

1 frequent cell searches, resulting in the flooding of plaintiff's cell and the denial of toiletries
2 ("harassment claim"); and (5) a First Amendment retaliation claim against defendants Kirkland,
3 Kissinger, Sanchez, Garate, and Aurich based on their destruction of plaintiff's personal property,
4 mail, and inmate appeals because plaintiff filed, or attempted to file, administrative appeals
5 ("retaliation claim"). In accordance with the parties' pretrial statements, the court orders as
6 follows:

7 **JURISDICTION/VENUE**

8 This court has jurisdiction pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to 28
9 U.S.C. § 1391 and Local Rule 120(d). There is no dispute over either jurisdiction or venue.

10 **UNDISPUTED FACTS**

- 11 1. Plaintiff is a State prisoner in the custody of the California Department of Corrections and
12 Rehabilitation (CDCR).
- 13 2. From November 24, 2006 through October 8, 2008, plaintiff was housed at High Desert
14 State Prison (HDSP).
- 15 3. On November 24, 2006 at approximately 8:00 p.m., plaintiff and several other inmates
16 were involved in a staff assault on Defendant Aurich and another correctional officer in
17 the Facility A yard.
- 18 4. Prison officials responded to the assault and placed the yard on lockdown.
- 19 5. Plaintiff's clothes were taken for evidence.
- 20 6. Plaintiff was left wearing boxer shorts.
- 21 7. Plaintiff was placed in waist and leg restraints.
- 22 8. A little before 4:00 a.m., Defendant Perry, the Facility D, Buildings 3 and 4 Sergeant, led
23 an escort team of officers. They took plaintiff and three other inmates to Facility D,
24 Building 5.
- 25 9. Officer Guilbeaux and Defendant Lower, who is another correctional officer, escorted
26 plaintiff.
- 27 10. Defendants Hook and Handschumaker were officers who escorted other inmates in the
28 group with plaintiff.

- 1 11. Defendant B. Ramsay, another correctional officer, was not involved with plaintiff
- 2 because he was part of a different escort team that was taking other inmates to Z Unit,
- 3 which is a separate and distinct unit from Facility D, where plaintiff was being escorted
- 4 for housing.
- 5 12. The walk from Facility A to Facility D took less than half an hour.
- 6 13. The temperature was between fifteen and 25 degrees Fahrenheit.
- 7 14. Plaintiff was dressed in boxer shorts and shoes during the escort.
- 8 15. Plaintiff was placed in a cell in Facility D, Building 5, and the waist and leg restraints
- 9 were removed.
- 10 16. Officer Essman was assigned to work in Facility D, Building 5 on November 25, 2006.
- 11 17. Officer Essman served plaintiff breakfast, lunch, and dinner on November 25.
- 12 18. Officer Essman did not work the next three days, November 26 – 28, 2006.
- 13 19. From November 26 – 28, 2006, plaintiff was fed by other officers who are not defendants.
- 14 20. Plaintiff was moved to Z-Unit (administrative segregation unit) on the evening of
- 15 November 28, 2006.
- 16 21. Plaintiff was given replacement items for lost or wet personal items.
- 17 22. Plaintiff remained in the administrative segregation unit until October 8, 2008, when he
- 18 was transferred to California State Prison-Corcoran.
- 19 23. Plaintiff requested medical care in July 2008.
- 20 24. After his request in July 2008, plaintiff was seen on a regular basis for his medical
- 21 complaints.
- 22 25. Plaintiff continues to do push-ups and other exercises that his doctors counseled against.

23 **DISPUTED FACTUAL ISSUES**

24 Defendants previously sought summary judgment. *See* ECF Nos. 86, 97, 98. That motion
25 addressed the denial of food claim, the excessive force claim, and the harassment claim. It did
26 not address the escort claim or the retaliation claim.

27 In denying the motion, the court found disputed issues of fact as to whether defendants
28 Sanchez and Essman denied plaintiff food from November 25, 2006 through November 28, 2006.

1 The court also found disputed issues of fact as to whether defendant Kirkland applied
2 force to plaintiff in the holding cell on November 28, 2006 maliciously and sadistically rather
3 than as a part of a good faith effort to maintain or restore discipline. In their pretrial statement,
4 defendants state that whether Kirkland treated plaintiff “roughly,” as plaintiff has alleged, is also
5 in dispute.

6 As for plaintiff’s harassment claim, the court found disputed issues of fact as to: (1)
7 whether defendants Kirkland, Kissinger, Sanchez, Garate, and/or Aurich tampered with or
8 repeatedly denied plaintiff meals while plaintiff was housed in the Z-Unit; (2) whether defendant
9 Kirkland threw plaintiff into a flooded cell on November 28, 2006; and (3) whether plaintiff was
10 subsequently denied basic supplies and food for several days and subjected to abusive cell
11 searches for months thereafter on a weekly basis. Defendants claim it also disputed: (1) whether
12 officers “threw” plaintiff’s dinner tray at him; (2) whether plaintiff received the same food as
13 other inmates in Z-Unit and was fed the same way; (3) whether plaintiff’s cell was flooded by
14 Defendants Kirkland, Kissinger, Sanchez, Garate, and Aurich, resulting in the destruction of his
15 bedding and toiletries; (4) whether plaintiff’s toiletries and other property were confiscated while
16 he was in Z-unit; (5) whether plaintiff was given bedding and supplies in Z-Unit; and (6) whether
17 plaintiff was allowed to exchange laundry.

