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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 TOM MARK FRANKS,

12 Plaintiff,

13 vs.

14 SERGEANT KIRK, *et al.*,

15 Defendants.  
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Case No. 1:15-cv-00401- EPG (PC)

ORDER DENYING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

(ECF No. 46)

ORDER SETTING STATUS CONFERENCE

17 **I. INTRODUCTION**

18 Tom Mark Franks ("Plaintiff") is proceeding *pro se* and *in forma pauperis* with this  
19 civil rights action pursuant to 42 U.S.C. § 1983. This case is proceeding on Plaintiff's Eighth  
20 Amendment claim for failure to protect against Defendants Kirk, Wygt and Mauldin. (ECF No.  
21 17.) Plaintiff's First Amended Complaint ("1AC"), (ECF No. 16), alleges that Plaintiff  
22 sustained severe injuries when he was attacked by another inmate when Defendants were aware  
23 of a previous altercation between Plaintiff and the same inmate.

24 Defendants have filed a motion for summary judgment arguing that undisputed facts  
25 demonstrate that they were not deliberately indifferent to an excessive risk to Plaintiff's health  
26 or safety. (ECF No. 46-1.) Because the Court finds that material disputes of fact remain, the  
27 Court denies Defendants' motion for summary judgment.  
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1           **II.     PROCEDURAL BACKGROUND**

2           Plaintiff filed the Complaint commencing this action on March 2, 2015 in the U.S.  
3 District Court for the Northern District of California. (ECF No. 1.) The case was transferred to  
4 this District on March 10, 2015. (ECF No. 4.) On April 12, 2016, the Court entered a screening  
5 order pursuant to its authority in 28 U.S.C. § 1915A and dismissed the Complaint with leave to  
6 amend. (ECF No. 15.) On May 9, 2016, Plaintiff filed the 1AC alleging additional facts related  
7 to his failure to protect claim. (ECF No. 16.) The Court screened the 1AC on September 6,  
8 2016, and found that service of the 1AC was appropriate. (ECF No. 17.)

9           Defendants filed the instant motion for summary judgment on August 31, 2017. (ECF  
10 No. 46.) Plaintiff filed a response in opposition to the motion on September 28, 2017. (ECF  
11 No. 50.) On October 5, 2017, Defendants filed a reply in support of their motion for summary  
12 judgment. (ECF No. 52.)

13           **III.     ALLEGATIONS IN THE FIRST AMENDED COMPLAINT**

14           Plaintiff was detained at Modesto Public Safety Center/Jail on October 25, 2014. One  
15 and a half years before that date, inmate Joe Dixon had pulled a razor-knife on Plaintiff and the  
16 two were separated for safety. Three weeks prior to that date, Plaintiff told Defendant Deputy  
17 Wygt about the prior knife incident and asked not to be in the same cell with Inmate Dixon.  
18 Plaintiff also wrote to Defendant Sergeant Kirk and asked for a change of cell classification.  
19 Several of Plaintiff’s requests were intercepted by Defendant Deputy Mauldin. Despite these  
20 notifications, Plaintiff was housed with inmate Dixon. On October 25, 2014, Inmate Dixon  
21 attacked Plaintiff and cut him several times, until inmate Dixon was shot to stop the attack.

22           Defendant Kirk specifically had access to Plaintiff’s entire history, including the prior  
23 incident with Inmate Dixon. Defendant Wygt was verbally told about the problem by Plaintiff.  
24 Defendant Mauldin failed to forward emergency requests. Plaintiff alleges “All 3 knew of the  
25 previous incident, the danger I was in by being in a cell again with Inmate Dixon, yet did  
26 nothing to remove me from a cell with him, and ignored/denied all my requests for help.”

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1           **IV.     DISCUSSION**

2           **A.   Motion for Summary Judgment Legal Standard**

3           Summary judgment is appropriate when, viewing the evidence in the light most  
4 favorable to the nonmoving party, “the movant shows that there is no genuine dispute as to any  
5 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a);  
6 *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017) (quoting *United States v. JP Morgan*  
7 *Chase Bank Account No. Ending 8215*, 835 F.3d 1159, 1162 (9th Cir. 2016)). “Once the  
8 moving party meets its initial burden, the non-moving party must ‘go beyond the pleadings and  
9 by her own affidavits, or by ‘the depositions, answers to interrogatories, and admissions on  
10 file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Burch v. Regents*  
11 *of Univ. of Cal.*, 433 F.Supp.2d 1110, 1125 (E.D. Cal. 2006) (quoting *Celotex Corp. v. Catrett*,  
12 477 U.S. 317, 324 (1986)).

