

1 After the time for filing an opposition had passed, the Court notified Plaintiff that if he
2 did not file an opposition, the motion would be decided without his input. The Court gave
3 Plaintiff twenty-one additional days to file an opposition.

4 Plaintiff filed an opposition on January 16, 2015.

5 Defendants filed their reply on January 23, 2015.

6 The motion is suitable for decision pursuant to Local Rule 230(l).

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8 **I. LEGAL STANDARD**

9 Any party may move for summary judgment, and the Court shall grant summary
10 judgment if the movant shows that there is no genuine dispute as to any material fact and the
11 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks
12 omitted); Washington Mutual Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's
13 position, whether it be that a fact is disputed or undisputed, must be supported by (1) citing to
14 particular parts of materials in the record, including but not limited to depositions, documents,
15 declarations, or discovery; or (2) showing that the materials cited do not establish the presence or
16 absence of a genuine dispute or that the opposing party cannot produce admissible evidence to
17 support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider
18 other materials in the record not cited to by the parties, but it is not required to do so. Fed. R.
19 Civ. P. 56(c)(3); Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir.
20 2001); accord Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

21 Defendant does not bear the burden of proof at trial and in moving for summary
22 judgment, he need only prove an absence of evidence to support Plaintiff's case. In re Oracle
23 Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett,
24 477 U.S. 317, 323, 106 S.Ct. 2548 (1986)). If Defendant meets his initial burden, the burden
25 then shifts to Plaintiff "to designate specific facts demonstrating the existence of genuine issues
26 for trial." In re Oracle Corp., 627 F.3d at 387 (citing Celotex Corp., 477 U.S. at 323). This
27 requires Plaintiff to "show more than the mere existence of a scintilla of evidence." Id. (citing
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1 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)).

2 In judging the evidence at the summary judgment stage, the Court may not make
3 credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509
4 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all
5 inferences in the light most favorable to the nonmoving party and determine whether a genuine
6 issue of material fact precludes entry of judgment, Comite de Jornaleros de Redondo Beach v.
7 City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation
8 omitted), cert. denied, 132 S.Ct. 1566 (2012). The Court determines only whether there is a
9 genuine issue for trial, and Plaintiff’s filings must be liberally construed because he is a pro se
10 prisoner. Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (quotation marks and citations
11 omitted).

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13 **II. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

14 Plaintiff is currently incarcerated at R.J. Donovan Correctional Facility in San Diego,
15 California. The events complaint of occurred while Plaintiff was housed at Pleasant Valley State
16 Prison (“PVSP”).

17 On January 3, 2009, Plaintiff alleges that Defendant Jordan grabbed him, kicked him and
18 then hit his chest to the wall. Plaintiff alleges that he complied with Defendant Jordan’s orders,
19 but Defendant Jordan kicked and hit him. Defendant Latia also hit Plaintiff in the back and
20 chest. The attack caused permanent injury.

21 **III. UNDISPUTED MATERIAL FACTS**³

22 On January 3, 2009, Plaintiff was housed at PVSP and was taken to the Correctional
23 Treatment Center (“CTC”). Latia Decl. ¶ 3. The CTC houses inmates who need professionally
24 supervised health care that cannot be provided on an outpatient basis. Latia Decl. ¶ 3.

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27 ³ Plaintiff neither filed his own separate statement of disputed facts nor admitted or denied the facts set forth by
28 Defendants as undisputed. Local Rule 260(b). Therefore, Defendants’ statement of undisputed facts is accepted
except where brought into dispute by Plaintiff’s verified complaint or opposition. Jones v. Blanas, 393 F.3d 918,
923 (9th Cir. 2004); Johnson v. Meltzer, 134 F.3d 1393, 1399-1400 (9th Cir. 1998).

1 In January 2009, Defendants Latia and Jordan were employed by the California
2 Department of Corrections and Rehabilitation (“CDCR”) and assigned to Facility A, Building 3,
3 as Floor Officers at PVSP. Latia Decl. ¶ 1; Jordan Decl. ¶ 1. Defendants Jordan and Latia
4 received training in the use of force policy maintained by CDCR, and both understood that
5 CDCR authorized reasonable force necessary to gain compliance with a lawful order, subdue an
6 attacker, overcome resistance and effect custody. Latia Decl. ¶2; Jordan Decl. ¶ 2.

