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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 C. DWAYNE GILMORE,  
11 Plaintiff,  
12 vs.  
13 D. AUGUSTUS, et al.,  
14 Defendants.  
15

1:12-cv-00925-LJO-GSA-PC

ORDER DENYING PLAINTIFF'S REQUEST  
FOR LEAVE TO PROPOUND ADDITIONAL  
INTERROGATORIES UPON DEFENDANT  
LOCKARD  
(Doc. 58; also resolves Doc. 59.)

16 **I. BACKGROUND**

17 C. Dwayne Gilmore ("Plaintiff") is a state prisoner proceeding pro se and in forma  
18 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint  
19 commencing this action on June 7, 2012. (Doc. 1.) This action now proceeds on the First  
20 Amended Complaint filed on March 8, 2013, against defendants Correctional Officer (C/O) C.  
21 Lockard, C/O C. Lopez, C/O J. Hightower, and C/O J. J. Torres for excessive force, and against  
22 defendant C/O J. J. Torres for denial of adequate medical care, in violation of the Eighth  
23 Amendment.<sup>1</sup> (Doc. 12.) This case is now in the discovery phase.<sup>2</sup>  
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26 <sup>1</sup> On November 18, 2013, the court issued an order dismissing all other claims and defendants from this  
27 action for failure to state a claim. (Doc. 17.) Defendants Lieutenant D. Augustus, Sergeant J. S. Diaz, Licensed  
28 Vocational Nurse (LVN) A. Serna, LVN B. Ismat, LVN I. Bari, LVN J. Canada, LVN Z. Nartume, and John Doe  
were dismissed from this action based on Plaintiff's failure to state any claims against them upon which relief may  
be granted under §1983, and Plaintiff's claims based on supervisory liability and claims for conspiracy and  
violation of due process were dismissed from this action for Plaintiff's failure to state a claim under § 1983. (Id.)

1 On July 2, 2014, Plaintiff filed a request for leave to propound three additional  
2 interrogatories on defendant C. Lockard (“Defendant”). (Doc. 58.) On July 23, 2014,  
3 Defendant filed an opposition to the request. (Doc. 62.) On August 6, 2014, Plaintiff filed a  
4 reply to the opposition. (Doc. 66.)

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6 **II. PLAINTIFF’S ALLEGATIONS AND EXCESSIVE FORCE CLAIM AGAINST  
DEFENDANT LOCKARD**

7 **A. Allegations**

8 The events at issue occurred at Kern Valley State Prison in Delano, California, when  
9 Plaintiff was incarcerated there.

10 On July 8, 2010, Plaintiff had just finished his inmate porter duties when he heard a  
11 commotion behind him and noticed an incident occurring between two handcuffed inmates and  
12 an officer. An alarm sounded, and Plaintiff got down on the ground. C/O Lockard aimed his  
13 Launcher Gun at Plaintiff’s right thigh and shot him with a sponge round. Plaintiff was struck  
14 in the front inner right lower thigh/upper kneecap area, ripping a large hole in his leg. Plaintiff  
15 fell backwards onto the floor, actively bleeding. C/O Lockard called down to C/O Lopez,  
16 “Check Gilmore. I shot him. He was trying to get involved.” Amd Cmp, Doc. 12 at 7 ¶21.  
17 Plaintiff was lying defenseless on the floor, in immense pain, attempting to put pressure on the  
18 wound. C/O Lopez walked over to Plaintiff and stood over him, stating, “You want to get  
19 involved motherf---er? You’re involved now.” Amd Cmp at 7 ¶23. C/O Lopez then sprayed  
20 Plaintiff with pepper spray without justification, in his face and up and down his backside. C/O  
21 Hightower approached Plaintiff and also began spraying him with pepper spray. Defendants  
22 Lopez and Hightower both emptied their pepper spray canisters on Plaintiff.

23 C/O Torres then handcuffed Plaintiff behind his back and aggressively yanked Plaintiff  
24 up from the floor. Plaintiff lost consciousness from pain but then awoke and began to yell that  
25 he was injured, bleeding, and needed medical attention. Plaintiff began to feel severe burning  
26 from the pepper spray. C/O Torres said, “You’re not getting s--t,” forced Plaintiff to walk  
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28 <sup>2</sup> On April 25, 2014, the Court issued a scheduling order in this action, opening discovery and  
establishing a deadline of December 25, 2014 for the completion of discovery. (Doc. 36.)