13           “[A]t the summary judgment stage the judge’s function is not himself to weigh the  
14 evidence and determine the truth of the matter but to determine whether there is a genuine issue  
15 for trial.” *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511. “Courts may not resolve genuine  
16 disputes of fact in favor of the party seeking summary judgment” or make credibility any  
17 determinations. *Zetwick*, 850 F.3d at 441 (citing *Tolan v. Cotton*, --- U.S. ---, 134 S. Ct. 1861,  
18 1866, 188 L. Ed. 2d 895 (2014); *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Reeves v.*  
19 *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

20           Rule 56 does not require that the absence of any factual dispute. *See Hanon v.*  
21 *Dataproducts Corp.*, 976 F.2d 497, 500 (9th Cir. 1992). Rather, there must be no *genuine* issue  
22 of *material* fact. *Id.* (emphasis as in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477  
23 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986)). “In short, what is required to defeat summary  
24 judgment is simply evidence ‘such that a reasonable juror drawing all inferences in favor of the  
25 respondent could return a verdict in the respondent’s favor.’” *Zetwick*, 850 F.3d at 441 (quoting  
26 *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015); *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505).  
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1 “On the other hand, the Supreme Court has made clear: ‘Where the record taken as a whole  
2 could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue  
3 for trial,’ and summary judgment is appropriate.” *Id.* (quoting *Ricci v. DeStefano*, 557 U.S. 557,  
4 586, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009); *Matsushita Elec. Indus. Co. v. Zenith Radio*  
5 *Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

## 6 **B. Failure to Protect Legal Standard<sup>1</sup>**

7 The Eighth Amendment protects prisoners from inhumane methods of punishment and  
8 from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th  
9 Cir. 2006). Although prison conditions may be restrictive and harsh, prison officials must  
10 provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety.  
11 *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (internal citations and quotations omitted).  
12 Prison officials have a duty to take reasonable steps to protect inmates from physical abuse. *Id.*  
13 at 833; *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005). The failure of prison officials  
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15 <sup>1</sup> It is noted that Plaintiff was convicted of a felony criminal offense on October 10,  
16 2014. (DSUF1) Prior to that time, Plaintiff was a pretrial detainee.

17 Depending upon Plaintiff’s status as pretrial detainee or convicted prisoner, a different  
18 provision of the U.S. Constitution is applicable. *See Castro v. Cty. of Los Angeles*, 833 F.3d  
19 1060, 1067–68 (9th Cir. 2016), *cert. denied sub nom. Los Angeles Cty., Cal. v. Castro*, 137 S.  
20 Ct. 831, 197 L. Ed. 2d 69 (2017) (“Inmates who sue prison officials for injuries suffered while  
21 in custody may do so under the Eighth Amendment’s Cruel and Unusual Punishment Clause or,  
22 if not yet convicted, under the Fourteenth Amendment’s Due Process Clause. *See Bell v.*  
23 *Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (holding that, under the Due  
24 Process Clause, a detainee may not be punished prior to conviction”). The applicable legal  
25 standard for a failure to protect Due Process claim differs from the applicable legal standard for  
26 a failure to protect claim based upon the Cruel and Unusual Punishment Clause. *See id.* at 1071  
27 (summarizing caselaw and concluding that, while an Eighth Amendment claim requires both a  
28 showing of subjective and objective elements to show deliberate indifference, “a pretrial  
detainee who asserts a due process claim for failure to protect [is required] to prove more than  
negligence but less than subjective intent—something akin to reckless disregard”).

For purposes of the instant motion for summary judgment, the Court applied the Eighth  
Amendment legal standard because summary judgment was inappropriate under either test and  
“the due process rights of a pretrial detainee are ‘at least as great as the Eighth Amendment  
protections available to a convicted prisoner.’” *Id.* at 1067 (citing *City of Revere v. Mass. Gen.*  
*Hosp.*, 463 U.S. 239, 244, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983)).

The parties should be prepared to present argument as to which legal standard is  
applicable at trial.

1 to protect inmates from attacks by other inmates may rise to the level of an Eighth Amendment  
2 violation where prison officials know of and disregard a substantial risk of serious harm to the  
3 plaintiff. See *Farmer*, 511 U.S. at 847; *Hearns*, 413 F.3d at 1040.

4 To establish a violation of this duty, the prisoner must establish that prison officials  
5 were “deliberately indifferent to a serious threat to the inmate’s safety.” *Farmer*, 511 U.S. at  
6 834. The question under the Eighth Amendment is whether prison officials, acting with  
7 deliberate indifference, exposed a prisoner to a sufficiently “substantial risk of serious harm” to  
8 his future health. *Id.* at 843 (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). The Supreme  
9 Court has explained that “deliberate indifference entails something more than mere negligence .  
10 . . [but] something less than acts or omissions for the very purpose of causing harm or with the  
11 knowledge that harm will result.” *Farmer*, 511 U.S. at 835. The Court defined this “deliberate  
12 indifference” standard as equal to “recklessness,” in which “a person disregards a risk of harm  
13 of which he is aware.” *Id.* at 836-37.

14 The deliberate indifference standard involves both an objective and a subjective prong.  
15 First, the alleged deprivation must be, in objective terms, “sufficiently serious.” *Id.* at 834.  
16 Second, subjectively, the prison official must “know of and disregard an excessive risk to  
17 inmate health or safety.” *Id.* at 837; *Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir.  
18 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial  
19 evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge.  
20 *Farmer*, 511 U.S. at 842; *Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995).

