

1 **I.**

2 **PROCEDURAL BACKGROUND**

3 This action is proceeding on Plaintiff’s Fourth and Eighth Amendment claims against
4 Defendant Thissell and Eighth Amendment claim for failure to protect against Defendants Smith,
5 Mahdavi, Masterson, Knoll, and Does 1 and 2.

6 As previously stated, on August 5, 2016, Defendants Knoll, Mahdavi, Masterson, Smith and
7 Thissell filed a motion to dismiss or, in the alternative, motion for summary judgment.²

8 After receiving two extensions of time, Plaintiff filed an opposition on November 17, 2016,
9 and Defendants filed a timely reply on November 29, 2016.

10 **II.**

11 **LEGAL STANDARDS**

12 **A. Motion to Dismiss**

13 A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim,
14 and dismissal is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts
15 alleged under a cognizable legal theory. Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th
16 Cir. 2011) (quotation marks and citations omitted). In resolving a 12(b)(6) motion, a court’s review is
17 generally limited to the operative pleading. Daniels-Hall v. National Educ. Ass’n, 629 F.3d 992, 998
18 (9th Cir. 2010); Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007); Schneider v. California Dept. of
19 Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

20 To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
21 true, to state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing
22 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (quotation marks omitted); Conservation
23 Force, 646 F.3d at 1242; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The Court
24 must accept the factual allegations as true and draw all reasonable inferences in favor of the non-
25 moving party, Daniels-Hall, 629 F.3d at 998; Sanders, 504 F.3d at 910; Morales v. City of Los

26 _____
27 ² Concurrently with their motion, Defendants served Plaintiff with the requisite notice of the requirements for opposing the
28 motion. Woods v. Carey, 684 F.3d 934, 939-41 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 960-61 (9th Cir. 1998).

1 Angeles, 214 F.3d 1151, 1153 (9th Cir. 2000), and in this Circuit, pro se litigants are entitled to have
2 their pleadings liberally construed and to have any doubt resolved in their favor, Wilhelm v. Rotman,
3 680 F.3d 1113, 1121 (9th Cir. 2012); Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012); Silva v.
4 Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011); Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010).

5 **B. Motion for Summary Judgment**

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

18 Plaintiff bears the burden of proof at trial, and to prevail on summary judgment, he must
19 affirmatively demonstrate that no reasonable trier of fact could find other than for him. Soremekun v.
20 Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). Defendants do not bear the burden of proof at
21 trial and in moving for summary judgment, they need only prove an absence of evidence to support
22 Plaintiff's case. In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). If Defendants meet
23 their initial burden, the burden then shifts to Plaintiff "to designate specific facts demonstrating the
24 existence of genuine issues for trial." In re Oracle Corp., 627 F.3d at 387 (citing Celotex Corp., 477
25 U.S. at 323). This requires Plaintiff to "show more than the mere existence of a scintilla of evidence."
26 Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

27 However, in judging the evidence at the summary judgment stage, the Court may not make
28 credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509 F.3d

1 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all inferences in the
2 light most favorable to the nonmoving party and determine whether a genuine issue of material fact
3 precludes entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657
4 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted). The Court determines *only*
5 whether there is a genuine issue for trial and in doing so, it must liberally construe Plaintiff's filings
6 because he is a pro se prisoner. Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (quotation
7 marks and citations omitted).

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

14 III.

15 DISCUSSION

16 A. Complaint Allegations

17 On September 14, 2014, during dinner at the Federal Correctional Institution of Mendota,
18 California, Plaintiff was exiting his assigned job in the chow hall on the "A" side at sometime between
19 5:00 and 6:00 p.m. Correctional officer Thissell pulled Plaintiff to the side to conduct a pat-down
20 search of Plaintiff's person.

21 Thissell's pat-down began from the back, roaming his hands all over Plaintiff's upper body.
22 Thissell then grabbed and cupped Plaintiff's genitals in an aggressive manner. Thissell then
23 whispered in Plaintiff's ear, "You don't feel like a Mexican." Thissell then searched up and down
24 each leg of Plaintiff and then stepped back. Plaintiff took a step forward, believing the search was
25 concluded, at which time and without warning Thissell from behind aggressively grabbed Plaintiff's
26 genitals again causing another surge of excruciating pain to Plaintiff.

1 The sexual assault was witnessed by several inmates and officer Alvarez. Alvarez was
2 standing directly to Thissell's right and witnessed the sexual assault. Thissell's conduct was so
3 outrageous that the Plaintiff and others watching saw Alvarez's jaw fall open.

4 After the assault, Plaintiff was in excruciating pain, embarrassed and in shock and walked back
5 to his housing unit with inmate Owens, who also witnessed the sexual assault by Thissell. Upon
6 arrival at his housing unit and with word of the assault by Thissell being spread by other inmates and
7 staff who were witnesses, Plaintiff was informed of his right to file a complaint under the Prison Rape
8 Elimination Act ("PREA"). Plaintiff filed the complaint and waited to be contacted by prison
9 officials.

10 On or about September 16, 2014, Plaintiff sought help from the prison's psychological services
11 department. Unfortunately, Plaintiff was turned away unseen because no one was available.
12 Approximately one week later, and with no response from Plaintiff's PREA complaint and no action
13 by prison officials, Plaintiff used the prison's e-mail system to report the Thissell sexual assault to
14 Defendant Warden Gill.

15 On or about September 25, 2014, Plaintiff was called to the Lieutenant's office and was
16 interviewed by Lieutenant Smith and another unknown Lieutenant regarding the sexual assault by
17 Thissell. During the interview, Plaintiff was asked to give an account of the sexual assault. Plaintiff
18 explained in detail what occurred and that officer Alvarez witnessed the entire incident, along with
19 several inmates. Smith concluded the interview by stating that Thissell was new and improperly
20 trained and that the incident was "no big deal."

21 Smith then sent Plaintiff to the prison's medical facility to be examined. Upon arrival, Plaintiff
22 was met by two nurse staff members (a female and a male). Plaintiff, while in the exam room, was
23 asked to pull down his pants for his genitals to be examined. Plaintiff requested twice for the female
24 to leave the room. Each time, the female nurse refused. After the third request, the female nurse
25 refused to leave but turned her back while the examination was conducted.

1 From approximately September 26, 2014 to October 6, 2014, Plaintiff met with Defendant
2 Psychologist Mahdavi³ on four separate visits.

3 During the first session, Plaintiff was asked by Mahdavi after explaining the sexual assault by
4 Thissell to write down the “pros” and “cons” of reporting the sexual assault within five minutes.
5 Plaintiff complied with the request by Mahdavi who read the list and threw it in the trash in front of
6 Plaintiff.

7 During the second session, Plaintiff explained he was having trouble sleeping and was anxious,
8 among other things, which was interfering with his relationship with his girlfriend. Plaintiff discussed
9 his feelings toward Thissell and the sexual assault. Mahdavi concluded the session and gave Plaintiff
10 a pamphlet entitled “Steps to Progressive Muscle Relaxation,” and Mahdavi told Plaintiff that his
11 feelings were normal and to read the pamphlet.