18 Defendants’ summary judgment motion did not address plaintiff’s Eighth Amendment
19 claim against defendants Perry, Hook, Lower, Handshumacker, and Ramsey based on the
20 November 25, 2006 escort. In their pretrial statement, defendants identify the following disputed
21 factual issues relevant to that claim: (1) whether plaintiff was subjected to an excessive risk to his
22 health or safety during the escort; (2) whether Defendants Perry, Hook, Lower, Handshumacker
23 and Ramsey were aware of an excessive risk to plaintiff’s health or safety during the escort; and
24 (3) whether Defendants Perry, Hook, Lower, Handshumacker and Ramsey ignored any excessive
25 risk to plaintiff’s health or safety during the escort.

26 Defendants’ motion also failed to address plaintiff’s First Amendment retaliation claim
27 against defendants Kirkland, Kissinger, Sanchez, Garate, and Aurich. Defendants identify the
28 following disputed factual issues relevant to that claim: (1) whether Defendant Kirkland

1 prevented plaintiff from sending or receiving letters from his family; (2) whether Defendants
2 Kirkland, Kissinger, Sanchez, Garate and Aurich destroyed plaintiff's personal property, mail and
3 inmate appeals; (3) whether Defendant Kirkland refused to pick up plaintiff's inmate appeals; and
4 (4) whether plaintiff was prevented from filing inmate appeals or sending personal mail.

5 **DISPUTED EVIDENTIARY ISSUES**

6 Plaintiff intends to file motions in limine to exclude evidence of his criminal history, his
7 conduct in prison, and his personal affairs, background and family.³

8 Defendants intend to file motions in limine to: (1) object to plaintiff testifying about the
9 diagnosis and prognosis of his medical condition and the cause of any medical condition of which
10 he now complains; and (2) object to various exhibits plaintiff intends to use at trial.

11 Defendants also intend to file motions in limine to preclude plaintiff from testifying,
12 eliciting testimony, or introducing evidence of the following matters: (1) dismissed claims and
13 unrelated claims and individuals; (2) defendants' involvement in other lawsuits or incidents
14 alleging excessive force; (3) offers to compromise; and (4) CDCR's indemnification of an
15 adverse judgment.

16 Defendants also intend to file a motion in limine to permit them to introduce evidence of
17 plaintiff's and any incarcerated witness's felony conviction or sentence for impeachment
18 purposes.

19 Defendants note that they anticipate objecting to any testimony suggesting that plaintiff
20 did not participate, instigate or attack anybody on November 24, 2006, on the grounds that such
21 testimony would undermine plaintiff's disciplinary finding of guilt of battery on a peace officer.
22 They also anticipate objecting to any evidence submitted by plaintiff based upon or containing
23 inadmissible hearsay, or evidence that is irrelevant, immaterial, or incompetent.

24 Motions in limine shall be filed not later than twenty-one days before trial. Oppositions
25 thereto shall be filed not later than fourteen days before trial. Reply briefs, if any, shall be filed
26 not later than seven days before trial.

27 ³ Plaintiff's "motion in limine," (ECF No. 118) is denied without prejudice to renewal in
28 keeping with the timeframe set forth herein.

1 **RELIEF SOUGHT**

2 Plaintiff seeks \$5,000,000 in compensatory damages and \$1,000,000 in punitive damages.

3 He also seeks injunctive relief.

4 Defendants seek judgment in their favor.

5 **POINTS OF LAW**

6 Plaintiff did not include a “Points of Law” section in his pretrial statement.

7 Defendants included the following “Points of Law” section in their pretrial statement:

8 **I. ACTING UNDER 42 U.S.C. § 1983.**

9 To prevail on a civil rights claim under 42 U.S.C. § 1983, a plaintiff must
10 first demonstrate a violation of his federally-protected rights. *Baker v. McCollan*,
11 443 U.S. 137, 140 (1979). There must be an actual connection or link between the
12 defendant’s actions and the plaintiff’s alleged deprivation of rights. *Monell v.*
13 *Dep’t of Soc. Servs.*, 426 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). A
14 person deprives another of a constitutional right within the meaning of § 1983 if
15 he performs an affirmative act, participates in another’s affirmative acts, or fails to
16 perform an act that he is legally required to do, that causes the claimed
17 deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). Vague and
18 conclusory allegations about an official’s involvement in a claimed civil rights
19 violation are insufficient; for each defendant, the plaintiff must show specific
20 conduct that was unlawful. *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d
21 266, 268 (9th Cir. 1982).

22 A plaintiff must show that each of the individual defendants was personally
23 involved in the alleged constitutional violation—that each defendant either acted
24 affirmatively, or failed to act, in a way that violated the plaintiff’s constitutional
25 rights. *Johnson v. Duffly*, 588 F.2d 740, 743 (9th Cir. 1978).

