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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JEREMIAH D. VICKERS,

Plaintiff,

v.

THOMPSON, et al.,

Defendants.

) Case No.: 1:15-cv-00129-SAB (PC)
)
) ORDER GRANTING PLAINTIFF’S
) MOTION FOR LEAVE TO FILE SECOND
) AMENDED COMPLAINT
) (ECF No. 56)
)
) ORDER DIRECTING CLERK OF COURT
) TO FILE SECOND AMENDED
) COMPLAINT
) (ECF No. 59)
)
) ORDER FINDING SERVICE OF SECOND
) AMENDED COMPLAINT APPROPRIATE
) AS TO DEFENDANTS AKIN, ALVAREZ,
) WILLIAMS, AND STELOW, AND
) FORWARDING PLAINTIFF THE
) NECESSARY SERVICE OF PROCESS
) DOCUMENTS FOR COMPLETION AND
) RETURN WITHIN **THIRTY DAYS**
)

Plaintiff Jeremiah D. Vickers (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The parties have consented to the jurisdiction of the United States Magistrate Judge. (ECF Nos. 8, 40, 65); Local Rule 302. Currently before the Court is Plaintiff’s motion for leave to file a second amended complaint, filed on November 30, 2016. (ECF No. 56.)¹

¹ It is typically this Court’s practice to promote efficiency and conserve the resources of the parties and the Court by ruling on motions to amend pleadings as soon as possible. As the parties are aware, unfortunately in this case the Court’s resources were burdened over the last several months by matters concerning service of process and related issues, which were only recently resolved. The parties’ patience in this regard is appreciated.

1 I.

2 RELEVANT BACKGROUND

3 This action proceeds on Plaintiff's first amended complaint, filed August 31, 2015,
4 alleging excessive force against Defendants Smith and Sandoval, and deliberate indifference
5 against Defendants Thompson, Smith and Sandoval, in violation of the Eighth Amendment.
6 (ECF No. 18.) On March 30, 2016, following some delays by Plaintiff in submitting the
7 necessary documents, the Court ordered the United States Marshal to serve a summons and first
8 amended complaint on Defendants. (ECF No. 28.)

9 On June 9, 2016, Defendants Smith and Thompson filed an answer to the first amended
10 complaint. (ECF No. 35.) Following issues concerning service of process, on May 11, 2017,
11 Defendant Sandoval filed an answer to the first amended complaint. (ECF No. 64.)²

12 On June 10, 2016, the Court issued a discovery and scheduling order. (ECF No. 36.)
13 Among other deadlines, that order set the deadline for amending pleadings as October 11, 2016,
14 and the discovery cut-off deadline as November 10, 2016.

15 On September 15, 2016, the United States Marshal returned the summons and complaint
16 unexecuted as to Defendant Sandoval. (ECF No. 48.)

17 On October 11, 2016, Plaintiff filed a motion to extend the deadline to file amended
18 pleadings. (ECF No. 49.) The Court granted Plaintiff's request and extended that deadline to
19 December 11, 2016. (ECF No. 50.)

20 On November 30, 2016, Plaintiff filed the subject motion for leave to file a second
21 amended complaint. (ECF No. 56.) Defendants filed an opposition to the motion on December 1,
22 2016. (ECF No. 58.) The time to file any reply has passed, and none was filed.

23 Accordingly, the motion is submitted without oral argument. Local Rule 230(1).

24 _____
25 ² This case also proceeded on certain claims against Deputy O'Neil. As alluded to above, there were
26 numerous motions, orders to show cause, orders to the United States Marshal, filings by the parties,
27 rulings on requests for default, and multiple attempts at service in this case since the Court originally
28 ordered all defendants in this matter to be served.

Ultimately, Deputy O'Neil was dismissed from this action, without prejudice, for the failure to
effect service of process, on July 11, 2017, (ECF No. 72).

