day that Sweeten responded to the incident in plaintiff's cell. While Sweeten reported that he inspected the cell at approximately 11 a.m., plaintiff argues that Sweeten actually "saw the blood was on me, he saw that my mouth had been busted" as early as 9-9:30 a.m., but did not respond or report the incident until hours later. (Dkt. 233, Ellington Dep. at 91-100.)

Plaintiff had blood on his pants and bottom lip, and Dennis had sustained small cuts on his left finger and left thumb. (*See id*.) Because Sweeten reported that he could not identify the aggressor, both inmates were issued a rules violation report for engaging in mutual combat. (*See id*., Exs. C and F.) Immediately following plaintiff's altercation with Dennis, correctional staff moved Dennis out of plaintiff's cell. (*See id*., Sweeten Decl.; Ellington Dep. at 100.) Plaintiff does not allege that he had requested a cell move prior to this incident.

D. *Disputed Facts*

The parties disagree regarding whether defendants asked or encouraged several Crip-affiliated inmates, including Goodman, Jones, and Dennis, to physically assault, harm, or steal from plaintiff, whether in retaliation for plaintiff's litigation and grievance history or for any other reason. (*See* Dkt. 195; Dkt. 232, DSUF at 1-4; Dkt. 233, Ellington Dep.) As discussed in more detail below, plaintiff's evidence to support his contention that defendants solicited inmates at HDSP to harm him consists of two unsigned and unsworn declarations purportedly dictated by inmates Goodman and Jones.[5] (*See* Dkt. 195, Ex. A and B.) Specifically, Goodman's declaration states that when he requested a cell transfer from plaintiff in 2003, Sweeten replied, "Why don't you do us a favor and go in there and beat the shit out of Ellington we've got that ass on video tape in the Central Treatment Center (CTC) dancing." (*Id*., Ex. A.) Similarly, Jones' declaration provides that when he asked Sweeten about a cell move in 2004, Sweeten responded, "Upon the cell move being submitted BEAT HIS ASS (Ellington). We don't give a damn about him. Then we'll move you." (*Id*., Ex. B.) Jones' declaration also states that Barron told him, "'You know what you've got to do to get a cell

[5] For the reasons discussed *infra*, these two declarations are not competent evidence for purposes of defendants' motion for summary judgment. Their contents are recited here only as a statement of plaintiff's allegations.

move.' Which [Jones] perceived as an invite to fight Ellington." (*Id*.) Although plaintiff also claims that at the time of the incident with Dennis, "[h]e told me that Sweeten had told him to slug me in the mouth . . . because I was a – a pedophile," plaintiff has failed to provide any evidence (such as a declaration from Dennis, or any other inmate at HDSP) to support his assertion that Dennis assaulted plaintiff at defendants' behest. (Dkt. 233, Ellington Dep. at 91-92.)

Furthermore, in this action the parties dispute whether defendants possessed any knowledge of plaintiff's commitment offense, litigation or administrative grievance history (aside from one grievance plaintiff filed in 2004 requesting a cell move from Jones), or gang affiliation status. They also dispute whether housing plaintiff in the same cell as Crip-affiliated inmates at HDSP presented a substantial risk of harm to plaintiff of which defendants were aware. (*See* Dkt. 232, DSUF at 4-5; Sweeten Decl.; Barron Decl.; Dkt. 233, Ellington Dep. at 92-93.)

III. DISCUSSION

A. *Defendants' Motion to Revoke Plaintiff's IFP Status and Dismiss the Case*

A prisoner may not proceed IFP in a civil action if he has, on three or more prior occasions, brought civil actions that were dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. *See* 28 U.S.C. § 1915(g). An exception to this general rule applies if a prisoner alleges that he is "under imminent danger of serious physical injury." *Id*. In this case, it is undisputed that plaintiff has "struck out" as a vexatious litigant under the PLRA, and therefore cannot proceed IFP unless he satisfies the "imminent danger" exception of 28 U.S.C. § 1915(g). (*See* Dkts. 1, 9, 14, 21, 235, and 239.) When this

Court considered plaintiff's request to proceed IFP in this action, however, it found that plaintiff's claims, as set forth in the first amended complaint, sufficiently alleged that he was "under imminent danger of serious physical injury" to satisfy the exception. (*See* Dkt. 21 at 1-2.)

In their "Motion to Dismiss Plaintiff's Complaint (Vexatious Litigant Motion)," defendants argue that plaintiff's case should nevertheless be dismissed because he "was not in imminent danger of serious physical injury when he filed his Third Amended Complaint." (Dkt. 230, Memorandum of Points and Authorities at 6.) Specifically, "[b]y the time he filed this complaint, Ellington was an inmate at California Substance Abuse Treatment Facility and State Prison in Corcoran, California - 454 miles away from High Desert State Prison, where Sweeten and Barron allegedly solicited other inmates to harm him." (*Id*.) As a result, defendants ask this Court to revoke plaintiff's IFP status pursuant to 28 U.S.C. § 1915(g), dismiss this case, and require plaintiff to immediately pay all filing fees before refiling this matter. (*See id*.) In response, plaintiff argues that he did not need to demonstrate imminent danger at the time he filed his third amended complaint because he had already made such a showing in his first amended complaint, when the Court granted his request to proceed IFP in this action. (*See* Dkt. 235 at 2.) The question before this Court is therefore whether plaintiff's IFP status can and should be revoked if he could no longer satisfy the "imminent danger" exception at the time he filed his third amended complaint.