26 **II. EIGHTH AMENDMENT CLAIMS**

27 **A. Excessive Force**

28 The Eighth Amendment prohibits prison officials from using excessive
force against prisoners. However, force does not amount to a constitutional
violation if it is applied in a good faith effort to restore discipline and order and
“not maliciously and sadistically for the very purpose of causing harm.” *Whitley v.*
Albers, 475 U.S. 312, 320-21 (1986); *Hudson v. McMillian*, 503 U.S. 1, 7 (1992);
Martinez v. Stanford, 323 F.3d 1178, 1184 (9th Cir. 2003). An excessive force
claim under the Eighth Amendment “necessarily involves a more culpable mental
state” than that required under the Fourth Amendment’s unreasonable seizures
restriction. *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002). “For this reason,
under the Eighth Amendment, we look for malicious and sadistic force, not merely

1 objectively unreasonable force.” *Id.* To constitute cruel and unusual punishment,
2 use of physical must be repugnant to the conscience of mankind. *Hudson*, 503 U.S.
3 at 9-10.

4 The relevant factors to consider in evaluating a claim of excessive force in
5 the prison context are: (1) the extent of the injury suffered by an inmate; (2) the
6 need for the application of force; (3) the relationship between that need and the
7 amount of force used; (4) the threat reasonably perceived by the responsible
8 officials; and (5) any efforts made to temper the severity of a forceful response.
9 *Hudson*, 503 U.S. at 7; *Martinez*, 323 F.3d at 1184. In considering these factors,
10 prison authorities “should be accorded wide-ranging deference in the adoption and
11 execution of policies and practices that in their judgment are needed to preserve
12 internal order and discipline and to maintain institutional security.” *Whitley*, 475
13 U.S. at 321 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1970)).

14 The extent of a prisoner’s injury is a factor that may suggest whether the
15 use of force could plausibly have been thought necessary in a particular situation.
16 *Id.* In order to show a violation of the Eighth Amendment, however, an injury must
17 be more than de minimis, but it need not be significant. *Id.* at 9-10.

18 **B. Conditions of Confinement**

19 The Eighth Amendment prohibits cruel and unusual punishment of a
20 person convicted of a crime. U.S. Const. amend. VIII. Where a prisoner challenges
21 the conditions of his confinement, he must make two showings. First, the plaintiff
22 must make an “objective” showing that the deprivation was “sufficiently serious”
23 to form the basis for an Eighth Amendment violation. *Johnson v. Lewis*, 217 F.3d
24 726, 731 (9th Cir. 2000) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).
25 Second, the plaintiff must make a “subjective” showing that the prison official
26 acted “with a sufficiently culpable state of mind.” *Id.*

27 Routine discomfort inherent in the prison setting is inadequate to satisfy the
28 objective prong of an Eighth Amendment inquiry. *Johnson*, 217 F.3d at 731. But
deprivations denying “the minimal civilized measure of life’s necessities are
sufficient to state an Eighth Amendment violation. *Id.* (quoting *Rhodes v.*
Chapman, 452 U.S. 337, 347 (1981)).

Prison officials have a duty to ensure that prisoners are provided adequate
shelter, food, clothing, sanitation, medical care, and personal safety. *Johnson*, 217
F.3d at 731 (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Keenan v. Hall*,
83 F.3d 1083, 1089 (9th Cir. 1996); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th
Cir. 1982)). The circumstances, nature, and duration of a deprivation of these
necessities must be considered in determining whether a constitutional violation
has occurred. *Id.* “The more basic the need, the shorter the time it can be
withheld.” *Id.* (citing *Hoptowit*, 682 F.2d at 1259; *Anderson v. County of Kern*, 45
F.3d 1310, 1314, *as amended*, 75 F.3d 448 (9th Cir. 1995)). More modest
deprivations can also form the objective basis of a violation, but only if such
deprivations are lengthy or ongoing. *Id.* (citing *Keenan*, 83 F.3d at 1090 91).

1
2 A prisoner's claim that defendants served him food in a manner he found
3 unpleasant, unsanitary, or not aesthetically pleasing does not state a constitutional
4 claim. *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993).

5 An unauthorized intentional deprivation of property by a state employee
6 does not constitute a violation of due process if a meaningful post deprivation
7 remedy for the loss is available. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).
8 California provides a remedy for tort claims against public officials. *Barnett v.*
9 *Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994) (citing Cal. Govt. Code § 810-895.)

10 C. Deliberate Indifference

11 In order to state a § 1983 claim for violation of the Eighth Amendment
12 based on inadequate medical care, the prisoner must show deliberate indifference
13 to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Jackson*
14 *v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). In order to establish a constitutional
15 violation, a prisoner must satisfy both the objective and subjective components of
16 a two-part test. *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (citing
17 *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1997)). The deprivation must be
18 objectively serious, and the official must have acted with deliberate indifference.
19 *Farmer v. Brennan*, 511 U.S. at 834; *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th
20 Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d
21 1133 (9th Cir. 1997) (en banc).