1 **II.**

2 **LEGAL STANDARD**

3 Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party's
4 pleading once as a matter of course twenty-one days after serving, or if a response was filed,
5 within twenty-one days after service of the response. Fed. R. Civ. P. 15(a)(1). Otherwise, a
6 party may amend only by leave of the court or by written consent of the adverse party, and leave
7 shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2).

8 Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so
9 requires.'" AmerisourceBergen Corp. v. Dialysis West, Inc., 465 F.3d 946, 951 (9th Cir. 2006)
10 (quoting Fed. R. Civ. P. 15(a)). However, courts "need not grant leave to amend where the
11 amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue
12 delay in the litigation; or (4) is futile." AmerisourceBergen Corp., 465 F.3d at 951.

13 **III.**

14 **DISCUSSION**

15 **A. Summary of First Amended Compliant**

16 At the time of the events at issue in this action, Plaintiff was a convicted inmate housed at
17 the Tulare County Jail while awaiting transfer to a CDCR facility. Plaintiff was housed in a
18 single status cell in administrative segregation. He is a documented Mental Health patient and
19 was receiving several varieties and doses of psychotropic medication during the day. Plaintiff is
20 African-American.

21 On August 27, 2014, at night medication pill pass, Defendant Smith opened the food port
22 on Plaintiff's cell door to allow the nurse to hand him medication. Plaintiff stuck his arm out of
23 the food port in a "non-threatening manner," dangling at the elbow downward, and "refused to
24 put it back in, hindering the deputy's ability to close it." (ECF No. 18, at 3.) Defendant Smith
25 told Plaintiff to take his arm out, and Plaintiff refused. Defendant Smith audibly exhaled and
26 then grabbed Plaintiff's arm and hand with both of his hands and began "twisting, turning and
27 pulling them violently in different directions in an attempt to dislocate and/or break them/it."
28 (ECF No. 18, at 8.) Plaintiff was able to non-aggressively turn with Defendant to prevent a break

1 or dislocation. The event lasted for fourteen seconds. After about seven seconds, Plaintiff asked
2 why he was trying to break his arm. Defendant Smith released Plaintiff's arm and shoved it back
3 into the door saying, "motherfucker!" (ECF No. 18, at 8.)

4 Defendant Smith then told the nurse to leave and radioed his sergeant and co-workers.
5 When the other deputies arrived, Defendant Smith, with a smirk, said, "He won't stick his arm
6 in. I tried to break that motherfucker." (ECF No. 18, at 8.) Defendant Thompson arrived and
7 instructed Plaintiff to take his arm out of the food port, or else he'd be tasered. At the suggestion
8 of another officer, Plaintiff was simply handcuffed and placed in a downstairs holding cell.
9 Plaintiff contends that he was never a physical threat because he was in his cell the entire time,
10 and he never acted aggressively.

11 Plaintiff was placed in a holding cell for about nine hours. Twice during this time,
12 Defendant O'Neil came and stood over Plaintiff, sneering down at him with an intimidating look,
13 but saying nothing. Plaintiff believes that he intended to intimidate Plaintiff.

14 At 6:40 a.m., Plaintiff asked a passing deputy what time it was. Ten minutes later,
15 Defendants Smith and O'Neil, along with Deputy Alvarez, placed Plaintiff back into his cell.
16 Once the handcuffs were taken off, Plaintiff refused to remove his arm out of the cell door's food
17 port. Defendants Smith and O'Neil became hostile, saying "Pull your fucking arm in, dude," or
18 "what the fuck is up with you?" (ECF No. 18, at 6.) Deputy Alvarez asked, "just tase him now?"
19 (ECF No. 18 at, 6.) Defendant O'Neil then grabbed Plaintiff's arm and wrist and violently
20 twisting and turning them, just as Defendant Smith had the night before. Deputy Alvarez and
21 Defendant Smith just watched.

22 Plaintiff turned with the assault and remained calm, and asked Defendant O'Neil,
23 "What's wrong with you...why are you trying to break my arm? This is out of line." (ECF No.
24 18, at 12.) Plaintiff's pleas only ignited Defendant O'Neil and he said several racial slurs, such as
25 "You don't want to pull in your arm, you fucking monkey." (ECF No. 18, at 12.) After ten or
26 twelve seconds, Defendant O'Neil released Plaintiff's arm and added more curses and racial
27 slurs.