1 while in pain, and then shoved Plaintiff's face into the concrete wall, causing Plaintiff's glasses  
2 to chip and scratch Plaintiff's face, and busting Plaintiff's bottom lip. Amd Cmp at 8 ¶¶34-36.  
3 LVN's Canada, Serna, Ismat, and Nartume, who had all responded to the alarm, refused to  
4 examine Plaintiff on-site or direct Plaintiff's transportation to Medical Service. Sgt. Diaz  
5 instructed C/O Torres to escort Plaintiff to the Program Office, and Plaintiff was forced to  
6 walk, in obvious pain, to the Program Office patio area. C/O Torres intentionally led Plaintiff  
7 into the metal door frame, causing Plaintiff to hit his mouth, aggravating his busted and swollen  
8 bottom lip. C/O Torres told Plaintiff, "You gotta watch where you're going, Gilmore," and  
9 began to chuckle. Amd Cmp at 9 ¶44. C/O Torres forced Plaintiff to continue walking, and  
10 intentionally led him into another metal door frame, smacking Plaintiff's face hard into the  
11 door frame. C/O Torres said, "Gilmore, why do you keep doing that? I'm going to have to  
12 write you up for self-mutilation," and then snickered. Amd Cmp at 10 ¶47.

13 Plaintiff's right knee began to give out and he cried out to C/O Torres, "I can't walk no  
14 more, my knee is broken," and began to collapse. Amd Cmp at 10 ¶¶48, 49. C/O Torres  
15 yanked Plaintiff upright and threatened to harm him, stating, "You try to go down on me and  
16 I'm going to slam your [expletive] on the ground. Now walk!" Amd Cmp at 10 ¶¶50, 51.  
17 Fearful, Plaintiff continued to limp while in immense pain. C/O Torres intentionally led  
18 Plaintiff into the Pedestrian Gate steel door, striking Plaintiff's right kneecap area, causing  
19 Plaintiff to scream out in pain and almost lose consciousness. C/O Torres led Plaintiff past  
20 Medical Service to the front of the Program Office, then forced him down onto the hot asphalt,  
21 stating, "Sit there!" Amd Cmp at 11 ¶56. Plaintiff screamed in pain from his knee injury and  
22 the burning of the pepper spray, for approximately 27 minutes. Lieutenant Augustus said,  
23 "Gilmore, I'm right here for you;" C/O Bari commented, "He looks like he's burning;" and  
24 C/O Torres said, "He sure is!" Amd Cmp at 11 ¶¶59-61.

25 Plaintiff was led to the front of Medical Services and forced down onto the hot asphalt.  
26 Plaintiff continued to beg, cry and plea to be decontaminated from the pepper spray, and for  
27 medical attention. C/O Torres said, "After we take pictures." Amd Cmp at 12 ¶67. Water was  
28 poured over Plaintiff's gunshot wound, clearing away the evidence of excessive bleeding.

1 Plaintiff was forced into a chair in Medical Services, where photographs were taken of  
2 Plaintiff's wound. While the photos were being taken, defendant John Doe pulled open  
3 Plaintiff's wound, intentionally causing Plaintiff to lose consciousness. Plaintiff regained  
4 consciousness and was led outside of Medical Service by C/O Torres, who told Plaintiff, "Go  
5 down on your knees if you want to be decontaminated." Amd Cmp at 13 ¶75. Plaintiff went  
6 down on his left knee, leaving his right leg stretched out. C/O Torres told Plaintiff, "No! Both  
7 knees or you're not getting any water." Amd Cmp at 13 ¶77. Plaintiff bent his right leg and  
8 placed his knee onto the hot asphalt, causing excruciating pain. C/O Torres then began to  
9 decontaminate Plaintiff by spraying him with water. Every minute or so, C/O Torres would  
10 stop spraying Plaintiff and say, "Tell me you want more!" and snicker. Amd Cmp at 14 ¶80.  
11 Defendant Sgt. Diaz asked C/O Torres, "You're just now decontaminating him?" Amd Cmp at  
12 14 ¶81. C/O Torres decontaminated Plaintiff for about five minutes and then placed him in a  
13 holding cell. Still burning and blind from the pepper spray, Plaintiff began to self-  
14 decontaminate without instructions. The blood vessels in Plaintiff's eyes had burst. At Delano  
15 Regional Medical Center, Plaintiff's wound was x-rayed for broken bones, and the wound was  
16 stapled shut. Plaintiff was housed in administrative segregation at KVSP on the false charge of  
17 assault on a peace officer.