22 III. FIRST AMENDMENT CLAIMS OF RETALIATION

23 A viable claim of First Amendment retaliation in the prison context
24 requires evidence that the prison official took some adverse action against an
25 inmate because of that prisoner's protected conduct, that such action would chill a
26 person of ordinary firmness from future First Amendment activities, and that the
27 action did not reasonably advance a legitimate correctional goal. *Rhodes v.*
28 *Robinson*, 408 F.3d 559, 567-69 (9th Cir. 2004) (citing *Resnick v. Hayes*, 213 F.3d
443, 449 (9th Cir. 2000) and *Mendocino Environmental Center v. Mendocino*
County, 192 F.3d 1283, 1300 (9th Cir. 1999)); *Barnett v. Centoni*, 31 F.3d at 815-
16).

IV. ADMISSIBILITY OF FELONY CONVICTIONS

For the purpose of attacking the character for truthfulness of a witness,
evidence that a witness has been convicted of a crime that was punishable by
imprisonment in excess of one year shall be admitted subject to Federal Rule of
Evidence 403. Fed. R. Evid. 609(a)(1); *see e.g., United States v. Murray*, 751 F.2d
1528, 1533 (9th Cir. 1983) (finding that trial court properly determined that
probative value of seventeen-year old conviction outweighed its prejudicial effect
when needed to resolve significant conflict between defendant and the
government's chief witness).

1 The presumption under Rule 609(a) is that the term “evidence”
2 encompasses the essential facts of the conviction, including the statutory name of
3 each offense, the date of conviction, and the sentence imposed. *United States v.*
4 *Estrada*, 430 F.3d 606, 615-16 (2d Cir. 2005); *United States v. Osazuwa*, 564 F.3d
5 1169, 1175 (9th Cir. 2009) (stating that impeachment with prior convictions is
6 generally limited to the crime charged, the date, and the disposition); *see also*, 4
7 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* §
8 609.20[2] at 609-57 (2d ed. 2005) (“When a prior conviction is admissible for
9 impeachment, the impeaching party is generally limited to establishing that bare
10 facts of the conviction; usually the name of the offense, the date of the conviction,
11 and the sentence.”).

12 The verdict in this case will be decided by the jury after consideration of
13 each witness’s credibility. Plaintiff, to meet his burden of proof at trial, is expected
14 to testify to his version of the events. He has also identified another inmate (Kevin
15 Fields) as a witness for trial.

16 Rule 609 of the Federal Rules of Evidence provides that evidence of a
17 witness’s prior felony conviction may be used to impeach that witness’s testimony.
18 Defendants contend that no one who has a prior felony conviction is entitled to the
19 false aura of veracity, which would occur if impeachment of the Plaintiff and
20 Fields were not allowed. *U.S. v. Bernal-Obeso*, 989 F.2d 331, 336 (9th Cir. 1993)
21 (“As any trial lawyer knows, felony convictions trench heavily upon such a
22 person’s credibility”). Accordingly, Defendant will seek to impeach Plaintiff’s trial
23 testimony, and that of Fields, with evidence of their prior felony convictions.

24 **V. QUALIFIED IMMUNITY**

25 Government officials are “shielded from liability for civil damages insofar
26 as their conduct does not violate clearly established statutory or constitutional
27 rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*,
28 457 U.S. 800, 818 (1982). The purpose of the rule is to permit officials to
undertake their responsibilities without fear that they will be held liable in
damages for actions that appear reasonable at the time, but are later held to violate
statutory or constitutional rights. *Id.* at 819. “The concern of the immunity inquiry
is to acknowledge that reasonable mistakes can be made” and that it is “often
difficult for an officer to determine how the relevant legal doctrine will apply to
the factual situation that he faces.” *Estate of Ford v. Ramirez Palmer*, 301 F.3d
1043, 1049 (9th Cir. 2002) (citing *Saucier v. Katz*, 533 U.S. 194, 205 (2001)).
Thus, regardless of whether the constitutional violation occurred, the [official]
should prevail if the right asserted by the plaintiff was not ‘clearly established’ or
the [official] could have reasonably believed that his particular conduct was
lawful.” *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

 In *Saucier*, the Supreme Court set forth a two-part inquiry to determine
whether the immunity exists. The initial inquiry, or first prong, is whether “[t]aken
in the light most favorable to the party asserting the injury, . . . the facts alleged
show that the officer’s conduct violated a constitutional right.” *Saucier*, 533 U.S.

1 at 201. If, and only if, a violation can be made out, the next step, or second prong,
2 is to ask whether the “right was clearly established.” *Id.* If the right was clearly
3 established at the time of the alleged incident, the court must then determine
4 whether, “under that law, could a reasonable state official have believed his
5 conduct was lawful.” *Id.* at 202; *Jeffers v. Gomez*, 267 F.3d 895, 910 (9th Cir.
6 2001) (quoting *Browning v. Vernon*, 44 F.3d 818, 822 (9th Cir. 1995)). “The
7 linchpin of qualified immunity is the reasonableness of the official’s conduct.”
8 *Rosenbaum v. Washoe County*, 654 F.3d 1001, 1006 (9th Cir. 2011).
9 Reasonableness is judged against the backdrop of law at the time of the conduct at
10 issue. *Brouseau v. Haugen*, 543 U.S. 194, 198 (2004); *Wilson v. Layne*, 526 U.S.
11 603, 614 (1999).

