

1 Recommendations were adopted in full on October 11, 2016, and Defendant's motion to dismiss was
2 denied.

3 On November 11, 2016, Defendant filed an answer to the complaint, as well as a motion for
4 summary judgment. (ECF Nos. 27, 28.) Plaintiff filed an opposition on November 23, 2016, and
5 Defendant filed a reply on November 30, 2016. Pursuant to Local Rule 230(1), the motion is deemed
6 submitted for review without oral argument.

7 II.

8 LEGAL STANDARD

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

20 In resolving cross-motions for summary judgment, the Court must consider each party's
21 evidence. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th Cir. 2011). Plaintiff bears the
22 burden of proof at trial, and to prevail on summary judgment, he must affirmatively demonstrate that
23 no reasonable trier of fact could find other than for him. Soremekun v. Thrifty Payless, Inc., 509 F.3d
24 978, 984 (9th Cir. 2007). Defendants do not bear the burden of proof at trial and in moving for
25 summary judgment, they need only prove an absence of evidence to support Plaintiff's case. In re
26 Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010).

27 In judging the evidence at the summary judgment stage, the Court does not make credibility
28 determinations or weigh conflicting evidence, Soremekun, 509 F.3d at 984 (quotation marks and

1 citation omitted), and it must draw all inferences in the light most favorable to the nonmoving party
2 and determine whether a genuine issue of material fact precludes entry of judgment, Comite de
3 Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation
4 marks and citation omitted).

5 In arriving at this recommendation, the Court has carefully reviewed and considered all
6 arguments, points and authorities, declarations, exhibits, statements of undisputed facts and responses
7 thereto, if any, objections, and other papers filed by the parties. Omission of reference to an argument,
8 document, paper, or objection is not to be construed to the effect that this Court did not consider the
9 argument, document, paper, or objection. This Court thoroughly reviewed and considered the
10 evidence it deemed admissible, material, and appropriate.

11 III.

12 DISCUSSION

13 A. Summary of Plaintiff's Complaint

14 On July 16, 2014, Defendant D. Ruffin invited Plaintiff in to his office to discuss a scheduling
15 conflict. Defendant became physically and verbally agitated by pushing an office chair abruptly out of
16 the way to then aggressively charging Plaintiff. While Defendant was screaming expletives and
17 threats to include "I ought to beat your ass and teach you a lesson in respect," Plaintiff then attempted
18 to leave the office. Defendant told Plaintiff "no," and grabbed him from behind. Defendant then said
19 "what you are going to do is get your fucking ass against the wall and don't fucking move." At which
20 time Defendant, who was holding Plaintiff from behind, pushed Plaintiff out of the door and across the
21 hall onto the wall. Defendant continued to scream expletives and called for back-up. Defendant
22 cuffed Plaintiff and ordered him to "the hole" to cool off for a couple of hours. Plaintiff never resisted
23 and complied with every order and did not need to cool off.

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B. Statement of Undisputed Facts¹

1. At all times relevant to this suit, Charles Albert Neely (CDC No. AE6507) was an inmate in the custody of the California Department of Corrections and Rehabilitation (CDCR) at Taft Modified Community Correctional Facility (TMCCF) in Taft, California. (Second Amended Complaint (SAC) at 1, 3-4.) Defendant Ruffin was a Correctional Counselor I at TMCCF during the same time period. (SAC at 3; Ruffin Decl. ¶ 3.)

2. In this action, Plaintiff brings a claim for excessive force against Defendant Ruffin for his alleged conduct on July 16, 2014. (SAC at 4, 6.)

3. On July 16, 2014, at approximately 11:45 a.m., Defendant Ruffin was in his office in the Counselor Hallway of TMCCF, and heard noises coming from the adjoining office. (Ruffin Decl. ¶ 3.) He opened the door and saw Plaintiff Neely in the office. (Id.) He ordered Plaintiff Neely to exit the office and remain out of the office until at least 1:30 p.m. (Id.) Plaintiff left, but returned several minutes later to Defendant Ruffin’s office. (Id.)

4. Surveillance video captured the interaction between Defendant Ruffin and Plaintiff Neely in the Counselor Hallway at TMCCF on July 16, 2014. (Negrete Decl. ¶ 2; Gautney Decl. ¶¶ 9-10.) Defendant’s Exhibit A is a true and correct copy of the surveillance footage recorded on July 16, 2014 at approximately 11:47 a.m., at the TMCCF in the Counselor Hallway taken from Camera 4. (Negrete Decl. ¶¶ 2-3; Brown Decl. ¶ 4; Shryock Decl. ¶ 2.)

