

1
2
3
4
5
6
7
8
9

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Curtis Brady Jr.,

Plaintiff

v.

James Dzurenda, et al.,

Defendants

Case No.: 2:17-cv-02534-JAD-VCF

**Order Granting in Part Defendants’
Motion for Summary Judgment and
Ordering Plaintiff to Show Cause Why
Claims Against Defendant Barron Should
Not Be Dismissed**

[ECF No. 46]

10 Pro se plaintiff Curtis Brady Jr. sues several current and former Nevada Department of
11 Corrections (NDOC) employees for threats and harassment that he claims occurred while he was
12 in custody at the High Desert State Prison (HDSP).¹ Brady claims that, during his time in prison,
13 three correctional officers (COs) prevented him from filing grievances against them and used
14 excessive force against him. He adds that the supervisors knew of this conduct but failed to
15 protect him from the COs. The defendants now move for summary judgment on all of Brady’s
16 claims, arguing that he failed to exhaust his administrative remedies, certain employees are
17 entitled to qualified immunity, and there is no genuine issue of material fact about the COs’
18 motivation for their actions or the supervisor and caseworker’s indifference to his safety.²

19 Because Defendant Morris Guice Jr. enjoys qualified immunity from the excessive-force
20 claim, I grant him summary judgment on that claim. I also grant summary judgment for
21 Associate Warden Ronald Oliver and caseworker Joseph Faliszek on Brady’s deliberate-

22
23 ¹ ECF No. 6 (complaint).

² ECF No. 46 (motion for summary judgment).

1 indifference claim because he did not present evidence showing a disputed fact about their
2 subjective indifference. I grant Oliver and Sergeant Stephen George summary judgment on
3 Brady's First Amendment retaliation claim because they did not personally participate or fail to
4 act to prevent the retaliation. But I deny COs Antonio Bryant and Guice's motion for summary
5 judgment on that claim because I find on this record that Brady exhausted his administrative
6 remedies and that genuine disputes of material fact exist about whether the COs acted in
7 retaliation for Brady's request for a grievance form.

8 **Background**

9 In 2016, Brady was imprisoned at HDSP.³ During his time there, Brady had several less-
10 than-cordial encounters with correctional officers (COs) Guice, Bryant, and Barron.⁴ Two
11 principal events form the basis for Brady's claims.

12 The first event happened in March 2016. Brady claims that in March 2016, CO Guice
13 left prisoners waiting outside of their cells while he ate his dinner.⁵ Brady claims that when
14 Guice returned from his meal, he began yelling at the inmates, challenging them to fight him,
15 and showing indifference to those inmates requesting to fill out grievances or see a sergeant or
16 lieutenant.⁶ The next day, Guice taunted the inmates—calling them “bitches”⁷ before pointing a
17 shotgun at Brady and others and saying “give me a reason.”⁸ Brady filed an informal grievance
18

19 ³ See ECF No. 46-2 at 2 (Case Note). These facts largely stem from Brady's grievances and
20 declarations from his cellmate and they should not be construed as findings of fact unless
otherwise stated in this order.

21 ⁴ See, e.g., ECF Nos. 46-1 at 2; 46-4 (Brady's grievances).

22 ⁵ ECF Nos. 46-4 at 41; 52 at 14 (Guardado affidavit).

23 ⁶ ECF Nos. 46-4 at 42–43; 52 at 14, 15.

⁷ ECF Nos. 46-4 at 43; 52 at 15–16.

⁸ ECF No. 52 at 17 (Guardado declaration).

1 about the situation two days later.⁹ He filed subsequent appeals on that grievance on April 9,¹⁰
2 and then on June 21.¹¹ They were all denied.¹²

3 The second event occurred on May 6th. Brady claims that CO Bryant approached his cell
4 door and demanded to see proof of ownership of his and his cellmate's shoes.¹³ But Brady's
5 inability to produce the paperwork that Bryant wanted prompted an altercation.¹⁴ According to
6 Brady, after he asked for a grievance form, Bryant told him he would not give him one and
7 instead said that he would "come tear [his] house up."¹⁵ Bryant left but returned with Guice and
8 then demanded that Brady and his cellmate exit their cell so they could search it.¹⁶ Brady began
9 to exit the cell when he and his cellmate heard Guice rack a shotgun.¹⁷ Because Guice had
10 previously threatened the pair, they refused to leave the cell, fearful of being shot.¹⁸ Eventually,
11 then-Lieutenant Oliver came to defuse the situation, speaking with the inmates while the officers
12 searched their cell.¹⁹ Familiar with the process, Brady filed several informal grievances about
13 the issue.²⁰ Many of his attempts were unsuccessful and returned as insufficient and abandoned

14
15

16 ⁹ ECF No. 46-4 at 41 (Informal Grievance #20063020146).