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1 Deputy Alvarez again asked if he should tase Plaintiff. Deputy Alvarez grabbed his taser
2 and Defendant O'Neil radioed and called all deputies to the fourth floor. Defendant O'Neil then
3 grabbed Plaintiff's arm and began twisting it again. Defendant Smith said he was going to open
4 the door and Defendant O'Neil nodded his head. Defendant Smith unlocked the door and began
5 violently pulling at Plaintiff's shoulders and shirt and shoving Plaintiff in the neck, torso and
6 mid-section. Both of Plaintiff's arms were in the food port, holding him in place.

7 Plaintiff remained calm and asked Defendant Smith why he was doing this. Defendant
8 Smith then lifted Plaintiff's feet 4.5 feet off the floor and pushed down on his shoulders. Plaintiff
9 remained silent and kept his body still. Defendant Smith dropped one of his legs.

10 When Defendant Thompson and other deputies approached, the attack intensified. One
11 deputy grabbed Plaintiff's other leg off the ground and another began to yank Plaintiff's torso
12 and mid-section, all while his arm and hand were being twisted and scraped on the other side of
13 the door. To avoid a head injury, Plaintiff was able to place one arm on the ground. His other
14 arm was released and pushed through the food port. Plaintiff's legs were thrown inside the cell,
15 out of the doorway. While Plaintiff was completely still on the ground, some deputies gave him
16 boot-kicks to the legs, side and back. Plaintiff attempted to curl-up and Defendant Sandoval
17 pressed Plaintiff's head to the ground with one hand as his knee was on Plaintiff's upper rib
18 section. He then delivered three or four closed-fist blows to Plaintiff's thigh and his arm, which
19 was covering his face. Defendant Smith was kicking Plaintiff in the shin and knee.

20 At some point, someone said, "all right," and Defendant Sandoval rose up and backed out
21 of the cell. Plaintiff asked if they were just going to leave him on the floor, and then asked to see
22 the nurse. Defendant Sandoval attempted to rush back in while Plaintiff was still on the ground.
23 Instead, he rushed into the corner of the bed frame, and Plaintiff put up his arm to brace himself
24 in case Sandoval fell. Plaintiff said, "Please be careful, don't hurt yourself trying to hurt me."
25 (ECF No. 18, at 14.) However, Defendant Sandoval looked down at Plaintiff and then punched
26 him in the face, busting open his lip and hitting his head off the floor. Defendant Sandoval got up
27 and kicked Plaintiff once or twice before he left. Plaintiff asked if he would receive medical
28 attention, but he did not receive any.

1 Approximately fifteen minutes later, Deputy Abbott began his shift and walked the tier.
2 Plaintiff asked for medical attention, and asked that he be able to see the shift sergeant or
3 lieutenant. Deputy Abbott asked Plaintiff what happened, and Plaintiff showed him his lip and
4 told him that he had been beaten by the previous shift deputies. Deputy Abbott told Plaintiff that
5 the nurse would be on the tier later, but he never informed the nurse of Plaintiff's situation.

6 When the pill pass nurse arrived about two and one-half hours later, Plaintiff informed
7 her of his condition. Plaintiff alleges that she was unaware, and was indifferent to the injuries he
8 showed her. She instructed Plaintiff to fill out a sick-call request ship, which he did and turned in
9 immediately. However, Plaintiff was never called on by medical staff.

10 Shortly after, Plaintiff was moved to a different section of the jail and no one ever spoke
11 to him about the incident.

12 **B. Summary of Plaintiff's Proposed Second Amended Complaint**

13 The factual allegations of Plaintiff's proposed second amended complaint are largely the
14 same as the allegations of the first amended complaint, with a few pertinent exceptions.
15 Plaintiff's proposed second amended complaint now names Deputy Alvarez as a defendant, with
16 the same factual allegations against him as summarized above.

