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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

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| Richard LeGrand Gause,<br>Plaintiff,<br>vs.<br>M. Mullen, et al.,<br>Defendants. | No. CV 12-1439-PHX-RCB (MEA)<br><br>**O R D E R** |

Plaintiff Richard LeGrand Gause brought this civil rights action under 42 U.S.C. § 1983 against two City of Mesa Police Officers: Michael Mullen and Christopher Beauford (Doc. 13). Before the Court are (1) Defendants' Motion for Summary Judgment (Doc. 37); (2) Defendants' Motion for Ruling on the Motion for Summary Judgment (Doc. 40); (3) Order to Show Cause directing Plaintiff to pay the civil filing fee (Doc. 41); and (4) Plaintiff's Motion for Time Extension and Counsel (Doc. 43).

The Court will discharge the Order to Show Cause, deny the Motion for Ruling, and deny Plaintiff's Motion for Time Extension and Counsel. Defendants' summary judgment motion will be granted, and the action will be terminated.

## I. Background

### A. First Amended Complaint

Plaintiff alleges that Defendants used excessive force during the course of his arrest (Doc. 13). In his First Amended Complaint, Plaintiff set forth the following facts:

On the afternoon of March 4, 2012, Mullen stopped Plaintiff for riding his bicycle in

the wrong bike lane (id. at 3). Mullen stopped his car about 70 feet in front of Plaintiff so as to block the bike lane and then got out of his car and told Plaintiff to stop (id.). Plaintiff had no brakes on his bicycle; therefore, he attempted to stop by dragging his feet on the ground. When it became clear that he was going to run into the parked car, Plaintiff swerved to avoid a collision. Mullen then grabbed him by the throat and slammed him face first into the asphalt, causing Plaintiff's forehead to split open (id.). Mullen told Plaintiff to stand up, and as he got up, Plaintiff grabbed his head. When he looked at his hand, it was covered in blood from his forehead (id.). Then, without provocation, Mullen punched Plaintiff in the face, grabbed Plaintiff's arm, and again slammed him into the asphalt (id.). Beauford then arrived, jumped on Plaintiff, and drove a knee into the Plaintiff's lower back (id. at 3-3A).

Mullen and Beauford then placed handcuffs on Plaintiff's wrists that were extremely tight and cut off blood flow (id. at 3A). For an hour, no one would loosen the cuffs (id.). Plaintiff's requests for medical attention for his hands, head, and back were denied (id.). Plaintiff was transported to the Mesa Police Department, where the handcuffs were finally removed, and Plaintiff again requested medical care (id.). He was told that the Mesa Police Department does not provide medical care and he would have to wait until he was transported to the county jail (id.).

Plaintiff states that as a result of Mullen and Beauford's actions, he has severe damage in both hands that causes constant, intense pain and he must wear braces on his hands (id. at 3). Plaintiff avers that he suffers constant, intense lower back pain, for which he may require surgery, and he must take nerve and pain medications (id. at 3, 3C). He further avers that he has reduced mobility, cannot stand or sit for long periods or use his hands for tasks, and he cannot lift heavy objects without blinding pain in his back and hands (id. at 3C).

**B. Procedural History**

Defendants moved for summary judgment on the grounds that Plaintiff's claim is barred under Heck v. Humphrey, 512 U.S. 477 (1994), and there is no evidence of excessive force by Defendants (Doc. 37). The Court issued a Notice, required under Rand v. Rowland, 154 F.3d 952, 962 (9th Cir. 1998) (en banc), which informed Plaintiff of the requirements

under Federal Rule of Civil Procedure 56 and the Local Rules governing summary judgment (Doc. 39). After Plaintiff failed to file a response, Defendants filed a Motion for Ruling on their summary judgment motion (Doc. 40).