7 On January 3, 2009, Defendant Jordan was inventorying and packing Plaintiff’s personal
8 property in the day room because he was told that Plaintiff was being transferred to the CTC.
9 Jordan Decl. ¶ 3. When inmates are transferred from their housing unit, their personal property
10 is inventoried by staff and stored for safekeeping. Jordan Decl. ¶ 4. The stealing of personal
11 property items has invoked violent reactions, such as cellmate on cellmate stabbings. Pl.’s Dep.,
12 11:22-12:1, 13:1-4.

13 On January 3, 2009, Plaintiff returned to his housing unit. Jordan Decl. ¶ 3. As he
14 entered the building, Plaintiff noticed that Defendant Jordan was inventorying his personal
15 property. Latia Decl. ¶ 4; Jordan Decl. ¶ 5. Plaintiff questioned Defendant Johnson about his
16 property. Pl.’s Dep. 11:4-7; Latia Decl. Jordan Decl. ¶¶ 5-6; Latia Decl. ¶ 5.

17 Defendant Jordan then ordered Plaintiff to return this his cell. Latia Decl. ¶ 6; Jordan
18 Decl. ¶ 7. Plaintiff did not comply and “verbally fought” with Defendants. Pl.’s Dep. 11:10-11;
19 14:6-9; 33:20-34:4. Plaintiff was aware that he was required to comply with officers’ orders.
20 Pl.’s Dep. 14:2-4; 53:2-8.

21 Defendant Jordan eventually activated his personal alarm, which signified an emergency
22 and summoned staff for assistance. Latia Decl. ¶ 7; Jordan Decl. ¶ 8.

23 Correctional staff responded to the alarm and an altercation followed. Latia Decl. ¶¶ 8-
24 15; Jordan Decl. ¶¶ 13-16; Pl’s Dep. 16:12-17:2; 22:12-18.

1 Once handcuffs were secured on Plaintiff, he was escorted from the building. Latia
2 Decl. ¶ 15; Jordan Decl. ¶ 18.

3 A medical assessment conducted after the incident revealed that Plaintiff had a scratch on
4 his wrist and lower back. Ex. D., at 17.

5 **IV. DISCUSSION**

6 1. Legal Standard

7 The Cruel and Unusual Punishments Clause of the Eighth Amendment protects prisoners
8 from the use of excessive physical force. Wilkins v. Gaddy, 559 U.S. 34, 37, 130 S.Ct. 1175,
9 1178 (2010) (per curiam); Hudson v. McMillian, 503 U.S. 1, 8-9, 112 S.Ct. 995 (1992). What is
10 necessary to show sufficient harm under the Eighth Amendment depends upon the claim at issue,
11 with the objective component being contextual and responsive to contemporary standards of
12 decency. Hudson, 503 U.S. at 8 (quotation marks and citations omitted). For excessive force
13 claims, the core judicial inquiry is whether the force was applied in a good-faith effort to
14 maintain or restore discipline, or maliciously and sadistically to cause harm. Wilkins, 559 U.S.
15 at 37, 130 S.Ct. at 1178 (citing Hudson, 503 U.S. at 7) (quotation marks omitted).

16 Not every malevolent touch by a prison guard gives rise to a federal cause of action.
17 Wilkins, 559 U.S. at 37, 130 S.Ct. at 1178 (citing Hudson, 503 U.S. at 9) (quotation marks
18 omitted). Necessarily excluded from constitutional recognition is the de minimis use of physical
19 force, provided that the use of force is not of a sort repugnant to the conscience of mankind.
20 Wilkins, 559 U.S. at 37-8, 130 S.Ct. at 1178 (citing Hudson, 503 U.S. at 9-10) (quotations marks
21 omitted). In determining whether the use of force was wanton and unnecessary, courts may
22 evaluate the extent of the prisoner's injury, the need for application of force, the relationship
23 between that need and the amount of force used, the threat reasonably perceived by the
24 responsible officials, and any efforts made to temper the severity of a forceful response. Hudson,
25 503 U.S. at 7 (quotation marks and citations omitted).

