



1 (1) That defendants Kesler and Miranda were deliberately indifferent to plaintiff's  
2 serious medical needs in violation of the Eighth Amendment when they rescinded his medical  
3 chrono and when they ignored his requests for medical attention after he was sprayed with  
4 oleoresin capsicum and handcuffed behind his back;

5 (2) That defendant Gustafson used excessive force in violation of the Eighth  
6 Amendment and retaliated against plaintiff for his exercise of First Amendment rights when he  
7 intentionally sprayed oleoresin capsicum in plaintiff's face;

8 (3) That defendant Gustafson used excessive force in violation of the Eighth  
9 Amendment, retaliated against plaintiff for his exercise of his First Amendment rights, and was  
10 deliberately indifferent to plaintiff's serious medical needs in violation of the Eighth Amendment  
11 when he handcuffed plaintiff behind his back rather than use waist restraints as authorized by  
12 plaintiff's prison chrono; and

13 (4) That defendants Gustafson, Walker, Blomquist, and Aguilera were deliberately  
14 indifferent to plaintiff's serious medical needs in violation of the Eighth Amendment when they  
15 ignored his requests for medical attention after he was sprayed with oleoresin capsicum and  
16 handcuffed behind his back. (ECF No. 6 at 5-6.)

17 Defendants Aguilera, Blomquist, Gustafson, Kesler, and Walker filed a motion for  
18 summary judgment. (ECF No. 30.) Plaintiff opposes defendants' motion. (ECF Nos. 39; 41.)  
19 Defendants filed a reply in support of his motion. (ECF No. 42.) The summary judgment motion  
20 is now ripe for review.

21 Defendant Miranda individually moved for summary judgment. (ECF No. 29.) The court  
22 issued a separate findings and recommendations concerning defendant Miranda's motion. (ECF  
23 No. 52.)

24 **B. Factual**

25 The below statement of facts is derived from the parties' statements of undisputed facts,  
26 oppositions to the statements of undisputed facts, the allegations in plaintiff's complaint, and the  
27 declarations, depositions and other records submitted for the court's consideration. (ECF Nos. 1;  
28 29-2; 29-3; 29-4; 30-2; 30-4; 30-5; 30-6; 30-7; 30-8; 30-9; 30-10; 30-11; 30-12; 30-13; 37; 38;

1 39; 43; 44-1; 44-2; 46-1.)<sup>1</sup>

2 On several occasions in his response to the undisputed statement of material facts,  
3 plaintiff asserts that a certain fact is disputed, but, in his explanation, does not actually dispute the  
4 fact. For instance, in defendants' statement of undisputed facts, they assert that defendant "Kesler  
5 did not rescind Plaintiff's accommodation chronos." (ECF No. 30-2 at 2.) Plaintiff contends that  
6 this fact is disputed, but his dispute merely alleges that defendant Kesler conversed with  
7 defendant Miranda<sup>2</sup> and defendant Gustafson concerning the chronos and that defendant Kesler  
8 should have intervened to stop others from rescinding the chronos. (ECF No. 38 at 3.) That  
9 defendant Kesler did not rescind the accommodation chronos is not actually disputed.

10 The court has reviewed plaintiff's statement of undisputed facts and his objections to  
11 defendants' statement of facts in detail. (ECF No. 38.) Where it is clear that plaintiff's "dispute"  
12 with a stated fact is merely an elaboration on the fact, the court will accept that the initial fact  
13 stated by defendants is undisputed. The court will, of course, consider plaintiff's elaborations and  
14 explanations, as far as they are supported by evidence, actually undisputed, and relevant.

15 Plaintiff arrived in the Receiving and Release Unit (R&R) at High Desert State Prison  
16 (HDSP) from Corcoran State Prison (Corcoran) on December 11, 2012. Plaintiff was temporarily  
17 transferred to HDSP for an appearance at a settlement conference in a separate action against  
18 HDSP staff.

19 Defendant Kesler was a Registered Nurse licensed by the State of California. Defendant  
20 Kesler was employed by California Department of Corrections and Rehabilitation (CDCR) at all  
21 relevant times. Defendants Gustafson, Walker, Blomquist, and Aguilera were employed by  
22 CDCR at HDSP as a Correctional Officers during the relevant time.

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23 <sup>1</sup> The court is taking into consideration some relevant undisputed facts that were established in  
24 the findings and recommendations concerning defendant Miranda's separate motion for summary  
25 judgment. (ECF No. 52.) In particular, the court is adopting factual findings concerning the  
26 medical intake process in the R&R of HDSP, which are relevant to the deliberate indifference  
27 claim against defendant Kesler arising from the rescinding of plaintiff's medical  
28 accommodations.

<sup>2</sup> Plaintiff's complaint and other filings in this case erroneously name defendant Miranda as  
"Rimanda." The court will refer to this defendant throughout as "Miranda."

1                                   **1.     R&R Intake at HDSP**

2                   Upon plaintiff's arrival in the R&R, defendant Kesler provided Plaintiff 50mg tablets of  
3 Indomethacin, conducted an intake interview with plaintiff, and documented his effective  
4 communication with plaintiff. Defendant Kesler noted Plaintiff had a comprehensive  
5 accommodation chrono dated October 22, 2012, for lower bunk, waist chains, orthopedic shoes,  
6 cotton bedding, and no walking over one quarter of a mile.

7                   Every inmate who arrives at HDSP is examined by a primary care provider, who  
8 determines whether any accommodations indicated on an inmate's accommodation "chrono"  
9 should be continued. Registered nurses do not have authority to grant, alter, or rescind  
10 accommodation chronos. Those duties are reserved from primary care providers, such as medical  
11 doctors, nurse practitioners, and physician's assistants.