12 Thus, the reasonableness inquiry must be undertaken in light of the specific
13 context of the case and not as a general, broad proposition. *Saucier*, 533 U.S. at
14 202; *Kennedy v. Ridgefield*, 439 F.3d 1055, 1065-66 (9th Cir. 2006). Qualified
15 immunity allows ample room for mistaken judgments—regardless of whether the
16 government official’s error is “a mistake of law, a mistake of fact, or a mistake
17 based on mixed questions of law and fact”—and applies even when wrongful
18 conduct occurs. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997); *Pearson v.*
19 *Callahan*, 555 U.S. 223, 231 (2009). The court has the discretion, based on the
20 circumstances of the particular case at hand, to decide whether the two-part inquiry
21 is worthwhile or if a determination can be made by analyzing a single prong of the
22 immunity inquiry. *Pearson* at 236.

23 VI. PUNITIVE DAMAGES

24 Plaintiff seeks punitive or exemplary damages. Plaintiff is not entitled to
25 punitive damages. The Supreme Court has determined that punitive damages are
26 available in a § 1983 action only when a defendant’s conduct is shown to be
27 motivated by evil motive or intent or when it involves reckless or callous
28 indifference to the federally protected rights of others. *Smith v. Wade*, 461
U.S. 30, 51 (1983).

It is not enough that a defendant may have acted in an objectively
unreasonable manner; their subjective state of mind must be assessed. *Wulf v. City*
of Wichita, 883 F.2d 842, 867 (10th Cir. 1989). Where there is no evidence that a §
1983 defendant has acted with evil intent, there is no legal right to punitive
damages. *Ward v. City of San Jose*, 967 F.2d 280, 286 (9th Cir. 1991). The
plaintiff alleging a § 1983 claim has the burden of proving that punitive damages
should be awarded by a preponderance of the evidence. *Dang v. Cross*, 422 F.3d
800, 807 (9th Cir. 2005) (citing Model Civ. Jury Instr. 9th Cir. 7.5 (2004)).

ECF No. 125 at 6-12.

The parties shall serve and file trial briefs (as described in Local Rule 285) no later than
fourteen days before trial. The parties shall thoroughly address all applicable claims and defenses
in their trial briefs.

1 **ABANDONED ISSUES**

2 None.

3 **WITNESSES**

4 Plaintiff's list of unincarcerated witnesses includes:⁴

- 5 1. HDSP CCII M. Danger
- 6 2. HDSP Psych Tech Hogan
- 7 3. HDSP Warden T. Felker
- 8 4. AW Complex II M. Wright
- 9 5. HDSP Sergeant Bond
- 10 6. HDSP CCII Jackson
- 11 7. c/o Cottrell
- 12 8. HDSP Lt. Dharlingue
- 13 9. HDSP ASU Z-Unit Law Library Officer Cotton
- 14 10. Aw/Med Mgr T. Perez, AW
- 15 11. R.K. Wong, AW
- 16 12. Ombudsman, Ralyn Conner
- 17 13. c/o Hays
- 18 14. c/o Renner
- 19 15. c/o Logan
- 20 16. c/o Mowry
- 21 17. c/o S. Jones
- 22 18. c/o G. Jones
- 23 19. c/o Priollo
- 24 20. c/o Beasely
- 25 21. c/o Delgado

27 ⁴ Plaintiff moved to amend his pretrial statement with an untimely witness list. *See* ECF
28 Nos. 127, 128. The motion is granted in that all of plaintiff's proposed witnesses are listed
herein.

1 22. c/o Montgomery

2 23. c/o Kirkland

3 24. c/o Kissinger

4 25. c/o Sanchez

5 26. Attorney Jordan Funk and Private Investigator

6 Plaintiff seeks the court's assistance in paying the witness fees for his unincarcerated
7 witnesses. ECF No. 128. That request is denied. If plaintiff intends to present these witnesses to
8 testify, it is his responsibility to obtain their presence at trial.⁵

9 Plaintiff also asks the court to "hold witness[] enrollments until defendants provide all
10 information and allow plaintiff the freedom to contact potential witnesses." ECF No. 120 at 2. It
11 is not clear what relief plaintiff is requesting. Moreover, plaintiff has not explained what
12 information he is requesting from defendants or how, if at all, defendants have restricted his
13 freedom to contact potential witnesses. Without such information, the court cannot grant
14 plaintiff's request.

15 Plaintiff is reminded of the requirements for obtaining the attendance of unincarcerated
16 witnesses:

17 A party need not obtain an order to produce an unincarcerated witness who intends to
18 testify voluntarily. However, the party is responsible for ensuring attendance of such a witness
19 by way of a subpoena. Specifically, to obtain the presence of a witness who is at liberty and who
20 refuses to testify voluntarily, the party who intends to present that witness's testimony must
21 complete a subpoena and submit it to the United States Marshal for service upon the witness.
22 Blank subpoena forms may be obtained from the Clerk of the Court. Completed subpoenas must
23 be submitted *not earlier than four weeks and not later than two weeks before trial*. The party
24 must also tender through the United States Marshal a money order payable to the witness in the
25 amount of the daily witness fee, \$40.00, *plus the witness's travel expenses*. If plaintiff seeks the
26 witness's presence and proceeds in forma pauperis, then plaintiff must also submit a copy of the

27 ⁵ The court notes, however, that per defendants' representation, the three defendant
28 witnesses will be present at trial. See ECF No. 131.