1 While the absence of a serious injury is relevant to the Eighth Amendment inquiry, it
2 does not end it. Hudson, 503 U.S. at 7. The malicious and sadistic use of force to cause harm
3 always violates contemporary standards of decency. Wilkins, 559 U.S. at 37, 130 S.Ct. at 1178
4 (citing Hudson, 503 U.S. at 9) (quotation marks omitted). Thus, it is the use of force rather than
5 the resulting injury which ultimately counts. Id. at 37-8.

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7 2. Analysis

8 Defendants move for summary judgment based on their contention that Plaintiff was
9 upset, disruptive, and noncompliant, and that they used only the minimal amount of force
10 necessary to maintain control. However, for the reasons that follow, genuine disputes of material
11 fact exists that prevent summary judgment.

12 As an initial matter, Plaintiff's opposition is one paragraph in length and cites to
13 documents attached to his First Amended Complaint. There are no exhibits attached, however.
14 Nonetheless, Plaintiff's statements in his verified First Amended Complaint should be taken into
15 account in determining whether a dispute of fact exists. Moreover, Defendants have used
16 various portions of Plaintiff's deposition to support their argument. A review of the entire
17 deposition, which was lodged with the Court by Defendants, also offers evidence that should be
18 examined in analyzing this motion. Although neither Defendants nor Plaintiff cite to specific
19 portions of Plaintiff's deposition that call Defendants' facts into dispute, the Court cannot simply
20 ignore the evidence submitted with this motion.

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22 Turning to the factual issues, it is undisputed that Plaintiff did not follow Defendant
23 Jordan's initial order to return to his cell. The events leading up to this, however, are disputed.
24 According to Defendants, Plaintiff became agitated when he saw Defendant Jordan with his
25 property and started moving towards him in an aggressive manner, stating, "What the fuck are
26 you doing with my property?" Latia Decl. ¶ 5; Jordan Decl. ¶ 5. Plaintiff demanded the return
27 of his property. Jordan Decl. ¶ 6. According to Plaintiff, he asked Defendant Jordan, "Why is
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1 my property out in the dayroom?” Defendant Jordan replied, “Oh, I thought you were going to
2 the hospital.” Plaintiff said, “Sir, may I have my property back?” Defendant Jordan said, “No,
3 get out of here.” Pl.’s Dep. 11:4-7.

4 The manner in which Plaintiff did not obey is also disputed. Plaintiff testified that he “sat
5 down right on the floor” because he wanted his property. Pl.’s Dep. 52:14-24. Plaintiff said,
6 “I’m not and I’m sitting on the floor until the sergeant comes. There is no reason for you to take
7 my property.” Pl.’s Dep. 11:1-17; 14:6-9.

8 According to Defendants, however, Plaintiff did not follow Defendant Jordan’s order,
9 and instead continued to walk towards Defendant Jordan, stating, “I am not going to lock up,
10 you’re going to have to take me to the hole.” Latia Decl. ¶ 6; Jordan Decl. ¶ 7. Defendant
11 Jordan believed that this meant that Plaintiff was not going to comply with his orders, and that
12 Plaintiff would need to be placed in Administrative Segregation. Jordan Decl. ¶ 7. Officer
13 Lopez, the control booth officer, also ordered Plaintiff to return to his cell. Ex. D (Crime
14 Incident Report), at 10.

15 Therefore, while there is no dispute that Plaintiff did not follow the initial order to return
16 to his cell, the facts that Defendant Jordan relies upon to support his belief that Plaintiff was a
17 threat are disputed. While Defendant Jordan contends that Plaintiff walked towards him in an
18 aggressive and agitated manner, Jordan Decl. ¶¶ 7-8, Plaintiff states that he did not walk towards
19 Defendant Jordan or say anything. Pl.’s Dep. 15:13-15, 20:19-24.