17 ¹⁰ Id. at 39 (First-Level Grievance #20063020146).

18 ¹¹ Id. at 38 (Second-Level Grievance #20063020146).

19 ¹² See id. at 46, 47, 37.

20 ¹³ ECF No. 46-1 at 2.

21 ¹⁴ ECF No. 52 at 18; see ECF No. 46-1 at 2.

22 ¹⁵ ECF No. 52 at 18.

23 ¹⁶ Id. at 18, 23 (Informal Grievance #20063025289).

¹⁷ Id. at 18; see ECF No. 46-1 at 2.

¹⁸ ECF No. 52 at 18.

¹⁹ ECF No. 46-1 at 2.

²⁰ See ECF Nos. 46-4 at 3, 4, 18; 52 at 39.

1 because he did not sign them—except for one.²¹ On May 23, Brady submitted an informal
2 grievance detailing the search and interaction with the officers.²² The parties dispute whether
3 Brady continued the appeal process. According to the defendants, Brady’s efforts stopped at the
4 informal level. But Brady argues that he submitted both first- and second-level grievances that
5 the prison did not respond to.²³

6 The next year, Brady filed this lawsuit.²⁴ It survived screening on three claims: First
7 Amendment retaliation against Barron, Bryant, Guice, Oliver, and George²⁵; Eighth Amendment
8 excessive force against Guice; and Eighth Amendment deliberate indifference to inmate safety
9 against Oliver and caseworker Joseph Faliszek, who reviewed many of Brady’s grievances.²⁶
10 Initially, the Nevada Attorney General’s office refused to accept service on behalf of Barron,
11 claiming he was unknown.²⁷ By 2019, Magistrate Judge Ferenbach ordered the Attorney
12 General’s office to produce information about Barron so he could be served.²⁸ After receiving
13 Barron’s information, Judge Ferenbach ordered Brady to submit the USM-285 form with
14 Barron’s information.²⁹ Barron still has not been served.

16
17 ²¹ Compare e.g., ECF No. 52 at 38 (Informal Grievance #20063023886), with ECF No. 46-4 at
18 18, 45, 47.

18 ²² ECF No. 46-4 at 18.

19 ²³ ECF No. 52 at 10; 45 (First-Level Grievance #200630225289); 47 (Second-Level Grievance
20 #200630225289).

20 ²⁴ ECF No. 1 (receipt of initiating documents).

21 ²⁵ Brady alleges that George knew of the retaliation and failed to act to prevent it. ECF No. 6 at
22 8.

22 ²⁶ ECF No. 5 at 11.

23 ²⁷ ECF No 12 at 1.

23 ²⁸ ECF No. 27 at 1.

²⁹ ECF No. 35.

1 light most favorable to the nonmoving party.³⁸ When the non-movant would bear the burden of
2 proof on a dispositive issue at trial, the moving party is not required to produce evidence to
3 negate the opponent’s claim; it merely has to point out the evidence that shows an absence of a
4 genuine material factual issue.³⁹ The purpose of summary judgment is to avoid unnecessary
5 trials when the facts are undisputed, so summary judgment is inappropriate when reasonable
6 minds could differ on material facts.⁴⁰

7 **II. First Amendment retaliation claims**

8 Of the incidents that form the basis of Brady’s retaliation claim in his complaint, the
9 officers move for summary judgment only based on the May one.⁴¹ They argue that Brady failed
10 to exhaust his available administrative remedies because he did not file the appropriate appeals
11 for the incident. The officers also contend that Brady cannot prove that the May incident was in
12 retaliation to his request for a grievance form.

13 **A. There are disputed issues of material fact about whether Brady exhausted his**
14 **administrative remedies.**

15 The Prison Litigation Reform Act (PLRA) requires prisoners to exhaust all available
16 administrative remedies before filing a civil-rights action challenging prison conditions.⁴² The
17 Supreme Court has interpreted the PLRA as “requir[ing] proper exhaustion,” which “demands
18 compliance with an agency’s deadlines and other critical procedural rules”⁴³ “An inmate
19

20 ³⁸ *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

21 ³⁹ See, e.g., *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 885 (1990).

22 ⁴⁰ *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

23 ⁴¹ See ECF No. 46 at 4, 5.

⁴² 42 U.S.C. § 1997e(a).

⁴³ *Woodford v. Ngo*, 548 U.S. 81, 91, 93 (2006).