Because Plaintiff had filed a Notice of Change of Address indicating his release from custody (Doc. 35), before addressing Defendants' motions, the Court issued an Order to Show Cause directing Plaintiff to either pay the $350 filing fee or file a response showing good cause why he cannot pay it (Doc. 41). On August 21, 2013, the Court received Plaintiff's Notice of Change of Address and a Motion for Time Extension and Counsel (Doc. 43).

**II. Order to Show Cause Discharged**

In his Motion for Time Extension and Counsel, Plaintiff states that in April 2013, he was in a serious motorcycle accident that resulted in severe head trauma, bleeding on the brain, swelling of the brain, and multiple facial fractures (id. at 1). Plaintiff avers that he woke up the day after the accident on life-support at the Scottsdale Trauma Center (id.). He also avers that he continues to suffer brain damage, memory loss, and seizures (id. at 2).

The Court will liberally construe this portion of Plaintiff's motion as a response to the Order to Show Cause to the extent that it demonstrates his failure—due to his medical condition—to pay the filing fee. Moreover, Plaintiff's Notice of Change of Address indicates that Plaintiff is now back at the county jail (Doc. 42). The Order to Show Cause will therefore be discharged.

**III. Plaintiff's Motion for Time Extension and Counsel**

Plaintiff seeks an extension of all deadlines and forgiveness of any missed deadlines going back to April 25, 2013, the date of his motorcycle accident (Doc. 43). One of the missed deadlines was the June 9, 2013 date for Plaintiff to file his response to Defendants' Motion for Summary Judgment (Doc. 39).

Excusable neglect is the standard that must be met to warrant an extension of an expired deadline. Fed. R. Civ. P. 6(b)(1)(B) (time may be extended "on motion made after the time has expired if the party failed to act because of excusable neglect"). Rule 6(b)(1)(B)

provides that a district court may, in its discretion, set a new deadline if the failure meet the original deadline was the result of excusable neglect. Pioneer Inv. Servs. Co. v. Brunswick Ass'n Ltd. P'ship, 507 U.S. 380, 395 (1993). An excusable neglect determination "is at bottom an equitable one, taking into account all of the relevant circumstances surrounding the party's omission[,]" including (1) the danger of prejudice to the other party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for the delay, and (4) whether the party acted in good faith. Id.[1] A district court abuses its discretion if it does not consider each of the four Pioneer factors separately. See Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1261 (9th Cir. 2010); Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1224 (9th Cir. 2000).

Extending the deadline for Plaintiff to file a response to the summary judgment motion will cause minimal prejudice to Defendants; "[p]rejudice requires greater harm than simply that relief would delay resolution of the case." Lemoge v. United States, 587 F.3d 1188, 1196 (9th Cir. 2009).

The length of the delay, however, and the potential impact on the proceedings is more than minimal. Defendants' summary judgment motion has been pending for over three months, and the deadline for responding expired over two months ago. Cf. In re Veritas Software Corp. Sec. Litig., 496 F.3d 962, 973 (9th Cir. 2007) (a 15-day delay was "not great"); Bateman, 231 F.3d at 1225 (a one-month delay was "still not long enough to justify denying relief"). Plaintiff now seeks an indefinite extension; thus, it is not clear what the actual delay would ultimately be.

Next, the Court considers the reason for delay. Plaintiff avers that he was in a motorcycle accident in April 2013, and he indicates that he woke up in the hospital (Doc. 43). This is valid justification for delay during the time period surrounding the accident. But Plaintiff does not explain how long he was hospitalized nor does he present any detailed

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[1]Pioneer involved an analysis of excusable neglect under Bankruptcy Rule 9006(b). The Supreme Court found that the Rule was modeled after Federal Rule of Civil Procedure 6(b) and therefore applied Rule 6(b) case law in its analysis. Pioneer, 507 U.S. at 391-92; see Comm. for Idaho's High Desert, Inc. v. Yost, 92 F.3d 814, 825 n. 4 (9th Cir. 1996).

information regarding his recovery since the accident. More importantly, Plaintiff does not state why he was unable to notify the Court of his condition prior to the Order to Show Cause. The Court notes that the May 9, 2013 Rand Notice sent to Plaintiff was not returned in the mail, and, according to Defendants' Certificates of Service, Plaintiff was sent copies of Defendants' motions in May and June 2013 (Doc. 37 at 8; Doc. 40 at 3). Despite these notices, Plaintiff failed to contact the Court for over three months.