12                   As a Physician's Assistant, Certified, defendant Miranda has the authority to change or  
13 discontinue an inmate's chrono accommodations based upon his evaluation of an inmate.  
14 Chapter 23 of Title 15, entitled "Comprehensive Accommodation Chrono," explicitly sets forth  
15 the criteria that qualifies an inmate for any given medical accommodation. Defendant Miranda is  
16 not authorized to give an inmate an accommodation for which he does not qualify under the  
17 criteria set forth in Title 15.

18                   When plaintiff arrived in the R&R on December 11, 2012, defendant Miranda reviewed  
19 the medical documents contained in the folder that was sent from plaintiff's sending institution, as  
20 well as medical records that defendant Miranda could access through the electronic Unit Health  
21 Records system. Defendant Miranda and registered nurse Kesler both asked plaintiff questions  
22 about his health and medical history.

23                   Upon reviewing plaintiff's medical records, defendant Miranda determined that plaintiff  
24 may qualify for orthotic shoes with custom insoles under the criteria set forth in Title 15.  
25 Plaintiff was wearing tennis shoes with fitted orthotic insoles rather than orthotic shoes when he  
26 arrived at HDSP. Plaintiff told defendant Miranda that he could walk in his tennis shoes without  
27 pain during his temporary stay at HDSP. Defendant Miranda discontinued plaintiff's  
28 accommodation for orthotic shoes with custom insoles because plaintiff had left the shoes at his

1 previous institution. Although plaintiff did not consent to defendant Miranda rescinding his  
2 accommodation chrono, plaintiff stated that he could walk in his tennis shoes without pain during  
3 his brief stay at HDSP. When plaintiff was returned to Corcoran, he was again able to access his  
4 orthotic shoes with custom insoles.

5 Pursuant to Title 15, an inmate only qualifies for a cotton bedding accommodation if he  
6 has a history of asthma or a wool allergy. Defendant Miranda reviewed plaintiff's medical  
7 records to look for medical evidence that plaintiff suffered from either asthma or a wool allergy,  
8 but he found no indication in the records that plaintiff met the criteria for a cotton bedding  
9 accommodation. Plaintiff received non-wool bedding to which he was not allergic while he was  
10 at HDSP and upon his return to Corcoran. Plaintiff did not suffer physical harm as a result of the  
11 decision to discontinue the chrono for cotton bedding.

12 Under Title 15, an inmate may qualify for a lower bunk accommodation if he has severe  
13 orthopedic conditions of the hips, knees, ankles, feet, or upper extremity that physically prevent  
14 or make it unduly painful or dangerous for the inmate to climb to an upper bunk. Defendant  
15 Miranda knew that the cells to which plaintiff would be assigned at HDSP were outfitted with a  
16 stool and desk that created a type of staircase that enabled an inmate to access a top bunk. In  
17 defendant Miranda's opinion, this "staircase" would not require any pulling on behalf of the  
18 inmate that would aggravate shoulder or back pain. Defendant Miranda and registered nurse  
19 Kesler asked plaintiff questions about his shoulder and whether he was experiencing any pain.  
20 Defendant Miranda reviewed plaintiff's medical records to look for medical evidence that  
21 plaintiff had any acute orthopedic conditions that would qualify him for a lower bunk  
22 accommodation. Defendant Miranda determined that plaintiff did not suffer from any acute  
23 orthopedic conditions that would qualify him for a lower bunk accommodation while he was  
24 housed at HDSP.

25 While at HDSP, plaintiff was the sole inmate assigned to his cell at all times and so was  
26 able to always use the lower bunk. Accordingly, plaintiff did not suffer any physical injury  
27 directly from the discontinuation of the lower bunk accommodation chrono.

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1 Under Title 15, an inmate may be entitled to a cuffing accommodation if the inmate  
2 cannot be safely cuffed behind his back due to “a significant musculoskeletal condition.”  
3 Typically an inmate only qualifies for a cuffing accommodation when the inmate has suffered a  
4 recent rotator cuff tear or recently undergone an invasive shoulder surgery. Defendant Miranda  
5 reviewed plaintiff’s medical records to look for medical evidence that plaintiff suffered from a  
6 significant musculoskeletal condition that would qualify him for a cuffing accommodation.  
7 Defendant Miranda determined that plaintiff did not suffer from any significant musculoskeletal  
8 conditions that would qualify him for a cuffing accommodation.

9 Defendant Kesler did not rescind plaintiff’s medical accommodation chronos.

## 10 **2. Defendant Gustafson’s Use of Force**

11 After the medical processing, plaintiff was escorted to and secured in Holding Tank #4,  
12 where he waited for an assignment to a more permanent cell. At some point after plaintiff’s  
13 medical evaluation, defendant Gustafson learned that plaintiff’s accommodation chronos,  
14 including for his waist chains, were determined to be medically unnecessary.

15 At around 8:50 PM, defendant Gustafson approached plaintiff’s holding tank, and, with  
16 the entrance closed, activated a MK4 oleoresin capsicum (OC) spray can, and discharged a burst  
17 toward plaintiff’s facial area, through the bars of the holding tank from approximately two or  
18 three feet away. The parties dispute what prompted the incident.<sup>3</sup>

19 Defendant Gustafson then ordered Plaintiff to “get down” and he complied. Defendant  
20 Gustafson then called for a Code 1 alarm using his institution radio. Plaintiff was then  
21 handcuffed behind his back by correctional officers, including defendants Blomquist, and Walker.  
22 The parties dispute whether defendants Gustafson and Aguilera participated in the handcuffing of  
23 plaintiff. Plaintiff admits that he could not see who actually applied the handcuffs though.

## 24 **3. Plaintiff’s Escort and Decontamination**

25 Once handcuffed, plaintiff was escorted to Holding Tank #5, which had a shower head, so  
26 that plaintiff could rinse off the OC spray. A correctional officer turned on the water and plaintiff

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27 <sup>3</sup> The parties dispute as to what, if anything prompted the incident is discussed in the legal  
28 analysis of Defendant Gustafson’s use of the OC spray.