Based upon this Court's review of the record and relevant case law, defendants' contentions appear to be based upon a misunderstanding of the Ninth Circuit's holding in *Andrews v. Cervantes*, 493 F.3d 1047, 1053 (9th Cir. 2007). Specifically, the *Andrews* court

held that "the availability of the [imminent danger] exception turns on the conditions a prisoner faced *at the time the complaint was filed*, not at some earlier or later time." *Andrews*, 493 F.3d at 1053 (emphasis added). Although the *Andrews* court did not expressly distinguish between the time when an "initial" versus an "amended" complaint is filed, the court indicated that the relevant time to determine whether an inmate satisfies the "imminent danger" exception to the three strikes rule is at the beginning of an action or lawsuit. For example, the *Andrews* court emphasized that 28 U.S.C. § 1915(g) is only concerned with the "initial act" of bringing an "action," which "refers to a case as a whole rather than just its individual claims":

> The PLRA provides that a prisoner with three strikes cannot use IFP status to "*bring* a civil action . . . unless the prisoner *is* under imminent danger of serious physical injury." 28 U.S.C. § 1915(g) (emphasis added). The exception's use of the present tense, combined with its concern only with the initial act of "bring[ing]" the lawsuit, indicates to us that the exception applies if the danger existed at the time the prisoner filed the complaint.

Id. at 1052-54.[6] Furthermore, the court observed that "the three-strikes rule is a screening device" to help determine whether an action may proceed without prepayment of the filing fee "based upon the allegations appearing on the face of the complaint." *Id*. at 1050.

Similarly, this Court, applying the Ninth Circuit's decision in *Andrews*, has recognized that "§ 1915(g) addresses *the time a prisoner brings an action*," and not simply any time a complaint is filed. *Andrews v. Cervantes*, 2008 WL 1970345, *1 (E.D. Cal. 2008) (emphasis

[6] Moreover, the *Andrews* court held that even if several claims in a complaint do not allege an imminent danger of serious physical injury, if some of the claims do meet the requisite standard, the prisoner has satisfied the "imminent danger" exception and qualifies for IFP status. *See id*. at 1054. "[O]nce a prisoner satisfies the exception . . . the district court must docket the entire complaint and resolve all of its claims, without requiring the upfront payment of the filing fee." *Id*. at 1053-54.

added) (citing *Andrews*, 493 F.3d at 1053). Specifically, this Court held that "despite the passage of time and plaintiff's transfer away from the California prison system . . . at the time he brought this action, he was in 'imminent danger of serious physical harm,'" and therefore plaintiff could proceed IFP with an amended complaint. *Id*. As a result, "neither the passage of time nor the transfer of a prisoner to a different facility has any impact on the determination of whether the [imminent danger] exception to the rule applies" in a given case. *Id*. *See also Jensen v. Knowles*, 2008 WL 744726 (E.D. Cal. 2008) (denying defendants' motion for revocation of plaintiff's IFP status and dismissal of the action because although plaintiff "was no longer incarcerated at [the prison] where the alleged conduct had been occurred," plaintiff had "satisfied the imminent danger exception *at the time the initial complaint was filed*."). Moreover, the case cited by defendants in support of their argument did not decide, as defendants suggest, that this Court must look only to the "operative complaint for the case." (Dkt. 239 at 3.) *See Wilson v. Hubbard*, 2009 WL 2971619 (E.D. Cal. 2009) (holding that plaintiff did not suffer "an imminent threat of serious physical injury at the time he filed this action" because plaintiff was clearly under no imminent danger at the time plaintiff filed his original complaint, his first amended complaint, or "the operative complaint, i.e. the second amended complaint. . . .").

Thus, case law does not support defendants' argument that this Court must re-evaluate plaintiff's IFP status at this juncture, simply because plaintiff has filed a third amended complaint in this action. As discussed above, this Court properly considered whether plaintiff was under imminent danger of serious physical injury at the time he brought this action, and "not at some earlier or later time," in accordance with the Ninth Circuit's decision in

Andrews. Specifically, when this Court found that allegations appearing on the face of the initial complaint might satisfy the "imminent danger" exception, it expressly deferred consideration of plaintiff's request to proceed IFP. (*See* Dkt. 9.) The Court subsequently found that plaintiff's first amended complaint (which set forth plaintiff's claims regarding Sweeten and Barron, among other defendants) satisfied the exception, and granted plaintiff's request to proceed IFP in this action. (*See* Dkt. 21 at 1-2.) The fact that plaintiff was subsequently transferred to a different prison is irrelevant.

Accordingly, defendants' request for this Court to revoke plaintiff's IFP status pursuant to 28 U.S.C. § 1915(g) and dismiss this case is DENIED. Plaintiff remains obligated to pay the $150.00 statutory filing fee in monthly payments, which shall be collected and paid in accordance with this Court's Order For Payment of Inmate Filing Fee dated May 17, 2005. (*See* Dkt. 22.)