5. It was at approximately 11:47:38 a.m. that Plaintiff walked into Defendant Ruffin’s office, located in the Counselor Hallway of TMCCF. (Shryock Decl. ¶ 2, Ex. A [Surveillance Video]; Ruffin Decl. ¶4; SAC at 4.)

6. At approximately 11:49:25, Plaintiff exited Defendant Ruffin’s office and stepped into the hallway. (Surveillance Video; Ruffin Decl. ¶ 5.) Defendant Ruffin had no physical contact with Plaintiff as Plaintiff stepped out into the hallway. (Surveillance Video; Ruffin Decl. ¶¶ 5-6.)

¹ Plaintiff neither filed his own separate statement of disputed facts nor admitted or denied the facts set forth by defendant as undisputed. Local Rule 56-260(b). Therefore, Defendant’s statement of undisputed facts is accepted except where brought into dispute by plaintiff’s verified complaint. Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004) (verified complaint may be used as an opposing affidavit if it is based on pleader’s personal knowledge of specific facts which are admissible in evidence).

1 7. When Plaintiff was approximately halfway between Defendant Ruffin’s office door and
2 the adjacent wall, Defendant Ruffin pointed at the adjacent wall, instructing Plaintiff to face the wall.
3 (Surveillance Video; Ruffin Decl. ¶ 6.)

4 8. Correctional Officer Gautney arrived at the scene at approximately 11:50:09, and
5 handed Defendant Ruffin handcuffs. (Surveillance Video; Gautney Decl. ¶¶ 4-5; Ruffin Decl. ¶ 11.)

6 9. Plaintiff did not physically resist as handcuffs were applied. (Surveillance Video;
7 Ruffin Decl. ¶ 11.)

8 10. At approximately 11:50:26, Defendant Ruffin guided Plaintiff to turn and face Officer
9 Gautney. (Surveillance Video; Ruffin Decl. ¶ 12; Gautney Decl. ¶ 6.) Officer Gautney then took
10 physical custody of Plaintiff. (Id.)

11 11. Plaintiff was escorted to a temporary holding cell by Officer Gautney. (Surveillance
12 Video; Gautney Decl. ¶ 7.) He returned to his dorm from the temporary holding cell at approximately
13 12:40 p.m. (Chavaria Decl. ¶ 4.)

14 12. Following this incident, Defendant Ruffin wrote Plaintiff a Rules Violation Report
15 (RVR). (Ruffin Decl. ¶ 13.) In that report, Defendant Ruffin described how he gave Plaintiff an order
16 to stay out of the office adjoining his until after 1:30 p.m., however, several minutes later Plaintiff
17 returned and entered Defendant Ruffin’s office. (Shryock Decl. ¶ 3, Ex. B.) On July 23, 2014,
18 Plaintiff was found guilty of failure to follow an order, and assessed fifteen days forfeiture of credit.
19 (Id.)

20 **C. Findings on Defendant’s Motion**

21 Defendant Ruffin moves for summary judgment on two grounds: (1) the undisputed evidence
22 demonstrates that Defendant Ruffin did not act maliciously and sadistically for the purpose of causing
23 harm to Plaintiff, but instead only placed his hand on Plaintiff for forty-six seconds to maintain
24 institutional order, and (2) based on the undisputed evidence, Defendant Ruffin is entitled to qualified
25 immunity.

26 The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment
27 forbidden by the Eighth Amendment. Hope v. Pelzer, 536 U.S. 730, 737 (2002) (citing Whitley v.
28 Albers, 475 U.S. 312, 319 (1986)) (quotation marks omitted). Among unnecessary and wanton

1 inflictions of pain are those that are totally without penological justification, Hope, 536 U.S. at 737
2 (citing Rhodes v. Chapman, 452 U.S. 337, 346 (1981)) (quotation marks omitted), and punitive
3 treatment which amounts to gratuitous infliction of wanton and unnecessary pain is prohibited by the
4 Eighth Amendment, id. at 738 (quotation marks omitted).