1 need exhaust only such administrative remedies as are ‘available,’⁴⁴ which requires that the
2 procedures “are ‘capable of use’ to obtain ‘some relief for the action complained of.’”⁴⁵ In *Ross*
3 *v. Blake*, the Supreme Court provided a non-exhaustive list of “circumstances in which an
4 administrative remedy, although officially on the books, is not capable of use to obtain relief.”⁴⁶
5 That list includes situations when a procedure “operates as a simple dead end—with officers
6 unable or consistently unwilling to provide relief to aggrieved inmates,” and “when prison
7 administrators thwart inmates from taking advantage of a grievance process through
8 machination, misrepresentation, or intimidation.”⁴⁷

9 To succeed on a PLRA-exhaustion defense at summary judgment, the defendant must
10 “prove that there was an available administrative remedy, and that the prisoner did not exhaust
11 that available remedy,” before the burden shifts to the plaintiff to provide evidence that the
12 remedy was unavailable to him.⁴⁸ But “the ultimate burden of proof remains with the
13 defendant.”⁴⁹ A court should grant summary judgment “[i]f undisputed evidence viewed in the
14 light most favorable to the prisoner shows a failure to exhaust”⁵⁰ But when disputed
15 material facts exist, the court should deny summary judgment and “the district judge rather than
16 a jury should determine the facts.”⁵¹

18 ⁴⁴ *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016).

19 ⁴⁵ *Id.* at 1859 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)).

20 ⁴⁶ *Id.*

21 ⁴⁷ *Id.* at 1860.

22 ⁴⁸ *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (quoting *Jones v. Block*, 549 U.S. 199,
204 (2007)) (quotations omitted).

23 ⁴⁹ *Id.*

⁵⁰ *Id.* at 1166.

⁵¹ *Id.*

1
2 **1. The grievance procedure at HDSP provided an available remedy to Brady.**

3 Defendants have cleared the first hurdle of this defense by showing that Brady had
4 available remedies. Within the NDOC, “[r]etaliatio[n] is a grievable [sic] issue.”⁵² The NDOC
5 grievance procedure requires inmates to follow three steps to exhaust their grievances at the
6 prison.⁵³ An inmate must first file an informal grievance, which is “reviewed, investigated[,] and
7 responded to by the Department supervisor that has responsibility over the issue . . . or
8 designated person.”⁵⁴ An inmate who is denied relief or who does not receive a response to the
9 informal grievance within 45 calendar days of receipt “may proceed to the next grievance
10 level.”⁵⁵ The inmate must initiate the first- and second-level grievance process before the formal
11 grievance process ends.⁵⁶ While Brady argues that the process often seems futile, neither party
12 denies that Brady could use this process to file his grievances against the officers. I thus find
13 that the officers have met their burden to show that the grievance process was available to Brady.

14
15 **2. There is a genuine dispute of material fact about whether Brady exhausted his remedies.**

16 The officers argue that while Brady began the grievance process by filing several
17 informal grievances, he never completed the process because he failed to “proceed[] to the
18 mandatory first or second level[s].”⁵⁷ The officers submit several of Brady’s informal grievances
19

20 ⁵² See generally *id.*

21 ⁵³ ECF No. 46-3.

22 ⁵⁴ *Id.*

23 ⁵⁵ *Id.* at 6.

⁵⁶ ECF Nos. 46-3 at 14–15; 52 at 47.

⁵⁷ ECF No. 46 at 14.

1 with resolution from the prison. But the officers appear to have mixed up incident numbers for
2 the May incident, and submitted Brady’s separate grievances—about a T.V. repair—with a
3 similar grievance number.⁵⁸ Brady maintains that he submitted grievances at each level but that
4 the prison did not respond to them.⁵⁹

5 Defendants do not discuss the first- and second-level grievances Brady submitted about
6 the May incident, and they do not respond to his claim that the grievance forms lack a response
7 from the prison because they “instead provide[d] a separate paper . . . and do not supply [Brady]
8 with a copy.”⁶⁰ Instead, the defendants admit that Brady filed multiple informal grievances but
9 continue to assert that he never proceeded to the next levels, citing several pages of informal
10 grievances that Brady has filed.⁶¹ Viewing this evidence in the light most favorable to Brady,
11 defendants’ documents do not resolve the genuine dispute about whether he failed to exhaust his
12 remedies when he filed the first- and second-level grievances about the May incident. I thus
13 deny the officers’ motion on the exhaustion issue, which means the burden does not shift to
14 Brady to produce evidence that he was precluded from accessing the available remedies.

