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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JEREMIAH D. VICKERS,	)	Case No.: 1:15-cv-00129-SAB (PC)
	)	
Plaintiff,	)	
	)	ORDER GRANTING IN PART AND
v.	)	DENYING IN PART DEFENDANTS'
	)	MOTION FOR SUMMARY JUDGMENT
THOMPSON, et al.,	)	(ECF No. 85)
	)	
Defendants.	)	ORDER PERMITTING DEFENDANTS TO
	)	FILE MOTION REQUESTING
	)	EVIDENTIARY HEARING
	)	<b>THIRTY-DAY DEADLINE</b>
	)	

Plaintiff Jeremiah D. Vickers is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. All parties have consented to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and Local Rule 302. (ECF Nos. 8, 40, 65, 89.)

Currently before the Court is a motion for summary judgment by Defendants Thompson, Smith, Sandoval, Jr., Akin, Williams, Alvarez, and Stelow, filed on October 3, 2017. (ECF No. 85.)

**I.**

**RELEVANT BACKGROUND**

This case has a lengthy procedural history, which the Court will briefly summarize. Plaintiff's claims arise out of use of force incidents in August 2014, when he was a convicted inmate housed at the Tulare County Jail while awaiting transfer to a California Department of

1 Corrections and Rehabilitation (“CDCR”) facility. This action previously proceeded on  
2 Plaintiff’s claims for excessive force against Defendants Smith and Sandoval, and deliberate  
3 indifference against Defendants Thompson, Smith and Sandoval, in violation of the Eighth  
4 Amendment. (ECF No. 18.) Following screening of the first amended complaint, delays and  
5 issues regarding service of process ensued. Eventually, Defendants Smith and Thompson filed  
6 an answer on June 9, 2016, and Defendant Sandoval filed an answer on May 11, 2017. (ECF  
7 Nos. 35, 64.)<sup>1</sup>

8 On June 10, 2016, the Court issued a discovery and scheduling order. (ECF No. 36.)  
9 Among other deadlines, that order set a deadline for amending pleadings of October 11, 2016.  
10 On October 11, 2016, Plaintiff filed a motion to extend that deadline. (ECF No. 49.) The Court  
11 granted Plaintiff’s request and extended the deadline to December 11, 2016. (ECF No. 50.)

12 On November 30, 2016, Plaintiff filed a motion for leave to file a second amended  
13 complaint. (ECF No. 56.) On July 26, 2017, the Court granted the motion. (ECF No. 76.) The  
14 Court found that Plaintiff’s second amended complaint stated a cognizable claim for excessive  
15 force against Deputy Akin, for the failure to intervene against Deputy Alvarez, and for deliberate  
16 indifference to a serious medical need against Deputy Akin, Deputy Alvarez, Lieutenant Stelow  
17 and Sergeant Williams, in violation of the Eighth Amendment, in addition to the cognizable  
18 claims noted above. Service of process on the additional defendants was then initiated. (ECF  
19 No. 79.)

20 Now this action proceeds on Plaintiff’s second amended complaint alleging excessive  
21 force against Defendants Smith, Sandoval and Akin, the failure to intervene against Defendant  
22 Alvarez, and deliberate indifference against Defendants Thompson, Smith, Sandoval, Akin,  
23 Alvarez, Stelow, and Williams, all in violation of the Eighth Amendment. (ECF No. 75.) As  
24 noted above, on October 3, 2017, Defendants filed a motion for summary judgment. (ECF No.

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25 <sup>1</sup> This case also proceeded on certain claims against Deputy O’Neil. As alluded to above, there  
26 were numerous motions, orders to show cause, orders to the United States Marshal, filings by the  
27 parties, rulings on requests for default, and multiple attempts at service in this case since the  
28 Court originally 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 85.) Plaintiff sought to reopen discovery to oppose the motion for summary judgment and to  
2 stay the motion. (ECF Nos. 90, 91.) On January 10, 2018, the Court denied those motions, and  
3 required Plaintiff to file a response to Defendants' summary judgment motion within thirty (30)  
4 days. (ECF No. 93.)

5 Plaintiff filed an opposition to Defendants' summary judgment motion, on extension, on  
6 March 2, 2018. (ECF No. 95). Defendants filed a reply on March 8, 2018. (ECF No. 97.) The  
7 motion is now deemed submitted, without oral argument. Local Rule 230(l).