1 rinsed off for between five seconds and five minutes. The parties dispute the water temperature  
2 and whether plaintiff perceived the water as too hot to wash off the OC spray.

3 Defendant Kesler filled out a “Medical Report of Injury or Unusual Occurrence” after the  
4 use of force. (ECF No. 30-13 at 3.) The form indicates that defendant Kesler was notified of the  
5 use of force at 8:58 PM on December 11, 2012 and that he responded to plaintiff at 9:00 PM on  
6 December 11, 2012. (Id.) The form states that defendant Kesler observed plaintiff’s face after  
7 his exposure to the OC spray, and that defendant Kesler determined that no injury was found as a  
8 result of the spray. (Id.) The form is dated as having been completed at 10:00 PM on December  
9 11, 2012. (Id.)

10 Plaintiff claims that this document was fabricated. (ECF No. 38 at 11.) Plaintiff supports  
11 this contention with his declaration, which asserts that he never received medical attention after  
12 the use of force despite his pleas to the correctional officers. (ECF No. 37 at 8-9.)

13 Where opposing parties tell two different stories, one of which is “blatantly contradicted”  
14 by the record so that no reasonable jury could believe it, the court should not adopt that version of  
15 the facts. Scott v. Harris, 550 U.S. 372, 380 (2007). Plaintiff’s contention that defendant  
16 Kesler’s medical report is fabricated is not blatantly contradicted by the record. Accordingly, the  
17 “Medical Report of Injury or Unusual Occurrence” dated December 11, 2012 is not determinative  
18 that plaintiff received medical treatment after the use of force for the following reasons.

19 “When the non-moving party relies on its own affidavits to oppose summary judgment, it  
20 cannot rely on conclusory allegations unsupported by factual data to create an issue of material  
21 fact.” Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). In Hansen, the plaintiffs  
22 contended there was a genuine issue of material fact as to whether the government sent a  
23 particular notice to them or not. While the government presented computer-generated public  
24 records showing that the notice had been sent, the plaintiffs merely submitted an affidavit that  
25 they had not received the notice. Hansen, 7 F.3d at 138. The court found that the plaintiffs’  
26 affidavit was insufficient to establish a genuine issue of material fact because it only went to  
27 whether the plaintiffs’ received the notice, not to whether the notice was actually sent. Id. Thus,  
28 there was no evidence presented to dispute that the government had ever sent the notice. Id.

1 Here, plaintiff supports his allegation that defendant Kesler fabricated the medical report  
2 form with an affidavit stating that defendant Kesler never evaluated him after the use of force  
3 incident. (ECF Nos. 37 at 8-9; 38 at 11.) Unlike the affidavit in Hansen, plaintiff's declaration in  
4 this case goes to the core concern regarding the document at issue: whether defendant Kesler  
5 actually saw and assessed plaintiff after the incident. Because plaintiff's declaration raises an  
6 issue of fact as to whether defendant Kesler ever evaluated plaintiff's injuries from the use of  
7 force, there is an issue of fact as to whether "Medical Report of Injury or Unusual Occurrence" is  
8 an accurate representation of defendant Kesler's actions.

9 Furthermore, in United States v. 1 Parcel of Real Property, Lot 4, Block 5 of Eaton Acres  
10 ("Eaton Acres"), which the Ninth Circuit relied upon to establish the statement of law in Hansen,  
11 the court unequivocally stated that it could not "reject claimant's evidence simply because it  
12 consists entirely of the [claimant's] self-serving testimony." 904 F.2d 487 (9th Cir. 1990).  
13 There, the claimant "offered a detailed declaration painting a picture entirely different from that  
14 described by the government." Id. And while the Ninth Circuit found the evidence to be "hardly  
15 overwhelming," it nonetheless concluded that "a rational trier of fact could find it to be credible.  
16 Clearly, it would make a world of difference which version of events the trier of fact believes."  
17 Id.

18 Similarly, in the present case, plaintiff paints a wholly different picture of the incident  
19 than that of defendants. Specifically, plaintiff claims that after the use of force, he pleaded for  
20 medical attention but defendants refused him access to medical staff. (ECF No. 37 at 8-9.)  
21 Defendants all declare that plaintiff was evaluated by defendant Kesler after the incident and that  
22 defendant Kesler filled out a medical report. (ECF Nos. 29-4; 29-5; 29-6; 29-7; 29-8; 29-13.)  
23 While plaintiff's statement concerning the care not received from defendant Kesler may be  
24 "hardly overwhelming" in the face of the numerous affidavits of defendants to the contrary, "it  
25 would make a world of difference which version of events the trier of fact believes." 904 F.2d at  
26 492. Therefore, for the purposes of this motion for summary judgment, the court will deem  
27 plaintiff's medical treatment after the use of force to be disputed.

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1           Additionally, defendants claim that plaintiff admitted to being evaluated by defendant  
2 Kesler after the use of force incident. (ECF No. 43 at 15.) Specifically, defendants claim that in  
3 his statement of disputed facts (ECF No. 38 at 10), plaintiff admitted that defendant Kesler  
4 evaluated him once he was secure in holding cell #2. (ECF No. 43 at 15.) However, the  
5 statement in question does not appear to actually be the admission that defendants claim it is.