12 During the third session, Plaintiff discussed his relationship with his girlfriend and family.
13 There was no discussion regarding the sexual assault by Thissell.

14 During the fourth session, Plaintiff inquired about any action taken by the prison regarding the
15 sexual assault by Thissell. Plaintiff expressed more concern as to Thissell working in the Plaintiff’s
16 housing unit. Plaintiff further explained how the verbal sexual harassment and pat-down searches
17 were becoming everyday events by Thissell. Plaintiff explained that he felt Thissell was retaliating
18 against him and felt uncomfortable with Thissella assigned to his housing unit. Mahdavi concluded
19 the session by telling Plaintiff there was nothing he could do to help him, and Plaintiff’s only option
20 was to proceed through the administrative remedy process.

21 On or about October 12, 2014, Plaintiff returned to the housing unit, at which time he was
22 shocked to see Thissell working in the unit. Upon entering the unit, Plaintiff was singled out of
23 several other inmates for a pat-down search of Plaintiff’s person by Thissell. While Thissell
24 conducted the pat-down of Plaintiff, Thissell was laughing at Plaintiff after noticing that Plaintiff was
25 trembling and obviously afraid of Thissell.

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³ Plaintiff incorrectly identified Defendant Mahdavi as “Mahdavi.”

1 Thissell's hand movements were odd, as the pat-down was more along the lines of being
2 rubbed down than a search. Thissell made several sexual comments to the Plaintiff that he had a nice
3 body and that his skin was soft. Throughout Thissell's shift, he stared at Plaintiff and made
4 inappropriate comments.

5 On October 15, 2014, Plaintiff while working his assigned prison job spoke to Defendant
6 Captain (last name unknown) and the same unknown Lieutenant who was in the September 25, 2014,
7 interview. Plaintiff explained the sexual assault to the Captain and also stated that Thissell was
8 continuing to make sexual remarks and single him out for pat-down searches in retaliation. The
9 unknown Lieutenant, in front of the Captain, told Plaintiff that he would make sure that Thissell was
10 put in a different housing unit.

11 On October 16, 2014, Plaintiff went to see Mahdavi about Thissell working the housing unit.
12 Plaintiff explained that he was intimidated by Thissell and he was uncomfortable by the sexual
13 remarks being made to him by Thissell. Plaintiff pleaded that Mahdavi do something to help.
14 Mahdavi told Plaintiff that he could not help him and he had to go through the administrative remedy
15 process.

16 On or about October 19 through 25, 2014, Thissell was assigned to work the Plaintiff's
17 housing unit. Every day that Thissell worked the Plaintiff's housing unit, he was singled out for a pat-
18 down search and Thissell told Plaintiff "You're looking good!" During the pat-down searches,
19 Thissell ran his hands in a creepy masochistic manner while making sexual comments to Plaintiff.

20 On one occasion, Thissell whispered in Plaintiff's ear while rubbing Plaintiff's shoulders
21 "You're losing weight and you look good, Mr. Kirkelie!" While performing a pat-down search of
22 Plaintiff, Thissell would often move both hands up and down each leg pushing to the Plaintiff's
23 genitals and commented "You're not happy to see me, Mr. Kirkelie?"

24 On October 25, 2014, Thissell, while working in Plaintiff's housing unit, singled out Plaintiff
25 for a pat-down search. Thissell made sexual comments to Plaintiff while he roamed his hands over his
26 chest, cupping and kneading Plaintiff's body. Thissell noticed that Plaintiff was extremely upset and
27 proceeded to search Plaintiff's locker tossing things around while laughing at Plaintiff.
28

1 Plaintiff called his father, Jeff Kirkelie and explained the situation. Plaintiff's father informed Plaintiff
2 he would call the prison to address the sexual assaults by Thissell. Plaintiff's father called Lieutenant
3 Masterson.

4 On November 10 and 14, 2014, Thissell, while assigned to Plaintiff's housing unit, singled out
5 Plaintiff for a pat-down search. During the pat-down, Thissell's hands roamed Plaintiff's body in an
6 inappropriate manner, and Thissell made more sexual comments about Plaintiff's body and asked why
7 he was so tense. Thissell's hands went up and down each leg, pausing while pressing the Plaintiff's
8 genitals.

9 On November 16, 2014, Plaintiff was notified by his counselor that the initial request for an
10 administrative remedy against Thissell was "lost." Plaintiff then began the process all over again by
11 submitting a new administrative remedy.

12 In early to mid-January 2015, Plaintiff through the prison e-mail system, contacted the
13 Associate Warden of Operations and inquired about the status of his complaint against Thissell. The
14 Associate Warden informed Plaintiff that there was no record of Plaintiff's complaint.

15 On January 23, 2015, Plaintiff met with a prison staff member who presented him with his BP-9
16 (administrative remedy request) one month late. The unknown prison official requested that Plaintiff
17 back-date the log book in order to make the late BP-9 look as if it were in compliance and timely.
18 Plaintiff refused and demanded the prison official put the correct date in the log book reflecting the
19 actual date the Plaintiff received the untimely BP-9 response from the Warden.

20 On March 5, 2015, Plaintiff met with A. Riofrio, who presented Plaintiff with a late BP-10
21 response. A. Riofrio told Plaintiff, "it was not her fault that the BP-10 was late. It must have been
22 misplaced in another unit."

23 Sometime in late March or early April 2015, Thissell was back working in Plaintiff's housing
24 unit. During all of the times that Thissell worked in Plaintiff's housing unit, he singled out Plaintiff
25 for a pat-down search and then shook down his locker. During the pat-downs, Thissell moved his
26 hands in an unprofessional manner and made sexual comments about Plaintiff's body.

1 On or about April 4, 2015, Plaintiff sent through the prison e-mail system to the new Warden,
2 Zuniga, and asked why Thissell is constantly put back in the Plaintiff's housing unit with knowledge
3 that Plaintiff had filed a sexual assault claim against him.

4 On or about April 7, 2015, Plaintiff was summoned to see Lieutenant Knoll. Knoll told
5 Plaintiff that their investigation was over and "Knoll will put Thissell anywhere on this compound he
6 wants."

7 On May 15, 2015, Plaintiff filed a civil rights complaint with this Court.

8 Sometime thereafter, Plaintiff's locker was shaken down by an unknown correctional officer or
9 officers. The only items missing from Plaintiff's locker were Plaintiff's note and a calendar which
10 documented everything that took place involving the sexual assault by Thissell, including the BP-9,
11 Bp-10 and BP-11 inmate appeals.

12 On or about May 28, 2015, Plaintiff received a 300-series write up for having a clothesline in
13 his living area. The write up was made by A. Riofrio, a prison secretary who the Plaintiff named in
14 his various requests for administrative remedy and the same individual who requested that Plaintiff
15 falsify the incriminated dated document.