5 What is necessary to show sufficient harm under the Eighth Amendment depends upon the
6 claim at issue, with the objective component being contextual and responsive to contemporary
7 standards of decency. Hudson v. McMillian, 503 U.S. 1, 8 (1992) (quotation marks and citations
8 omitted). For excessive force claims, the core judicial inquiry is whether the force was applied in a
9 good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.
10 Wilkins v. Gaddy, 559 U.S. 34, 37 (2010) (per curiam) (citing Hudson, 503 U.S. at 7) (quotation
11 marks omitted). Not every malevolent touch by a prison guard gives rise to a federal cause of action.
12 Wilkins, 559 U.S. at 37 (citing Hudson, 503 U.S. at 9) (quotation marks omitted). Necessarily
13 excluded from constitutional recognition is the *de minimis* use of physical force, provided that the use
14 of force is not of a sort repugnant to the conscience of mankind. Wilkins, 559 U.S. at 37-8, 130 S.Ct.
15 at 1178 (citing Hudson, 503 U.S. at 9-10) (quotation marks omitted).

16 In determining whether the use of force was wanton and unnecessary, courts may evaluate the
17 extent of the prisoner's injury, the need for application of force, the relationship between that need and
18 the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts
19 made to temper the severity of a forceful response. Hudson, 503 U.S. at 7 (quotation marks and
20 citations omitted). While the absence of a serious injury is relevant to the Eighth Amendment inquiry,
21 it does not end it. Hudson, 503 U.S. at 7. The malicious and sadistic use of force to cause harm
22 always violates contemporary standards of decency. Wilkins, 559 U.S. at 37 (citing Hudson, 503 U.S.
23 at 9) (quotation marks omitted). Thus, it is the use of force rather than the resulting injury which
24 ultimately counts. Wilkins, 559 U.S. at 37-8.

25 “When opposing parties tell two different stories, one of which is blatantly contradicted by the
26 record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for
27 purposes of ruling on a motion for summary judgment.” Scott v. Harris, 550 U.S. 372, 380 (2007). In
28 Scott, a videotape recording clearly contradicted the version of the story told by the arrestee-non-

1 moving party, and in reversing the lower court the Court explained that it should not have relied ‘on
2 such visible fiction’ in determining the facts for purposes of ruling on a motion for summary
3 judgment. Id. at 378. There is no question that the surveillance recording in this case captured the
4 incident in the counselor hallway at TMCCF giving rise to the alleged physical force on July 16, 2014,
5 and the videotape is not susceptible to multiple reasonable interpretations.

6 Defendant argues that he is entitled to judgment as a matter of law because the undisputed
7 evidence demonstrates that he did not use force on Plaintiff maliciously and sadistically to cause harm,
8 but rather to maintain institutional security. The only physical force Defendant Ruffin applied to
9 Plaintiff was placing his hand in the middle of Plaintiff’s back for forty-six seconds while waiting for
10 back-up officers to arrive with handcuffs. In addition, Plaintiff suffered no physical injuries as a result
11 of this incident.

12 In opposition, Plaintiff argues that there are two separate hallways to the offices occupied by
13 Plaintiff and Defendant Ruffin, and Plaintiff submits a diagram purportedly of the hallway where the
14 incident took place.² (ECF No. 32, at 2, 9.) Plaintiff contends that when Ruffin ordered him to leave
15 the office and not return he obeyed the order. Plaintiff was later allowed access to the hallway to
16 utilize the restroom, and requested to speak with Defendant Ruffin. Plaintiff argues that contrary to
17 Defendant’s argument, Ruffin “did have physical contact with plaintiff, when plaintiff attempted to
18 enter Defendant’s office as depicted on the video surveillance.” (ECF No. 32, at 3.) Plaintiff contends
19 he attempted to exit Defendant Ruffin’s office, when Ruffin grabbed his arm from behind and pushed
20 him into the hallway. (Id.) Plaintiff contends Ruffin then pushed him against the wall and pinned him
21 there unnecessarily and used force when none was necessary. (Id.) As Plaintiff was pinned against
22 the wall, Defendant Ruffin forcefully slammed Plaintiff’s satchel from under his arm. (Id. at 4.)
23 Plaintiff also submits that he was obedient throughout the incident, complying with Defendant
24 Ruffin’s order to place his hands behind his back. (Id.)