6           In disputing defendants' claim that plaintiff received medical attention after the incident,  
7 plaintiff wrote that defendant "Kesler never physically evaluated Plaintiff after Plaintiff was  
8 pepper sprayed in holding tank by Defendant Gustafson (holding tank #4), until Plaintiff was  
9 secured into holding cage #2 by Defendants Walker, Blomquist, and Aguilera." (ECF No. 38 at  
10 10.) Defendants interpret this statement to mean that plaintiff was evaluated by defendant Kesler  
11 once he was secure in holding tank #2. (ECF No. 43 at 15.) However, a review of the declaration  
12 pages cited to by plaintiff in support of this dispute (ECF No. 37 at 6-9) shows that plaintiff does  
13 not admit to being evaluated by defendant Kesler. In fact, the declaration specifically states that  
14 plaintiff was secured in holding tank #2 for approximately three hours while pleading for medical  
15 attention, which was not provided. (Id. at 8-9.) So, while plaintiff, as a pro se inmate, may use  
16 language that is unclear in his statement of disputed facts, the underlying declaration makes it  
17 abundantly clear that he was not admitting to having been seen by defendant Kesler.

#### 18           **4. Rules Violation Report**

19           On December 17, 2012, defendant Gustafson issued Rules Violation Report (RVR) ASU-  
20 12-12-003 in connection with the events in this case. (ECF No. 29-9 at 5.) Plaintiff was found  
21 guilty of "Disruptive Behavior with Potential to Lead to Violence." (Id. at 5-6.) Plaintiff lost  
22 thirty days of good behavior credits as a result of the RVR. (Id.)

#### 23           **II. Legal Standard for Summary Judgment**

24           Summary judgment is appropriate when there is "no genuine dispute as to any material  
25 fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary  
26 judgment avoids unnecessary trials in cases in which the parties do not dispute the facts relevant  
27 to the determination of the issues in the case, or in which there is insufficient evidence for a jury  
28 to determine those facts in favor of the nonmovant. Crawford-El v. Britton, 523 U.S. 574, 600

1 (1998); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50 (1986); Nw. Motorcycle Ass'n v.  
2 U.S. Dep't of Agric., 18 F.3d 1468, 1471-72 (9th Cir. 1994). At bottom, a summary judgment  
3 motion asks whether the evidence presents a sufficient disagreement to require submission to a  
4 jury.

5 The principal purpose of Rule 56 is to isolate and dispose of factually unsupported claims  
6 or defenses. Celotex Cop. v. Catrett, 477 U.S. 317, 323-24 (1986). Thus, the rule functions to  
7 “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for  
8 trial.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)  
9 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments). Procedurally,  
10 under summary judgment practice, the moving party bears the initial responsibility of presenting  
11 the basis for its motion and identifying those portions of the record, together with affidavits, if  
12 any, that it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477  
13 U.S. at 323; Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). If the moving  
14 party meets its burden with a properly supported motion, the burden then shifts to the opposing  
15 party to present specific facts that show there is a genuine issue for trial. Fed. R. Civ. P. 56(e);  
16 Anderson, 477 U.S. at 248; Auvil v. CBS “60 Minutes”, 67 F.3d 816, 819 (9th Cir. 1995).

17 A clear focus on where the burden of proof lies as to the factual issue in question is crucial  
18 to summary judgment procedures. Depending on which party bears that burden, the party seeking  
19 summary judgment does not necessarily need to submit any evidence of its own. When the  
20 opposing party would have the burden of proof on a dispositive issue at trial, the moving party  
21 need not produce evidence which negates the opponent's claim. See e.g., Lujan v. National  
22 Wildlife Fed'n, 497 U.S. 871, 885 (1990). Rather, the moving party need only point to matters  
23 which demonstrate the absence of a genuine material factual issue. See Celotex, 477 U.S. at 323-  
24 24 (“[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a  
25 summary judgment motion may properly be made in reliance solely on the ‘pleadings,  
26 depositions, answers to interrogatories, and admissions on file.’”). Indeed, summary judgment  
27 should be entered, after adequate time for discovery and upon motion, against a party who fails to  
28 make a showing sufficient to establish the existence of an element essential to that party's case,

1 and on which that party will bear the burden of proof at trial. See id. at 322. In such a  
2 circumstance, summary judgment must be granted, “so long as whatever is before the district  
3 court demonstrates that the standard for entry of summary judgment . . . is satisfied.” Id. at 323.

4 To defeat summary judgment the opposing party must establish a genuine dispute as to a  
5 material issue of fact. This entails two requirements. First, the dispute must be over a fact(s) that  
6 is material, i.e., one that makes a difference in the outcome of the case. Anderson, 477 U.S. at  
7 248 (“Only disputes over facts that might affect the outcome of the suit under the governing law  
8 will properly preclude the entry of summary judgment.”). Whether a factual dispute is material is  
9 determined by the substantive law applicable for the claim in question. Id. If the opposing party  
10 is unable to produce evidence sufficient to establish a required element of its claim that party fails  
11 in opposing summary judgment. “[A] complete failure of proof concerning an essential element  
12 of the nonmoving party's case necessarily renders all other facts immaterial.” Celotex, 477 U.S.  
13 at 322.

14 Second, the dispute must be genuine. In determining whether a factual dispute is genuine  
15 the court must again focus on which party bears the burden of proof on the factual issue in  
16 question. Where the party opposing summary judgment would bear the burden of proof at trial on  
17 the factual issue in dispute, that party must produce evidence sufficient to support its factual  
18 claim. Conclusory allegations, unsupported by evidence are insufficient to defeat the motion.  
19 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, the opposing party must, by affidavit  
20 or as otherwise provided by Rule 56, designate specific facts that show there is a genuine issue  
21 for trial. Anderson, 477 U.S. at 249; Devereaux, 263 F.3d at 1076. More significantly, to  
22 demonstrate a genuine factual dispute the evidence relied on by the opposing party must be such  
23 that a fair-minded jury “could return a verdict for [him] on the evidence presented.” Anderson,  
24 477 U.S. at 248, 252. Absent any such evidence there simply is no reason for trial.