B. *Defendants' Motion for Summary Judgment*

Defendants also move this Court for summary judgment as to plaintiff's claims that defendants (1) violated plaintiff's First Amendment rights by soliciting several Crip-affiliated inmates to physically harm or steal from plaintiff in retaliation for his litigation and grievances against custody and medical staff in the HDSP, (2) violated plaintiff's Eighth Amendment rights by housing plaintiff in a cell with Crip-affiliated inmates, thereby disregarding an excessive risk to plaintiff's health and safety, and (3) violated plaintiff's Eighth Amendment rights by soliciting several Crip-affiliated inmates to physically harm plaintiff, because plaintiff alleges that Dennis assaulted him at defendants' behest. (*See* Dkt. 195 at 3; Dkt. 232.)

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, the records show that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court draws all reasonable inferences in favor of the non-moving party. *United States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1013 (9th Cir. 2006). The moving party can carry its initial burden by producing affirmative evidence that negates an essential element of the nonmovant's case, or by establishing that the nonmovant lacks the quantum of evidence needed to satisfy his burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). "[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." *Id.* at 1221.

In addition, to sustain a cause of action under 42 U.S.C. § 1983, a plaintiff must show (i) that he suffered a violation of rights protected by the Constitution or created by federal statute, and (ii) that the violation was proximately caused by a person acting under color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The causation requirement of § 1983 is satisfied only if a plaintiff demonstrates that a defendant did " 'an affirmative act, participates in another's affirmative acts, or omits to perform an act which

[that person] is legally required to do that causes the deprivation of which complaint is made.'" *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). "[T]he 'requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" *Id.* (quoting *Johnson*, 588 F.2d at 743-44).

1. *Plaintiff's Unsigned and Unsworn Declarations from Goodman and Jones*

As mentioned above, plaintiff's primary evidence to support his First and Eighth Amendment claims in this case consist of declarations from two former cellmates of plaintiff, Goodman and Jones. (*See* Dkt. 195, Ex. A and B.) These two declarations constitute the only evidence proffered by the plaintiff, aside from his own testimony, that defendants solicited or encouraged any inmates at HDSP to physically harm or steal from plaintiff, and are therefore critical to each of plaintiff's claims set forth in his Third Amended Complaint. (*See* Dkt. 195 at 3-4.) For example, plaintiff failed to provide any evidence to support his assertion that Dennis, the only prisoner at HDSP who plaintiff alleges actually harmed him, did so at defendants' behest, because Dennis "didn't write [a declaration] for me." (Dkt. 233, Ellington Dep. at 92.)

Given the importance of the evidence from Goodman and Jones, the fact that these two prisoners' declarations contain only typed signatures is fatal to plaintiff's case, because the declarations have no evidentiary value. *See* 28 U.S.C. § 1746 (providing that unsworn declarations may be regarded "with like force and effect" as sworn declarations, if they are subscribed with the declarant's signature as true under penalty of perjury). Specifically,

Goodman's declaration was not executed with Goodman's signature, accompanied by an assertion that Goodman made the statements contained therein under oath, or accompanied by a statement that Goodman signed the declaration under penalty of perjury. (*See id*., Ex. A.) Similarly, although the unsworn declaration from Jones contains an assertion that Jones made the statements contained therein under penalty of perjury, it was not executed with Jones' signature. (*See id*., Ex. B.)

Indeed, there is no evidence in this case, aside from plaintiff's self-serving testimony, that either Goodman or Jones even saw these two declarations, or made the statements contained therein. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) ("[T]his court has refused to find a 'genuine issue' where the only evidence presented is 'uncorroborated and self-serving' testimony. . . .") Plaintiff admits that he typed up both declarations himself, but asserts the inmates verbally "sign[ed] on" to what plaintiff had typed. (Dkt. 233, Ellington Dep. at 89.) Specifically, plaintiff was asked during his deposition if he possessed "a signed copy of [Jones'] declaration," because the one attached to plaintiff's Third Amended Complaint "looks like his declaration was typed up for him and his name is typed in." (*Id*.) Plaintiff responded, "[T]hat's the only one that I have in my possession . . . He dictated that to me as I typed." (*Id*.) Similarly, plaintiff acknowledged that Goodman had told plaintiff about the incident described in his declaration, and that "his name [was] typed" on the signature line at the bottom. (*Id*. at 84.)

Moreover, plaintiff was specifically advised on at least two occasions, pursuant to this Court's Orders dated December 8, 2005, and March 11, 2009, that any motions or opposition supported by unsigned affidavits or declarations in this case would be stricken. (*See* Dkt. 56

at 5; Dkt. 198 at 5.) Plaintiff has been provided numerous opportunities in this action to amend his complaints to cure any defects, and support his allegations against defendants. (*See* Dkts. 182, 187, 192, and 194.) Because plaintiff has failed to comply with this Court's admonishments and directions throughout this action, he has also been advised that failure to do so may result in the imposition of sanctions, or dismissal of this action with prejudice. (*See* Dkt. 194.) Under these circumstances, it is inappropriate to provide plaintiff with yet another opportunity to attempt to cure the defects in his complaint.