17 Plaintiff also names some new defendants. Plaintiff alleges that Deputy Akin is one of the
18 previously un-named responding deputies who engaged in the alleged assault. Specifically,
19 Plaintiff alleges that Deputy Akin yanked Plaintiff's torso and mid-section, and was one of the
20 deputies that gave him boot-kicks to the legs, side and back while he was completely still on the
21 ground.

22 Plaintiff further names Sergeant Williams and Lieutenant Stelow as defendants. Plaintiff
23 alleges that, after the incidents discussed above, he was escorted to and placed in a downstairs
24 holding cell. While in this holding cell, Sergeant Williams took photographs of parts of
25 Plaintiff's body, at the instruction of Lieutenant Stelow. Plaintiff further alleges that Lieutenant
26 Stelow and Sergeant Williams understood Plaintiff was involved in a use of force according to
27 their reports, but they failed to ensure that he had medical care.

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1 **C. Parties' Arguments**

2 Plaintiff seeks leave to file a second amended complaint to name as additional defendants
3 Lieutenant Stelow, Sergeant Williams, Deputy Alvarez, and Deputy Akin. Plaintiff asserts that
4 leave should be granted pursuant to Rules 15(a) and 19(a), because he has determined that these
5 additional defendants' actions or failure to act constituted violations of his rights, and leave to
6 amend should be freely given.

7 Defendants oppose Plaintiff's motion. Defendants argue that the more stringent "good
8 cause" standard of Rule 16(b) should apply to Plaintiff's motion for leave to amend his
9 complaint, rather than the "freely given" standard of Rule 15(a), and that Plaintiff has not met
10 that standard here. Defendants further argue that Plaintiff's amendment here is unduly delayed,
11 and will prejudice them. Finally, Defendants seek to have this action dismissed for the failure to
12 join an indispensable party.

13 **D. Analysis**

14 Defendants raise as a threshold issue whether the standard of Rule 15(a) or Rule 16(b) is
15 the proper standard to apply to this motion for leave to amend. As noted above, motions to
16 amend are generally governed by Rule 15(a) of the Federal Rules of Civil Procedure. However,
17 Rule 15(a) does not control once a court has issued a pretrial scheduling order. See Johnson v.
18 Mammoth Recreations, Inc., 975 F.2d 604, 607–08 (9th Cir. 1992). Instead, Rule 16(b) supplies
19 the governing standard. Id. at 608. Under that standard, the pretrial scheduling order "may be
20 modified only for good cause." Fed. R. Civ. P. 16(b)(4). The party seeking to amend must show
21 good cause. Johnson, 975 F.2d at 608.

22 Here, the Court previously evaluated the issue of good cause for amending the scheduling
23 order in addressing Plaintiff's October 11, 2016 motion to extend the deadline to amend the
24 pleadings. (ECF No. 49.) The Court considered Plaintiff's assertions that due to issues at his
25 institution with the legal facilities and his need to obtain certain materials and discovery, he was
26 unable to complete a proposed second amended complaint by the deadline. The Court found this
27 sufficient good cause to grant Plaintiff's motion, as stated in its order issued on October 14, 2016
28 granting Plaintiffs' request. (ECF No. 50.)

1 Defendants now argue that they intended to oppose Plaintiff's request to extend the
2 deadline to amend the pleadings because Plaintiff had sufficient months of time to amend his
3 complaint by the relevant deadline, and relatively ample access to legal resources. The Court
4 finds these contentions to be insufficient grounds for revisiting or reversing its earlier ruling.
5 Plaintiff had shown sufficient diligence and good cause for an extension, and his proposed
6 second amended complaint cites information that Plaintiff asserts was uncovered in discovery.