18 On July 9, 2010, at his initial hearing, Plaintiff denied the charge and countercharged  
19 cruel and unusual punishment, denial of due process, and conspiracy. On July 20, 2010,  
20 Plaintiff was issued a Rules Violation Report authored by defendant C/O C. Lopez, falsely  
21 reporting that Plaintiff had assaulted a peace officer. On August 18, 2010, at his disciplinary  
22 hearing, Plaintiff pled not guilty and was found guilty.

23 Plaintiff continues to experience itchininess, numbness, pain, stiffness, and throbbing in  
24 his right knee as a result of the gunshot wound.

25 **B. Excessive Force Claim – Eighth Amendment**

26 The court found that Plaintiff states a cognizable claim against defendant Lockard for  
27 use of excessive force in violation of the Eighth Amendment. (Doc. 13.)

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1 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual  
2 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue . . . .” Hudson  
3 v. McMillian, 503 U.S. 1, 8 (1992). “The objective component of an Eighth Amendment claim  
4 is . . . contextual and responsive to contemporary standards of decency.” Id. (internal quotation  
5 marks and citations omitted). The malicious and sadistic use of force to cause harm always  
6 violates contemporary standards of decency, regardless of whether or not significant injury is  
7 evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth  
8 Amendment excessive force standard examines *de minimis* uses of force, not *de minimis*  
9 injuries)). However, not “every malevolent touch by a prison guard gives rise to a federal cause  
10 of action.” Id. at 9. “The Eighth Amendment’s prohibition of cruel and unusual punishments  
11 necessarily excludes from constitutional recognition *de minimis* uses of physical force,  
12 provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’” Id. at  
13 9-10 (internal quotations marks and citations omitted).

14 “[W]henever prison officials stand accused of using excessive physical force in  
15 violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether  
16 force was applied in a good-faith effort to maintain or restore discipline, or maliciously and  
17 sadistically to cause harm.” Id. at 7. “In determining whether the use of force was wanton and  
18 unnecessary, it may also be proper to evaluate the need for application of force, the relationship  
19 between that need and the amount of force used, the threat reasonably perceived by the  
20 responsible officials, and any efforts made to temper the severity of a forceful response.” Id.  
21 (internal quotation marks and citations omitted). “The absence of serious injury is . . . relevant  
22 to the Eighth Amendment inquiry, but does not end it.” Id.

### 23 **III. REQUEST TO PROPOUND ADDITIONAL INTERROGATORIES**

#### 24 **A. Legal Standard**

25 Pursuant to Rule 33(a) of the Federal Rules of Civil Procedure, “[u]nless otherwise  
26 stipulated or ordered by the court, a party may serve on any other party no more than 25 written  
27 interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be  
28 granted to the extent consistent with Rule 26(b)(2).” Fed. R. Civ. P. 33(a). Rule 26(b)(2)(A)

1 provides that “[b]y order, the court may alter the limits in these rules on the number of . . .  
2 interrogatories. Fed. R. Civ. P. 26(b)(2)(A). However, “the court must limit the frequency or  
3 extent of discovery . . . if it determines that (i) the discovery sought is unreasonably cumulative  
4 or duplicative, or can be obtained from some other source that is more convenient, less  
5 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to  
6 obtain the information by discovery in the action; or (iii) the burden or expense of the proposed  
7 discovery outweighs its likely benefit, considering the needs of the case, the amount in  
8 controversy, the parties’ resources, the importance of the issues at stake in the action, and the  
9 importance of the discovery in resolving the issues.” Fed. R. Civ. P. 26(b)(2)(C).