## 8 II.

### 9 LEGAL STANDARD

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

22 In judging the evidence at the summary judgment stage, the Court does not make  
23 credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509  
24 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all  
25 inferences in the light most favorable to the nonmoving party and determine whether a genuine  
26 issue of material fact precludes entry of judgment, Comite de Jornaleros de Redondo Beach v.  
27 City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation  
28 omitted).

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**III.**  
**DISCUSSION**

**A. Parties Arguments**

Defendants first argue that the Tulare County Jail had an inmate grievance policy and procedure that Plaintiff was aware of and utilized, but he did not file any grievance for this incident. Therefore, Defendants argue that this case must be dismissed for the failure to exhaust available administrative remedies. Defendants next argue that the undisputed evidence shows that there was a need to use force on Plaintiff to restore order and discipline, that minimal force was used, that Plaintiff had no significant injuries, and medical treatment was provided to Plaintiff within minutes of the incident. Thus, summary judgment should be granted in Defendants' favor.

In opposition, Plaintiff argues that he submitted a grievance to the next shift's tier deputy regarding the incidents forming the basis for his claim just after it happened, on August 28, 2014. Further, he argues that he has raised a genuine dispute of facts regarding the use of force incidents and the aftermath. Plaintiff asserts that the evidence he submits shows that the use of force was excessive under the circumstances, and that Defendants ignored his need for medical care after the incident.

Defendants argue in reply that Plaintiff has produced no evidence that he exhausted his administrative remedies, and therefore he has failed to raise a genuine dispute on that issue. Further, they argue that Plaintiff's own evidence supports that the force used on him was not excessive under the circumstances, and there was no deliberate indifference to his minimal injuries.

As it is a threshold issue, the Court first turns to Defendants' argument that summary judgment should be granted because Plaintiff failed to exhaust his administrative remedies.

**B. Exhaustion of Administrative Remedies**

1. Statutory Exhaustion Requirement

The Prison Litigation Reform Act (PLRA) of 1995, requires that prisoners exhaust "such administrative remedies as are available" before commencing a suit challenging prison

1 conditions.” 42 U.S.C. § 1997e(a); see Ross v. Blake, — U.S. —, 136 S. Ct. 1850, 1862, 195 L.  
2 Ed. 2d 117 (June 6, 2016) (“An inmate need exhaust only such administrative remedies that are  
3 ‘available.’”). Exhaustion is mandatory unless administrative remedies are unavailable. “The  
4 obligation to exhaust ‘available’ remedies persists as long as *some* remedy remains ‘available.’  
5 Once that is no longer the case, then there are no ‘remedies ... available,’ and the prisoner need  
6 not further pursue the grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis  
7 in original) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

8 This statutory exhaustion requirement applies to all inmate suits about prison life, Porter  
9 v. Nussle, 534 U.S. 516, 532 (2002) (quotation marks omitted), regardless of the relief sought by  
10 the prisoner or the relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and  
11 unexhausted claims may not be brought to court, Jones v. Bock, 549 U.S. 199, 211 (2007) (citing  
12 Porter, 534 U.S. at 524).

13 The failure to exhaust is an affirmative defense, and the defendants bear the burden of  
14 raising and proving the absence of exhaustion. Jones, 549 U.S. at 216; Albino, 747 F.3d at 1166.  
15 “In the rare event that a failure to exhaust is clear from the face of the complaint, a defendant  
16 may move for dismissal under Rule 12(b)(6).” Albino, 747 F.3d at 1166. Otherwise, the  
17 defendants must produce evidence proving the failure to exhaust, and they are entitled to  
18 summary judgment under Rule 56 only if the undisputed evidence, viewed in the light most  
19 favorable to the plaintiff, shows that he failed to exhaust. Id.

## 20 2. Description of Tulare County Grievance Process

21 The Tulare County Sheriff’s Department Detention Division Procedure No. F-200,  
22 Inmate Grievances, sets out the Grievance Policy and Procedure that was in effect in August of  
23 2014. (See Decl. of Denise Damari (“Damari Decl.”), ECF No. 85-4, ¶¶ 5, 7-8 & Ex. A.) A  
24 grievance was defined as “[a] complaint by an inmate which involves any condition of  
25 confinement including but not limited to medical care, classification actions, lock downs,  
26 program participation, telephone, mail and visiting procedures and food, clothing and bedding.”  
27 (Id.)