### 21 **C. Analysis**

22 Defendants argue that they are entitled to summary judgment because they were not  
23 aware of facts from which an inference could be drawn that Plaintiff was at risk of serious harm  
24 from Dixon. They contend that “[i]n a jail setting, there is always a risk [that inmates will get in  
25 fights, but that risk was no greater for plaintiff and Dixon than any other inmates.” (ECF No.  
26 46-1 at 2.) Defendants point to the facts that Plaintiff and Dixon wanted to be housed together  
27 and that they were housed together for three weeks prior to the incident without any problems.

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1 “did not submit any written complaints prior to October 25, 2014, regarding issues with  
2 Dixon.” (*Id.* ¶ 6.)

3 *ii. Plaintiff’s Evidence*

4 Plaintiff has submitted declarations in opposition stating that in August 2012, Modesto  
5 Jail staff suspected that Dixon was going to assault Plaintiff. (Plaintiff decl., ECF No. 50 at 13  
6 ¶¶ 3-4.) (*Id.* at 1 ¶ 1.) Dixon was charged with possession of a weapon after staff found a  
7 shank, and a “keep-away order” was placed informing all staff that Plaintiff and Dixon should  
8 not be housed together. (*Id.*) The order was removed on October 4, 2014, and Plaintiff and  
9 Dixon were housed together again until October 25, 2014, when Dixon attacked Plaintiff with a  
10 knife and seriously injured him. (*Id.* at 1-2 ¶ 2.)

11 With respect to the defendants in this case, Plaintiff attests that: 1) Plaintiff never asked  
12 at any time in 2014 to be housed with Dixon, 2) prior to the housing assignment, Plaintiff told  
13 Wygt about the prior 2012 incident, 3) Plaintiff protested the housing assignment but was told  
14 that he had no choice, and 4) for the three weeks Plaintiff was housed with Dixon, Plaintiff  
15 wrote several requests to Defendant Kirk asking to be moved. (*Id.* at 13 ¶ 3.) Plaintiff received  
16 no response from Defendant Kirk after requesting to be moved out of the cell with Dixon. (*Id.*  
17 at 2 ¶ 4.) “Several of Plaintiff’s requests to move were intercepted and blocked by deputy  
18 Mauldin, who failed to forward his emergency requests.” (*Id.*)

19 *iii. Triable Issues Remain*

20 The testimonial evidence submitted by the parties is in clear conflict. Defendant Wygt  
21 declares that he was unaware of a risk to Plaintiff’s safety while Plaintiff states he expressly  
22 told Defendant Wygt that he objected to the housing assignment because of his prior history  
23 with Dixon. Defendant Mauldin similarly states that he was unaware of any risk to Plaintiff’s  
24 safety while Plaintiff attests that Defendant Mauldin intercepted and blocked several of his  
25 emergency requests to be moved to another cell. Defendant Kirk claims that he never received  
26 a kite from Plaintiff disputing the housing assignment while Plaintiff claims that he sent  
27 Defendant Kirk multiple emergency requests to be moved prior to the attack.

1 On summary judgment, the Court may not make credibility determinations or weigh the  
2 evidence. *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513–14 (providing that, on summary  
3 judgment, “[c]redibility determinations, the weighing of the evidence, and the drawing of  
4 legitimate inferences from the facts are jury functions, not those of a judge”). Furthermore, the  
5 “evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in  
6 his favor.” *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-  
7 09, 26 L.Ed.2d 142 (1970)). As a reasonable juror drawing all inferences in favor of Plaintiff  
8 could return a verdict in his favor on his failure to protect claim, summary judgment is  
9 inappropriate in this case. *See Zetwick*, 850 F.3d at 441.

10 **V. CONCLUSION AND ORDER**

11 Accordingly, the Court ORDERS as follows:

- 12 1. Defendants’ motion for summary judgment (ECF No. 46) is DENIED;
- 13 2. The Court sets a Telephonic Status Conference for February 28, 2018 at 1:30 p.m. in  
14 Courtroom 10 (EPG) before Magistrate Judge Erica P. Grosjean. The Court grants telephonic  
15 appearances at said conference and directs the parties to use the following dial-in number and  
16 passcode: 1-888-251-2909; passcode 1024453;
- 17 3. Plaintiff’s institution of incarceration is ordered to make Plaintiff available for the  
18 telephonic appearance. The Clerk is directed to send a copy of this Order to the litigation  
19 coordinator at Plaintiff’s institution of incarceration so that arrangements can be made for his  
20 telephonic appearance at the February 28, 2018 Status Conference; and
- 21 4. All other hearings and deadlines set in this case currently remain in place and will be  
22 discussed further at the status conference.

23 IT IS SO ORDERED.

24 Dated: February 9, 2018

25 /s/ Erica P. Grosjean  
26 UNITED STATES MAGISTRATE JUDGE