7 If the party seeking to amend its pleading shows good cause, then the Court evaluates the
8 request in light of Rule 15(a)'s liberal standard. Johnson, 975 F.2d at 608. As noted above, leave
9 to amend should be granted unless amendment (1) would cause prejudice to the opposing party,
10 (2) is sought in bad faith, (3) creates undue delay, or (4) is futile. Chudacoff v. Univ. Med. Ctr.
11 of S. Nev., 649 F.3d 1143, 1152 (9th Cir. 2011); AmerisourceBergen Corp., 465 F.3d at 951.

12 Defendants argue that there is undue delay here because Plaintiff's motion for leave to
13 amend and proposed second amended complaint were not filed until a year and a half after his
14 first amended complaint was filed. Defendants note that although Plaintiff did not name all of the
15 parties that he seeks to add, he did mention some of their actions or failures to act and has known
16 of the parties for some time.

17 The Court does not find Defendants arguments regarding undue delay persuasive here.
18 As noted above, Plaintiff explained that he required additional time to conduct legal research on
19 his claims and evaluate the discovery he was provided. Defendants submissions show that in July
20 2016 they provided at least 800 pages of discovery to Plaintiff, (ECF Nos. 41, 43), which may
21 have reasonably taken substantial time for Plaintiff to evaluate. Plaintiff's proposed second
22 amended complaint has attached incident reports and other documents that are marked to show
23 they were produced in discovery.

24 Furthermore, his amended allegations state that he has identified from the discovery the
25 identity of previously unknown prison officials. Plaintiff had previously alleged unnamed
26 deputies were involved in the alleged assault he complains of, and now alleges in his proposed
27 second amended complaint that "upon information and belief," one of the deputies who assaulted
28 him was Deputy Akin, based on a report he received in discovery. (ECF No. 59, p. 16.)

1 Plaintiff also explains that although he was aware that Sergeant Williams had taken
2 photographs of him, he was unaware that Sergeant Williams and Lieutenant Stelow had allegedly
3 failed to instruct that he receive medical care despite their knowledge of the alleged assault and
4 his condition. Thus, Plaintiff has sufficiently shown that he was unable to name as defendants
5 Deputy Akin, Sergeant Williams and Lieutenant Stelow until he conducted discovery and
6 confirmed a claim. The Court does not find bad faith or undue delay here in Plaintiff's conduct.

7 The Court does find some unexplained delay in Plaintiff now seeking to name Deputy
8 Alvarez as a defendant. Plaintiff previously mentioned Deputy Alvarez in prior pleadings, and
9 the Court specifically informed Plaintiff that because he did not name Deputy Alvarez as a
10 defendant, it was not clear whether he intended to state any claim against Alvarez. (ECF No. 14,
11 p. 7.) Plaintiff was permitted leave to amend, yet did not seek to name Deputy Alvarez as a
12 defendant until now. However, as delay alone is generally an insufficient ground for denial of
13 leave to amend, United States v. Webb, 655 F.2d 977, 980 (9th Cir.1981), the Court will turn to
14 Defendants' arguments regarding the prejudice caused by the alleged delay here.

15 Prejudice to the opposing party carries the greatest weight in analyzing whether a motion
16 to amend should be granted. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th
17 Cir. 2003). Defendants first assert that they are prejudiced by Plaintiff's failure to provide any
18 discovery to them, including his initial disclosures. This argument is not persuasive. To the
19 extent Defendants believed Plaintiff failed to provide discovery which he was required to
20 produce, they could have moved to compel such discovery and made the appropriate showing for
21 relief. The alleged failure to provide discovery is not grounds to deny Plaintiff leave to amend
22 here.

23 Defendants also assert that they are prejudiced here by the need to conduct additional
24 discovery and further depose Plaintiff if new parties and claims are added. However, in this case
25 the factual allegations underlying the additional excessive force claims and failure to provide
26 medical treatments overlap significantly, and thus it appears any additional discovery should be
27 minimal, given the overlap in the claims and legal theories. Furthermore the increased costs of
28 litigation for additional discovery does not show prejudice. See Webb, 655 F.2d at 980.