15 **3. Brady exhausted his administrative remedies.**

16 Because I deny the officers’ motion for summary judgment on the exhaustion issue, I
17 must now resolve the disputed factual questions about exhaustion.⁶² If the court finds that the
18 prisoner has satisfied the PLRA’s exhaustion requirement, “the case may proceed to the
19

20 ⁵⁸ ECF No. 46-4 at 19–37. Brady’s grievance over the May incident is logged as incident
21 #20063025289. The officers submitted Brady’s informal grievance and then his first- and
second-level grievances in incident #20063032589. *Id.* at 19–35.

22 ⁵⁹ ECF No. 52 at 10.

23 ⁶⁰ *Id.*

⁶¹ ECF No. 53 at 4 (citing generally ECF No. 46).

⁶² *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014).

1 merits.”⁶³ The disputed facts here center on whether Brady filed first- and second-level
2 grievances. If he did, he has exhausted his administrative remedies on the retaliation claim. If
3 not, he has not met NDOC’s exhaustion requirement and this claim is not ripe for review. After
4 reviewing the regulation provided by the officers⁶⁴ and the evidence submitted by Brady, I find
5 that Brady exhausted his administrative remedies on his retaliation claim.

6 The language of NDOC’s remedy procedure does not state what full exhaustion requires
7 but indicates that prisoners must request review at each level to exhaust a claim.⁶⁵ The
8 regulation that the officers provide permits a prisoner to proceed to the next level if the prisoner
9 does not receive a response from the prison within the allotted time period.⁶⁶ Prison officials
10 have 45 days to respond to informal grievances and first-level grievances, and 60 days to respond
11 to second-level grievances.⁶⁷ Thus, under the language provided by the officers, it is immaterial
12 whether the prison responded to Brady’s grievances if he did not receive a response within 60
13 days. And neither party argues that Brady had to wait for a response to his second-level
14 grievance after the 60 day response period expired before coming to this court.⁶⁸ Thus, I find
15 that the evidence presented by the parties shows that Brady exhausted his available

16
17
18 ⁶³ Id. at 1171.

19 ⁶⁴ ECF No. 46-3 (AR 740).

20 ⁶⁵ See ECF No. 46-3 at 6, 10–14.

21 ⁶⁶ Id. at 6 (“The inmate may proceed to the next grievance level, if a response is overdue.”).

22 ⁶⁷ Id. at 12, 14–15.

23 ⁶⁸ Whether the regulation requires a prisoner to wait indefinitely for a response before coming to this court would not change the outcome here. If prisoners are required to wait for a decision before fully exhausting their remedies, but the prison does not issue a response for almost a year, the process would almost certainly stop before issuing a response, leaving prisoners without an available remedy. See *Andres v. Marshall*, 867 F.3d 1076, 1079 (9th Cir. 2017) (citing *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016)).

1 administrative remedies before filing this lawsuit. So I hold that the exhaustion defense is not
2 available to the officers at trial on the retaliation claim.

3 **B. There are triable issues of fact about Bryant and Guice’s retaliatory intent.**

4 “Of fundamental import to prisoners [is] their First Amendment ‘right to file prison
5 grievances. . . .’”⁶⁹ In the prison context, a plaintiff must prove five elements to establish a
6 retaliation claim: “(1) An assertion that a state actor took some adverse action against an inmate
7 (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
8 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
9 legitimate correctional goal.”⁷⁰ Bryant and Guice argue that Brady cannot provide any
10 admissible evidence to establish that the officers’ actions were performed in retaliation for his
11 filing of grievances—challenging only the causation element.

12 To establish causation on a retaliation claim, the plaintiff’s conduct must be “the
13 ‘substantial’ or ‘motivating’ factor behind the defendant’s conduct.”⁷¹ The Ninth Circuit held in
14 *Brodheim v. Cry* that, on summary judgment, a plaintiff “need only ‘put forth evidence of
15 retaliatory motive, that taken in the light most favorable to him, presents a genuine issue of
16 material fact as to [the defendant’s] intent.”⁷² At this stage, a plaintiff may rely on timing “as
17 circumstantial evidence of retaliatory intent.”⁷³

18 Brady’s claim relies on the timing of Bryant and Guice’s disproportionate responses to
19 his request for a grievance form on May 6th. Brady argues that after several altercations

21 ⁶⁹ *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005) (bracket omitted).

22 ⁷⁰ *Id.* at 567–68.

23 ⁷¹ *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009).

⁷² *Id.* (quoting *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003)).

⁷³ *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995).