25 The court does not determine witness credibility. It believes the opposing party's  
26 evidence, and draws inferences most favorably for the opposing party. See id. at 249, 255;  
27 Matsushita, 475 U.S. at 587. Inferences, however, are not drawn out of “thin air,” and the  
28 proponent must adduce evidence of a factual predicate from which to draw inferences. American

1 Int'l Group, Inc. v. American Int'l Bank, 926 F.2d 829, 836 (9th Cir. 1991) (Kozinski, J.,  
2 dissenting) (citing Celotex, 477 U.S. at 322). If reasonable minds could differ on material facts at  
3 issue, summary judgment is inappropriate. See Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th  
4 Cir. 1995). On the other hand, “[w]here the record taken as a whole could not lead a rational trier  
5 of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S.  
6 at 587 (citation omitted); Celotex, 477 U.S. at 323 (if the evidence presented and any reasonable  
7 inferences that might be drawn from it could not support a judgment in favor of the opposing  
8 party, there is no genuine issue). Thus, Rule 56 serves to screen cases lacking any genuine  
9 dispute over an issue that is determinative of the outcome of the case.

10 Defendants’ motion for summary judgment included a so-called “Rand notice” (ECF No.  
11 84-2) to plaintiff informing him of the requirements for opposing a motion pursuant to Rule 56 of  
12 the Federal Rules of Civil Procedure. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v.  
13 Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999);  
14 Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

### 15 **III. Legal Analysis**

16 Defendants move for summary judgment on the grounds that: (1) Defendants were not the  
17 legal cause of plaintiff’s injuries; (2) Defendant Gustafson did not use excessive force or retaliate  
18 against plaintiff; (3) Defendants were not deliberately indifferent in relation to plaintiff’s  
19 accommodation chronos, after he was pepper sprayed, and after he was handcuffed; (4) Plaintiff’s  
20 claims are barred by Heck v. Humphrey; and (5) Defendants are entitled to qualified immunity.

21 For the reasons outline below, the undersigned recommends that defendants’ motion be  
22 granted concerning the deliberate indifference claims related to the discontinuation of plaintiff’s  
23 medical accommodations. Additionally, the undersigned recommends that the motion be granted  
24 as to the deliberate indifference claim against defendant Kesler for failure to respond to plaintiff’s  
25 injuries after the use of force incident. The undersigned recommends denial of the summary  
26 judgment motion as to all other claims.

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1           **A. Deliberate Indifference Concerning Medical Accommodations**

2           Plaintiff alleges that defendants Kesler and Miranda were deliberately indifferent to his  
3 medical needs by discontinuing his prior accommodations for orthotic shoes with custom insoles,  
4 a lower bunk, cotton bedding, and waist restraints. Plaintiff claims that the decision to  
5 discontinue the four medical accommodations was based upon reasons other than the actual  
6 medical record. (ECF No. 1 at 6-7.) Specifically, plaintiff alleges that defendant Gustafson  
7 suggested that defendant Miranda discontinue the accommodations. (Id.)

8           Defendant Miranda moved separately for summary judgment on this claim, which the  
9 court addressed in a findings and recommendations. (ECF No. 52.) As the court found there and  
10 in the undisputed facts above, defendant Miranda was the primary care provider with authority to  
11 adopt or rescind plaintiff’s medical accommodations. (See ECF Nos. 30-12 at 11, 15; 52.) The  
12 “Comprehensive Accommodation Chrono” form at HDSP was filled out by defendant Miranda,  
13 as was the “Primary Care Provider Progress Note,” which comprehensively assessed plaintiff’s  
14 wellbeing upon his arrival at HDSP. (ECF No. 30-12 at 11, 15.) Furthermore, as a registered  
15 nurse, defendant Kesler is not authorized to grant, alter, or rescind accommodation chronos.  
16 (ECF No. 29-4 at 3.)

17           Plaintiff cannot establish that defendant Kesler (or any other defendant besides defendant  
18 Miranda) caused any injury that may have resulted from the discontinuation of his medical  
19 accommodations because the decision to rescind the accommodations was defendant Miranda’s  
20 alone. As such, the court provides a full analysis of this specific claim as it relates to defendant  
21 Miranda in the separate findings and recommendations on defendant Miranda’s summary  
22 judgment motion. As plaintiff cannot prevail on a claim for deliberate indifference against  
23 defendant Kesler concerning his medical accommodations, the undersigned recommends that  
24 defendants’ motion for summary judgment be granted concerning this claim.

25           **B. Deliberate Indifference Concerning Care after Use of Force Incident**

26           **1. Legal Standard for Deliberate Indifference to Serious Medical Needs**

27           “[D]eliberate indifference to serious medical needs of prisoners constitutes the  
28 unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment. This is true

1 whether the indifference is manifested by prison doctors in their response to the prisoner's needs  
2 or by prison guards in intentionally denying or delaying access to medical care or intentionally  
3 interfering with the treatment once prescribed.” Estelle v. Gamble, 429 U.S. 97, 104-05 (1976)  
4 (internal citations, punctuation and quotation marks omitted). “Prison officials are deliberately  
5 indifferent to a prisoner’s serious medical needs when they ‘deny, delay or intentionally interfere  
6 with medical treatment.’” Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990) (quoting  
7 Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988)).

8 “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in  
9 further significant injury or the ‘unnecessary and wanton infliction of pain.’” McGuckin v.  
10 Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX Technologies v.  
11 Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc) (quoting Estelle, 429 U.S. at 104). Serious  
12 medical needs include “[t]he existence of an injury that a reasonable doctor or patient would find  
13 important and worthy of comment or treatment; the presence of a medical condition that  
14 significantly affects an individual’s daily activities; [and] the existence of chronic and substantial  
15 pain.” McGuckin, 974 F.2d at 1059-60.