The last factor is whether Plaintiff acted in good faith. Absent sufficient information from Plaintiff, the Court cannot assess whether the delay can be attributed to bad faith or has been caused solely by Plaintiff's medical condition.

On balance, the Court finds that Plaintiff has failed to demonstrate excusable neglect to support an extension of the deadline to file a response to the summary judgment motion.

The Court further finds that appointment of counsel is not warranted in this case. Appointment of counsel is required only when "exceptional circumstances" are present, which is determined by evaluating the likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issue involved. See Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). In considering both elements, it does not appear that exceptional circumstances are present.

For the above reasons, Plaintiff's Motion for Time Extension and Counsel will be denied.

**IV. Defendants' Motion for Ruling**

Defendants' Motion for Ruling requests that the Court grant their summary judgment motion on the merits, reasserts the summary judgment arguments, and notes Plaintiff's failure to file a response (Doc. 40).

Plaintiff's failure to respond to the summary judgment motion does not, by itself, warrant a ruling in Defendants' favor. See Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000) (if the party moving for summary judgment fails to satisfy its initial burden, the nonmovant need not produce anything); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) (at summary

judgment, "no defense to an insufficient showing is required"). Defendants' Motion for Ruling appears to be a reply in support of their summary judgment motion. No reply was necessary, and this Order moots a request to rule on the summary judgment motion. The Motion for Ruling will be denied.

## V. Defendants' Motion for Summary Judgment

### A. Governing Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, that it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323.

If the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 250 (1986); see Triton Energy Corp. v. Square D. Co., 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal citation omitted); see Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence, and draw all inferences in the nonmovant's favor. Id. at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

Although Plaintiff did not file a response to Defendants' motion, in its analysis, the Court must construe Plaintiff's verified First Amended Complaint as an affidavit in opposition to summary judgment (see Doc. 13). See Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004) (allegations in a pro se plaintiff's verified pleadings must be considered as evidence in opposition to summary judgment); Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995) (verified complaint may be used as an affidavit opposing summary judgment if it is based on personal knowledge and sets forth specific facts admissible in evidence).

**B. Factual Assertions**

In support of their motion, Defendants submit a separate Statement of Facts (DSOF), which is supported by Defendants' affidavits; the affidavit of Rhoda Williams-Alexander, Maricopa County Probation Officer; the affidavit of Dan Padia, Mesa Police Department Detention Shift Supervisor; and copies of Plaintiff's change of plea transcript and the Mesa Police Department booking checklist (Doc. 38, Exs. A-F).

Defendants assert the following relevant facts:

On March 4, 2012, at approximately 4:00 p.m., Mullen attempted to conduct a traffic stop on Plaintiff, who was riding his bicycle near Mesa Drive and 2nd Avenue in Mesa, Arizona (DSOF ¶ 1). Mullen used his marked squad car to block the bicycle lane in which Plaintiff was traveling, and he activated the car's emergency lights (id. ¶ 2). Mullen, who was wearing his police uniform with Mesa Police Department shoulder patches and a badge, exited his car and told Plaintiff to stop (id. ¶ 3).