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26 ² As an initial matter, Defendant submits that Plaintiff’s opposition should not be considered as evidence in ruling on the
27 instant motion because it is not signed under penalty of perjury. While Defendant is correct, the Court finds that given
28 Plaintiff’s pro se status and the fact that it is signed by Plaintiff, the Court will consider it when ruling on the instant
motion.

1 The surveillance video is conclusive on the issue of whether Defendant Ruffin used excessive
2 force upon Plaintiff on July 16, 2014.³

3 Defendant Ruffin declares that Plaintiff ignored an order to leave and not return to the office
4 adjoining Defendant Ruffin's until after 1:30 p.m. (Ruffin Decl. ¶¶ 3, 13; Shryock Decl. ¶ 3, Ex. B.)
5 Plaintiff returned several minutes later, spent approximately two minutes with Defendant Ruffin in his
6 office, and then walked back into the hallway. (Ruffin Decl. ¶¶ 3-6; Surveillance Video.) Defendant
7 Ruffin followed Plaintiff out of the office and pointed at the wall. (Ruffin Decl. ¶ 6; Surveillance
8 Video.) Plaintiff lined up with the front of his body facing the wall and his hands placed behind his
9 back. Defendant Ruffin placed his left hand in the middle of Plaintiff's back. (Ruffin Decl. ¶ 6;
10 Surveillance Video.) Ruffin declares that he was previously attacked by an inmate in similar
11 circumstances and was concerned for his safety, and felt it was necessary to use this minimal amount
12 of force. (Ruffin Decl. ¶¶ 6, 14.) Defendant Ruffin also did not have handcuffs in his possession, and
13 keeping his hand on Plaintiff's back allowed him to maintain control of Plaintiff and prevent him from
14 launching an attack. (Ruffin Decl. ¶¶ 6, 8.) Shortly thereafter, Officer Gautney arrived and handed
15 Defendant Ruffin handcuffs. (Surveillance Video; Gautney Decl. ¶¶ 4-5; Ruffin Decl. ¶ 11.)
16 Defendant Ruffin accepted the handcuffs with his right hand, keeping his left hand placed in the
17 middle of Plaintiff's back. (Surveillance Video; Ruffin Decl. ¶ 11.) Defendant Ruffin placed Plaintiff
18 in handcuffs, and then turned over physical custody of Plaintiff to Officer Gautney. (Surveillance
19 Video; Ruffin Decl. ¶¶ 11-12; Gautney Decl. ¶¶ 6-7.) Based on a review of the video surveillance,
20 Defendant Ruffin's hand remained in the middle of Plaintiff's back for approximately 46 seconds
21 while he waited for other officers to arrive with handcuffs. Given the record in this case, the minimal
22 use of force simply does not rise to the level of an Eighth Amendment violation.

23 Plaintiff has failed to provide any competent evidence that creates a triable issue of material
24 fact. First, Plaintiff's argument relating to the hallway and doorway layout at TMCCF is irrelevant to
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28 ³ Plaintiff was provided the opportunity to view the surveillance video prior to opposing Defendant's motion and
references such video in his opposition. (See ECF No. 32.)

1 the issue of whether Defendant Ruffin used excessive force on July 16, 2014.⁴ Second, even assuming
2 some verbal altercation took place while Plaintiff and Defendant Ruffin were in Ruffin’s office, verbal
3 harassment and/or threats are insufficient to give rise to a claim under the Eighth Amendment. See
4 Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (assaultive comments by prison guard not enough
5 to implicate Eighth Amendment); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987)
6 (“Verbal harassment or abuse . . . is not sufficient to state a constitutional deprivation under 42 U.S.C.
7 § 1983”) (quoting Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979)); Gaut v. Sunn, 810 F.2d 923,
8 925 (9th Cir. 1987) (mere threat does not constitute constitutional wrong). Third, even assuming that
9 Plaintiff complied with Defendant Ruffin’s order to place his hands behind his back, Defendant
10 Ruffin’s subjective belief that Plaintiff was aggressive and argument is sufficient to justify the
11 minimal use of force in this instance.⁵ It is undisputed based on a review of the video surveillance that
12 Defendant Ruffin placed his hand on Plaintiff’s back for 46 seconds until back-up officers arrived with
13 handcuffs. Thus, there is no reasonable interpretation that Defendant Ruffin’s actions were malicious
14 or sadistic. The video surveillance “blatantly contradicts” Plaintiff’s claim that he was grabbed by the
15 arm and thrown out of Ruffin’s office and against the wall. The video surveillance demonstrates that
16 Plaintiff walked out of Ruffin’s office and was then ordered against the wall to which he complied.
17 Lastly, Plaintiff’s argument that Defendant Ruffin had available alternatives to physical force does not
18 create a trial issue of fact. Plaintiff contends that Defendant Ruffin should have asked Plaintiff to
19 “cuff up,” call a “code,” or to use pepper spray before placing his hands on Plaintiff’s back. (Pl.’s
20 Opp’n at 5-6.) However, not every criticism of an officer’s conduct suggests excessive force.
21 Whitley v. Albers, 475 U.S. 312, 322 (1986). It is an officer’s conduct done in bad faith or for no
22 legitimate purpose that gives rise to a claim under the Eighth Amendment. Id. Thus, in order to