With these two declarations stricken from the record, plaintiff has not provided any evidence to support his claim that defendants solicited inmates at HDSP to harm him. *See Crumpton*, 947 F.2d at 1420 (providing that § 1983 requires a plaintiff to show a federal deprivation proximately caused by a state actor). This is a wholly sufficient basis to grant defendants' motion for summary judgment as to plaintiff's First and Eighth Amendment claims. Because plaintiff's claims against defendants have risen, like a phoenix, from the ashes on several occasions since plaintiff commenced this action in 2002, however, the Court will also address the merits of plaintiff's claims in the interests of completeness. As discussed below, defendants are entitled to summary judgment on the merits even assuming *arguendo* that plaintiff could cure the defects in the declarations from Goodman and Jones, if provided yet another opportunity to do so.

2. *Plaintiff's First Amendment Retaliation Claim*

In his Third Amended Complaint, plaintiff asserts that defendants retaliated against him because of (1) plaintiff's commitment offense of rape, (2) defendants' belief that plaintiff was a child molester, (3) defendants' belief that plaintiff was a "snitch," and (4) "due to his

writing-up of custodial and medical staff" at HDSP in the past. (Dkt. 195 at 3.)

As a threshold matter, however, retaliation claims must allege that plaintiff was engaging in a protected activity under the First Amendment and the state impermissibly infringed on the plaintiff's right to engage in that activity. *See Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). As a result, plaintiff's assertions that defendants retaliated against him because they believed plaintiff was a rapist or child molester fail to state a claim for retaliation. Moreover, in this case plaintiff has not provided any evidence, such as affidavits or declarations from inmates, which contradict defendants' assertions in their declarations that "while Ellington lived in [HDSP], I was not aware of his commitment offense, or of any charges he received," and "never called Ellington a child molester or a snitch . . . [or] accused him of any crime." (Dkt. 232, Sweeten Decl; Barron Decl.; s*ee* Dkts. 195 and 234.) Without more than the bare assertion that defendants retaliated against plaintiff because they believed plaintiff was a rapist, child molester, and "snitch," plaintiff has failed to present a genuine issue of material fact for trial. *See Rizzo*, 778 F.2d at 532 n.4 ("[B]are allegations of arbitrary retaliation are [not] enough . . . to avoid dismissal."). Thus, this Court proceeds to plaintiff's argument that defendants retaliated against him "due to his writing-up of custodial and medical staff," which properly states a claim for relief under the First Amendment.

Plaintiff contends that defendants solicited several Crip-affiliated inmates who were living with plaintiff, including Goodman, Jones, and Dennis, to harm him in retaliation for plaintiff's lawsuits and grievances filed against staff at HDSP. (*See* Dkt. 195 at 3.) In particular, plaintiff claims that defendants sought to harm him because he was "a litigator," and because of a lawsuit plaintiff had filed against "something like 76 officers and medical

staff" of HDSP in 1999. (Dkt. 233, Ellington Dep. at 40-41, 120-122.) Plaintiff admits that Goodman and Jones declined to harm him, but claims that Dennis did physically assault him at the defendants' behest. (*See id*. at 92-93, 119.)

Although plaintiff's complaint also contends that defendants solicited inmates to steal from him, with the exception of inmate Dennis (who plaintiff asserts packed several of plaintiff's personal items - such as food items, tobacco, and deodorant – when he moved out of their shared cell), plaintiff has not identified any individuals who stole from him at HDSP or any stolen items. Plaintiff states that he is "pretty sure" inmates at HDSP stole from him, although "who it was and when it happened, I can't say." (Dkt. 233, Ellington Dep. at 105.) Plaintiff also admits that he did not file any administrative grievances concerning stolen items at HDSP. (*See id*. at 103-09.) Because there is no evidence in the record of any theft committed against plaintiff at HDSP, by Dennis or anyone else, this Court limits its analysis to plaintiff's allegation that the defendants solicited inmates to physically harm him, as alleged in the declarations from Goodman and Jones. (*See* Dkt. 195 at 3.)

Prisoners have protected "First Amendment rights to file prison grievances and to pursue civil rights litigation in the courts." *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). In order for a prisoner to prevail on a claim of First Amendment retaliation under § 1983, a plaintiff must establish five elements: "(1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal," such as preserving institutional order and discipline. *Id.* at 567-68. *See also Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir.

2000); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994).

Thus, in each case, a plaintiff asserting a retaliation claim must show that the defendants were "actually aware" of his protected speech, and establish a "but-for" causal nexus between the alleged retaliation and protected speech. *Pratt v. Rowand*, 65 F.3d 802, 809 (9th Cir. 1995) (holding that the plaintiff bears the burden of pleading and proving retaliatory motive). A plaintiff must submit evidence, either direct or circumstantial, to establish this causal link. *See id.* at 806; *McDonald v. Campbell*, 2010 WL 1328696 (E.D. Cal. 2010) ("The prisoner must submit evidence demonstrating a link between the exercise of his constitutional rights and the defendant's allegedly retaliatory action."). In this context, a plaintiff can generally raise a genuine issue of material fact regarding retaliatory motive by "produc[ing], in addition to evidence that the defendant knew of the protected speech, at least (1) evidence of proximity in time between the protected speech and the allegedly retaliatory decision, (2) evidence that the defendant expressed opposition to the speech, or (3) evidence that the defendant's proffered reason for the adverse action was false or pretextual." *Pinard v. Clatskanie School Dist.*, 467 F.3d 755, 771 n.21 (9th Cir. 2006) (citing *Keyser v. Sacramento City Unif. Sch. Dist.*, 265 F.3d 741, 751-52 (9th Cir. 2001)).