1 resulting in informal grievances against the officers, Bryant confiscated his shoes and searched
2 his cell in retaliation for those grievances.⁷⁴ He maintains that on May 6th, after he asked Bryant
3 for a grievance form for refusing to accept proof that Brady owned the confiscated shoes, Bryant
4 stated: “Grievance? I’ll come tear your house up,” before telling Brady and his cellmate to step
5 out of the cell so he could search it.⁷⁵ But before the two stepped out of their cell, they heard
6 Guice rack a shotgun, indicating to the inmates that he was ready to shoot them.⁷⁶ The officers
7 argue that Brady is unable to prove that retaliation for the grievance request is the reason the
8 officers conducted the search and that Guice racked the gun.

9 To support his timing argument, Brady offers the declaration of his cellmate Ernest
10 Guardado,⁷⁷ who corroborates Brady’s account of the incident.⁷⁸ The officers do not offer a
11 different explanation for why Bryant requested to search the cell. In fact, the evidence that the
12 officers provide seems to confirm that Bryant ordered Brady to leave the cell after “dialogue
13 back and forth between both inmates and Senior Bryant.”⁷⁹ Thus, based on the events described
14 by Guardado that support Brady’s version of the facts, a reasonable jury could infer that the
15 officers acted in retaliation to Brady’s request for a grievance form. Brady has presented
16 evidence that presents a genuine issue of material fact as to the officers’ intent, so I deny their
17 motion on this claim.

18
19

20 ⁷⁴ ECF No. 52 at 3–4.

21 ⁷⁵ Id. at 3.

22 ⁷⁶ Id. at 18–19.

23 ⁷⁷ Id. at 4.

⁷⁸ Id. at 18.

⁷⁹ ECF No. 46-1 at 2.

1 **C. Oliver and George are entitled to judgment on Brady’s retaliation claim.**

2 Although the issues of fact regarding the officers’ conduct preclude summary judgment
3 in their favor, the record does not similarly support this claim against supervisors Oliver or
4 George. “There is no respondeat superior liability under section 1983.”⁸⁰ Generally, supervisors
5 are not liable under § 1983 for their employees’ actions unless “the supervisor participated in or
6 directed the violations, or knew of the violations and failed to act to prevent them.”⁸¹ Oliver and
7 George contend that summary judgment is appropriate because neither directly participated in
8 the May search or threats.⁸² They add that, because neither of them knew of the misconduct
9 before it happened, they cannot be liable for failure to act.⁸³ Instead, they maintain that Oliver
10 spoke with Brady about Brady’s concerns and “upgraded” the issue “to supervisor level for
11 review of possible staff misconduct.”⁸⁴

12 Brady argues that Oliver and George knew of Guice and Bryant’s ongoing misconduct
13 and the risk they posed, but they failed to move Brady to a different cell or discipline the
14 officers.⁸⁵ But Brady does not present any evidence that suggests that Oliver or George knew of
15 the alleged violations and failed to prevent them, instead resting on assertions that the two had a
16 duty to protect him. But as the Ninth Circuit has instructed, “[a] summary judgment motion
17 cannot be defeated by relying solely on conclusory allegations unsupported by factual data.”⁸⁶

18
19 ⁸⁰ Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

20 ⁸¹ Id. (citing Ybarra v. Reno Thunderbird Moblie Home Village, 723 F.2d 675, 680–81 (9th Cir.
1984)).

21 ⁸² ECF No. 46 at 6–7.

22 ⁸³ Id. at 7.

23 ⁸⁴ ECF No. 46 at 7.

⁸⁵ ECF No. 52 at 5.

⁸⁶ Taylor, 880 F.2d at 1045.

1 So I grant summary judgment for Oliver and George on Brady’s retaliation claim because he has
2 failed to establish a genuine issue of material fact about their knowledge and failure to act.

3 **III. CO Guice enjoys qualified immunity from Brady’s excessive-force claim.**

4 Qualified immunity shields government officials “from money damages unless a plaintiff
5 pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that
6 the right was ‘clearly established’ at the time of the challenged conduct.”⁸⁷ While a district court
7 may evaluate these prongs in any order, it should avoid starting with the first prong “when it
8 would unnecessarily wade into ‘difficult questions’ of constitutional interpretation that ‘have no
9 effect on the outcome of the case.’”⁸⁸ Conduct is immunized if either prong is not satisfied.⁸⁹

10 To show that conduct violated a clearly established law, the plaintiff must prove that, at
11 the time of the alleged misconduct, “the contours of [the] right [were] sufficiently clear that
12 every reasonable official would have understood that what he is doing violates that right.”⁹⁰
13 While this does not require the plaintiff to cite a case “directly on point,” the “existing precedent
14 must have placed the statutory or constitutional question beyond debate.”⁹¹ The United States
15 Supreme Court routinely instructs courts to not determine whether a right is clearly established
16 “at a high level of generality.”⁹² Instead, the law at issue must be specific to the facts at hand.⁹³

17
18 _____
⁸⁷ Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

19 ⁸⁸ Sjurset v. Button, 810 F.3d 609, 615 (9th Cir. 2015) (quoting Pearson v. Callahan, 555 U.S.
20 223, 236–37 (2009)).