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1 Under Step A of the applicable Grievance Procedure, the inmate must first attempt to  
2 resolve any grievance in an informal manner by discussing it with the Housing Officer. In the  
3 event the inmate's grievance is not resolved at Step A, the inmate may start the formal grievance  
4 procedure, under Step B, by requesting an inmate grievance form and filing it with the Shift  
5 Sergeant within five (5) days of any specific complaint. (Id.)

6 Once the Shift Sergeant receives the inmate grievance form under Step B, an  
7 investigation will be initiated into the grievance upon receipt of said grievance, submitted in the  
8 proper manner and through the proper chain of command. The inmate will be so informed of the  
9 investigative results. The decision and reasons for the decision shall be in writing on the inmate  
10 grievance form. If corrective action is taken, the person responding to the grievance shall  
11 include such information on the inmate grievance form. The investigation and response by the  
12 person responsible to respond shall be completed within seven (7) days. (Id.)

13 If the inmate is not satisfied with the decision of the responding person, the inmate may  
14 appeal to the Facility Manager, who shall review the entire proceedings under Step C. The  
15 appeal must be submitted to the Facility Manager within three (3) days of the adverse decision.  
16 The Facility Manager may consult with the Captain, Undersheriff and/or Sheriff to resolve the  
17 grievance. The Facility Manager shall return his/her decision and reason(s) for the decision in  
18 writing on the inmate grievance form within ten (10) days of the filing of the appeal with the  
19 Facility Manager as part of Step C. If corrective action is taken, the Facility Manager shall  
20 include such information on the inmate's grievance form. (Id.)

21 Finally, if an inmate is still dissatisfied with the outcome of the grievance, he/she may  
22 seek judicial review of the condition grieved, by bringing an appropriate legal action. (Id.)

### 23 3. Analysis

24 As an initial matter, there is no dispute that there was an administrative remedy system at  
25 the Tulare County Jail at the time of the events at issue, and that Plaintiff was aware of and had  
26 utilized the grievance process. Albino, 747 F.3d at 1172. Defendants present evidence that  
27 Plaintiff filed seven grievances between August 4, 2013 and July 15, 2014. (Damari Decl. ¶¶ 7,  
28 9 & Ex. B.) The incidents at issue in this case began after those dates, during the evening of

1 August 27, 2014. (Damari Decl. ¶¶ 7, 10.) Plaintiff was released from the custody of Tulare  
2 County to the custody of CDCR not long after the incidents in question, on September 9, 2014.  
3 (Id.) According to Defendants, there is no record of Plaintiff filing any grievance that relates to  
4 the incident in this case at any time up through his transfer, or otherwise. (*Id.*)

5 Plaintiff argues that there is a genuine dispute of material fact precluding summary  
6 judgment here. Plaintiff asserts that he submitted a grievance regarding the incident forming the  
7 basis of his claim, within the required time frame and in the required format. In support, Plaintiff  
8 submits a declaration which states, in pertinent part, as follows:

9 42. The next shift floor Deputy, Deputy Abbot, walked past my door for  
10 his first tier check approximately 15 minutes later. I informed Deputy Abbot that  
11 I needed to see medical staff and talk to the shift Sergeant or Lieutenant about  
12 what occurred with the previous shift’s deputies beating me and then just leaving  
13 me in pain to suffer, and I also explained the emotional distress I was feeling.  
14 Deputy Abbot claimed to not know what incident I was referring to and asked,  
15 “Why? What happened?” I then pointed to my swollen, cut lip and repeated that  
16 I’d been beaten by the previous shift’s deputies and asked to see the nurse and  
17 about properly reporting the incident and my condition (i.e., physical).

18 43. Abbot responded that the nurse would be on the tier “later,” in  
19 reference to routine pill pass. Deputy Abbot never called for nor informed the  
20 nurse about my situation.

21 ...

22 45. At some point, Abbot gave me a grievance form, after I’d asked on a  
23 previous walk of his. I promptly filled it out, stating all the facts on the incidents  
24 of the previous shift—but not in detail—and I returned it to Abbot. Abbot failed  
25 to issue me the “1st Level” receipt. A while afterward, I would never see Abbot  
26 again.