In this case, plaintiff has proffered evidence to support only four of the five elements of his retaliation claim. First, if the declarations of Goodman and Jones are presumed to be authentic, they support plaintiff's claim that defendants took adverse action against him. (*See* Dkt. 195, Exs. A and B.) Adverse action is action that "would chill a person of ordinary firmness" from engaging in that activity. *Pinard v. Clatskanie School Dist.*, 467 F.3d 755, 770 (9th Cir. 2006). In the prison context, the action taken must be clearly adverse to the

plaintiff. *See e.g., Rhodes*, 408 F.3d at 568 (arbitrary confiscation and destruction of property, initiation of a prison transfer, and assault in retaliation for filing grievances); *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (retaliatory placement in administrative segregation for filing grievances); *Pratt*, 65 F.3d at 806 (retaliatory prison transfer and double-cell status in retaliation). Although Goodman and Jones never physically harmed plaintiff, their declarations assert that defendants encouraged or solicited them to do so. (*See* Dkt. 195, Exs. A and B.) Assuming the declarations are correct, the Court finds that defendants' solicitation of physical harm to plaintiff at the hands of other inmates was sufficient to constitute adverse action under § 1983, even if defendants' instructions were never carried out.[7] *See Valandingham v. Bojorquez*, 866 F.2d 1135, 1139 (9th Cir. 1989) (holding that plaintiff's claim that prison officials retaliated against him for his grievance activities by labeling him a "snitch," where plaintiff's claim was also supported by numerous inmate affidavits confirming that defendants had called plaintiff a "snitch" in front of other inmates with the intention of having plaintiff harmed or killed, presented a genuine issue of material fact for trial).

In addition to proffering evidence of defendants' adverse action, plaintiff can likely support three other prongs of his retaliation claim. Specifically, the parties do not appear to dispute the fact that plaintiff engaged in speech activities protected by the First Amendment during the course of his incarceration at HDSP by filing numerous lawsuits and grievances. (*See* Dkt. 233, Ellington Dep. at 10-11, 58, 105-06; Dkts. 232 and 239.) *See also Rhodes*, 408

[7] Plaintiff admits that aside from his physical altercation with Dennis, no other cellmate at HDSP actually harmed him. (*See* Dkt. 233, Ellington Dep. at 103.) Although plaintiff alleges that Dennis harmed him at defendants' direction "because I was a – a pedophile," there is no evidence in the record to support this claim. (*Id*. at 92.) Plaintiff did not file a declaration from Dennis to support this allegation.

F.3d at 567 ("Of fundamental import to prisoners are their First Amendment right[s] to file prison grievances . . . [and to] pursue civil rights litigation in the courts."). Moreover, although it might have required something more to chill *this* plaintiff's litigation activities, "a person of ordinary firmness" would have suffered a "chilling effect" on his speech due to defendants' actions this case. (Dkt. 233, Ellington Dep. at 43.) *See also Rhodes*, 408 F.3d at 569 (holding that a plaintiff need not demonstrate that his speech was "actually inhibited or suppressed," if defendant's actions "would chill or silence a person of ordinary firmness from future First Amendment activities."). Finally, defendants' actions were not justified by any legitimate penological objective. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994) ("Prison conditions may be restrictive and even harsh . . . but gratuitously allowing the beating or rape of one prisoner by another serve no 'legitimate penological objectiv[e].'").

The weakness in plaintiff's case is that he has not presented any evidence of a retaliatory motive, a critical element of his claim. Plaintiff asserts that defendants solicited the Crip-affiliated inmates to harm him "just because I had disgruntled some of their coworkers with [plaintiff's] 1999 lawsuit." (Dkt. 233, Ellington Dep. at 58; *see id*. at 40-42.) Although he admits that he cannot recall any date or time when the defendants made any statement around him specifically referencing any of his First Amendment activities, plaintiff maintains that the retaliation "was because of that 1999 lawsuit." (*Id*. at 58; *see id*. at 122.) Plaintiff asserts that defendants "had it in for me . . . [b]ecause I'm a litigator." (*Id*. at 120.) Without more, however, plaintiff's conclusory assertions are insufficient to withstand defendants' motion for summary judgment on this claim. *See Rizzo*, 778 F.2d at 532 n.4.

Specifically, plaintiff has not provided any evidence to show that defendants were even aware of his First Amendment activities. *See Pratt*, 65 F.3d at 808 (no retaliatory motive where the plaintiff has not provided evidence that defendants were aware of the plaintiff's First Amendment activity). For example, plaintiff has failed to produce any declarations or affidavits to contradict defendants' statements in their declarations that, with the sole exception of plaintiff's request for a cell move in 2004 from inmate Jones, defendants had no knowledge of plaintiff's litigation history or any grievances he filed at HDSP. (*See* Dkt. 232, Sweeten Decl.; Barron Decl.) Plaintiff does not allege that defendants were retaliating against him as a result of his request for a cell change from Jones. (*See* Dkts. 195 and 234.) Without additional evidence, plaintiff has also not established that because defendants knew about his grievance regarding his cell change from Jones, defendants must have been aware of all the grievances plaintiff filed at HDSP. (*See* Dkt. 234 at 5.)