21 ⁸⁹ Martinez v. City of Clovis, 943 F.3d 1260, 1270 (9th Cir. 2019).

22 ⁹⁰ Ashcroft, 563 U.S. at 741 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))
(quotation and brackets omitted); see Robinson v. York, 556 F.3d 817, 826 (9th Cir. 2009).

23 ⁹¹ Ashcroft, 563 U.S. at 741.

⁹² Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018).

⁹³ White v. Pauly, 137 S. Ct. 548, 552 (2017) (quoting Ashcroft, 563 U.S. at 742).

1 This requires a court to look at binding precedent to determine if “a reasonable officer would
2 have had fair notice that the action was unlawful . . .”⁹⁴ before turning to “all available decisional
3 law.”⁹⁵

4 Two separate incidents form the basis for this claim: the March incident in which Guice
5 pointed the gun at him and threatened to shoot, and the May incident in which Guice racked the
6 shotgun outside of Brady’s cell. Guice maintains that he is entitled to qualified immunity
7 because no case has held—in the Eighth Amendment context—that threats without physical
8 contact violate a clearly established law.⁹⁶ Without citation, Brady argues that there is a plethora
9 of case law establishing that threats of deadly force violate a prisoner’s Eighth Amendment
10 rights.⁹⁷ Because neither party has provided me with much guidance, I look to the Ninth Circuit
11 to answer whether racking a shotgun during a search or threatening deadly force violates a
12 prisoner’s Eighth Amendment rights.

13 The Eighth Amendment’s prohibition against cruel and unusual punishment protects
14 prisoners from “unnecessary and wanton infliction of pain.”⁹⁸ Generally, threats by themselves
15 do “not violate the Eighth Amendment.”⁹⁹ While the Ninth Circuit has alluded to a cognizable
16 claim under the Eighth Amendment when verbal harassment is coupled with an intent to cause
17

17

18

19 ⁹⁴ Chappell v. Mandeville, 706 F.3d 1052, 1056 (9th Cir. 2013) (quoting Drummond ex rel.
20 Drummond v. City of Anaheim, 343 F.3d 1052, 1060–61 (9th Cir. 2003)) (brackets omitted).

21 ⁹⁵ Osolinski v. Kane, 92 F.3d 934, 936 (9th Cir. 1996) (citing Lum v. Jensen, 876 F.2d 1385,
1387 (9th Cir. 1989), cert. denied, 493 U.S. 1057 (1990)).

22 ⁹⁶ ECF No. 46 at 9–10.

23 ⁹⁷ ECF No. 52 at 7.

⁹⁸ Whitley v. Albers, 475 U.S. 312, 319 (1986) (quoting Ingraham v. Wright, 430 U.S. 651, 670
(1977)).

⁹⁹ Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996).

1 psychological harm,¹⁰⁰ Guice’s conduct here does not clearly meet this standard. Rather, the
2 Ninth Circuit has held that “it trivializes the [E]ighth [A]mendment to believe a threat constitutes
3 a constitutional wrong.”¹⁰¹ In other, more egregious contexts, the Ninth Circuit has also implied
4 that “psychological torture” may present a cognizable claim.¹⁰² For example, in *Grant v. Foye*,
5 the Ninth Circuit noted that a threat, coupled with holding a gun to the individual’s head and
6 pulling the trigger, without firing, with purpose of scaring the victim, was sufficient to establish
7 “wanton infliction of psychological torture.”¹⁰³

8 Other courts have looked to the Tenth Circuit’s decision in *Northington v. Jackson*,¹⁰⁴
9 and the Fourth Circuit’s decision in *Hudspeth v. Figgins*,¹⁰⁵ as the threshold to determine
10 whether a threat amounts to cruel and unusual punishment.¹⁰⁶ But *Grant*, *Northington*, and they
11 *Hudspeth* are not binding precedent,¹⁰⁷ and they present situations far too factually
12 distinguishable from Brady’s claim. The *Northington* and *Hudspeth* courts both dealt with
13 scenarios in which an official threatened an individual who was not in prison. And in
14

15 ¹⁰⁰ *Id.* Although other district courts have similarly highlighted the possibility of an excessive-
16 force claim for verbal threats, they do not establish that Guice would have been on notice that the
17 threats violated the Eighth Amendment because those cases generally involve verbal threats
18 coupled with intent to cause psychological harm. See, e.g., *Parker v. Asher*, 701 F. Supp. 192,
195 (D. Nev. Dec. 16, 1988) (noting that the ruling was limited and holding “only that guards
cannot aim their taser guns at inmates for the malicious purpose of inflicting gratuitous fear”).