27 (Pl.’s Decl., ECF No. 95, ¶¶ 42-45 (errors in original).) Plaintiff also further declares that all or  
28 at least portions of the events that occurred should be visible from the jail’s ceiling-mounted  
surveillance cameras, presumably including these exchanges between him and Deputy Abbot.  
(Id. at ¶ 46.) Finally, Plaintiff declares that after these incidents, he was re-housed in a different  
part of the jail and was never again spoken to about any aspect of these matters by anyone. (Id.  
at ¶ 48.)

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1           “Under § 1997e(a), the exhaustion requirement hinges on the “availab[ility]” of  
2 administrative remedies: An inmate, that is, must exhaust available remedies, but need not  
3 exhaust unavailable ones.” Ross, 136 S. Ct. at 1858 (quoting 42 U.S.C. § 1997e(a)). When a  
4 prison official or administrator thwarts an inmate from taking advantage of a grievance process,  
5 such as through machination, misrepresentation, or intimidation, and prevents their use of  
6 otherwise proper procedures, this renders the administrative process unavailable. *Id.* (citing  
7 Davis v. Hernandez, 798 F.3d 290, 295 (5th Cir. 2015); Schultz v. Pugh, 728 F.3d 619, 620 (7th  
8 Cir. 2013); Pavey v. Conley, 663 F.3d 899, 906 (7th Cir. 2011); Tuckel v. Grover, 660 F.3d  
9 1249, 1252-53 (10th Cir. 2011); Goebert v. Lee County, 510 F.3d 1312, 1323) (11th Cir. 2007).  
10 In this case, Plaintiff has presented evidence that he attempted to exhaust his administrative  
11 remedies about the events at issue here by submitting a grievance to Deputy Abbot on August  
12 28, 2014. Whether due to some inadvertent loss of the grievance form, or for some other reason,  
13 Plaintiff contends that his complaint was not acted upon by prison officials, and he was thereby  
14 prevented from fully exhausting the grievance.

15           Defendants raise several arguments against Plaintiff’s contentions here, including that the  
16 evidence shows that Plaintiff fully understood the grievance procedure at the jail, that he had  
17 enough time to properly file a formal grievance, and that Tulare County has timely responded to  
18 all of Plaintiff’s other grievances submitted prior to this incident. Whether Plaintiff acted in an  
19 unusual manner here, why this incident was different from the other times that Plaintiff followed  
20 the grievance procedure, and why there is no record of Tulare County receiving and acting on  
21 this grievance, are all disputed matters that go to witness credibility. The inconsistencies and  
22 conflicts in the evidence, if any, affects whether Plaintiff should be believed that he attempted to  
23 exhaust his remedies, but was somehow prevented from doing so due to the circumstances.  
24 These issues of credibility and factual disputes may not be decided on summary judgment. See  
25 Williams v. Gore, No. 15-cv-654, 2017 WL 1354695 at \*7 (S.D. Cal. 2017) (citing Coleman v.  
26 Brown, 938 F. Supp. 2d 955, 961–62 (E.D. Cal. 2013)) (resolving credibility determinations are  
27 normally accomplished through an evidentiary hearing).

28 ///



1 Defendants also argue that Plaintiff offers no evidence to support his contention that he  
2 attempted to file a grievance at the jail to exhaust this claim. There is some explanation for that  
3 issue in Plaintiff's own declaration, in which he asserts that he gave the grievance form back to  
4 Deputy Abbot right away and was not issued any receipt. Further, Plaintiff has submitted  
5 sufficient evidence in support of his contentions, in the form of his declaration declaring facts  
6 under penalty of perjury, based on personal knowledge, that he could testify about and be  
7 examined upon. See Fed. R. Civ. P. 56(c)(4).

8 For these reasons, Defendants are not entitled to summary judgment on the grounds that  
9 Plaintiff failed to exhaust administrative remedies. An evidentiary hearing would be required to  
10 resolve the disputed issues of fact here. Therefore, the Court next turns to the parties' arguments  
11 regarding the merits of Plaintiff's claims.