1 order granting him leave so to proceed. *The United States Marshal will not serve a subpoena*
2 *upon an unincarcerated witness without the witness fee and travel expenses having been*
3 *tendered.* No statute authorizes the use of public funds for expenses in civil cases and so even a
4 plaintiff proceeding in forma pauperis must tender the fees.

5 Plaintiff's list of incarcerated witness includes:

- 6 1. Inmate Shankar (CDCR No. T91407), Substance Abuse Treatment Facility
- 7 2. Inmate Xiong (CDCR No. T29966), Pleasant Valley State Prison
- 8 3. Inmate Hoac (CDCR No. K19964), Folsom State Prison
- 9 4. Inmate Yang (CDCR No. K91139), Folsom State Prison
- 10 5. Inmate Kinikini (CDCR No. F05107), Substance Abuse Treatment Facility

11 Plaintiff has not complied with the requirements for calling incarcerated witnesses. If the
12 incarcerated witness is willing to testify voluntarily, the court will issue an order directing the
13 custodian to produce the witness at trial only upon a showing that the witness has agreed to testify
14 voluntarily and has actual knowledge of relevant facts. Plaintiff can make this showing by
15 submitting a sworn affidavit signed by either himself or the witness. If the incarcerated witness
16 does not intend to testify voluntarily, plaintiff must file a motion for an order directing that
17 witness to appear. Such a motion must also be accompanied by an affidavit showing that the
18 witness has actual knowledge of relevant facts, but that the witness does not intend to testify
19 voluntarily. Plaintiff shall have thirty days from the date of this order to submit the necessary
20 information to obtain the attendance at trial of his incarcerated witnesses. Without such
21 information, the court will not issue an order directing the custodian to produce any incarcerated
22 witness for trial.

23 Defendants intend to call the following witnesses:

- 24 1. T. Kissinger
- 25 2. J. Hook
- 26 3. H. Kirkland
- 27 4. G. Handschumaker
- 28 5. R. Essman

- 1 6. C. Lower
- 2 7. T. Sanchez
- 3 8. R. Garate
- 4 9. Z. Aurich
- 5 10. B. Ramsey
- 6 11. M. Perry
- 7 12. D. Fletcher
- 8 13. J. Marsh
- 9 14. D. Spangle
- 10 15. E. Schwab
- 11 16. R. Dreith
- 12 17. M. DeForest
- 13 18. D. Swingle, M.D. – expert witness
- 14 19. Custodian of Human Resource/Employment Records at High Desert State Prison
- 15 20. Custodian of Records for Plaintiff’s central file and Unit Health Records
- 16 21. Custodian of Records for facility logbooks retained at High Desert State Prison
- 17 22. Litigation Coordinator, High Desert State Prison
- 18 23. Litigation Coordinator, California Men’s Colony

19 Any party may call any witness identified by another party. No other witness will be
20 permitted to testify. The court will, not later than six weeks before trial, issue all necessary writs
21 to provide for plaintiff’s attendance at trial.

22 **EXHIBITS, SCHEDULES, AND SUMMARIES**

23 Plaintiff expects to use the following exhibits at trial:

- 24 1. Sanchez’s responses to interrogatories
- 25 2. Garate’s responses to interrogatories
- 26 3. Hook’s responses to interrogatories
- 27 4. Record of Daily Activity for Plaintiff (Inmate Segregation Record)
- 28 5. Daily Record (HDSP, D-Yard, Building 5)

- 1 6. Inmate Buth's staff complaint (Log No. 08-02563)
- 2 7. Inmate Xiong's staff complaint (Log No. 08-00252)
- 3 8. Inmate Xiong's staff complaint (Log No. 07-03504)
- 4 9. Inmate Lee's staff complaint (Log No. 07-2751)
- 5 10. Inmate Buth's staff complaint (Log No. 07-2343)
- 6 11. Inmate Lasaphangthong's staff complaint (Log No. 07-02598)
- 7 12. Inmate Ryle's staff complaint (Log No. 07-00672)
- 8 13. Inmate Chatman's staff complaint (Log No. 08-02830)
- 9 14. Brown's responses to interrogatories
- 10 15. Marsh's responses to interrogatories
- 11 16. Plaintiff's July 8, 2007 request for interview
- 12 17. Plaintiff's September 17, 2007 request for interview
- 13 18. Plaintiff's numerous complaints and requests for interview regarding mail tampering
- 14 19. Plaintiff's request for help from Lt. Dharlingue
- 15 20. Letter from plaintiff's sister
- 16 21. Cell search slip
- 17 22. Various notices regarding plaintiff's appeals
- 18 23. Plaintiff's March 20, 2008 letter to Warden T. Felker
- 19 24. Plaintiff's January 7, 2008 letter to Prison Law Office
- 20 25. Plaintiff's harassment complaint (Log No. 08-00254)
- 21 26. Plaintiff's May 10, 2008 letter to Warden T. Felker
- 22 27. Plaintiff's April 11, 2008 letter to Warden T. Felker
- 23 28. Plaintiff's August 15, 2007 Letter to Internal Affairs
- 24 29. Plaintiff's complaint of cell search (Log No. 03229)
- 25 30. Plaintiff's second letter to ombudsman
- 26 31. Letters to plaintiff from ombudsman
- 27 32. Plaintiff's complaint (Log No. 02169)
- 28 33. Perry's responses to interrogatories