16 On or about July 28, 2015, Plaintiff was transferred to the Federal Correctional Institution at
17 Terminal Island, California, where he is currently incarcerated.

18 Sometime between April and June 2015, Plaintiff spoke to inmate Jamie Hernandez-Samudio
19 (Fed. Reg. No. 11629-010), who told Plaintiff that he was also sexually assaulted by Thissell and
20 when he informed Lieutenants Smith and Knoll, he was locked in the staff bathroom for over one
21 hour. Smith and Knoll later threatened inmate Hernandez-Samudio with placement in the Special
22 Housing Unit to be "buried there."

23 **B. Motion to Dismiss**

24 Defendants argue that Plaintiff has failed to state a cognizable claim under the Fourth and
25 Eighth Amendments.

26 Plaintiff's complaint was screened and the Court determined it stated a claim upon which relief
27 may be granted. 28 U.S.C. § 1915A; Nordstrom, 762 F.3d at 908 ("Dismissal for failure to state a
28 claim under § 1915A 'incorporates the familiar standard applied in the context of failure to state a

1 claim under Federal Rule of Civil Procedure 12(b)(6).”) (quoting Wilhelm, 680 F.3d at 1121);
2 Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012) (section 1915(e)(2)(B)(ii) screening standard
3 is the same as Rule 12(b)(6) standard). Defendants acknowledgement that the complaint was screened
4 is noted; however, Defendants present no arguments which persuade the Court it erred in determining
5 that Plaintiff’s Fourth and Eighth Amendment claims were cognizable or that any other grounds
6 justifying relief from the screening order exist. See Ingle v. Circuit City, 408 F.3d 592, 594 (9th Cir.
7 2005) (“A district court abuses its discretion in applying the law of the case doctrine only if (1) the
8 first decision was clearly erroneous; (2) an intervening change in the law occurred; (3) the evidence on
9 remand was substantially different; (4) other changed circumstances exist; or (5) a manifest injustice
10 would otherwise result.”). Therefore, the Court will proceed to issue a ruling on Defendants’
11 alternative motion for summary judgment.

12 **C. Motion for Summary Judgment**

13 Defendants move for summary judgment or, in the alternative, qualified immunity.

14 1. Undisputed Facts⁴

15 a. Plaintiff Jonathan Kirkelie, a federal prisoner at Federal Correctional Institution (FCI)
16 Mendota, was assigned to a work detail as a PM Food Service worker to help prepare the evening
17 meal for the inmate population. (Compl., ECF No. 17, p. 1; Knoll Decl., ¶ 2.)

18 b. After each meal served at FCI Mendota, correctional officers stand post outside the
19 dining hall to pat search inmates for any contraband items. (Compl. at p. 1; Knoll Decl. ¶ 5.)

20 c. Jeremy Thissell joined the BOP on April 20, 2014, and he did not have a permanent
21 work assignment at the FCI for the first year of his employment; instead was rotated throughout the
22 prison. (Knoll Decl. ¶¶ 6, 17; Ex. 11, Thissell Housing Unit Assignment 9.1.14-12.31.14.)

23 d. Thissell was never permanently assigned to Plaintiff’s unit (unit A2). *Id.*

24 e. On September 14, 2014, at approximately 5:50 p.m., after completing his shift as a PM

25
26 ⁴ Plaintiff neither filed his own separate statement of disputed facts nor admitted or denied the facts set forth by defendant
27 as undisputed. Local Rule 56-260(b). Therefore, Defendants’ statement of undisputed facts is accepted except where
28 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 Food Service worker, Plaintiff was subject to a pat down search outside the dining hall. (Compl., p. 1;
2 Knoll Decl., ¶ 8; Ex. 2, Plaintiff 9/14/14 Email to OIG.)

3 f. On September 14, 2014, Thissell was assigned to conduct pat searches outside the
4 dining hall at the usual time and place in plain view of other inmates and staff. (Compl., at p. 7-8;
5 Knoll Decl., ¶ 17; Ex. 11, Thissell Housing Unit Assignment 9/1/14-12.31.14; Ex. 17, Plaintiff Decl.,
6 ¶ 6.)

7 g. On September 14, 2014, Plaintiff sent an Email to OIG. Whether Plaintiff knew it or
8 not, he did not send the e-mail to any staff member at FCI Mendota. (Knoll Dec., ¶ 9, Ex. 2; Ex. 17,
9 Plaintiff Decl., ¶ 5.)

10 h. On September 25, 2014, after staff at FCI Mendota learned of Plaintiff's claims,
11 Lieutenant Masterson and SIS Lieutenant Angela Smith immediately retrieved Plaintiff from his
12 housing unit for an interview and launched an investigation including threat assessment. (Knoll Decl.,
13 ¶ 11, Ex. 4, Operations Lieutenant Masterson Memorandum; Compl., at pp. 7-8.)

14 i. Immediately upon the conclusion of their September 25, 2014, interview, Lieutenants
15 Masterson and Smith sent Plaintiff to the Health Services and Psychology Services for clinical
16 assessment. (Knoll Decl., ¶¶ 12-13; Compl., at p. 2.)

17 j. After September 25, 2014, Lieutenant Masterson had no further role in the investigation
18 because SIS handles investigations of sexual abuse. (Knoll Decl., ¶ 12.)

19 k. On September 25, 2014, the Health Services medical staff examined Plaintiff who
20 reported no physical injuries. (Knoll Decl., ¶ 13, Ex. 5 Plaintiff Health Services Clinical Encounter
21 9.25.14.)

22 l. On September 25, 2014, Plaintiff met with staff psychologist, Amir Mahdavi, who
23 confirmed that Plaintiff "did not anticipate having any difficulties with staff or other inmates on the
24 compound and reported feeling safe on the compound." (Knoll Decl., Ex. 6, Plaintiff Psychology
25 Services Clinical Encounter 9.25.14.)

26 m. On September 26, 2014, Mahdavi conducted a follow-up with Plaintiff in Psychology
27 Services and reported that he "appeared psychologically stable with no acute concern at the time."
28 (Knoll Decl., ¶ 16, Ex. 10, Plaintiff Psychology Services Clinical Encounter 9.26.14.)

1 n. Mahdavi’s duties as a psychologist do not include making a final decision regarding the
2 risk assessment. (Knoll Decl., ¶ 16, Compl., at pp. 5-6.)

3 o. On September 25, 2014, Lieutenant Smith interviewed Thissell, who provided a written
4 statement in which he denied any unusual or sexually abusive conduct. (Knoll Decl., ¶ 14, Ex. 7,
5 Thissell 9.25.14 Memorandum for Smith.)

6 p. As a result of her initial investigation, on September 25, 2014, Lieutenant Smith
7 determined that the allegations were unverified or not validated. (Knoll Decl., ¶ 15, Ex. 8, Update
8 Inmate Hisotry 9.25.14.)