### 12 **C. Excessive Force and Failure to Intervene**

#### 13 1. Legal Standards

14 "[W]henver prison officials stand accused of using excessive physical force in violation  
15 of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was  
16 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to  
17 cause harm." Hudson v. McMillian, 503 U.S. 1, 7 (1992) (citing Whitley v. Albers, 475 U.S.  
18 312 (1986)). To determine whether a defendant's use of force was malicious and sadistic, the  
19 Hudson Court laid out five factors for courts to consider: (1) the extent of injury suffered by an  
20 inmate, (2) the need for application of force, (3) the relationship between that need and the  
21 amount of force used, (4) the threat reasonably perceived by the responsible officials, and (5) any  
22 efforts made to temper the severity of a forceful response. Hudson, 503 U.S. at 7 (citing  
23 Whitley, 475 U.S. at 321). In weighing these factors, "[u]nless it appears that the evidence,  
24 viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness  
25 in the infliction of pain under the standard . . . the case should not go to the jury." See Whitley,  
26 475 U.S. at 322.

27 A prison official may be liable under 42 U.S.C. § 1983 if he is aware that a fellow officer  
28 is violating a prisoner's constitutional rights but fails to intervene. Cunningham v. Gates, 229

1 F.3d 1271, 1289 (9th Cir. 2000) (“[P]olice officers have a duty to intercede when their fellow  
2 officers violate the constitutional rights of a suspect or other citizen.”); see also Gaudreault v.  
3 Municipality of Salem, 923 F.2d, 203, 207 n. 3 (1st Cir. 1990) (“An officer who is present at the  
4 scene who fails to take reasonable steps to protect the victim of another officer’s use of excessive  
5 force can be held liable under section 1983 for his nonfeasance.”). The failure to intervene can  
6 support an excessive force claim where the bystander-officers had a realistic opportunity to  
7 intervene but failed to do so. Lolli v. County of Orange, 351 F.3d 410, 418 (9th Cir. 2003);  
8 Cunningham, 229 F.3d at 1289; Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995).

9 2. Analysis

10 Defendants argue that the force used on Plaintiff was not excessive under the  
11 circumstances. Plaintiff submitted a declaration in support of his opposition to Defendants’  
12 summary judgment motion, which is largely consistent with his verified second amended  
13 complaint. (Pl.’s Decl., ECF No. 95; Second Am. Compl., ECF No. 75.) As Plaintiff is the non-  
14 moving party, the Court will recount the events as he contends they occurred.

15 In summary, Plaintiff was a convicted inmate housed at the Tulare County Jail while  
16 awaiting transfer to a CDCR facility, and a mental health patient with an extensive history of  
17 mental illness and related issues. (Id. at ¶¶ 6-7.) Plaintiff was undergoing various treatments,  
18 including taking psychotropic medications. (Id.) Plaintiff had been designated as a high-risk  
19 inmate with single-cell status and had a steel door on his cell. (Id.)

20 The incidents at issue began on the evening of August 27, 2014. During the night  
21 medication pill pass, Defendant Smith opened Plaintiff’s cell door food port to allow the nurse to  
22 hand Plaintiff his medication. (Pl.’s Decl. ¶ 8.) Plaintiff stuck his arm out of the food port in a  
23 non-threatening manner, dangling it downward at the elbow, and refused to pull it out. (Id.)  
24 Defendant Smith allegedly grabbed and twisted Plaintiff’s arm and hands, twisting and turning  
25 his limb in different directions. (Id. at ¶¶ 9-11.) Defendant Smith eventually let go and radioed  
26 his sergeant and co-workers. (Id. at ¶ 12.) Defendant Thompson warned Plaintiff to take his arm  
27 out of the food port or be tasered. (Id. at ¶ 13.) At the suggestion of another deputy, Plaintiff  
28 was instead handcuffed and taken to a holding cell. (Id.)

1 Plaintiff was left in the holding cell for about nine hours, until August 28, 2014. (Pl.’s  
2 Decl. ¶ 15.) Plaintiff was then taken back to his cell; according to his deposition testimony, this  
3 was sometime between 6:00 and 7:00 in the morning of August 28, 2014, at least some minutes  
4 before the shift change at 7:00 a.m. (Id. at ¶ 16; Pl.’s Dep. 14:3-11, 14:17-20, 15:11-18.) Once  
5 Plaintiff’s handcuffs were taken off, he again refused to move his arm out of the cell door’s food  
6 port. (Pl.’s Dep. ¶ 16.) A discussion ensued, and then Deputy O’Neil began violently twisting  
7 and turning Plaintiff’s arm and wrist, as Defendant Smith had done the night before. (Id. at ¶  
8 19.) Defendants Alvarez and Smith watched. (Id.) After another verbal exchange, Deputy  
9 O’Neil released Plaintiff’s arm. (Id. at ¶¶ 20-21.)