1 Defendants further argue that they are prejudiced because to the extent Plaintiff seeks to
2 add new claims and new parties concerning the August 2014 incident, those claims are outside of
3 the applicable statute of limitations. This argument is made in passing and without much support
4 or analysis, and the statute of limitations is not given.

5 For claims brought under 42 U.S.C. § 1983, the applicable statute of limitations is
6 California's statute of limitations for personal injury actions. See Wallace v. Kato, 549 U.S. 384,
7 387-88 (2007). In California, there is a two-year statute of limitations in § 1983 cases. See Cal.
8 Civ. Proc. Code § 335.1; Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004). But state
9 tolling statutes do apply to § 1983 actions. See Elliott v. City of Union City, 25 F.3d 800, 802
10 (citing Hardin v. Straub, 490 U.S. 536, 543-44 (1998)). Accordingly, prisoners generally have
11 four years from the time the claim accrues to file their action. Cal. Civ. Pro. Code § 352.1(a).
12 Thus, the Court does not find that Plaintiff's proposed claims are beyond the applicable statute of
13 limitations here.

14 Finally, Defendants argue that because Plaintiff argued in his motion to amend that he
15 should be granted leave under Federal Rule of Civil Procedure 19(a), his action should be
16 dismissed for the failure to join indispensable parties. Specifically, Defendants assert that
17 because Rule 19(a) concerns joinder of indispensable parties and Plaintiff mentioned the rule in
18 his motion, he is effectively conceding that these previously unnamed defendants were
19 "indispensable" to this action, and thus his failure to join these indispensable parties warrants
20 dismissal of this action in its entirety.

21 Federal Rule of Civil Procedure 12(b)(7) permits a Court to dismiss an action for failure
22 to join a party whose presence is needed for just adjudication under Federal Rule of Civil
23 Procedure 19. See Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496,
24 1498 (9th Cir. 1991). In order to grant a dismissal on such grounds, courts are to consider: (1)
25 whether an absent party is necessary to the action under Rule 19(a); (2) whether it is feasible to
26 order that the absent necessary party be joined; and (3) if both the absent party is necessary and
27 joinder is infeasible, then courts must determine, under Rule 19(b), "whether the case can
28 proceed without the absentee, or whether the absentee is an 'indispensable party' such that the

1 action must be dismissed.” See E.E.O.C. v. Peabody Western Coal Co., 400 F.3d 774, 779–80
2 (9th Cir. 2005); Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 878
3 (9th Cir. 2004) (citations omitted).

4 Defendants have not shown that any of Plaintiff’s proposed defendants were
5 indispensable parties to this action, and the Court finds no merit to this argument. Plaintiff’s
6 appeal to Rule 19(a) appears to have been in error, and the Court finds that Defendants have
7 shown no grounds for dismissal on this basis, or denial of the subject motion.

8 For these reasons, the Court in weighing the factors to be considered finds that the
9 balance weights in favor of granting Plaintiff’s motion for leave to amend. Thus, the Court will
10 direct the clerk of the Court to file Plaintiff’s second amended complaint on the docket.

11 The Court will now turn to screening Plaintiff’s proposed additional claims.

12 **E. Screen of Plaintiff’s Proposed Second Amended Complaint**

13 The Court is required to screen complaints brought by prisoners seeking relief against a
14 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C. §
15 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or
16 malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
17 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28
18 U.S.C. § 1915(e)(2)(B)(ii).

19 A complaint must contain “a short and plain statement of the claim showing that the
20 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
21 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
22 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937,
23 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964–
24 65 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge
25 unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)
26 (internal quotation marks and citation omitted).

27 To survive screening, Plaintiff’s claims must be facially plausible, which requires
28 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable

1 for the misconduct alleged. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (quotation marks omitted);
2 Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility
3 that a defendant acted unlawfully is not sufficient, and mere consistency with liability falls short
4 of satisfying the plausibility standard. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949 (quotation
5 marks omitted); Moss, 572 F.3d at 969.