9 q. On October 7, 2014, Smith presented the findings of her investigation to the Warden at
10 FCI Mendota with the conclusion that Plaintiff’s claim could not be verified. (Knoll Decl., ¶ 18, Ex.
11 12, Lieutenant Smith Referral to Warden on 10.7.14.)

12 r. After September 14, 2014, Thissell was not assigned to Plaintiff’s unit after Plaintiff’s
13 claims were investigated, found to be unverified, and reported to OIG on or about October 7, 2014.
14 (Knoll Decl., ¶ 17, Ex. 11, Thissell Housing Unit Assignment 9.1.14-12.31.14.)

15 s. On October 13, 2014, Plaintiff sent another email to OIG, which was not provided to
16 staff at FCI Mendota. (Knoll Decl., ¶ 19, Ex. 13.)

17 t. On February 9, 2015, OIA referred the matter to FCI Mendota to formalize the
18 investigation. Because Smith had left FCI Mendota, the matter was assigned to her replacement,
19 Steven Knoll. (Knoll Decl., ¶ 21, Ex. 15, 2.9.15 OIA Referral to FCI Mendota for Formal
20 Investigation.)

21 u. Upon receiving the assignment to formalize the investigation of Plaintiff’s claims,
22 Knoll re-interviewed witnesses and obtained the declarations. (Knoll Decl., ¶ 21, Ex. 16, Knoll
23 Memoranda for Interview & Affidavits for Formal Investigation.)

24 v. On March 10, 2015, Knoll issued an OIA Investigative Report concluding that “there is
25 not sufficient evidence to support the allegation” and finding the allegations are “not sustained.”
26 (Knoll Decl., ¶ 22, Ex. 17, Knoll Investigative Report, OIA 2015-00271.)

27 w. On August 15, 2015, BOP transferred Plaintiff to FCI Terminal Island. (Knoll Decl., ¶
28 23, Ex. 1, Plaintiff’s Assignment History Report at 4; Compl., at p. 10.)

1 2. Defendant Thissell

2 Defendant Thissell has moved for summary judgment on the grounds that his conduct did not
3 violate the Fourth or Eighth Amendments as a matter of law and that he is entitled to qualified
4 immunity.

5 **a. Fourth and Eighth Amendment Claim**

6 The Fourth Amendment prohibits only unreasonable searches. Bell v. Wolfish, 441 U.S. 520,
7 558 (1979); Byrd v. Maricopa Cnty. Sheriff's Dep't, 629 F.3d 1135, 1140 (9th Cir. 2011);
8 Michenfelder v. Sumner, 860 F.2d 328, 332 (9th Cir. 1988). The Ninth Circuit has recognized that the
9 Fourth Amendment applies to the invasion of bodily privacy in prisons. Bull v. City & Cnty. of San
10 Francisco, 595 F.3d 964, 974-75 (9th Cir. 2010). The reasonableness of the search is determined by
11 the context, which requires a balancing of the need for the particular search against the invasion of
12 personal rights the search entails. Bell, 441 U.S. at 558-59 (quotations omitted); Byrd, 629 F.3d at
13 1141; Bull v. City and Cnty. of San Francisco, 595 F.3d 964, 974-75 (9th Cir. 2010); Nunez v.
14 Duncan, 591 F.3d 1217, 1227 (9th Cir. 2010); Michenfelder, 860 F.2d at 332-34. Factors that must be
15 evaluated are the scope of the particular intrusion, the manner in which it is conducted, the
16 justification for initiating it, and the place in which it is conducted. Bell, 441 U.S. at 559 (quotations
17 omitted); Byrd, 629 F.3d at 1141; Bull, 595 F.3d at 972; Nunez, 591 F.3d at 1227; Michenfelder, 860
18 F.2d at 332.

19 A sexual assault on an inmate by a prison employee is deeply offensive to human dignity and
20 violates the Eighth Amendment. Schwenick v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000). The
21 Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners not only
22 from inhumane methods of punishment but also from inhumane conditions of confinement. Morgan v.
23 Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer v. Brennan, 511 U.S. 825, 847 (1994)
24 and Rhodes v. Chapman, 452 U.S. 337, 347 (1981)) (quotation marks omitted). While conditions of
25 confinement may be, and often are, restrictive and harsh, they must not involve the wanton and
26 unnecessary infliction of pain. Morgan, 465 F.3d at 1045 (citing Rhodes, 452 U.S. at 347) (quotation
27 marks omitted). Thus, conditions which are devoid of legitimate penological purpose or contrary to
28 evolving standards of decency that mark the progress of a maturing society violate the Eighth

1 Amendment. Morgan, 465 F.3d at 1045 (quotation marks and citations omitted); Hope v. Pelzer, 536
2 U.S. 730, 737 (2002); Rhodes, 452 U.S. at 346.

3 Prison officials have a duty to ensure that prisoners are provided adequate shelter, food,
4 clothing, sanitation, medical care, and personal safety, Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir.
5 2000) (quotation marks and citations omitted), but not every injury that a prisoner sustains while in
6 prison represents a constitutional violation, Morgan, 465 F.3d at 1045 (quotation marks omitted). To
7 maintain an Eighth Amendment claim, a prisoner must show that prison officials were deliberately
8 indifferent to a substantial risk of harm to his health or safety. Farmer, 511 U.S. at 847; Thomas v.
9 Ponder, 611 F.3d 1144, 1150-51 (9th Cir. 2010); Foster v. Runnels, 554 F.3d 807, 812-14 (9th Cir.
10 2009); Morgan, 465 F.3d at 1045; Johnson, 217 F.3d at 731; Frost v. Agnos, 152 F.3d 1124, 1128 (9th
11 Cir. 1998).

12 “Although the Ninth Circuit has recognized that sexual harassment may constitute a cognizable
13 claim for an Eighth Amendment violation, the Court has specifically differentiated between sexual
14 harassment that involves verbal abuse and that which involves allegations of physical assault, finding
15 [only] the later to be in violation of the constitution.” Minifield v. Butikofer, 298 F.Supp.2d 900, 904
16 (N.D. Cal. 2004) (citing Schwenk v. Hartford, 204 F.3d at 1198.) If the sexual harassment claim is
17 based on brief inappropriate touching by a correctional official it is generally found to be
18 noncognizable, especially if the alleged touching took place pursuant to an authorized search. “Even
19 if plaintiff believed that there was a sexual aspect to the search, more is needed.” Smith v. Los
20 Angeles County, No. CV 07-7028-VAP (MAN), 2010 WL 2569232, *5 (C.D. Cal. 2010); adopted in
21 full 2010 WL 2572570 (C.D. Cal. 2010); aff’d 452 Fed. Appx. 768 (9th Cir. 2011). Thus, to support a
22 cognizable Eighth Amendment claim based on a body search, the plaintiff must allege a risk of harm
23 beyond a “momentary discomfort.” Jordan v. Garnder, 986 F.2d 1521, 1526 (9th Cir. 1993); see also
24 Wood v. Beauclair, 692 F.3d 1041 (in evaluating a prisoner’s claim, courts will consider whether the
25 alleged wrongdoing was objectively “harmful enough” to establish a constitutional violation); Somers
26 v. Thurman, 109 F.3d 614, 624 (9th Cir. 1997) (as amended).