10 Defendants Alvarez and Smith then discussed tasing Plaintiff, and Deputy O’Neil  
11 radioed for all deputies to the fourth floor. (Pl.’s Decl. ¶ 22.) Deputy O’Neil again grabbed  
12 Plaintiff’s arm and hand and began twisting, turning, and pulling. (Id.) While this happened,  
13 Defendant Smith unlocked and swung open Plaintiff’s cell door, and violently pulled at  
14 Plaintiff’s upper body. (Id. at ¶ 26.) Both of Plaintiff’s arms and hands were through the food  
15 port, holding him in place. (Id.) Plaintiff pleaded, “Why are you doing this?” and was calm,  
16 non-combative, and non-aggressive. (Id.)

17 Next, Defendant Smith grabbed Plaintiff’s legs, lifted them, and pounded down on  
18 Plaintiff’s shoulders. (Pl.’s Dec. ¶ 27.) The responding deputies arrived—Defendants Akin,  
19 Sandoval and Thompson—and the door opened wider as Defendants Sandoval and Akin grabbed  
20 Plaintiff’s legs and yanked at his body. (Id. at ¶ 28.) Plaintiff braced himself, and his legs were  
21 thrown inside the cell, out of the doorway. (Id. at ¶ 29.) Plaintiff was still on the ground, and  
22 Plaintiff was kicked while he curled up and moaned. (Id. at ¶ 30.) Defendant Sandoval held  
23 Plaintiff’s head to the ground and delivered closed fist blows to Plaintiff’s thighs and arms,  
24 Defendant Smith kicked Plaintiff, and Plaintiff felt kicks from others, including Defendant Akin.  
25 (Id.) The assault ceased briefly, and then Defendant Sandoval “pounced” on Plaintiff and  
26 continued hitting him. (Id. at ¶¶ 32-35.) Eventually Defendant Sandoval rose from Plaintiff,  
27 left, and the cell door shut. (Id. at ¶ 36.) Plaintiff asked to see a nurse but was left on the  
28 ground. (Id. at ¶ 37.)

1           Approximately fifteen minutes later, the next shift floor deputy, Deputy Abbot, walked  
2 past Plaintiff's door, and Plaintiff informed Deputy Abbot that he needed to see medical staff,  
3 and talk to a sergeant or lieutenant about being beaten. (Pl.'s Decl. ¶ 42.) Deputy Abbot did not  
4 call for a nurse, and the interactions between Deputy Abbot and Plaintiff are described above.  
5 (Id. at ¶¶ 42-45.) Later in the day, Defendant Williams entered Plaintiff's holding cell and took  
6 photographs of Plaintiff's body, at the instruction of Defendant Stelow. (Pl.'s Decl. ¶ 47.)

7           Defendants dispute Plaintiff's version of events and argue that they are entitled to  
8 summary judgment because Plaintiff has not raised enough evidence to show a constitutional  
9 violation. First, Defendants argue that Plaintiff's admitted disobedience of multiple orders to  
10 remove his arm from the food port justified the use of force to gain compliance. Further, they  
11 argue that the amount of force used was directly related to the need to gain compliance over  
12 Plaintiff. Defendants also cite to the lack of details in Plaintiff's deposition testimony to argue  
13 that he cannot show the force used was excessive. For example, although Plaintiff discusses that  
14 Defendant Akin yanked, grabbed, and kicked him in his second amended complaint and  
15 declaration, he does not directly mention Defendant Akin in his deposition. Also, in his  
16 deposition, Plaintiff was sometimes vague or unclear about who did what, such as stating that he  
17 thought Defendant Alvarez went to the end of the tier at some point, or that he was not sure at  
18 times who was in his cell. (Pl.'s Dep. 17:25-18:5; 20:12-25; 50:2-9.) Defendants also assert that  
19 although Plaintiff did not pose a significant threat to them during the incidents, his  
20 noncompliance did pose general safety concerns.