Plaintiff did not stop, and Mullen was forced to chase Plaintiff and pull him off of his bicycle (id. ¶ 4). Plaintiff raised his fist to Mullen while they were standing in close proximity (id. ¶ 5). Mullen feared that Plaintiff was going to punch him, and he attempted to effect Plaintiff's arrest for aggravated assault on an officer by grabbing Plaintiff's arms and performing a side-cast take down by using his grip on Plaintiff's arms to throw Plaintiff to the ground (id. ¶¶ 6-7). Plaintiff resisted on the ground as Mullen tried to effect the arrest, so Mullen pinned Plaintiff to the ground with his body weight and attempted to secure Plaintiff's hands in handcuffs (id. ¶¶ 8-9). Plaintiff kept his other arm under his body, and

Mullen remained on top of Plaintiff for approximately 20 additional seconds until Beauford arrived (id. ¶ 10).

As Beauford approached the scene, he heard Plaintiff yelling and saw Plaintiff using his arm underneath his body to push off of the ground as Mullen was lying on top of him (id. ¶ 11). Beauford, who was also wearing his police uniform, was able to grab Plaintiff's other arm while he continued to resist by trying to keep it under his body; Mullen secured Plaintiff's hands in handcuffs (id. ¶¶ 10, 12).

Beauford escorted Plaintiff to the nearby curb where Plaintiff sat and spoke with the officers (id. ¶ 13). Plaintiff did not complain of any injury or discomfort of any kind relating to the handcuffs, and Plaintiff's demeanor became much calmer once he was handcuffed (id. ¶ 14). Beauford transported Plaintiff to the Mesa Police Department's Holding Facility (id. ¶ 15). At the Holding Facility, Plaintiff indicated to Beauford and Mesa Detention Shift Supervisor Padia that he was not injured (id. ¶ 16).

Plaintiff pled guilty in Maricopa County Superior Court to resisting arrest, a class 6 felony (id. ¶ 17). At the change of plea hearing, Plaintiff confirmed that he committed resisting arrest when he intentionally attempted to prevent a known police officer from effecting an arrest by squirming when he was on the ground (id.).

**C. Analysis**

"'[A]ll claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment 'reasonableness' standard.'" Hooper v. Cnty. of San Diego, 629 F.3d 1127, 1133 (9th Cir. 2011) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). The inquiry is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham, 490 U.S. at 397 (citations omitted). But if Plaintiff's excessive-force claim is barred under Heck, as Defendants argue, it would be premature to address whether Defendants' actions were objectively reasonable. Therefore, the Court will first address Defendants' argument that Heck bars Plaintiff's civil rights action against them.

**1. Heck Bar**

To recover damages for harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. Heck, 512 U.S. at 486-87. If the conviction or sentence arises out of the same facts that underlie the alleged unlawful behavior for which damages are sought, the § 1983 suit must be dismissed. Smithart v. Towery, 79 F.3d 951, 952 (9th Cir. 1996). Therefore, a district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if so, the complaint must be dismissed. Heck, 512 U.S. at 487.

As noted by Defendants, the Ninth Circuit has addressed the circumstances under which Heck bars excessive force claims arising out of an incident in which the plaintiff was convicted of resisting arrest (Doc. 27 at 4-5). See Smith v. City of Hemet, 394 F.3d 689, 693 (9th Cir. 2005). In Smith, the appellate court explained that an essential element of a conviction for resisting a peace officer pursuant to California law is that the police officer was "engaged in the performance of his official duties." Id. at 695. Under California law, this means that the police officer was engaged in "lawful" conduct, including not using excessive force. See id. at 695-96 (citing California state court decisions). Thus, if a plaintiff was convicted for resisting a police officer during the course of an arrest, his subsequent § 1983 claim that the police officer used excessive force during the course of that arrest would, if successful, necessarily undermine the conviction. Id. at 697-98. In such circumstances, the Heck bar applies. Id.