6 Here, Plaintiff seeks to add the following claims and defendants: (1) a claim for excessive
7 force in violation of the Eighth Amendment against Deputy Akin, and a failure to intercede in
8 the use of excessive force against Deputy Alvarez; (2) a claim for the violation of his procedural
9 due process rights in violation of the Fourteenth Amendment against Deputy Akin; and (3) a
10 claim for deliberate indifference to Plaintiff's risk of harm medical needs in violation of the
11 Eighth Amendment against Deputy Akin, Sergeant Williams, Lieutenant Stelow and Deputy
12 Alvarez. Thus, each of these proposed additional claims is screened below.

13 1. Excessive Force

14 The Cruel and Unusual Punishments Clause of the Eighth Amendment protects prisoners
15 from the use of excessive physical force. Wilkins v. Gaddy, 559 U.S. 34, 37 (2010) (per curiam);
16 Hudson v. McMillian, 503 U.S. 1, 8-9 (1992). What is necessary to show sufficient harm under
17 the Eighth Amendment depends upon the claim at issue, with the objective component being
18 contextual and responsive to contemporary standards of decency. Hudson, 503 U.S. at 8
19 (quotation marks and citations omitted). For excessive force claims, the core judicial inquiry is
20 whether the force was applied in a good-faith effort to maintain or restore discipline, or
21 maliciously and sadistically to cause harm. Wilkins, 559 U.S. at 37 (quoting Hudson, 503 U.S. at
22 7) (quotation marks omitted). Bystander-officers can be liable for the failure to intervene in the
23 use of excessive force where a bystander-officer has a realistic opportunity to intervene, but fails
24 to do so. Lolli v. County of Orange, 351 F.3d 410, 418 (9th Cir. 2003); Cunningham v. Gates,
25 229 F.3d 1271, 1289 (9th Cir. 2000); Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995).

26 Here, the Court finds that, liberally construed, Plaintiff has stated an excessive force
27 claim against Deputy Akin, based on the allegations that Plaintiff was assaulted while he was
28 lying on the ground and not resisting. The Court further finds that Plaintiff has stated a claim

1 against Deputy Alvarez by alleging that when he was assaulted, Deputy Alvarez stood by just
2 looking, and did not radio for help or otherwise intercede.

3 2. Deliberate Indifference

4 While the Eighth Amendment of the United States Constitution entitles Plaintiff to
5 medical care, the Eighth Amendment is violated only when a prison official acts with deliberate
6 indifference to an inmate’s serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th
7 Cir. 2012), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th
8 Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d
9 1091, 1096 (9th Cir. 2006). Plaintiff “must show (1) a serious medical need by demonstrating
10 that failure to treat [his] condition could result in further significant injury or the unnecessary and
11 wanton infliction of pain,” and (2) that “the defendant’s response to the need was deliberately
12 indifferent.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096).

13 Deliberate indifference is shown by “(a) a purposeful act or failure to respond to a
14 prisoner’s pain or possible medical need, and (b) harm caused by the indifference.” Wilhelm,
15 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective
16 recklessness, which entails more than ordinary lack of due care. Snow, 681 F.3d at 985 (citation
17 and quotation marks omitted); Wilhelm, 680 F.3d at 1122.

18 Plaintiff alleges that after he was injured in the assault, he requested medical attention
19 from those present, but none was received. Later, he was taken to a holding cell, and parts of his
20 body were photographed by Sergeant Williams at Lieutenant Stelow’s direction. Although they
21 were aware of the incident and Plaintiff’s injuries, they failed to ensure he received any medical
22 care. Liberally construed, these allegations are sufficient to state a claim for deliberate
23 indifference against Deputy Akin, Deputy Alvarez, Lieutenant Stelow and Sergeant Williams.

24 3. Procedural Due Process

25 Plaintiff finally alleges that his procedural due process rights were violated with Deputy
26 Akin and other defendants inflicted a risk of harm on him and failed to respond with reasonable
27 medical attention.