27 Defendant frames Plaintiff’s claim as involving a single pat-down search on September 14,
28 2014; however, the allegations presented in the operative complaint involve more than a single

1 inappropriate pat-down search. However, Plaintiff raises the following instances in which he was
2 subjected to which he claims to be unreasonable searches by Defendant Thissell: (1) pat-down search
3 on September 14, 2014; (2) pat-down search on October 12, 2014, which Plaintiff categorizes the
4 search as a rub-down, while Thissell made comments that Plaintiff had a nice body and his skin was
5 soft); (3) on or about October 19 through October 25, 2014, Plaintiff was subjected to a pat-down
6 search by Thissell, every day in which Thissell worked in his housing unit. He told Plaintiff “you’re
7 looking good, and ran his hands in a creep masochistic manner while making sexual comments to
8 Plaintiff. On one occasion, Thissell whispered in Plaintiff’s ear while rubbing Plaintiff’s shoulders
9 and stated, “you’re losing weight and you look good, Mr. Kirkelie!” In addition, while performing a
10 pat-down search of Plaintiff, Thissell would often move both hands up and down each leg pushing to
11 Plaintiff’s genitals and commented “you’re not happy to see, Mr. Kirkelie?”; (4) on October 25, 2014,
12 Thissell singled out Plaintiff for a pat-down search, and made sexual comments to Plaintiff while he
13 roamed his hands over Plaintiff’s chest, cupping and kneading Plaintiff’s body; (5) on November 10
14 and 14, 2014, Thissell again singled out Plaintiff for a pat-down search, and during the search,
15 Thissell’s hands roamed Plaintiff’s body in an inappropriate manner, and Thissell made sexual
16 comments about Plaintiff’s body and asked why he was so tense. Thissell’s hands went up and down
17 each leg, pausing while pressing Plaintiff’s genitals; and (6) sometime in late March or early April
18 2015, Thissell was back working in Plaintiff’s housing unit. During all of the times that Thissell
19 worked in Plaintiff’s housing unit, he singled out Plaintiff for a pat-down search and then shook down
20 his locker. During the pat-downs, Thissell moved his hands in an unprofessional manner and made
21 sexual comments about Plaintiff’s body.

22 Given the nature of Plaintiff’s allegations in the operative complaint, the Court cannot find that
23 Defendant Thissell is entitled to summary judgment based on the argument that the pat-down search
24 on September 14, 2014, alone, did not constitute a Fourth and/or Eighth Amendment violation.
25 Plaintiff’s allegations in his verified complaint set forth evidence that suggests the searches were
26 undertaken to harass or humiliate out of retaliation and not for any legitimate purpose, and Defendant
27 Thissell has not shown that there is not a genuine dispute as to whether the searches violated
28 Plaintiff’s rights under the Fourth and Eighth Amendments.

1 3. Defendants Smith, Knoll, Masterson and Mahdavi

2 As with Defendant Thissell, Defendants Smith, Knoll, Masterson and Mahdavi move for
3 summary judgment on the ground that the constitutional violation against them fails as a matter of law
4 and that they are entitled to qualified immunity.

5 Plaintiff's claims against Defendants Smith, Knoll, Masterson and Mahdavi are based on their
6 failure to intervene to stop Thissell from continuing his abusive searches. Defendants argue that
7 summary judgment is warranted because there was no identifiable risk of serious harm and none of
8 them as investigating officials were aware of a substantial risk of serious harm.

9 Supervisory personnel may not be held liable under section 1983 for the actions of subordinate
10 employees based on *respondeat superior*, or vicarious liability. Crowley v. Bannister, 734 F.3d 967,
11 977 (9th Cir. 2013); accord Lemire v. California Dep't of Corr. and Rehab., 726 F.3d 1062, 1074-75
12 (9th Cir. 2013); Lacey v. Maricopa County, 693 F.3d 896, 915-16 (9th Cir. 2012) (en banc). "A
13 supervisor may be liable only if (1) he or she is personally involved in the constitutional deprivation,
14 or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the
15 constitutional violation." Crowley, 734 F.3d at 977 (citing Snow, 681 F.3d at 989) (internal quotation
16 marks omitted); accord Lemire, 726 F.3d at 1074-75; Lacey, 693 F.3d at 915-16. "Under the latter
17 theory, supervisory liability exists even without overt personal participation in the offensive act if
18 supervisory officials implement a policy so deficient that the policy itself is a repudiation of
19 constitutional rights and is the moving force of a constitutional violation." Crowley, 734 F.3d at 977
20 (citing Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)) (internal quotation marks omitted).

21 A failure to intervene can support a constitutional violation where the bystander-officers had a
22 realistic opportunity to intervene but failed to do so. Lolli v. County of Orange, 351 F.3d 410, 418
23 (9th Cir. 2003). The failure to intervene is a theory of liability that derives meaning from the
24 underlying violation (here, improper searches under the Fourth and Eighth Amendments), not a
25 separate claim." Taylor v. O'Hanneson, 2014 WL 7359185, at *13 (E.D. Cal. Dec. 24, 2014) report
26 and recommendation adopted, No. 1:11-CV-00538-LJO, 2015 WL 778473 (E.D. Cal. Feb. 24, 2015),
27 citing Lynch v. Barrett, No. 09-cv-00405-JLK-MEH, 2010 WL 3938359, at *4-5 (D. Colo. June 9,
28 2010); see also Harper v. Albert, 400 F.3d 1052, 1064 (7th Cir. 2005) ("In order for there to be a

1 failure to intervene, it logically follows that there must exist an underlying constitutional violation
2 ...”).

3 The evidence submitted by Defendants reveals that on September 25, 2014, after staff at FCI
4 Mendota learned of Plaintiff’s claims, Lieutenant Masterson and SIS Lieutenant Angela Smith
5 immediately retrieved Plaintiff from his housing unit for an interview and launched an investigation
6 including threat assessment. (Knoll Decl., ¶ 11, Ex. 4, Operations Lieutenant Masterson
7 Memorandum; Compl., at pp. 7-8.) Immediately upon the conclusion of their September 25, 2014,
8 interview, Lieutenants Masterson and Smith sent Plaintiff to the Health Services and Psychology
9 Services for clinical assessment. (Knoll Decl., ¶¶ 12-13; Compl., at p. 2.) After September 25, 2014,
10 Lieutenant Masterson had no further role in the investigation because SIS handles investigations of
11 sexual abuse. (Knoll Decl., ¶ 12) On September 25, 2014, the Health Services medical staff examined
12 Plaintiff who reported no physical injuries. (Knoll Decl., ¶ 13, Ex. 5 Plaintiff Health Services Clinical
13 Encounter 9.25.14.)

