

1 On April 17, 2017, Plaintiff submitted an ambiguous response to the Court’s April 5, 2017;
2 therefore, on April 18, 2017, the Court again directed Plaintiff to either file an amended complaint or
3 notify the Court of his intent to proceed solely on the cognizable claims.

4 On May 1, 2017, Plaintiff filed objections to the Court’s April 5, 2017 order, and requested
5 reconsideration by the assigned District Judge.

6 On July 10, 2017, Plaintiff’s motion for reconsideration was denied.

7 As previously stated, on September 5, 2017, Plaintiff filed a first amended complaint.

8 II.

9 COMPLAINT ALLEGATIONS

10 On August 12, 2012 or August 12, 2013, Plaintiff did not have access to legal materials.
11 Defendant L. Lima ducated Plaintiff for law library but didn’t call him. Defendant Lima did not have
12 any manila envelopes to mail out ten copies or any to the Court which made him miss his ten-day
13 deadline.

14 R.D. Cranstan seized a section 1983 complaint, while Plaintiff was in administrative
15 segregation. Cranstan made no copies and did not provide the legal materials requested.

16 On August 12, 2012, Christopher Constello yanked Plaintiff while he was being escorted in
17 handcuffs, threw him against the wall, and stated “you[’re] the dumbest nigger I ever met!” Constello
18 and Brent Urban used their body weight against Plaintiff, and Plaintiff was thrown to the patio ground.
19 Officer William Jones jumped on Plaintiff and made his head hit the ground ten times. During this
20 time, officer M. Lefler, who was in the gun tower watched the unnecessary use of force, along with
21 Brent Urban and Christopher Constello.

22 III.

23 DISCUSSION

24 A. Access to the Courts Claim

25 Inmates have a fundamental constitutional right of access to the courts. Lewis v. Casey, 518
26 U.S. 343, 346 (1996); Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011); Phillips v. Hust, 588
27 F.3d 652, 655 (9th Cir. 2009). However, to state a viable claim for relief, Plaintiff must show that he
28 suffered an actual injury, which requires “actual prejudice to contemplated or existing litigation.”

1 Nevada Dep't of Corr. v. Greene, 648 F.3d 1014, 1018 (9th Cir. 2011) (citing Lewis, 518 U.S. at 348)
2 (internal quotation marks omitted); Christopher v. Harbury, 536 U.S. 403, 415 (2002); Lewis, 518
3 U.S. at 351; Phillips, 588 F.3d at 655. In addition, delays in providing legal materials or assistance
4 that result in actual injury are “not of constitutional significance” if “they are the product of prison
5 regulations reasonably related to legitimate penological interests.” Lewis, 518 U.S. at 362. A missed
6 filing deadline, by itself, does not state an access to the courts claim. See Flagg v. City of Detroit, 715
7 F.3d 165, 178-79 (6th Cir. 2013) (plaintiff is not required to prove government obstruction caused him
8 to lose underlying claim, but must show that the claim was at least arguably meritorious and not
9 frivolous); Barbour v. Haley, 471 F.3d 1222, 1226 (11th Cir. 2006) (“plaintiff must identify within his
10 complaint, a ‘nonfrivolous,’ ‘arguable’ underlying claim”).

11 With regard to Law Librarian, L. Lima, Plaintiff fails to show actual injury in relation to his
12 access to the courts claim. In addition, Plaintiff has failed to show he required library access in order
13 to file his habeas corpus petition. Although Plaintiff contends that he was not provided an envelope,
14 in his first amended complaint, he indicates that was able to use an old envelope to mail his petition to
15 the California Supreme Court. Plaintiff provides no information about how any specific case was
16 affected by the lack of access to the law library and/or manila envelopes. To the extent, Plaintiff is
17 attempting to state a denial of access to the courts claim against Defendant officer Cranston, Plaintiff
18 also fails to state a cognizable claim as there is simply no allegation as to any actual injury based on
19 Cranston’s actions. Accordingly, Plaintiff’s allegations fail to state a cognizable claim for a violation
20 of his First Amendment right of access to the courts.