19 ¹⁰¹ *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987).

20 ¹⁰² *Grant v. Foye*, Nos. 91-55198, 91-55202, 1992 WL 371312, at *2 (9th Cir. Dec. 16, 1992).

21 ¹⁰³ *Id.*

22 ¹⁰⁴ *Northington v. Jackson*, 973 F.2d 1518, 1522–24 (10th Cir. 1992).

23 ¹⁰⁵ *Hudspeth v. Figgins*, 584 F.2d 1345, 1348 (4th Cir. 1978).

¹⁰⁶ See *Parker v. Asher*, 701 F. Supp. 192, 195 (D. Nev. Dec. 16, 1988) (citing *Hudspeth v. Figgins*, 584 F.2d 1345, 1348 (4th Cir. 1978), cert. denied, 441 U.S. 913 (1979)).

¹⁰⁷ 9th Cir. R. 36-3 (“Unpublished dispositions and orders of [the Ninth Circuit] are not precedent . . .”).

1 Northington, the plaintiff alleged that the officer put a gun to his head and threatened to kill
2 him.¹⁰⁸ These cases are markedly different from Brady’s account of the facts. In neither the
3 March nor the May incident did Guice put the gun to Brady’s head. And in May, Brady does not
4 deny that Guice was outside both of his cell and his line of sight. So I cannot say that any of
5 these circuit-court decisions put Guice on notice that holding a shotgun from above and telling
6 prisoners to “give [him] a reason to shoot” or racking a shotgun during a search violated the
7 Eighth Amendment. Because Brady has failed to provide a any case in which either alleged
8 incident was held to violate the Eighth Amendment, I cannot find that the law on this point was
9 clearly established. So I grant Guice summary judgment on Brady’s excessive-force claim based
10 on qualified immunity.¹⁰⁹

11 **IV. Oliver and Faliszek are entitled to summary judgment on Brady’s claim for**
12 **deliberate indifference to his safety.**

13 The screening order also permitted Brady to move forward on a claim against Oliver and
14 caseworker Faliszek for deliberate indifference to Brady’s safety, based on Brady’s allegation
15 that he informed them of the threats that Guice posed, but they did nothing.¹¹⁰ Under the Eighth
16 Amendment, prison officials “must ‘take reasonable measures to guarantee the safety of
17 inmates.’”¹¹¹ A prisoner must show that he was deprived of something that is “sufficiently
18

19 ¹⁰⁸ Northington, 973 F.2d at 1522.

20 ¹⁰⁹ Because I find that Guice enjoys qualified immunity, I need not and do not reach his
21 remaining arguments on Brady’s excessive-force claim. I also deny Brady’s request to order the
22 defendants to produce documents about Guice’s termination because discovery is closed and
Brady has not shown he has complied with the meet-and-confer requirements of Federal Rule of
Civil Procedure 37(a)(1) or L.R. 26-7.

23 ¹¹⁰ ECF No. 5 at 10.

¹¹¹ Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citing Hudson v. Palmer, 468 U.S. 517, 526–
27 (1984)).

1 serious,” which requires “the prison official’s act or omission [to] result[] ‘in the denial of the
2 minimal civilized measure of life’s necessities.’”¹¹² Second, the prisoner must also prove the
3 official acted with “deliberate indifference” to the prisoner’s risk of the harm.¹¹³ To prove
4 deliberate indifference, a prisoner “must show that prison officials ‘knew of and disregarded’ the
5 substantial risk of harm, but the officials need not have intended any harm to befall the inmate;
6 ‘it is enough that the official . . . failed to act despite his knowledge of a substantial risk of
7 serious harm.’”¹¹⁴ The second element is subjective and even when prison officials “actually
8 knew” of a substantial risk to inmate safety, they may be found “free from liability if they
9 responded reasonably to the risk.”¹¹⁵

10 Brady argues that his grievances about Bryant and Guice’s violent threats put Oliver and
11 Faliszek on notice of the harm he faced. He also claims that, despite being aware of his
12 grievances, they failed to move him or investigate his claims by speaking with other inmates.
13 Faliszek maintains that he was not indifferent to the risks that Bryant and Guice posed because
14 he was unable, as a caseworker, to “intervene to correct the alleged actions” taken by the
15 officers.¹¹⁶ He argues that he “did what he could” and reviewed Brady’s grievances.¹¹⁷ Oliver
16 contends that, once he knew of the situation between Brady and the officers on May 6th, he
17 spoke with Brady to investigate the matter.¹¹⁸

19 ¹¹² *Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (quoting *Foster*
20 *v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009)).