14 On September 25, 2014, Plaintiff met with staff psychologist, Amir Mahdavi, who confirmed
15 that Plaintiff “did not anticipate having any difficulties with staff or other inmates on the compound
16 and reported feeling safe on the compound.” (Knoll Decl., Ex. 6, Plaintiff Psychology Services
17 Clinical Encounter 9.25.14.) On September 26, 2014, Mahdavi conducted a follow-up with Plaintiff
18 in Psychology Services and reported that he “appeared psychologically stable with no acute concern at
19 the time.” (Knoll Decl., ¶ 16, Ex. 10, Plaintiff Psychology Services Clinical Encounter 9.26.14.)
20 Mahdavi’s duties as a psychologist do not include making a final decision regarding the risk
21 assessment. (Knoll Decl., ¶ 16, Compl., at pp. 5-6.) On September 25, 2014, Lieutenant Smith
22 interviewed Thissell, who provided a written statement in which he denied any unusual or sexually
23 abusive conduct. (Knoll Decl., ¶ 14, Ex. 7, Thissell 9.25.14 Memorandum for Smith.) As a result of
24 her initial investigation, on September 25, 2014, Lieutenant Smith determined that the allegations were
25 unverified or not validated. (Knoll Decl., ¶ 15, Ex. 8, Update Inmate History 9.25.14.) On October 7,
26 2014, Smith presented the findings of her investigation to the Warden at FCI Mendota with the
27 conclusion that Plaintiff’s claim could not be verified. (Knoll Decl., ¶ 18, Ex. 12, Lieutenant Smith
28 Referral to Warden on 10.7.14.)

1 First, as argued by Defendants, Plaintiff's claim based solely on the search on September 14,
2 2014, is insufficient to give rise to a claim under the Fourth and Eighth Amendments. It is that
3 incident, combined with the subsequent incidents of alleged abuse that give rise to claim under the
4 Fourth and Eighth Amendments. Therefore, the Court must review the evidence to determine when
5 and what each individual Defendant learned of the improper searches and whether such individual was
6 in a position to prevent them from occurring.

7 **a. Defendant Masterson**

8 As stated above, the evidence presented demonstrates that immediately after Plaintiff reported
9 the incident on September 14, 2014, Defendants Smith and Masterson sent Plaintiff to the Health
10 Services and Psychology Services for clinic assessment, pursuant to PREA protocols. Because SIS
11 handles investigations of sexual abuse, Defendant Lieutenant Masterson had no further role in the
12 investigation, and Plaintiff fails to present any evidence to the contrary.

13 Based on the evidence presented, Defendant Masterson has met his burden in demonstrating
14 that no genuine issue of material fact exists as to whether he knew of and disregarded an excessive risk
15 to Plaintiff's health and safety and failed to intervene to prevent/stop such conduct. Plaintiff fails to
16 present any evidence that Defendant Masterson had any potential involvement or knowledge of
17 Defendant Thissell's alleged misconduct after the initial September 14, 2014, incident, and absent
18 such evidence, Plaintiff has failed to overcome the evidence presented by Defendant. Accordingly,
19 Defendant Masterson is entitled to summary judgment on Plaintiff's failure to intervene claim.

20 **b. Defendant Mahdavi**

21 On September 25, 2014, Defendant Mahdavi met with Plaintiff, who confirmed that Plaintiff
22 "did not anticipate having any difficulties with staff or other inmates on the compound and reported
23 feeling safe on the compound." (Ex. 6, Plaintiff Psychology Services Clinical Encounter 9.25.14.)
24 Madhavi advised Plaintiff to report back to Psychology Services the next day for another consultation.
25 (Id.) On September 26, 2014, Mahdavi meet with Plaintiff for follow-up and reported that Plaintiff
26 "appeared psychologically stable with no acute concern at the time." No additional appointments
27 were planned, but Plaintiff was advised to consult Psychological Services if the need arises.
28 Defendant Knoll submits that Mahdavi, as a staff psychologist, does not have final decision making

1 authority regarding protective custody, and he has no authority over decisions regarding staff
2 assignments. (Knoll Decl. ¶ 16.) Defendant Knoll declares that Mahdavi’s “role in PREA
3 investigations is to consult with inmates regarding psychological injuries and claims and make
4 recommendations to investigators. BOP records confirm that Mahdavi had no further involvement in
5 the investigation.” (Id.)

6 In contrast, Plaintiff alleges, by way of verified complaint, that he meet with Mahdavi on four
7 separate occasions between September 26, 2014 and October 6, 2014. (Compl. at p. 9; ECF No. 17.)
8 During the first session, Plaintiff contends that Mahdavi told Plaintiff to write down the “pros” and
9 “cons” of reports the sexual assault by Thissell. (Id.) On the fourth session, Plaintiff inquired as to
10 what was being done about Thissell’s sexual assault against him, and Plaintiff expressed concern that
11 Thissell was working in his housing unit. Plaintiff contends he “explained how the verbal sexual
12 harassment and his being singled out for pat-down searches were becoming every day events by
13 Thissell. . . . Plaintiff explained that he felt Thissell was retaliating against him, and further felt very
14 uncomfortable with Thissell assigned to his housing unit. [Madhavi] concluded the session by telling
15 the Plaintiff that there was nothing he could do to help him. The Plaintiff’s only option was to go
16 through the administrative remedy process.” (Id. at pp. 10-11.)

17 Then, according to Plaintiff’s allegations in his verified complaint, on October 16, 2014,⁵
18 Plaintiff went to see Madhavi regarding Thissell working in his housing unit. “Plaintiff explained that
19 he was intimidated by Thissell, and there were sexual remarks being made to him, making the Plaintiff
20 feel very uncomfortable. The Plaintiff pleaded that [Madhavi] do something to help him. [Madhavi]
21 told the Plaintiff that he could not help him, and to go through the administrative remedy process.”
22 (Id. at p. 12.) As explained above, Plaintiff was thereafter subjected to repeated sexual assault by
23 Defendant Thissell.

24 Based on Plaintiff’s allegations, there is some evidence that Madhavi had knowledge of
25 Thissell’s continued presence in Plaintiff’s housing unit and potential to commit further sexual
26 assaults on Plaintiff. Defendant Knoll acknowledges that Madhavi could have walked Plaintiff to the

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28 ⁵ In the complaint, Plaintiff references the year as 2015, but it appears to be a typographical error as all the corresponding dates and allegations relate to the year 2014.

1 unit for protective housing, but argues that Madhavi as a staff psychologist does not have final
2 decision making authority regarding protective custody, and Plaintiff could have requested protective
3 custody at any time. (Knoll Decl. ¶ 16.) The fact that Plaintiff may have requested protective custody
4 at any time (assuming Plaintiff had such knowledge) does not overcome the Defendants' obligation to
5 ensure Plaintiff's safety. 50Accordingly, summary judgment should be denied as to Defendant
6 Mahdavi.