Furthermore, plaintiff has failed to provide any direct or circumstantial evidence to establish a "but-for" causal nexus, and show that defendants took the retaliatory action against him *because of* plaintiff's exercise of his First Amendment rights. *See Rhodes*, 408 F.3d at 567-68; *Pratt*, 65 F.3d at 807. For example, the declarations from Goodman and Jones do not provide any evidence of a retaliatory motive stemming from plaintiff's First Amendment activities. Jones' declaration does not suggest any reason for the defendants' actions. (Dkt. 195, Ex. B.) Although Goodman stated that Sweeten asked him to beat up plaintiff because there was a videotape of plaintiff "in the Central Treatment Center (CTC) dancing," without more, this vague statement, which references plaintiff's alleged physical infirmities, cannot reasonably be construed as referencing a lawsuit or grievance brought by the plaintiff against

HDSP medical staff years ago. (Dkt. 195, Ex. A.) Finally, plaintiff asserts that Dennis punched him on Sweeten's behalf because Sweeten thought plaintiff was "a pedophile" or "child molestor," not because of plaintiff's speech activities. (*See* Dkt. 232, Ex. B; Dkt. 233, Ellington Dep. at 91-92.)

Accordingly, plaintiff has failed to offer evidence from which a reasonable jury could return a verdict in his favor based upon his claim that defendants retaliated against him for his First Amendment activities at HDSP. *See Triton*, 68 F.3d at 1221. Specifically, he has not met his burden of demonstrating the existence of material factual disputes for trial. *See Pratt*, 65 F.3d at 809. As a result, I recommend that defendants' motion for summary judgment on this claim be granted.

3. *Plaintiff's Eighth Amendment Claim that Defendents Disregarded an Excessive Risk to His Health and Safety*

Plaintiff claims that defendants violated his Eighth Amendment rights by housing him in the same cell as Crip-affiliated inmates, thereby disregarding an excessive risk to his health and safety. (*See* Dkt. 195 at 4.) Specifically, plaintiff argues that defendants knew that plaintiff was not affiliated with any gang, and was therefore more vulnerable to harm by Crip-affiliated cellmates. (*See* Dkt. 195 at 3-4; Dkt. 234 at 2-3 and Ex. A.) Plaintiff also asserts that defendants falsely identified him as a "Crip" on numerous occasions at HDSP in order to increase the likelihood that plaintiff would be housed with Crips who were likely to harm him, due to HDSP's policy of attempting to house Crip-affiliated inmates together. (*See* Dkt. 195 at 4.) Thus, plaintiff is apparently arguing that housing gang-affiliated inmates in the same cell as non-affiliated inmates inherently presents a substantial risk that the non-affiliated inmate will be assaulted, and that in this case defendants were aware of this risk of harm to

plaintiff and deliberately disregarded it. (*See* Dkt. 232 at 3.)

Defendants contend that they are entitled to summary judgment as to this claim because they were never aware that housing plaintiff with Crip-affiliated inmates, including Dennis, presented any risk of harm, and therefore did not deliberately disregard this risk. (*See* Dkt. 239 at 5; Dkt. 232 at 8.) Specifically, defendants point out that plaintiff's initial housing review form, dated June 5, 2001, identified plaintiff as a Crip-affiliated gang member. (*See* Dkt. 232, Ex. B.) Based upon this review, Barron asserts that he believed that plaintiff was affiliated with the Crips in 2003 and 2004. (*See id*.; Barron Decl.) Because Barron was also unaware of any disputes or physical altercations between plaintiff and any Crip-affiliated inmates at HDSP, Barron declares that "I did not have any reason to believe that he would have trouble living with other Crip-affiliated inmates." (*Id*.) Although Sweeten declares that he did not know if plaintiff was associated with any gang at HDSP, he also denies having any reason to believe plaintiff had trouble living with Crip-affiliated inmates. (*See id*.; Sweeten Decl.) The defendants point out that, with the single exception of inmate Dennis, plaintiff had shared his cell with numerous Crip-affiliated and non-affiliated inmates without incident, and was admittedly on friendly terms with many Crip-affiliated inmates in his building at HDSP. (*See* Dkt. 232, DSUF at 3-4; Dkt. 233, Ellington Dep. at 71-78, 82-91.)

The Eighth Amendment imposes a duty on prison officials to provide humane conditions of confinement, which includes "protect[ing] prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833. Prison officials are not liable for every injury suffered by one prisoner at the hands of another, however. *See id*. at 834. To establish an Eighth Amendment violation resulting from failure to prevent harm, a prisoner must satisfy

the two-part test set forth in *Farmer*, which contains both an objective and a subjective component.

To satisfy the objective component, a plaintiff must show that "he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834. The Ninth Circuit has also held that where the claim is based upon the failure of prison officials to protect an inmate from assault, "an inmate must demonstrate that the assault was 'sufficiently serious' or that the risk of assault was 'substantial'. . . ." *Kimble v. Bunnell*, 67 F.3d 307, 1995 WL 564751, *1 (9th Cir. 1995) (unpublished) (quoting *Farmer*, 511 U.S. at 834).