- 1 34. Lower's responses to interrogatories
- 2 35. Essman's responses to interrogatories
- 3 36. Kirkland's responses to interrogatories
- 4 37. Kissinger's responses to interrogatories
- 5 38. Aurich's responses to interrogatories
- 6 39. Ramsey's responses to interrogatories
- 7 40. Photo One of plaintiff
- 8 41. Photo Two of plaintiff

9 Defendants expect to use the following exhibits at trial:

- 10 1. Plaintiff's Abstract of Judgment, Case No. 97NF1524, filed April 3, 1998
- 11 2. Plaintiff's Abstract of Judgment, Case No. CH025583, filed July 8, 2008
- 12 3. Crime/Incident Report Incident Log No. HDP-FA2-06-11-0591 dated November 24, 2006
- 13 4. Rules Violation Report, Log No. FA-07-02-020R
- 14 5. Medical Report of Injury Or Unusual Occurrence, dated November 24-25, 2006
- 15 6. Relevant portions of plaintiff's Unit Health records from November 24, 2006 through
- 16 October 8, 2008
- 17 7. Relevant portions of plaintiff's mental health records from November 24, 2006 through
- 18 October 8, 2008, pertaining to plaintiff's stressors and emotional distress claims made to
- 19 treating mental health providers
- 20 8. Plaintiff's grievances, log # HDSP-Z-08-00254, HDSP-Z-08-01206, and HDSP-Z-08-
- 21 01906
- 22 9. Photos and diagrams of plaintiff and HDSP facilities, including housing units, food trays
- 23 and equipment, including restraint gear
- 24 10. Facility Logbooks for Facility D, HDSP November 25, 2006 through November 28, 2006
- 25 11. Inmate Segregation Records, CDCR Form 114, for plaintiff from November 25, 2006
- 26 through October 8, 2008
- 27 12. Custody Sign In & Sign Out Sheet for Facility D and Z Unit at HDSP from November 25,
- 28 2006 through October 6, 2008

1 13. Other portions of plaintiff's Central File for purposes of impeachment/rebuttal, or
2 refreshing recollection, as may be determined at trial

3 14. Declarations of plaintiff filed in litigation, as well as complaints or other pleadings filed
4 by plaintiff, and prior testimony given under oath, as may be determined at trial to be
5 relevant for purposes of impeachment or rebuttal.

6 The parties shall mail copies of their exhibits, schedules, and summaries and other items
7 they anticipate offering into evidence to all other parties no later than twenty-eight days before
8 trial.

9 Objections to a party's items sought to be introduced into evidence shall be filed twenty-
10 one days before trial. Each item to which no pretrial objection is made will be forthwith received
11 into evidence.

12 If defendants object to any of plaintiff's exhibits which purport to be copies of records
13 from the California Department of Corrections and Rehabilitation on foundational grounds or
14 otherwise dispute the authenticity of those copies, defendants shall subpoena or otherwise
15 produce the custodians of the records for testimony at trial. To the extent defendants anticipate
16 that plaintiff will so object, the custodians of records are permitted to authenticate documents
17 through their declarations.

18 Plaintiff will use numbers to mark his exhibits; defendants will use letters.

19 The parties are directed to bring an original and one copy of each exhibit to trial.

20 **DISCOVERY DOCUMENTS**

21 At trial, defendants may offer portions of plaintiff's deposition transcript (or exhibits
22 appended thereto) for purposes of impeachment.

23 **FURTHER DISCOVERY OR MOTIONS**

24 Defendants state that they may bring a motion under Federal Rule of Civil Procedure 50.

25 Plaintiff has filed several motions.

26 First, plaintiff requests that he be provided with the assistance of a Cambodian interpreter
27 at trial. ECF No. 129. Defendants shall file a response to this request within thirty days from the
28 date this order is issued.

1 Second, plaintiff requests that the court appoint counsel. ECF No. 129. District courts
2 lack authority to require counsel to represent indigent prisoners in section 1983 cases. *Mallard v.*
3 *United States Dist. Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may
4 request an attorney to voluntarily to represent such a plaintiff. *See* 28 U.S.C. § 1915(e)(1);
5 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332,
6 1335-36 (9th Cir. 1990). When determining whether “exceptional circumstances” exist, the court
7 must consider the likelihood of success on the merits as well as the ability of the plaintiff to
8 articulate his claims pro se in light of the complexity of the legal issues involved. *Palmer v.*
9 *Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Having considered those factors, the court finds there
10 are no exceptional circumstances in this case.