7 **c. Defendants Smith and Knoll**

8 Defendant Smith conducted an investigation into Plaintiff's claim of misconduct on September
9 14, 2014, by interviewing Thissell and Alvarez, who both denied any misconduct. Smith also verified
10 that the pat search was not video recorded, and determined if it could have been on video surveillance.
11 (Knoll Decl. ¶ 14.) Based on her initial investigation, Defendant Smith determined that Plaintiff's
12 allegations were unverified or not validated. (Ex. 8, Update Inmate History 9.25.14.) Smith related
13 the findings to AW Lake, who informed the Warden on September 25, 2014, that the facility was
14 conducting an investigation. (Ex. 9, AW Lake 9.25.14 Email to Warden.) In conducting the
15 investigation, Smith used ONESOURCE, a checklist prepared to assist staff in responding to inmate's
16 claims of sexual abuse. (Knoll Decl. ¶ 15.) On October 7, 2014, Smith presented the findings to FCI
17 Mendota Warden and concluded that Plaintiff's claims could not be verified. (Ex. 12, Lt. Smith
18 Referral to Warden on 10.7.14.) The Warden notified OIG of the findings on October 10, 2014.
19 Defendant Knoll declares that Smith handled the investigation until on or about January 11, 2015
20 when she transferred to FCI Cumberland, Maryland. (Knoll Decl. ¶ 3.)

21 Defendant Knoll declares that he took over the investigation on February 9, 2015, after Smith
22 left FCI Mendota, and reviewed Plaintiff's complaints against Defendant Thissell. (Knoll Decl. ¶ 21,
23 Ex. 15, 2.9.15 OIA Referral to FCI Mendota for Formal Investigation.) Knoll further declares that he
24 had "no material involvement in the matter" prior to February 2015. (Knoll Decl. ¶ 3.) Knoll
25 interviewed witnesses and obtained declarations. (Knoll Decl. ¶ 21, Ex. 16, Knoll Memoranda of
26 Interview & Affidavits for Formal Investigation.) Subsequently, on March 10, 2015, Knoll issued an
27 OIA Investigative Report concluding that "there is no sufficient evidence to support the allegation"
28

1 and finding the allegations are “not sustained.” (Knoll Decl. ¶ 23, Ex. 17, Knoll Investigative Reports,
2 OIA 2015-00271.)

3 As previously stated, in his verified complaint, on or about October 12, 2014, Plaintiff returned
4 to the housing unit, at which time he was shocked to see Thissell working in the unit. Upon entering
5 the unit, Plaintiff was singled out of several other inmates for a pat-down search of Plaintiff’s person
6 by Thissell. While Thissell conducted the pat-down of Plaintiff, Thissell was laughing at Plaintiff
7 after noticing that Plaintiff was trembling and obviously afraid of Thissell.

8 Thissell’s hand movements were odd, as the pat-down was more along the lines of being
9 rubbed down than a search. Thissell made several sexual comments to the Plaintiff that he had a nice
10 body and that his skin was soft. Throughout Thissell’s shift, he stared at Plaintiff and made
11 inappropriate comments.

12 On October 15, 2014, Plaintiff while working his assigned prison job spoke to Defendant
13 Captain (last name unknown) and the same unknown Lieutenant who was in the September 25, 2014,
14 interview. Plaintiff explained the sexual assault to the Captain and also stated that Thissell was
15 continuing to make sexual remarks and single him out for pat-down searches in retaliation. The
16 unknown Lieutenant, in front of the Captain, told Plaintiff that he would make sure that Thissell was
17 put in a different housing unit.

18 On October 16, 2014, Plaintiff went to see Mahdavi about Thissell working the housing unit.
19 Plaintiff explained that he was intimidated by Thissell and he was uncomfortable by the sexual
20 remarks being made to him by Thissell. Plaintiff pleaded that Mahdavi do something to help.
21 Mahdavi told Plaintiff that he could not help him and he had to go through the administrative remedy
22 process.

23 On or about October 19 through 25, 2014, Thissell was assigned to work the Plaintiff’s
24 housing unit. Every day that Thissell worked the Plaintiff’s housing unit, he was singled out for a pat-
25 down search and Thissell told Plaintiff “You’re looking good!” During the pat-down searches,
26 Thissell ran his hands in a creepy masochistic manner while making sexual comments to Plaintiff.

27 On one occasion, Thissell whispered in Plaintiff’s ear while rubbing Plaintiff’s shoulders
28 “You’re losing weight and you look good, Mr. Kirkelie!” While performing a pat-down search of

1 Plaintiff, Thissell would often move both hands up and down each leg pushing to the Plaintiff's
2 genitals and commented "You're not happy to see me, Mr. Kirkelie?"

3 On October 25, 2014, Thissell, while working in Plaintiff's housing unit, singled out Plaintiff
4 for a pat-down search. Thissell made sexual comments to Plaintiff while he roamed his hands over his
5 chest, cupping and kneading Plaintiff's body. Thissell noticed that Plaintiff was extremely upset and
6 proceeded to search Plaintiff's locker tossing things around while laughing at Plaintiff.

7 Plaintiff called his father, Jeff Kirkelie and explained the situation. Plaintiff's father informed Plaintiff
8 he would call the prison to address the sexual assaults by Thissell. Plaintiff's father called Lieutenant
9 Masterson.

10 On November 10 and 14, 2014, Thissell, while assigned to Plaintiff's housing unit, singled out
11 Plaintiff for a pat-down search. During the pat-down, Thissell's hands roamed Plaintiff's body in an
12 inappropriate manner, and Thissell made more sexual comments about Plaintiff's body and asked why
13 he was so tense. Thissell's hands went up and down each leg, pausing while pressing the Plaintiff's
14 genitals.

15 On November 16, 2014, Plaintiff was notified by his counselor that the initial request for an
16 administrative remedy against Thissell was "lost." Plaintiff then began the process all over again by
17 submitting a new administrative remedy.

18 In early to mid-January 2015, Plaintiff through the prison e-mail system, contacted the
19 Associate Warden of Operations and inquired about the status of his complaint against Thissell. The
20 Associate Warden informed Plaintiff that there was no record of Plaintiff's complaint.

21 On January 23, 2015, Plaintiff met with a prison staff member who presented him with his BP-9
22 (administrative remedy request) one month late. The unknown prison official requested that Plaintiff
23 back-date the log book in order to make the late BP-9 look as if it were in compliance and timely.
24 Plaintiff refused and demanded the prison official put the correct date in the log book reflecting the
25 actual date the Plaintiff received the untimely BP-9 response from the Warden.

26 On March 5, 2015, Plaintiff met with A. Riofrio, who presented Plaintiff with a late BP-10
27 response. A. Riofrio told Plaintiff, "it was not her fault that the BP-10 was late. It must have been
28 misplaced in another unit."