21 ¹¹³ *Farmer*, 511 U.S. at 834.

22 ¹¹⁴ *Lemire*, 726 F.3d at 1074 (brackets omitted).

23 ¹¹⁵ *Farmer*, 511 U.S. at 844.

¹¹⁶ ECF No. 46 at 12.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

1 While Brady offers evidence that Oliver knew of the May incident, he does not present
2 any evidence that Oliver knew of the prior incidents, nor does he offer evidence to support the
3 claim that Faliszek was able to do anything more than review his grievances. Rather, he
4 provides only his and other inmates' grievances about the officers. But these grievances do not
5 establish that Oliver knew about those altercations or that Faliszek could prevent future harm.
6 Because Brady has failed to put forward evidence to support these elements, I grant summary
7 judgment on his deliberate-indifference-to-safety claim against Oliver and Faliszek.¹¹⁹

8 **V. Brady must show cause why I should not dismiss his claim against Barron.**

9 While this order addresses the claims against the majority of the defendants, it does not
10 address the claim against unserved defendant Barron. Brady initiated this lawsuit at the end of
11 2017.¹²⁰ By mid-2019, he still had not served a defendant whom he sued under the single name
12 "Barron."¹²¹ After the defendants submitted the name and last-known address of this defendant,
13 Magistrate Judge Ferenbach ordered Brady to complete a USM-285 form by June 12, 2019, so
14 Barron could be served.¹²² It has been more than 400 days since that deadline passed, and the
15 record reflects that Brady still has not submitted the form. Thus, Brady must show cause why
16 his claim against Barron should not be dismissed for failure to follow Judge Ferenbach's order
17 and failure to timely serve this suit on Barron. If Brady fails to show cause to continue with this
18 claim against Barron by October 25, 2020, the claim against Barron will be deemed abandoned

19

20

21 ¹¹⁹ Because I grant summary judgment on this argument, I need not and do not reach the issue of
22 qualified immunity or exhaustion on this claim.

23 ¹²⁰ ECF No. 1.

¹²¹ See ECF No. 27.

¹²² ECF No. 35.

1 and this case will proceed only against Guice and Bryant on Brady's First Amendment retaliation
2 claim.

3 **Conclusion**

4 IT IS THEREFORE ORDERED that **defendants' motion for summary judgment**
5 **[ECF No. 46] is GRANTED IN PART AND DENIED IN PART:**

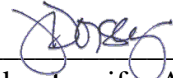
- 6 • Summary judgment is granted in favor of the defendants and against Brady on his:
 - 7 ○ First claim for relief (First Amendment retaliation) against defendants George and
 - 8 Oliver;
 - 9 ○ Second claim for relief (Eighth Amendment excessive-force) against defendant
 - 10 Guice; and
 - 11 ○ Third claim for relief (deliberate indifference to inmate safety) against defendants
 - 12 Oliver and Faliszek.
- 13 • The motion is denied in all other respects, so **this case proceeds on Brady's First**
14 **Amendment retaliation claim against defendants Guice and Bryan only.**

15
16 IT IS FURTHER ORDERED that **Brady must SHOW CAUSE by October 25, 2020,**
17 **why his claim against Barron should not be dismissed.**

18 IT IS FURTHER ORDERED that **this case is referred to the Pro Bono Program**
19 adopted in General Order 2016-02 for the purpose of screening for financial eligibility (if
20 necessary) and identifying counsel willing to be appointed as counsel for Plaintiff Curtis Brady
21 Jr. at no expense to him. The scope of appointment will be for all purposes through conclusion
22 of trial. By referring this case to the Pro Bono Program, I am not expressing an opinion on the
23

1 merits of the case. The **Clerk of Court** is directed to forward this **order to the Pro Bono**
2 **Liaison.**

3 IT IS FURTHER ORDERED that this case is **REFERRED** to the magistrate judge for a
4 **MANDATORY SETTLEMENT CONFERENCE.** The parties' obligation to file their joint
5 pretrial order is **STAYED until 10 days after that settlement conference.**



U.S. District Judge Jennifer A. Dorsey
September 28, 2020

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23