20 Defendant Jordan then states that he ordered Plaintiff to get down, but that he refused and
21 remained standing. Jordan Decl. ¶¶ 9-10. According to Plaintiff, however, he was already
22 down, and got up when Defendant Jordan ordered him to so do. Pl.’s Dep. 15:8-14, 53:6-10.

23 At this point, the parties agree that Defendant Jordan activated his personal alarm. The
24 events after the alarm activation, however, are entirely disputed. Defendant Jordan states that he
25 ordered Plaintiff to turn around, face the wall and place his hands behind his back. Latia Decl. ¶
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1 7; Jordan Decl. ¶ 11. He contends that Plaintiff refused and became loud and disruptive. Latia
2 Decl. ¶ 7; Jordan Decl. ¶ 12. Defendants state that Plaintiff became compliant when custody
3 staff responded to the alarm, and he turned around to face the wall and placed his hands behind
4 his back. Jordan Decl. ¶ 13. However, when Defendant Jordan reached for Plaintiff's right hand
5 to place it into handcuffs, Plaintiff broke his grasp by twisting his torso to the right and left.
6 Latia Decl. ¶ 8; Jordan Decl. ¶ 14; Ex. D, at 9, 11. To regain order and to assist in safely
7 handling Plaintiff, Defendant Latia placed his left hand on Plaintiff's left shoulder blade, his
8 right hand on Plaintiff's right shoulder blade and pinned him to the wall. Latia Decl. ¶ 9.
9 Officer Rodriguez took control of Plaintiff's left hand and moved it behind his back. Latia Decl.
10 ¶ 10; Jordan Decl. ¶ 15; Ex. D, at 9. To avoid being injured and to stop Plaintiff's resistive
11 behavior, Defendant Jordan gained control of Plaintiff's right hand and forced it behind his back
12 so that he could secure it in handcuffs. Latia Decl. ¶ 10; Jordan Decl. ¶ 16. As Defendant
13 Jordan was placing handcuffs on Plaintiff, Plaintiff thrust his head backwards towards Defendant
14 Jordan. Latia Decl. ¶ 11; Ex. D. at 15. To prevent Plaintiff from hurting himself or staff,
15 Defendant Latia placed his left hand on the side of Plaintiff's face and held his head against the
16 wall. Latia Decl. ¶ 12

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18 Plaintiff testified, however, that Defendants did not give him an order to turn around.
19 Pl.'s Dep. 16:14-16. Instead, they threw him on the office door. Defendant Latia grabbed
20 Plaintiff's neck and pushed with his other hand "[his] pacemaker on the -- on the wall, hitting--
21 injuring my pacemaker." Plaintiff didn't do anything, just went with the flow. He did not
22 attempt to turn around. Pl.'s Dep. 17:3-14. Defendant Jordan also pushed him up against the
23 wall, hitting his pacemaker, and then kicked him in the lower back. Pl.'s Dep. 16:12-17:2.
24 Defendant Latia kicked him in the lower back, and pushed his face up against the wall with his
25 right hand. With his left hand, he hit Plaintiff's pacemaker against the wall and then kicked him
26 in the back. "Actually, both officers did that." Pl.'s Dep. 22:12-18.

1 Defendants deny kicking or hitting Plaintiff in the chest or back, and contend that they
2 did not slam him into the wall. Latia Decl. ¶¶ 13-14; Jordan Decl. ¶ 17. Instead, Defendants
3 contend that they only used the amount of force necessary to maintain control of Plaintiff and to
4 prevent him from injuring himself or other staff members, and to stop his assaultive behavior.
5 Latia Decl. ¶ 16; Jordan Decl. ¶ 20.

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7 Taking these facts in the light most favorable to Plaintiff, a genuine dispute exists as to
8 whether Defendants used force to gain compliance of Plaintiff, or whether the use of force was
9 used maliciously or sadistically for the purpose of causing harm. Even though it is undisputed
10 that Plaintiff did not comply with Defendant Jordan's initial order to return to his cell, the
11 alleged use of force occurred after Plaintiff contends that he began complying with orders. There
12 is also a dispute as to Plaintiff's actions, actions that Defendant Jordan uses to justify his belief
13 that Plaintiff was a threat.