Although Plaintiff's conviction was under Arizona law rather than California law, this makes no difference for the present analysis. A defendant can only be convicted of resisting arrest in Arizona if the officer's conduct was "lawful" when effecting the arrest; an officer's conduct was not "lawful" if he used excessive force. See Ariz. Rev. Stat. § 13-404(B)(2) (a person may not use physical force to resist arrest by an officer unless the physical force used

by the officer exceeds that allowed by law); State v. Fontes, 986 P.2d 897, 901 (Ariz. Ct. App.1998) (if the force used to make the arrest is reasonable, the defendant is not justified in using physical force to resist the arrest).

Here, the record shows that Plaintiff was convicted of resisting arrest, and that this conviction has not been expunged, reversed, invalidated or otherwise called into question (Doc. 13 at 3B-3C; Doc. 38, DSOF ¶ 17). The question in this case is whether the Smith analysis applies. Smith drew a distinction between a plaintiff who resists officers before they use force and a plaintiff who resists during the course of the arrest and accompanying application of force. 394 F.3d at 697-98. The Court identified different "phases" of the encounter between the plaintiff and the officers and held that if Smith's conviction was for resisting the officers during the "investigative phase," i.e., before the officers had begun to arrest and use force against him, then Heck did not bar his claims and the force was excessive. Id. at 698. But if Smith's conviction was for resisting the officers while they were effecting arrest and using purportedly excessive force, then Heck did bar his claims that the officers used excessive force. Id. at 698-99.

Plaintiff describes multiple uses of force that he claims were excessive: (1) when Mullen "grabbed [Plaintiff] by the throat and slammed [him] face first into the asphalt[,]" thereby taking Plaintiff off his bicycle; (2) when, after Plaintiff stood up after the fall on the asphalt, Mullen punched Plaintiff in the face without provocation and then grabbed Plaintiff's arm and slammed his back onto the asphalt; (3) when Plaintiff was on the ground squirming in pain and Beauford slammed his knee into Plaintiff's lower back; and (4) when the both officers handcuffed Plaintiff so tightly that it cut off blood flow and no one would loosen his cuffs for an hour (Doc. 13 at 3-3A).

Defendants submit the transcript of Plaintiff's change of plea hearing, which reflects that his resisting arrest conviction arose specifically when he was squirming on the ground when Mullen and Beauford were attempting to effect an arrest and place handcuffs on him:

> [Plaintiff's attorney]: . . . [Plaintiff] committed Resisting Arrest when he intentionally attempted to prevent a person reasonably known to him, an officer, acting in a such color of his authority from effecting an arrest by squirming when he was on the ground.

> The Court: And the officer was attempting to handcuff him or take him into custody?
>
> [Plaintiff's attorney]: The officer was attempting to effect arrest and [Plaintiff] was squirming.
>
> . . .
>
> The Court: [State's attorney], any additions or corrections?
>
> [State's attorney]: No, thank you, Your Honor.

(Doc. 38, Ex. C, Hr'g Tr. 9:9-10:1 June 19, 2012.)

The Court finds that if Plaintiff was successful on his § 1983 claim that Defendants used excessive force and Beauford slammed his knee into Plaintiff's back when he was on the ground and they were trying to handcuff him, it would necessarily undermine his conviction for resisting arrest. Accordingly, this portion of Plaintiff's excessive-force claim is Heck-barred.

Because Plaintiff's resisting arrest conviction was limited solely to the time period—or "phase"—when he was on the ground and both Mullen and Beauford were attempting to handcuff and arrest him, the claims of excessive force used prior to that phase and after (tight handcuffs) are not subject to the Heck bar.

**2. Graham Objective Reasonableness**

Accordingly, Plaintiff's remaining excessive-force claims must be examined under the objective-reasonableness standard established in Graham. The objective-reasonableness inquiry is a three-step analysis. Miller v. Clark Cnty., 340 F.3d 959, 964 (9th Cir. 2003). First, the court must evaluate the type and amount of force used. Next, it must assess the importance of the governmental interests at stake by considering the factors set out in Graham—the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest. Finally, the court must balance the "gravity of the intrusion on the individual against the government's need for the intrusion . . . ." Miller, 340 F.3d at 964. The need for force is at the heart of Graham. Drummond v. City of Anaheim, 343 F.3d 1052, 1057 (9th Cir. 2003) (citation omitted). Where there is no need for force, any forced used is excessive.