10 “[B]road discretion is vested in the trial court to permit or deny discovery, and its  
11 decision to deny discovery will not be disturbed except upon the clearest showing that denial of  
12 discovery results in actual and substantial prejudice to the complaining litigant.” Dichter-Mad  
13 Family Partners, LLP v. U.S., 709 F.3d 749, 751 (9th Cir. 2013) (quoting Hallett v. Morgan,  
14 296 F.3d 732, 751 (9th Cir. 2002) (alteration omitted)); accord Goehring v. Brophy, 94 F.3d  
15 1294, 1305 (9th Cir. 1996)). “A plaintiff seeking discovery must allege ‘enough fact to raise a  
16 reasonable expectation that discovery will reveal’ the evidence he seeks.” Dichter-Mad Family  
17 Partners, LLP, 709 F.3d at 751 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556,  
18 127 S.Ct. 1955 (2007)); see also Gager v. United States, 149 F.3d 918, 922 (9th Cir. 1998) (“It  
19 is well-established that the burden is on the party seeking to conduct additional discovery to put  
20 forth sufficient facts to show that the evidence sought exists.”)

### 21 **Parties’ Positions**

22 Plaintiff requests leave to propound three additional interrogatories upon defendant  
23 Lockard, for a total of twenty-eight interrogatories. Plaintiff has submitted his proposed “First  
24 Request for Interrogatories to defendant Lockard” containing the twenty-eight interrogatories,  
25 for the court’s review. (Exhibits to Request, Doc. 58 at 4-22.) Plaintiff argues that the twenty-  
26 eight interrogatories are not unreasonably cumulative or duplicative, and that he cannot obtain  
27 the information from some other source that is more convenient, less burdensome, or less  
28 expensive. Plaintiff also argues that the burden and expense of responding to the

1 interrogatories is within reason, considering the importance of the discovery to the resolution of  
2 this case.

3 Defendant Lockard asserts that Plaintiff served the twenty-eight interrogatories upon  
4 Defendant on June 30, 2014, before he filed the July 2, 2014 request to propound additional  
5 interrogatories. In opposition to Plaintiff's request, Defendant first argues that Interrogatories  
6 Nos. 1-4 seek irrelevant information concerning whether non-defendant Officers Herrera, King,  
7 and Torres were properly allowed in the building to conduct a search of Plaintiff's cell and  
8 whether they properly conducted the search. Defendants argue that whether the cell search was  
9 properly conducted is irrelevant, and the relevant inquiry in this matter is whether Defendants  
10 acted reasonably in perceiving a threat from Plaintiff, and whether Defendants acted reasonably  
11 to the perceived threat of Plaintiff.

12 Defendant also argues that Plaintiff's proposed interrogatories are mostly compound,  
13 effectively resulting in fifty-four interrogatories to defendant Lockard. Defendant asserts that  
14 almost every interrogatory contains at least one subpart, and a few contain multiple subparts.

15 Defendant also argues that Plaintiff's proposed Interrogatory No. 10 seeks information  
16 that could jeopardize the CDCR's institutional safety and security. Defendant asserts that the  
17 interrogatory seeks information pertaining to institutional procedures for loading weapons and  
18 quelling disturbances, which inmates could use to manipulate situations, stage altercations,  
19 potentially overcome staff, and otherwise jeopardize safety and security.

20 In reply, Plaintiff reasserts the arguments in his request and also argues that the  
21 proposed interrogatories are not compound. Plaintiff argues that Defendant seeks to delay  
22 prosecution of this action, take Plaintiff to task, and vex Plaintiff. Plaintiff argues that  
23 Interrogatories Nos. 1-4 are relevant because they concern whether Defendant's decision to  
24 allow Officers Herrera, King and Torres into the building was lawful, and will lead to evidence  
25 "whether the Defendant could reasonably believe his decision, which resulted in him shooting  
26 Plaintiff, was tempered." (Request, Doc. 66 at 5:21-27.) Plaintiff also argues that  
27 Interrogatories Nos. 1-4 will lead to evidence whether the decisions precipitating the cell search

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1 address the objective need for force, the relationship between any such need, the amount of  
2 force actually used, and the threat reasonably perceived by defendant Lockard.