14 For these reasons, summary judgment must be denied.

15 3. Qualified Immunity

16 Finally, Defendants argue that they are entitled to qualified immunity.

17 Qualified immunity is "immunity from suit rather than a mere defense to liability; and
18 like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."
19 Mueller v. Auer, 576 F.3d 979, 993 (9th Cir. 2009) (citation and internal quotations omitted).
20 Qualified immunity shields government officials from civil damages unless their conduct
21 violates "clearly established statutory or constitutional rights of which a reasonable person would
22 have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). "Qualified
23 immunity balances two important interests - the need to hold public officials accountable when
24 they exercise power irresponsibly and the need to shield officials from harassment, distraction,
25 and liability when they perform their duties reasonably," Pearson v. Callahan, 555 U.S. 223, 231,
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1 129 S.Ct. 808 (2009), and it protects “all but the plainly incompetent or those who knowingly
2 violate the law,” Mallei v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

3 In resolving the claim of qualified immunity, the Court must determine whether, taken in
4 the light most favorable to Plaintiff, Defendants’ conduct violated a constitutional right, and if
5 so, whether the right was clearly established. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151
6 (2001); Mueller, 576 F.3d at 993. While often beneficial to address in that order, the Court has
7 discretion to address the two-step inquiry in the order it deems most suitable under the
8 circumstances. Pearson, 555 U.S. at 236 (overruling holding in Saucier that the two-step inquiry
9 must be conducted in that order, and the second step is reached only if the court first finds a
10 constitutional violation); Mueller, 576 F.3d at 993-94.

11 In this instance, the evidence viewed in the light most favorable to Plaintiff demonstrates
12 a constitutional violation, and there exist triable issues of fact as to whether that right was
13 violated. Therefore, the Court proceeds without further discussion to the second step of the
14 inquiry.

15 “For a constitutional right to be clearly established, its contours must be sufficiently clear
16 that a reasonable officer would understand that what he is doing violates that right.” Hope v.
17 Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508 (2002). While the reasonableness inquiry may not be
18 undertaken as a broad, general proposition, neither is official action entitled to protection “unless
19 the very action in question has previously been held unlawful.” Hope, 536 U. S. at 739.

20 “Specificity only requires that the unlawfulness be apparent under preexisting law,” Clement v.
21 Gomez, 298 F.3d 898, 906 (9th Cir. 2002) (citation omitted), and prison personnel “can still be
22 on notice that their conduct violates established law even in novel factual circumstances,” Hope,
23 536 U.S. at 741.

1 In 2009, an inmate's right to be free from the use of excessive physical force was clear.
2 Hudson, 503 U.S. at 6-7 (articulating the standard for excessive force claims under the Eighth
3 Amendment).

4 The Court recognizes that the existence of material factual disputes does not necessary
5 preclude a finding of qualified immunity. Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043,
6 1053 (9th Cir. 2002). "Qualified immunity gives government officials breathing room to make
7 reasonable but mistaken judgments about open legal questions," Ashcroft v. al-Kidd, ___ U.S. ___,
8 ___, 131 S.Ct. 2074, 2085 (2011). Here, however, assuming the facts in the light most favorable
9 to Plaintiff, no reasonable officer would have believed that kicking and hitting an inmate who
10 had complied with orders, and did not pose a threat, was lawful.

11 Accordingly, Defendants are not entitled to qualified immunity.

12
13 **V. FINDINGS AND RECOMMENDATIONS**

14 For the reasons set forth above, the Court HEREBY RECOMMENDS that Defendants'
15 motion for summary judgment be DENIED.

16 These Findings and Recommendations will be submitted to the United States District
17 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
18 thirty (30) days after being served with these Findings and Recommendations, the parties may
19 file written objections with the Court. Local Rule 304(b). The document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
21 objections must be filed within fourteen (14) days from the date of service of the objections. The
22 parties are advised that failure to file objections within the specified time may waive the right to
23 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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25 IT IS SO ORDERED.

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27 Dated: February 11, 2015

28 /s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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