Headwaters Forest Def. v. Cnty. of Humboldt, 240 F.3d 1185, 1199 (9th Cir. 2000), vacated and remanded on other grounds, Cnty. of Humboldt v. Headwaters Forest Def., 534 U.S. 801 (2001).

The Supreme Court has clarified the summary-judgment standard for excessive-force claims, rejecting the argument that the question of objective reasonableness is "a question of fact best reserved for a jury." Scott v. Harris, 550 U.S. 372, 381, n. 8 (2007). "At the summary judgment stage . . . once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record . . . the reasonableness of [the defendant's] actions . . . is a pure question of law." Id.; see also Marvin v. City of Taylor, 509 F.3d 234, 244 (6th Cir. 2007).

**a. Mullen's Initial Use of Force**

According to Plaintiff's facts, the first use of force alleged to be excessive was when he was still on his bicycle and Mullen grabbed him by the throat and slammed his face in to the asphalt (Doc. 13 at 3). Plaintiff submits that the his forehead was split open as a result and he suffered extreme pain and dizziness (id.). This does not amount to deadly force; however, it is more than insignificant.

As to the governmental interest at stake, there is no dispute that Mullen sought to stop Plaintiff for a traffic violation (id.; Doc. 38, DSOF ¶ 1). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996). A traffic violation committed by a bicycle rider does not rise to a serious threat but there was probable cause for a stop. The Court must consider whether Plaintiff was attempting to evade arrest, and the undisputed facts show that Mullen told Plaintiff to stop but Plaintiff did not stop (Doc. 13 at 3). There is no indication that Mullen would have known the reason for Plaintiff's failure to stop—that his bicycle had no brakes. For example, Plaintiff does not allege that he yelled to Mullen that he had no brakes and was trying to stop. And the record is clear that Mullen's use of force was for the purpose of stopping Plaintiff (Doc. 13 at 3; Doc. 38, DSOF ¶ 4).

On balance, given the interest in stopping Plaintiff for a traffic violation and Plaintiff's failure to stop his bicycle, there is no material factual dispute that Mullen's use of force was objectively reasonable in the circumstances. Summary judgment as to this portion of Plaintiff's excessive-force claim will be granted.

**b. Mullen's Punch and Take Down of Plaintiff**

Plaintiff avers that after getting up off the ground, he looked at his hand to see that it was covered in blood from the wound on his forehead, at which point Mullen punched him and took him to the ground (Doc. 13 at 3). Mullen avers that after Plaintiff got up, he raised his fist to Mullen, which caused Mullen to believe that Plaintiff was going to punch him and, therefore, Mullen took Plaintiff down to the ground (Doc. 38, Ex. A, Mullen Aff. ¶ 6).

A single punch and a takedown do not rise to deadly force; however, like the takedown off of the bicycle, this amount of force is more than insignificant and can result in serious injury. There is no dispute, however, that prior to the punch and takedown, Plaintiff raised his hand as he stood in front of Mullen. Even if Plaintiff was only looking at the blood on his hands, it was not unreasonable for Mullen to view this action as a threat and to believe that Plaintiff was about to throw a punch. Further, this potentially threatening action followed what appeared to be Plaintiff's refusal to stop his bicycle and Mullen first use of force against Plaintiff, for which Mullen could reasonably believe Plaintiff might react with some force.

In balancing the force used against the government's interest, the determination "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-97. Thus, although Mullen's use of force was, in hindsight, not required, given the threat he reasonably perceived from Plaintiff's actions, the force used was objectively reasonable in the circumstances. Summary judgment on this portion of Plaintiff's claim will be granted.