21           Although the undisputed evidence that Plaintiff was not complying with orders may  
22 support the need for the application of force, Plaintiff's account is that the use of force escalated  
23 beyond what was necessary to gain his compliance. Further, to the extent Plaintiff has  
24 inconsistencies or lacks details in his deposition testimony as compared to his allegations, those  
25 matters go to Plaintiff's credibility. Defendants have not shown that Plaintiff's deposition  
26 testimony so clearly contradicts his declaration that his declaration must be disregarded. See  
27 Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012) (inconsistency between a party's  
28 deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking

1 the affidavit); Van Asdale v. International Game Tech., 577 F.3d 989, 998-99 (9th Cir. 2009)  
2 (same). These disputed issues of material fact cannot be resolved on summary judgment.

3 Next, Defendants argue that Plaintiff cannot show that he had any significant injuries  
4 from the use of force. In support, Defendant's cite a mental health medical record from August  
5 28, 2014 stating that Plaintiff reported blood on his hands and face, but there was no evidence of  
6 such, and that Plaintiff was agitated, with pressured speech, and suffering auditory  
7 hallucinations. (Aug. 28, 2014 Mental Health Progress Note, ECF No. 85-16.) The record  
8 further states that "[m]edical saw only a small 'dash' on [Plaintiff's] right arm" and that Plaintiff  
9 was "[m]edically cleared." (Id.) Defendants also cite to the photographs taken by Defendant  
10 Williams, which show no blood, and only what appear to be minor scrapes, bruises, scratches,  
11 and small gashes on various parts of Plaintiff's body and face, and some swelling on his head.  
12 (Aug. 28, 2014 photos, ECF No. 85-13.) Defendants further note that Plaintiff testified at his  
13 deposition that the injuries he incurred were "[m]y legs and my arm, my hand, were scraped. My  
14 head was lumped. My lip was busted." (Pl.'s Dep. 36:11-12.) Based on these submissions,  
15 Defendants argue that Plaintiff has only presented evidence of minor scrapes and bruises that are  
16 not indicative of an excessive use of force.

17 The objective component of an Eighth Amendment claim is contextual and responsive to  
18 contemporary standards of decency. Hudson, 503 U.S. at 8 (quotation marks and citation  
19 omitted). Although de minimis uses of force do not violate the Constitution, the malicious and  
20 sadistic use of force to cause harm always violates contemporary standards of decency,  
21 regardless of whether or not significant injury is evident. Wilkins v. Gaddy, 559 U.S. 34, 37-8  
22 (2010) (citing Hudson, 503 U.S. at 9-10) (quotation marks omitted); Oliver v. Keller, 289 F.3d  
23 623, 628 (9th Cir. 2002). "Injury and force . . . are only imperfectly correlated, and it is the latter  
24 that ultimately counts." Wilkins, 509 U.S. at 38.

25 Here, Plaintiff argues that although he did not suffer major injuries such as broken bones,  
26 the forced used on him was malicious. Plaintiff was allegedly dropped on the floor, and kicked  
27 and hit while curled up on the ground, while he was not posing any significant threat. He asserts  
28 that hours passed before photographs were taken of his injuries during which he had a cell with a

1 sink and “didn’t just lay there,” inferring that he cleaned himself so that the “blood wasn’t  
2 flowing” by the time the photos were taken. (Pl.’s Dep. 36:16-17; 37:21-38:3.) Further, Plaintiff  
3 asserts that the “swelling start[ed] to go down” when the photos were taken, because they were  
4 taken hours after the incident. (Pl.’s Dep. 36:16-17; 37:21-38:3.)

5 Thus, although Plaintiff does not materially dispute that he did not suffer serious physical  
6 injuries, there are some disputed material facts here regarding the nature of the force used under  
7 the circumstances. Although the extent of Plaintiff’s injuries must be considered when assessing  
8 Plaintiff’s excessive force claim, his injuries must be considered together with the need for the  
9 use of force during the events at issue. As discussed above, the current record does not resolve  
10 these material factual disputes.

11 Therefore, the Court cannot find here that only de minimus force was used, and  
12 Defendants’ motion for summary judgment on Plaintiff’s claims for excessive force and the  
13 failure to intervene in violation of the Eighth Amendment shall be denied. The Court next turns  
14 to Defendants’ arguments regarding Plaintiff’s claim for deliberate indifference in violation of  
15 the Eighth Amendment.