21 Plaintiff’s contention that the alleged constitutional violation itself is actual injury is without
22 merit. Plaintiff does not set forth facts to demonstrate that any underlying claims/actions were
23 “nonfrivolous” or “arguable.” In addition, when asserting a backward-looking denial of access claim
24 which seeks vindication for an opportunity already lost, the complaint “must identify a remedy that
25 may be awarded as recompense but not otherwise available in some suit that may yet be brought.”
26 Christopher v. Harbury, 536 U.S. at 415. Plaintiff has failed to do so. Even drawing all reasonable
27 inferences in favor of Plaintiff, the first amended complaint, as with the original complaint, fails to
28 allege a cognizable access to courts claim.

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B. Excessive Force/Failure to Intervene Claims

The unnecessary and wanton infliction of pain violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 5 (1992) (citations omitted). For claims arising out of the use of excessive physical force, the issue is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” Wilkins v. Gaddy, 559 U.S. 34, 37 (2010) (per curiam) (citing Hudson, 503 U.S. at 7) (internal quotation marks omitted); Furnace v. Sullivan, 705 F.3d 1021, 1028 (9th Cir. 2013). The objective component of an Eighth Amendment claim is contextual and responsive to contemporary standards of decency, Hudson, 503 U.S. at 8 (quotation marks and citation omitted), and although *de minimis* uses of force do not violate the Constitution, the malicious and sadistic use of force to cause harm always violates contemporary standards of decency, regardless of whether or not significant injury is evident, Wilkins, 559 U.S. at 37-38 (citing Hudson, 503 U.S. at 9-10) (quotation marks omitted); Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002).

Factors that can be considered are “the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted.” Whitley v. Albers, 475 U.S. 312, 321 (1986). Although the extent of the injury is relevant, the inmate does not need to sustain serious injury. Hudson, 503 U.S. at 7; Wilkins, 559 U.S. at 37-38. The Eighth Amendment’s prohibition on cruel and unusual punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force. Hudson, 503 U.S. at 9-10.

The failure to intervene can support an excessive force claim where the bystander-officers had a realistic opportunity to intervene but failed to do so. Lolli v. County of Orange, 351 F.3d 410, 418 (9th Cir. 2003); Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000); Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995); see also Motley v. Parks, 383 F.3d 1058, 1071 (9th Cir. 2004) (neither officers who participated in the harassing search nor officers who failed to intervene and stop the harassing search were entitled to qualified immunity).

Viewing Plaintiff’s allegations liberally as this Court must, Plaintiff’s allegations state a cognizable claim for excessive force against Defendants Christopher Constello, Brent Urban and William Jones, and against M. Lefler for failing to intervene during the alleged use of excessive force.

1 IV.

2 RECOMMENDATIONS

3 Plaintiff's first amended complaint states a cognizable claim for excessive force against
4 Defendants Christopher Constello, Brent Urban and William Jones, and against M. Lefler for failing to
5 intervene during the alleged use of excessive force. However, the complaint does not state a
6 cognizable access to the courts claim. Plaintiff was previously notified of the applicable legal
7 standards and the deficiencies in his pleading, and despite guidance from the Court, Plaintiff's first
8 amended complaint is largely identical to the original complaint. Based upon the allegations in
9 Plaintiff's original and first amended complaint, the Court is persuaded that Plaintiff is unable to
10 allege any additional facts that would support a claim for cruel and unusual punishment in violation of
11 the Eighth Amendment, and further amendment would be futile. See Hartmann v. CDCR, 707 F.3d
12 1114, 1130 (9th Cir. 2013) ("A district court may not deny leave to amend when amendment would be
13 futile.") Based on the nature of the deficiencies at issue, the Court finds that further leave to amend is
14 not warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th. Cir. 2000); Noll v. Carlson, 809 F.2d 1446-
15 1449 (9th Cir. 1987). Accordingly, it is HEREBY RECOMMENDED that:

16 1. The instant action proceed on Plaintiff's claim of excessive force against Defendants
17 Christopher Constello, Brent Urban and William Jones, and against M. Lefler for failing to intervene
18 during the alleged use of excessive force; and

19 2. Plaintiff's access to the courts claim and Defendants L. Lima, Heather Ayon, and R. D.
20 Cranston be dismissed from the action for failure to state a cognizable claim for relief.

21 These Findings and Recommendations will be submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14) days**
23 after being served with these Findings and Recommendations, Plaintiff may file written objections
24 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
25 Recommendations." Plaintiff is advised that failure to file objections within the specified time may

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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: September 14, 2017


UNITED STATES MAGISTRATE JUDGE