16 To prevail on a claim for deliberate indifference to serious medical needs, a prisoner must  
17 demonstrate that a prison official “kn[ew] of and disregard[ed] an excessive risk to inmate health  
18 or safety; the official must both be aware of the facts from which the inference could be drawn  
19 that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer v.  
20 Brennan, 511 U.S. 825, 837 (1994).

21 “In the Ninth Circuit, the test for deliberate indifference consists of two parts. First, the  
22 plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner’s  
23 condition could result in further significant injury or the unnecessary and wanton infliction of  
24 pain. Second, the plaintiff must show the defendant’s response to the need was deliberately  
25 indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to  
26 respond to a prisoner’s pain or possible medical need and (b) harm caused by the indifference.”  
27 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations, punctuation and quotation  
28 marks omitted); accord, Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Lemire v.

1 CDCR, 726 F.3d 1062, 1081 (9th Cir. 2013).

2 “The indifference to a prisoner’s medical needs must be substantial. Mere ‘indifference,’  
3 ‘negligence,’ or ‘medical malpractice’ will not support this claim. Even gross negligence is  
4 insufficient to establish deliberate indifference to serious medical needs.” Lemire, 726 F.3d at  
5 1081-82 (internal citations, punctuation and quotation marks omitted); accord, Cano v. Taylor,  
6 739 F.3d 1214, 1217 (9th Cir. 2014). Moreover, “[a] difference of opinion between a physician  
7 and the prisoner -- or between medical professionals -- concerning what medical care is  
8 appropriate does not amount to deliberate indifference.” Snow v. McDaniel, 681 F.3d 978, 987  
9 (9th Cir. 2012) (citing Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.1989)).

10 Whether a defendant had requisite knowledge of a substantial risk of harm is a question of  
11 fact. “[A] factfinder may conclude that a prison official knew of a substantial risk from the very  
12 fact that the risk was obvious. The inference of knowledge from an obvious risk has been  
13 described by the Supreme Court as a rebuttable presumption, and thus prison officials bear the  
14 burden of proving ignorance of an obvious risk. . . . [D]efendants cannot escape liability by virtue  
15 of their having turned a blind eye to facts or inferences strongly suspected to be true[.]” Coleman  
16 v. Wilson, 912 F. Supp. 1282, 1316 (E.D. Cal. 1995) (citing Farmer, 511 U.S. at 842-43) (internal  
17 quotation marks omitted).

18 When the risk is not obvious, the requisite knowledge may still be inferred by evidence  
19 showing that the defendant refused to verify underlying facts or declined to confirm inferences  
20 that he strongly suspected to be true. Farmer, 511 U.S. at 842. On the other hand, prison officials  
21 may avoid liability by demonstrating “that they did not know of the underlying facts indicating a  
22 sufficiently substantial danger and that they were therefore unaware of a danger, or that they  
23 knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise  
24 was insubstantial or nonexistent.” Id. at 844. Thus, liability may be avoided by presenting  
25 evidence that the defendant lacked knowledge of the risk and/or that his response was reasonable  
26 in light of all the circumstances. Id. at 844-45; see also Wilson v. Seiter, 501 U.S. 294, 298  
27 (1991); Thomas v. Ponder, 611 F.3d 1144, 1150-51 (9th Cir. 2010).

28 ///

1                                   **2. Defendant Kesler’s Deliberate Indifference**

2           In addition to discontinuing his medical accommodations, plaintiff also alleges that  
3 defendants Kesler and Miranda ignored his calls for medical assistance after the alleged excessive  
4 force incident. Specifically, plaintiff alleges that the correctional officer defendants in this action  
5 sprayed him with pepper spray through a cell door, dragged him out of the cell, pushed him into a  
6 wall, twisted his arms, put him in an excessively hot shower, handcuffed him behind his back,  
7 and then placed him back in a holding cell. (ECF No. 1 at 8-10.) While in the holding cell,  
8 plaintiff claims that he could hear the voices defendants Miranda and Kesler in the distance, but  
9 that they did not come to his assistance when he pleaded for emergency medical help after the  
10 alleged excessive force incident. (Id. at 10.)

11           Defendant Kesler alleges that he was summoned immediately after the use of force  
12 incident and evaluated plaintiff at that time. (ECF Nos. 30-4 at 3; 30-13 at 4.) However, as the  
13 analysis above demonstrated, there is an issue of fact as to whether defendant Kesler actually  
14 attended to plaintiff after the OC spray. (See supra, pp. 7-9.) However, even if the court were to  
15 find that defendant Kesler did not respond to evaluate plaintiff’s condition, plaintiff still cannot  
16 prevail on a deliberate indifference claim against defendant Kesler.

17           At the time that plaintiff purportedly called for help, he could not see defendant Miranda  
18 or nurse Kesler because of the pepper spray in his eyes. (ECF No. 1 at 10.) Additionally,  
19 plaintiff’s complaint states that defendants Miranda and Kesler were “a far distance” away in the  
20 R&R medical unit while plaintiff was in holding cage number 2. (Id.) During his deposition,  
21 plaintiff stated that defendants Miranda and Kesler were “a room or two away” from him when he  
22 called out for medical help. (ECF No. 29-4 at 35-36.) Defendant Miranda, in his sworn  
23 declaration, states that following the examination where he discontinued plaintiff’s medical  
24 accommodations, he “never again examined [plaintiff] or otherwise interacted with him. I never  
25 heard [plaintiff] call out for medical assistance on the night of December 11, 2012.” (ECF No.  
26 29-3 at 7.) Likewise, defendant Kesler was at no point alerted to plaintiff’s pleas for medical  
27 help. (See ECF No. 30-4 at 2-3.)