3 Plaintiff argues that his proposed Interrogatory No. 10 does not seek information that  
4 could jeopardize institutional safety and security, because inmates cannot use the information  
5 to manipulate situations. Plaintiff argues that Defendant's contention that prisoners could use  
6 information about correctional officers' handling of launcher guns to stage altercations or  
7 overcome staff is "ridiculous." (Request, Doc. 66 at 8:2.) Plaintiff asserts that the requested  
8 information is useless to prisoners because the guns are locked and secured in safety and  
9 security towers, which prisoners cannot access.

### 10 **Discussion**

11 The court has reviewed Plaintiff's twenty-eight proposed interrogatories and finds merit  
12 in Defendant's argument that many of them are impermissibly compound or contain multiple  
13 subparts, causing them to greatly exceed twenty-eight interrogatories. For example,  
14 Interrogatory No. 1 reads as follows:

15 Before you allowed Officers J. J. Torres, S. Herrera, and M. King to enter  
16 Facility A, Building 8, on Thursday, July 8, 2010, were you notified and  
17 instructed by your immediate supervisor or any supervisor that the Officers  
18 [were] authorized to conduct a specific cell search/inspection of cell 132 and its  
occupants? If no, please explain why you allowed the Officers to enter the  
building to conduct the search. If yes, please state the time of the notification,  
name of the supervisor and the instructions given you.

19 This interrogatory consists of at least two separate subparts, depending on whether Defendant  
20 answers "yes" or "no" to the first subpart.

21 Interrogatory No. 15 contains five separate subparts if Defendant answers "yes" to the  
22 first subpart:

23 At any time after you discharged the sponge round at Plaintiff, did you leave  
24 away from the control booth/tower window? If yes, please explain – a) why; b)  
25 did you return to the control booth/tower window; c) how much time elapsed  
from when you left until you returned; and d) why this fact was never reported  
by you.

26 Similarly, most of Plaintiff's proposed interrogatories are either compound or contain multiple  
27 subparts, which is impermissible. Based on this finding alone, the court shall deny Plaintiff's  
28 request for leave to propound the twenty-eight proposed interrogatories upon Defendant.



1 Defendant Lockard is not required to respond to any of the proposed twenty-eight  
2 interrogatories which were served upon him on June 30, 2014.

3 With respect to Interrogatories Nos. 1-4, the court finds them irrelevant to Plaintiff's  
4 claims in this action. This case now proceeds only against defendants C/O C. Lockard, C/O C.  
5 Lopez, C/O J. Hightower, and C/O J. J. Torres for excessive force, and against defendant C/O  
6 J. J. Torres for denial of adequate medical care, in violation of the Eighth Amendment.<sup>3</sup>  
7 Plaintiff makes no allegations in the First Amended Complaint concerning a cell search, and  
8 the Defendant's decision to conduct a cell search is not relevant to whether Defendant used  
9 excessive force on July 8, 2010, or whether there was an objective need for force.

10 Should Plaintiff wish to serve interrogatories upon defendant Lockard, he is advised to  
11 prepare only twenty-five new interrogatories, posing only one question per interrogatory. If  
12 Plaintiff wishes to serve more than twenty-five interrogatories, he should request leave of court  
13 before he serves the interrogatories.

14 **IV. CONCLUSION**

15 Based on the foregoing and good cause appearing, IT IS HEREBY ORDERED that  
16 Plaintiff's motion to propound an excess number of interrogatories upon defendant Lockard,  
17 filed on July 17, 2014, is DENIED.

18  
19 IT IS SO ORDERED.

20 Dated: August 27, 2014

/s/ Gary S. Austin  
21 UNITED STATES MAGISTRATE JUDGE  
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28 <sup>3</sup> Defendant has stated that J. J. Torres is a non-defendant, because Torres is deceased. (Doc. 62 at 3:4-6,  
fn.1.) However, at this juncture, defendant J. J. Torres has not been dismissed from this action.