To satisfy the subjective component, a plaintiff must show that prison officials acted with "a sufficiently culpable state of mind," which in prison-condition cases is "one of 'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834. In other words, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. at 837. Although the Ninth Circuit has acknowledged that "neither *Farmer* nor subsequent authorities have fleshed out at what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes," in this context the Ninth Circuit has asserted that a prison official would violate the Eighth Amendment if he knew that an inmate was acting out dangerously with cellmates or otherwise posed a threat, but housed another inmate in the same cell anyway. *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050-51 (9th Cir. 2002). Moreover, the Ninth Circuit has stated that a plaintiff may "rely on

circumstantial evidence that the risk of assault was 'obvious.'" *Kimble*, 67 F.3d 307, 1995 WL 564751, *1 (citing *Farmer*, 511 U.S. at 842-43).

Even assuming that plaintiff was not a member of any gang at HDSP in 2003 and 2004, plaintiff has not satisfied the objective component of the two-part test.[8] Specifically, plaintiff has failed to provide any evidence or cite any authority (and the court is aware of none) establishing that housing a non-affiliated inmate in the same cell as a gang-affiliated inmate will inherently present "a substantial risk" that the non-affiliated inmate will be physically assaulted or harmed. *See Farmer*, 511 U.S. at 833-35. Plaintiff has also failed to offer any evidence that any of the specific Crip-affiliated inmates he shared a cell with at HDSP, including Dennis, acted out dangerously with cellmates in the past, or otherwise behaved in a manner indicating that housing them in the same cell with plaintiff would pose an "obvious" threat to plaintiff's safety. *See Ramirez-Palmer*, 301 F.3d at 1051. Without more, plaintiff's conclusory assertions regarding the "substantial danger" of housing gang-affiliated and non-affiliated inmates in a cell together do not satisfy the objective component of *Farmer*. (*See* Dkt. 232 at 3.)

Similarly, as to the subjective component, plaintiff has failed to provide any evidence to contradict defendants' statements in their declarations that they were not aware that

[8] As mentioned above, plaintiff has provided evidence that HDSP granted his administrative appeal and "identified [plaintiff] as a Black non-affiliate and not a Crip" on December 6, 2005. (*See* Dkt. 234, Ex. A.) The Kern Valley State Prison also identified plaintiff as a non-affiliated inmate as recently as 2009. (*See* Dkt. 234, Ex. A.) In addition, plaintiff provides a March 16, 2010, declaration from an inmate expressing his personal belief that plaintiff is not affiliated with any gang, and observing that plaintiff does not have any tattoos suggesting prior gang membership. (*See* Dkt. 234 at 2; *id*., Ex. A; Dkt. 233, Ellington Dep. at 52.) Although plaintiff's evidence does not prove that he was not affiliated with the Crips in the past, the Court notes that it helps support an inference that plaintiff was no longer affiliated with the Crips by 2003 or 2004.

housing plaintiff with Crip-affiliated inmates would present a substantial risk of harm, regardless of defendants' beliefs regarding plaintiff's gang affiliation status. (*See* Dkt. 232, Sweeten Decl; Barron Decl.) It is undisputed that aside from the incident with Dennis, plaintiff did not have any physical altercations or disputes during his incarceration in Facility B, Building 1 at HDSP. (*See* Dkt. 232, DSUF at 5; Dkt. 233, Ellington Dep. at 91.) As a result, plaintiff has not shown the presence of facts from which the inference could be drawn that housing plaintiff in a cell with Crip-affiliated inmates presented a substantial risk that plaintiff would be assaulted, or that defendants actually drew this inference and disregarded the risk. *See Farmer*, 511 U.S. at 837.

Accordingly, plaintiff is unable to meet his burden of demonstrating the existence of material factual disputes for trial. The Court therefore recommends that defendants' motion for summary judgment on plaintiff's Eighth Amendment claim be granted.

4. *Plaintiff's Eighth Amendment Claim that Defendants Solicited Inmates, Including Dennis, to Physically Harm Him*

Plaintiff asserts that "Defendant's (sic) Sweeten and Barron . . . solicited inmate's (sic) to Beat, steal from, defile and generally harm Plaintiff" at HDSP in 2003 and 2004, and that "inmate-Dennis did in fact assault plaintiff, and the assault was under request of Custodial officer Sweeten. . . ." (Dkt. 195 at 3-4.) Even if the Court construes this statement as a claim that defendants' conduct constituted harassment which violated plaintiff's right to be free from cruel and unusual punishment under the Eighth Amendment, plaintiff has not provided any evidence showing a connection between defendants and the incident during which Dennis allegedly assaulted plaintiff on August 9, 2003, as required under § 1983.

Inmates have an Eighth Amendment right to be free from "calculated harassment unrelated to prison needs." *Hudson v. Palmer*, 468 U.S. 517, 530 (1984). The U.S. Supreme Court has recently reiterated that the Eighth Amendment should be reserved for serious incidents causing "unnecessary and wanton infliction of pain," which "are those that are 'totally without penological justification.'" *Hope v. Pelzer*, 536 U.S. 730, 736-37 (2002) (citing *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). As discussed above, in making this determination in the context of prison conditions, we must ascertain whether the officials involved acted with "deliberate indifference" to the inmates' health or safety, which can be inferred from the fact that the risk of harm in a given situation is obvious. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994). *See also Hudson v. McMillian*, 503 U.S. 1, 8 (1992).