24 ⁴ Defendant also properly objects to the diagram purportedly drawn by Plaintiff for lack of authentication. Fed. R. Evid.
25 901. Unauthenticated documents cannot be considered in a motion for summary judgment, Las Vegas Sands, LLC v.
26 Nehme, 632 F.3d 526, 533 (9th Cir. 2011) (citing Orr v. Bank of America, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002))
27 (quotation marks omitted), and therefore, lack of proper authentication can be an appropriate objection where the
28 document’s authenticity is genuinely in dispute. In any event, as explained, the diagram is irrelevant to the ultimate issue
to be decided in this motion.

⁵ Indeed, Plaintiff admits that Defendant Ruffin ordered him to leave the office and not return until after open line, and
Plaintiff did return to talk to Defendant Ruffin. (Shrylock Decl., Ex. B; Pl’s Opp’n at 2.)

1 proceed under the Eighth Amendment, the evidence must go “beyond a mere dispute over the
2 reasonableness of a particular use of force or the existence of arguably superior alternatives” to
3 support “a reliable inference of wantonness in the infliction of pain.” *Id.* No such inference exists
4 here. Defendant Ruffin’s decision to place his hand on Plaintiff’s back for 46 second until officer
5 arrived with handcuffs, does not demonstrate an intent to inflict pain or injury, and was no more than
6 de minimis use of force. *See, e.g., Thompson v. Rosario*, Case No. 2:12-cv-0776 KJM DAD P, 2014
7 WL 1400857, at *1, *11 (E.D. Cal. Apr. 10, 2014) (holding a shove in the back that caused plaintiff to
8 stumble forward, lose his balance, and slam his right shoulder against the railing of the door jamb,
9 resulting in an abrasion to the back of plaintiff’s shoulder was a relatively small amount of force, and
10 did not rise to the level of a constitutional violation); *Royal v. Knight*, Case No. 1:09-cv-01407 BAM
11 PC, 2013 WL 685188, at *2, *8 (E.D. Cal. Dec. 20, 2013) (finding allegation that defendant grabbed
12 the plaintiff’s shoulder and pushed him into a cell frame, causing the plaintiff pain to his shoulder,
13 neck, head, and back, was a de minimis use of force and did not rise to the level of a constitutional
14 violation); *Washington v. Duncan*, Case No. C 05-2775 WHA (PR), 2011 WL 2020703, at *1-2 (N.D.
15 Cal. May 24, 2011) (holding an unprovoked shoving of the plaintiff into a fence with such force that
16 he bounced backwards, causing an abrasion or scratch to the plaintiff’s cheek and knuckle was de
17 minimis force and did not rise to the level of a constitutional violation). Based on the record in this
18 case, Defendant Ruffin is entitled to summary judgment.⁶

19 **IV.**

20 **RECOMMENDATIONS**

21 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 22 1. Defendant’s motion for summary judgment be granted; and
23 2. The Clerk of Court be directed to enter judgment in favor of Defendant.

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26 ⁶ Because the Court has determined in its review of Plaintiff’s claim on the merits that no constitutional right has been
27 violated, there is no reason to further analyze or address the issue of qualified immunity. *Saucier v. Katz*, 533 U.S. 194,
28 201 (2001).

1 These Findings and Recommendations will be submitted to the United States District Judge
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after
3 being served with these Findings and Recommendations, the parties may file written objections with
4 the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and
5 Recommendations.” The parties are advised that failure to file objections within the specified time
6 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.
7 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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9 IT IS SO ORDERED.

10 Dated: March 6, 2017



11 UNITED STATES MAGISTRATE JUDGE