1 Plaintiff alleges that sometime in late March or early April 2015, Thissell was back working in
2 Plaintiff's housing unit. During all of the times that Thissell worked in Plaintiff's housing unit, he
3 singled out Plaintiff for a pat-down search and then shook down his locker. During the pat-downs,
4 Thissell moved his hands in an unprofessional manner and made sexual comments about Plaintiff's
5 body. On or about April 4, 2015, Plaintiff sent through the prison e-mail system to the new Warden,
6 Zuniga, and asked why Thissell is constantly put back in the Plaintiff's housing unit with knowledge
7 that Plaintiff had filed a sexual assault claim against him. On or about April 7, 2015, Plaintiff was
8 summoned to see Lieutenant Knoll. Knoll told Plaintiff that their investigation was over and "Knoll
9 will put Thissell anywhere on this compound he wants."

10 In the October 13, 2014, email complaint entitled "Request for Staff," Plaintiff alleged the
11 following:

12 I would like to file a further complaint on an incident that occurred on 9-14-14, and which I
13 had already reported to this office and to the Administration here at FCI-Mendota.

14 After filing a sexual assault complaint against C.O. Thiss[ell] and seeing the psychology
15 department about my emotional and mental distress, that came from this incident, the
16 Administration here thought it appropriate to assign C.O. Thiss[ell] to the unit in which I am
17 assigned. C.O. Thiss[ell] has made comments about the incident, singled me out for a "pat
18 down", and continues to smile and laugh at me, mocking me.

19 I would like to file a formal complaint against the Warden and Associate Wardens for their
20 complete disregard for my safety and emotional distress. I have been and continue to be
21 victimized by the staff and now the administration. The Wardens continue to ignore the safety
22 of the[ir] staff and the inmates, ignoring legitimate complaints, and failing to apply any
23 repercussions for staff who violate the law and FBOP policies. I am also requesting a formal
24 investigation into the continued staff misconduct and subsequent Administrative condoning of
25 this behavior.

26 (Ex. 13.)

27 In furtherance of the investigation, Defendant Knoll interviewed Plaintiff on February 15,
28 2015, and Plaintiff stated, in pertinent part, the following:

On September 25, 2014, I sent an electronic copout to PREA reporting alleging on September
7, 2014, I was inappropriately groped while being pat searched by C.O. Thissell. I had sent my
original PREA concern the day it occurred, but I was not aware it was going to a private place
outside of the prison, and when I got no response I wrote the one on September 25, 2014, to the
Warden.

1 While exiting the food service, I was called over for a pat search by Officer Thissell, and
2 Officer Alvarez was there as well. Thissell conducted the search, and hit my genitals with his
3 hands when he searched my legs, and he said, "You feel different then the Mexicans." Once the
4 search was conducted and I started to walk away, Thissell grabbed my genitals and squeezed. I
5 couldn't believe what happened and I looked at Alvarez and she looked like she couldn't
6 believe it either. The other inmate cook, Owens (Black inmate), was present. Owens, and
7 whoever he was with were saying stuff like they wouldn't let this happen to them, and they
8 were laughing. I walked away and t[r]ied to handle this the right way.

9 Since this incident, Thissell had worked my unit, A2. While working the unit, he has acted
10 inappropriately towards me. I felt like he knew I had complained and he would do little stupid
11 things. He pat searched me very, very slowing, making sure to check my waist band in a very
12 slow, creepy manner. He would search me every time he worked there, making comments like
13 I had lost weight, looked thinner, and I had no idea why he would be talking to me like this.

14 (Ex. 16.)

15 Knoll declares that Smith continued with the investigation until she left FCI Mendota in
16 January 2015, and he (Knoll) took over the investigation around February 9, 2015. Based on
17 Plaintiff's allegations in his verified complaint and the investigation conducted by Defendants Smith
18 and Knoll, there is a genuine issue of material fact as to whether Defendants Smith and Knoll knew
19 and had an opportunity intervene in the alleged violations by Defendant Thissell, during the time of
20 their investigations. Plaintiff submits, and Defendants' evidence confirms, that Thissell worked in
21 Plaintiff's housing unit subsequent to the search on September 14, 2014, and based on the evidence
22 presented a genuine issue of triable fact exists as to Defendants' subjective awareness of a serious risk
23 to Plaintiff's safety.⁶ As such, there is evidence from which a reasonable trier of fact could find that
24 Defendants who were assigned to investigate Plaintiff's claims of sexual assault were aware of
25 Thissell's actions' and if they were not, they should have been. See Eastman Kodak Co. v. Image
26 Technical Services, Inc., 504 U.S. 451, 456 (1992) (inferences drawn from the evidence must be
27 viewed in the light most favorable to the non-moving party).

28 Indeed, this Court's determination at summary judgment, is to determine only if there is a
genuine issue of material fact in dispute and the Court cannot make credibility determinations.

⁶ Defendants submit Thissell's housing unit assignment which reflects assignment to Plaintiff's housing unit 2 on October 12-13, 2014, October 19-22, 2014, October 25, 2014, November 10, 2014, and November 14, 2014. (Knoll Decl. Ex. 11.) Defendants further acknowledge that Thissell worked in Plaintiff's unit on April 1, 2015. (Knoll Decl. ¶ 17 n.3.)

1 Soremekun v. Thrifty Payless, Inc., 509 F.3d at 984; see also Thomas v. Ponder, 611 F.3d at 1150
2 (The Court determines *only* whether there is a genuine issue for trial and in doing so, it must liberally
3 construe Plaintiff’s filings because he is a pro se prisoner). Accordingly, summary judgment should
4 be denied as to Defendants Smith and Knoll.

5 4. Qualified Immunity

6 Qualified immunity is “immunity from suit rather than a mere defense to liability; and like an
7 absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.” Mueller v.
8 Auker, 576 F.3d 979, 993 (9th Cir. 2009) (citation and internal quotations omitted). Qualified
9 immunity shields government officials from civil damages unless their conduct violates “clearly
10 established statutory or constitutional rights of which a reasonable person would have known.”
11 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). “Qualified immunity balances two important
12 interests – the need to hold public officials accountable when they exercise power irresponsibly and
13 the need to shield officials from harassment, distraction, and liability when they perform their duties
14 reasonably,” Pearson v. Callahan, 555 U.S. 223, 231 (2009), and it protects “all but the plainly
15 incompetent or those who knowingly violate the law,” Malley v. Briggs, 475 U.S. 335, 341 (1986).

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

23 As explained above, Plaintiff’s allegations go beyond mere verbal harassment, and viewing the
24 facts in the light most favorable to Plaintiff, as this Court must, the Court finds that a reasonable
25 officer in Defendants Thissell, Madhavi’s, Knoll and Smith’s position would have known that their
26 conduct violated a clearly established constitutional right to be free from sexual assault by a prison
27 official, and Defendants are not entitled to qualified immunity in this instance.

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IV.

RECOMMENDATIONS

Based on the foregoing, it is HEREBY RECOMMENDED that Defendants’ motion for summary judgment should be granted as to Defendant Masterson only and denied as to all other Defendants.

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

IT IS SO ORDERED.

Dated: February 1, 2017



UNITED STATES MAGISTRATE JUDGE