28    ///

1 It is undisputed that defendants Kesler and Miranda did not hear plaintiff's calls for  
2 medical assistance. While plaintiff claims to have called out for help, there is no evidence on the  
3 record that these defendants should have or actually did hear these pleas. It is uncontested that  
4 defendants Kesler and Miranda were not in the same room as plaintiff when he called for  
5 assistance and defendant Miranda has sworn to the fact that he did not hear plaintiff that evening.  
6 (ECF Nos. 29-4 at 7; 29-4 at 35-36.) Even if the court were to make the leap and infer that these  
7 defendants **should have** heard plaintiff's calls for help, "an official's failure to alleviate a  
8 significant risk that he should have perceived but did not . . . cannot . . . be condemned as the  
9 infliction of punishment" under the Eighth Amendment. Farmer, 511 U.S. at 838.

10 So, while there is a dispute as to whether plaintiff was brought to defendant Kesler for  
11 treatment immediately after the incident as defendant Kesler claims (ECF No. 30-4 at 2), there is  
12 no dispute that neither defendant Kesler nor defendant Miranda heard plaintiff plea for medical  
13 assistance on the evening of December 11, 2012.

14 Accordingly, because the uncontroverted evidence establishes that these defendants did  
15 not hear plaintiff call for help, the court should grant summary judgment for defendant Kesler  
16 concerning this portion of the Eighth Amendment claim.

### 17 **3. Defendant Correctional Officers' Deliberate Indifference**

18 Plaintiff alleges that after the use of force incident, defendants Aguilera, Blomquist,  
19 Gustafson, and Walker inadequately decontaminated him by providing only excessively hot water  
20 and then failed to provide him with medical assistance while he suffered from the effects of the  
21 OC spray for hours. (ECF No. 1 at 9-10.) Plaintiff's declaration states that all of these  
22 defendants were present from the time immediately after defendant Gustafson administered the  
23 OC spray and issued a Code 1 alarm through the time that plaintiff called out for medical  
24 assistance once back in holding tank #2. (ECF No. 37 at 6-9.) Defendant Aguilera claims that he  
25 did not respond to the alarm and had no interaction with plaintiff at all on December 11, 2012.  
26 (ECF No. 30-5 at 2.) Defendant Gustafson claims that his personal interaction with plaintiff  
27 ended after he pepper sprayed him and sounded the alarm. (ECF No. 30-8 at 2-3.) At that point,  
28 he only observed defendants Walker and Blomquist handcuff plaintiff and escort him to the

1 shower. (Id.) Defendants Walker and Blomquist claim that they escorted plaintiff to be evaluated  
2 by nurse Kesler immediately after the decontamination in the shower room. (ECF Nos. 30-6; 30-  
3 7.)

4 These varied accounts establish genuine disputes of material facts surrounding the events  
5 that occurred after plaintiff was pepper sprayed by defendant Gustafson. First, as demonstrated  
6 above, there is a genuine dispute as to whether plaintiff was ever evaluated by defendant Kesler.  
7 (See supra, pp. 7-9.) If plaintiff were not assessed by defendant Kesler after the incident and if  
8 plaintiff pleaded for medical assistance, then plaintiff could establish a claim for deliberate  
9 indifference to medical needs.

10 “First, the plaintiff must show a serious medical need by demonstrating that failure to treat  
11 a prisoner’s condition could result in further significant injury or the unnecessary and wanton  
12 infliction of pain.” Jett, 439 F.3d at 1096. Plaintiff’s allegations concerning his exposure to OC  
13 spray and then an excessively hot shower, which did not allow for the spray to be washed off  
14 properly (plus the subsequent hours he endured this condition) establishes a serious medical need.

15 “Second, the plaintiff must show the defendant’s response to the need was deliberately  
16 indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to  
17 respond to a prisoner’s pain or possible medical need and (b) harm caused by the indifference.”  
18 Jett, 439 F.3d at 1096. Plaintiff demonstrates the first element of this prong by alleging that these  
19 four correctional officer defendants failed to respond to his claims of pain and pleas for medical  
20 help after he was pepper sprayed. (ECF No. 37 at 6-9.) The second element is shown through  
21 plaintiff’s allegations of ongoing pain and difficulty breathing for approximately three hours after  
22 he was sprayed. (Id. at 8-9.)

23 Plaintiff has supported these allegations with a sworn declaration. (ECF No. 37.) While  
24 defendants’ own declarations paint an entirely different picture of what occurred, the court cannot  
25 reject plaintiff’s “evidence simply because it consists entirely of the [claimant’s] self-serving  
26 testimony.” Eaton Acres, 904 F.2d at 487. While plaintiff’s declaration may be “hardly  
27 overwhelming, . . . a rational trier of fact could find it to be credible. Clearly, it would make a  
28 world of difference which version of events the trier of fact believes.” Id.

1           Accordingly, the undersigned recommends denying defendants' motion for summary  
2 judgment on the Eighth Amendment deliberate indifference claims as to defendants Aguilera,  
3 Blomquist, Gustafson, and Walker.

4           **C. Defendant Gustafson's Use of OC spray**

5                 **1. Justification for the Use of Force**

6           Defendant Gustafson first asserts that his use of force against plaintiff was justified under  
7 the circumstances. Specifically, defendant Gustafson states that plaintiff became agitated after  
8 his medical chronos were discontinued. (ECF No. 30-8 at 2.) Defendant Gustafson claims that  
9 plaintiff yelled obscenities and threw items out of the holding tank and across the R&R unit. (Id.)  
10 Next, defendant Gustafson claims he approached the holding tank with the intention of  
11 counseling plaintiff and ordering him to cease his disruptive behavior. (Id.) According to  
12 defendant Gustafson, plaintiff reacted by yelling, advancing towards the holding tank bars, and  
13 thrusting his right arm through the bars towards defendant Gustafson. (Id.) In response, from  
14 approximately two or three feet away, defendant Gustafson sprayed plaintiff in the face with  
15 pepper spray. (Id.)