28 ///

1 The Due Process Clause protects Plaintiff against the deprivation of liberty without the
2 procedural protections to which he is entitled under the law. Wilkinson v. Austin, 545 U.S. 209,
3 221, 125 S. Ct. 2384 (2005). To state a claim, Plaintiff must first identify the interest at stake.
4 Wilkinson, 545 U.S. at 221. Liberty interests may arise from the Due Process Clause itself or
5 from state law. Id.

6 The Due Process Clause does not confer on inmates a liberty interest in avoiding more
7 adverse conditions of confinement, and under state law, the existence of a liberty interest created
8 by prison regulations is determined by focusing on the nature of the condition of confinement at
9 issue. Id. at 221-23 (citing Sandin v. Conner, 515 U.S. 472, 481-84, 115 S. Ct. 2293 (1995))
10 (quotation marks omitted). Liberty interests created by prison regulations are generally limited to
11 freedom from restraint which imposes atypical and significant hardship on the inmate in relation
12 to the ordinary incidents of prison life. Id. at 221(citing Sandin, 515 U.S. at 484) (quotation
13 marks omitted); Myron v. Terhune, 476 F.3d 716, 718 (9th Cir. 2007).

14 There are no procedural due process protections related to the alleged risk of harm here
15 or the failure to receive medical care. Although Plaintiff attempts to characterize his claims as a
16 due process deprivation, they are instead properly cognizable as identified above. Plaintiff
17 therefore fails to state a claim under the Fourteenth Amendment for any due process violation.

18 Thus, the Court finds that Plaintiff's second amended complaint states additional claims
19 for excessive force against Deputy Akin, for the failure to intervene against Deputy Alvarez, and
20 for deliberate indifference to a serious medical need against Deputy Akin, Deputy Alvarez,
21 Lieutenant Stelow and Sergeant Williams, in violation of the Eighth Amendment. Service will be
22 initiated accordingly.

23 IV.

24 ORDER

25 For the foregoing reasons, it is HEREBY ORDERED that:

26 1. Plaintiff's motion for leave to file a second amended complaint, filed on
27 November 30, 2016 (ECF No. 56), is GRANTED;

28 ///

1 2. The Clerk of the Court is ordered to file Plaintiff's second amended complaint,
2 lodged at ECF No. 59, as filed in this action on the date it was lodged;

3 3. The Court finds that Plaintiff's second amended complaint states a cognizable
4 claim for excessive force against Deputy Akin, for the failure to intervene against Deputy
5 Alvarez, and for deliberate indifference to a serious medical need against Deputy Akin, Deputy
6 Alvarez, Lieutenant Stelow and Sergeant Williams, in violation of the Eighth Amendment;

7 4. Service shall be initiated on the following Defendants:

8 **Lieutenant Stelow, Tulare County Sheriff**

9 **Sergeant Williams, Tulare County Sheriff**

10 **Deputy Akin, Tulare County Sheriff**

11 **Deputy Alvarez, Tulare County Sheriff**

12 5. The Clerk of the Court shall send Plaintiff four (4) USM-285 forms, four (4)
13 summons, a Notice of Submission of Documents form, an instruction sheet and a copy of the
14 second amended complaint, as filed;

15 6. Within **thirty (30) days** from the date of this order, Plaintiff shall complete the
16 attached Notice of Submission of Documents and submit the completed Notice to the Court with
17 the following documents:

- 18 a. One completed summons for each Defendant listed above;
- 19 b. One completed USM-285 form for each Defendant listed above;
- 20 c. Five (5) copies of the endorsed second amended complaint, as filed; and
- 21 d. All CDCR Form 602 documentation submitted in relation to
- 22 this case;

23 7. Plaintiff need not attempt service on the defendants and need not request waiver
24 of service. Upon receipt of the above-described documents, the Court will direct the United
25 States Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure
26 4 without payment of costs; and

27 ///

28 ///

1 8. The failure to comply with this order may result in sanctions, up to and
2 including dismissal of this action.

3
4 IT IS SO ORDERED.

5 Dated: July 25, 2017


UNITED STATES MAGISTRATE JUDGE