In addition, § 1983 also plainly requires the plaintiff to demonstrate an actual connection or link between the actions of defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). A person can deprive another of a constitutional right, within the meaning of § 1983, " 'not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.' " *Hunter*, 500 F.3d at 988 (quoting *Johnson*, 588 F.2d at 743-44).

If plaintiff had provided evidence that defendants actually solicited Dennis to physically harm plaintiff, or that Dennis purposefully assaulted plaintiff at defendants' behest in August 2003, this Court finds that this "punitive treatment" would almost certainly amount "to gratuitous infliction of 'wanton and unnecessary' pain that [U.S. Supreme Court]

precedent clearly prohibits." *Pelzer*, 536 U.S. at 738. Indeed, such conduct by defendants would be "totally without penological justification." *Id*. Moreover, by soliciting Dennis to carry out this constitutional violation on their behalf, defendants would have set in motion a series of acts which they knew, or reasonably should have known, would result in Dennis inflicting the constitutional injury on plaintiff. *See Hunter*, 500 F.3d at 988. That is not our case, however.

Here, plaintiff has failed to provide any evidence showing a causal connection between defendants and the incident in which Dennis allegedly assaulted Plaintiff. Specifically, plaintiff provides no evidence (such as a declaration from Dennis, or any other inmate from HDSP) to support his conclusory assertions that his documented physical altercation with Dennis in August 2003 was actually an "assault" on him by Dennis, or that Dennis assaulted him because "Mr. Dennis had actually succumbed" to defendants' requests that Dennis harm plaintiff. (Dkt. 233, Ellington Dep. at 92.) Plaintiff admits that there were no other witnesses to the alleged "assault," which HDSP deemed an incident of "mutual combat with no serious injury where the aggressor cannot be determined." (*Id*. at 93; Dkt. 195, Ex. C.) In addition, plaintiff admits that although Dennis "may have [written a declaration] for the officers . . . He didn't write one for me."[9] (Dkt. 233, Ellington Dep. at 92.) Finally, although the declarations from Jones and Goodman, if true, assert that defendants solicited each of them to harm plaintiff, it is undisputed that neither inmate ever harmed or stole from him. (*Id*. at 84-90.)

[9] The record before this Court does not contain a declaration from Dennis submitted by either party.

Without more, plaintiff has not met his burden of setting forth specific facts in support of his claim that defendants solicited gang-affiliated inmates at HDSP, including Dennis, to harm plaintiff, thereby "setting in motion a series of acts by others" which defendants knew or reasonably should have known would cause others to harm plaintiff. *See Hunter*, 500 F.3d at 988. Because plaintiff has proffered only bare allegations in support of his Eighth Amendment claim that he has suffered actionable harm as a result of defendants' conduct, this issue need not be tried. *See Villiarimo*, 281 F.3d at 1061 ("[T]his court has refused to find a 'genuine issue' where the only evidence presented is 'uncorroborated and self-serving' testimony. . . .") I therefore recommend the Court grant defendants' motion for summary judgment on this claim.

4. *Defense of Qualified Immunity*

Defendants argue that they are entitled to qualified immunity in this § 1983 action because "they are not liable for any constitutional violations." (Dkt. 232 at 11.) Specifically, defendants claim they did not retaliate against plaintiff, and they are not liable for failing to protect plaintiff from a substantial risk of harm by housing him in the same cell as Crip-affiliated inmates at HDSP. (*See id*.) In the alternative, defendants argue that "[e]ven if this court found that Sweeten and Barron violated Ellington's constitutional rights, [defendants] are still entitled to qualified immunity because their actions did not violate any clearly established law." (*Id*.)

The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,*

457 U.S. 800, 818 (1982). A qualified immunity analysis consists of two prongs: (1) whether, "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the [defendants'] conduct violated a constitutional right"; and (2) whether that right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *modified by Pearson v. Callahan*, --- U.S. ----, 129 S.Ct. 808, 818 (2009) (holding that addressing the two prongs of the test in this order is often beneficial, but it is not mandatory.) If the allegations do not establish the violation of a constitutional right under the first prong of the test, "there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201.

As discussed above, plaintiff has failed to show the violation of a federal right by defendants. Under *Saucier*, it is therefore unnecessary to make further inquiries regarding qualified immunity. *See id.*

IV. CONCLUSION

For all of the reasons discussed above, the Court recommends that defendants' motion to dismiss on IFP grounds (Dkt. 230) be DENIED, and defendants' motion for summary judgment on the merits (Dkt. 232) be GRANTED. The Court further recommends that this case as a whole be DISMISSED with prejudice.

This Report and Recommendation is submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14) days of being served with this Report and Recommendation, any party may file written objections with this Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation." Either party may then respond to the other party's objections within fourteen (14) days of being served a copy

of such written objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation.

DATED this 1st day of July, 2010.

JOHN L. WEINBERG
United States Magistrate Judge