**c. Tight Handcuffing**

"It is well-established that overly tight handcuffing can constitute excessive force." Wall v. Cnty. of Orange, 364 F.3d 1107, 1112 (9th Cir. 2004). A plaintiff alleging an excessive force claim bears the burden of "providing specific facts to show that the force used was unreasonable or that [the plaintiff] sustained actual injuries," and "conclusory allegations unsupported by factual data are insufficient to defeat [a] summary judgment motion." Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 922 (9th Cir. 2001). The Ninth Circuit has held that tight handcuffing constitutes a Fourth Amendment violation where plaintiffs were demonstrably injured or where their complaints about too-tight handcuffs were ignored. See Wall, 364 F.3d at 1109-12 (doctor testified arrestee suffered nerve damage); LaLonde v. County of Riverside, 204 F.3d 947, 952, 960 (9th Cir. 2000) (arrestee complained to officer who refused to loosen handcuffs); Palmer v. Sanderson, 9 F.3d 1433, 1434-36 (9th Cir. 1993)(arrestee's wrists were discolored and officer ignored his complaint).

Defendants submit sworn statements stating that they did not hear Plaintiff complain that his handcuffs were too tight (Doc. 38, Ex. A, Mullen Aff. ¶ 17; Ex. D, Beauford Aff. ¶ 10). They also present a copy of the jail booking sheet, which reflects that when Plaintiff was asked at booking whether he was injured, he answered "no" (id., Ex. F). Plaintiff alleges that after Defendants placed extremely tight handcuffs on him, "for approx[imately] 1 hour no cop would loosen my cuffs" (Doc. 13 at 3A). Plaintiff also states that he repeatedly asked for medical attention for his hands, head, and back but Mullen told him to "quit being a baby" (id.). Plaintiff avers that Beauford transported Plaintiff to the Mesa Police Department and then removed the handcuffs, at which time Plaintiff's hands were "purple looking with large, open wounds" (id.). Finally, Plaintiff claims that about a month after he arrived at the jail, a physician diagnosed him with handcuff neuropathy (id. at 3A-3B).

Plaintiff fails to identify which officers he asked to loosen his cuffs. Further, it is not clear from these allegations whether Plaintiff asked Mullen for medical attention due to tight handcuffs or for injuries that may have been sustained prior to and during the course of his

arrest. See Rizzo v. Goode, 423 U.S. 362, 371-71, 377 (1976) (the plaintiff must show an affirmative link between a specific injury and the specific conduct of a defendant). In addition, there is no evidence in the record to support Plaintiff's claim of unreasonable injury, such as photographs or medical records. In short, Plaintiff's only evidence consists of general allegations that are insufficient to demonstrate that Mullen or Beauford ignored complaints that the handcuffs were too tight or that Plaintiff was demonstrably injured. See Arpin, 261 F.3d at 922; see also Celotex, 477 U.S. at 324 (nonmovant must "go beyond the pleadings and . . . designate specific facts showing that there is a genuine issue for trial") (citation omitted). Summary judgment is therefore appropriate on the claim concerning tight handcuffing.

In light of the above, the Court will grant Defendants' Motion for Summary Judgment.

**IT IS ORDERED:**

(1) The Order to Show Cause (Doc. 41) is **discharged**.

(2) The reference to the Magistrate Judge is **withdrawn** as to Defendants' Motion for Summary Judgment (Doc. 37) and Motion for Ruling (Doc. 40), and Plaintiff's Motion for Time Extension and Counsel (Doc. 43).

(3) Defendants' Motion for Summary Judgment (Doc. 37) is **granted**.

(4) Defendants' Motion for Ruling (Doc. 40) is **denied**.

(5) Plaintiff's Motion for Time Extension and Counsel (Doc. 43) is **denied**.

(6) The Clerk of Court must enter judgment accordingly and terminate the action.

DATED this 11th day of September, 2013.

Robert C. Broomfield
Senior United States District Judge