11 Lastly, plaintiff requests that when he is transferred to a new prison for the upcoming trial,
12 he: (1) be allowed to transport all of his legal property with him; (2) be given immediate access to
13 his legal property upon his arrival; (3) be granted single-cell status so he can concentrate; and (4)
14 be afforded daily access to the library. ECF No. 130. Plaintiff’s request is denied without
15 prejudice. “Courts must accord wide-ranging deference to prison administrators in the adoption
16 and execution of policies and practices that in their judgment are needed to preserve internal order
17 and discipline and to maintain institutional security.” *Toussaint v. McCarthy*, 801 F.2d 1080,
18 1104 (9th Cir. 1986) (internal quotation and citation omitted). At this stage in the proceedings,
19 the court will not interfere with CDCR’s policies regarding how inmate property is processed
20 upon a transfer, how single-cell housing is prioritized, or how inmates are expected to request and
21 obtain library access. If plaintiff is transferred and the receipt of his legal materials is
22 unreasonably delayed, or his library access is unreasonably restricted, he may seek court
23 intervention at that time.

24 **STIPULATIONS**

25 Defendants are willing to stipulate to the authenticity of plaintiff’s unaltered records from
26 his central and medical files maintained by CDCR and any CDCR records generated and
27 maintained in the regular course of business, which may be used as exhibits at trial. Plaintiff
28 shall, within 30 days of the date of this order, inform the court whether he so stipulates.

1 **AMENDMENTS/DISMISSALS**

2 None.

3 **SETTLEMENT NEGOTIATIONS**

4 The court has not held a settlement conference in this case and defendants do not believe
5 that settlement negotiations would be successful.

6 **AGREED STATEMENTS**

7 None.

8 **SEPARATE TRIAL OF ISSUES**

9 Defendants request to bifurcate the trial on the *amount* of punitive damages, if the jury
10 should determine that punitive damages are appropriate. That request is granted, to the extent that
11 defendants are permitted to reserve their testimony as to their net financial worth until after any
12 entitlement to punitive damages has been established. If plaintiff fails to establish that punitive
13 damages are warranted, no additional testimony will be necessary.

14 **IMPARTIAL EXPERTS/LIMITATION OF EXPERTS**

15 This is not a case which warrants the appointment of an impartial expert witness.

16 **ATTORNEYS' FEES**

17 Plaintiff is proceeding pro se and attorney's fees are therefore not appropriate.

18 Defendants do not anticipate seeking attorney's fees if they prevail, but will request an
19 award of costs.

20 Any motions for costs or attorneys' fees shall be filed after judgment and timely presented
21 in accordance with Local Rules 292 and 293.

22 **TRIAL EXHIBITS**

23 No special handling of trial exhibits is expected.

24 **JURY TRIAL**

25 All parties have timely requested trial by jury.

26 Jury trial is scheduled to begin on November 17, 2014, at 9:30 a.m. in Courtroom No. 8,
27 13th Floor, before the undersigned. Although the parties do not provide a good faith estimate, it
28 appears that the action will be submitted to a jury for verdict within three to four days.

1 **PROPOSED JURY VOIR DIRE AND PROPOSED JURY INSTRUCTIONS**

2 The parties' proposed jury voir dire and proposed jury instructions (as described in Local
3 Rules 162.1(a) and 163(a)) shall be lodged with the clerk and copies served on all parties no later
4 than fourteen days before trial.

5 **SUMMARY OF ORDER**

- 6 1. The Clerk of the Court is directed to update and delete Felker from the case caption, as
7 defendant Felker has been dismissed.
- 8 2. Plaintiff shall have thirty days from the date of this order to: (a) submit the necessary
9 information to obtain the attendance at trial of his incarcerated witnesses. (Without
10 such information, the court will not issue an order directing the custodian to produce
11 any incarcerated witness for trial); and (b) inform the court as to whether he stipulates
12 to the authenticity of his unaltered records from his central and medical files
13 maintained by CDCR and any CDCR records generated and maintained in the regular
14 course of business.
- 15 3. Defendants shall file a response to plaintiff's request for a Cambodian interpreter at
16 trial (ECF No. 129) within thirty days from the date this order is issued.
- 17 4. The parties shall mail copies of their exhibits, schedules, and summaries and other
18 items they anticipate offering into evidence to all other parties no later than twenty-
19 eight days before trial.
- 20 5. Objections to a party's items of evidence sought to be introduced into evidence shall
21 be filed no later than twenty-one days before trial.
- 22 6. Motions in limine shall be filed no later than twenty-one days before trial.
- 23 7. Trial briefs, proposed jury voir dire, proposed jury instructions, and any agreed
24 statement of the case shall be filed no later than fourteen days before trial.
- 25 8. The Clerk of the Court shall terminate docket numbers 118, 127, 129, and 130.

26 **MODIFICATION OF PRETRIAL ORDER**

27 Each party is granted 30 days to object to this Pretrial Order. Any objections shall set
28 forth the basis of the objections and any changes to be made. Each party is also granted 14 days

1 thereafter to respond to the other party's objections. If no objections are made, the Pretrial Order
2 will become final without further order of the court.

3 Pursuant to Federal Rule of Civil Procedure 16, the final pretrial order shall control the
4 subsequent course of this action and will not be modified except according to its terms or to
5 prevent manifest injustice.

6 So ordered

7 DATED: July 28, 2014.



8 EDMUND F. BRENNAN
9 UNITED STATES MAGISTRATE JUDGE
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