#### 16 **D. Deliberate Indifference to Serious Medical Need**

17 Prison officials violate the Eighth Amendment if they are “deliberate[ly] indifferen[t] to  
18 [a prisoner’s] serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 104 (1976). “A medical  
19 need is serious if failure to treat it will result in ‘significant injury or the unnecessary and wanton  
20 infliction of pain.’” Peralta v. Dillard, 744 F.3d 1076, 1081-82 (2014) (quoting Jett v. Penner,  
21 439 F.3d 1091, 1096 (9th Cir. 2006)). To maintain a deliberate indifference claim, a prisoner  
22 must first “show a serious medical need by demonstrating that failure to treat a prisoner’s  
23 condition could result in further significant injury or the unnecessary and wanton infliction of  
24 pain. Second, the plaintiff must show the defendants’ response to the need was deliberately  
25 indifferent.” Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012) (quoting Jett, 439 F.3d at  
26 1096 (quotation marks omitted)). “Indications that a plaintiff has a serious medical need include  
27 the existence of an injury that a reasonable doctor or patient would find important and worthy of  
28 comment or treatment; the presence of a medical condition that significantly affects an

1 individual's daily activities; or the existence of chronic or substantial pain." Colwell v.  
2 Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (citation and internal quotation marks omitted);  
3 Wilhelm, 680 F.3d at 1122; Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000).

4 Defendants argue that the undisputed facts show that Plaintiff had no serious medical  
5 need in this case to which they failed to respond. As noted above, Plaintiff's medical records  
6 submitted here, the photographs of his injuries, and his own testimony indicate that Plaintiff did  
7 not have any serious injuries from the events at issue. Plaintiff disclaimed any major or  
8 significant injuries in his declaration, although he does assert some minor scrapes and bruises, a  
9 lump on his head, and a busted lip. Considering the undisputed facts regarding Plaintiff's  
10 injuries in the light most favorable to Plaintiff, his injuries do not rise to the level of an  
11 objectively significant medical need that required treatment to avoid serious further injury.  
12 Thus, the Court agrees that Defendants have met their burden to show an absence of any  
13 evidence that Plaintiff had a serious medical need to which they failed to respond. Plaintiff has  
14 shown no material dispute of fact here. Summary judgement therefore will be granted in  
15 Defendants' favor on this claim.

16 **IV.**  
17 **CONCLUSION**

18 Based on the foregoing, it is HEREBY ORDERED that Defendants' motion for summary  
19 judgment is granted in part and denied in part, as follows:

20 1. Defendants' motion for summary judgment on Plaintiff's claims for excessive  
21 force and the failure to intervene in violation of the Eighth Amendment, is denied;

22 2. Defendants' motion for summary judgment on Plaintiff's Eighth Amendment  
23 deliberate indifference claim, is granted;

24 3. This matter shall proceed only on Plaintiff's Eighth Amendment claims for  
25 excessive force against Defendants Smith, Sandoval and Akin, and the failure to intervene  
26 against Defendant Alvarez.

27 4. Judgment shall be entered in favor of Defendants Thompson, Stelow, and  
28 Williams;

1           5. Defendants' motion for summary judgment for the failure to exhaust available  
2 administrative remedies is denied, without prejudice. As explained above, dispute issues of fact  
3 preclude the Court from concluding that administrative remedies were available to Plaintiff. In  
4 such circumstances, Defendants are entitled to an evidentiary hearing to resolve disputed factual  
5 issues. See Albino, 747 F.3d at 1170;

6           6. Here, Defendants have not requested an evidentiary hearing. If Defendants wish  
7 to pursue this defense, they may request an evidentiary hearing by filing a motion for a hearing  
8 within **thirty (30) days**. Defense counsel shall confer with Plaintiff, prior to requesting any such  
9 hearing, on the witnesses to be called and the evidence to be presented at the hearing. The  
10 motion shall include a statement that the meet and confer took place, including the date(s) and  
11 the method(s), and shall include a statement setting forth the anticipated witness(es) to be called  
12 and any document(s) or other evidence to be presented at the hearing. If the motion is granted,  
13 an order setting the hearing date and setting deadlines and procedures for the hearing will be  
14 issued; and

15           7. If no motion for an evidentiary hearing is filed within the **thirty (30) day**  
16 deadline, the Court will proceed to set this matter for trial on the claims described above.

17  
18 IT IS SO ORDERED.

19 Dated: August 14, 2018

  
UNITED STATES MAGISTRATE JUDGE