16           Plaintiff paints a very different picture of the lead-up to the use of force. First, plaintiff  
17 contends that his agitation was triggered by defendant Gustafson ordering him to turn around so  
18 that handcuffs could be placed on him behind his back. (ECF No. 37 at 5.) Plaintiff claims that  
19 he asked for defendant Gustafson's supervisor and explained how his medical conditions  
20 necessitated waist restraints rather than handcuffs behind his back. (Id. at 5-6.) Plaintiff alleges  
21 that this response agitated defendant Gustafson who subsequently screamed at plaintiff to comply  
22 with his orders. (Id. at 6.) Then, without further provocation, plaintiff alleges that defendant  
23 Gustafson withdrew his canister of OC spray and sprayed plaintiff directly in the face. (Id.)

24           When a prison official uses excessive force against a prisoner, he violates the inmate's  
25 Eighth Amendment right to be free from cruel and unusual punishment.” Clement v. Gomez, 298  
26 F.3d 898, 903 (9th Cir. 2002). “Force does not amount to a constitutional violation in this respect  
27 if it is applied in a good faith effort to restore discipline and order and not ‘maliciously and  
28 sadistically for the very purpose of causing harm.’” Id. (quoting Whitley v. Albers, 475 U.S. 312,

1 320–21 (1986)). To make this determination, the court may evaluate “the need for application of  
2 force, the relationship between that need and the amount of force used, the threat ‘reasonably  
3 perceived by the responsible officials,’ . . . ‘any efforts made to temper the severity of a forceful  
4 response’” and the extent of any injury inflicted. Hudson v. McMillian, 503 U.S. 1, 7 (1992).

5 The evidence presented by the parties varies greatly. When taken most favorably to  
6 plaintiff, the evidence demonstrates that there is a genuine dispute of material fact as to the action  
7 of defendant Gustafson. First, defendant Gustafson’s claim that plaintiff was throwing items out  
8 of his holding tank is contradicted by plaintiff’s declaration to the contrary. (See ECF Nos. 30-8  
9 at 2; 37 at 5-6.) Additionally, defendant Gustafson’s assertion that plaintiff lunged at him through  
10 the bars of the cell is also contradicted by plaintiff’s declaration, which asserts that he did not  
11 make any movements towards defendant Gustafson. (See id.) So, in viewing the evidence in a  
12 light most favorable to the non-moving party, there is a genuine dispute of material fact  
13 concerning defendant Gustafson’s justification for using the OC spray. Thus, the only undisputed  
14 evidence concerning the justification would be plaintiff’s admission that he was questioning  
15 defendant Gustafson’s orders to submit to handcuffing rather than complying with them. (ECF  
16 No. 37 at 5-6.)

17 Second, while plaintiff himself admits to not immediately complying with instructions to  
18 turn around and put his hands behind his back for cuffing (ECF No. 37 at 5-6), such a momentary  
19 hesitation to respond while plaintiff is still confined to a holding tank would not necessitate the  
20 use of even a small amount of pepper spray. While the judgments of correctional officers are  
21 entitled to wide deference concerning their use of force, Hudson, 503 U.S. at 6, the facts of this  
22 situation do not demonstrate that plaintiff was clearly and admittedly participating in an action  
23 that required a forceful response from the correctional officer. From plaintiff’s perspective, he  
24 was simply asking a question about his medical accommodations and requesting that defendant  
25 Gustafson summon a supervisor. (ECF No. 37 at 6.)

26 Most significantly, plaintiff was confined to his holding cell at the time, separated from  
27 defendant Gustafson by the bars of the cell. Thus, even if plaintiff’s questioning of defendant  
28 Gustafson was not appropriate, he posed very little threat to defendant Gustafson, nor to the

1 general order of the prison institution. At this stage of the proceedings, it is only undisputed that  
2 defendant Gustafson administered the OC spray into a locked cell, striking plaintiff in the face.  
3 (See supra, pp. 6-7.) Defendant Gustafson’s allegations about plaintiff causing a disturbance and  
4 throwing items from the cell is disputed by plaintiff’s declaration. Thus, the question of whether  
5 defendant Gustafson faced a situation where he was entitled to apply force in good faith is subject  
6 to several questions of material fact. Accordingly, the undersigned recommends denying  
7 defendants’ motion for summary judgment concerning this claim.

8 **2. Heck v. Humphrey**

9 Separately, defendant Gustafson argues that plaintiff’s excessive force claim is barred  
10 pursuant to Heck v. Humphrey because a prisoner cannot advance a claim if its success would  
11 necessarily imply the invalidity of a lawful conviction or sentence. 512 U.S. 477, 487 (1994). In  
12 Heck, the Supreme Court held that a state prisoner’s claim for damages is not cognizable under 42  
13 U.S.C. § 1983 if a judgment in favor of the plaintiff would necessarily imply the invalidity of his  
14 conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has  
15 previously been invalidated. In Edwards v. Balisok, 520 U.S. 641, 646 (1997), the Supreme  
16 Court extended this ruling to bar claims under § 1983 for damages and declaratory relief brought  
17 by a state prisoner challenging the validity of the procedures used to deprive him of good-time  
18 credits.

19 Defendant Gustafson argues that plaintiff’s claim for excessive force and retaliation would  
20 imply the invalidity of the disciplinary proceedings resulting in the credit loss. (ECF No. 29-3 at  
21 19.) However, defendant Gustafson errantly bases this line of argument on the assumption that, if  
22 plaintiff were to win his claims in this action, the credits that he lost would be reinstated so as to  
23 necessarily impact the duration of his detention. At the screening stage, the court already found  
24 that plaintiff failed to state a cognizable claim concerning the purportedly false RVR. (ECF No. 6  
25 at 6.)

26 The cognizable retaliation and excessive force claims that plaintiff is currently proceeding  
27 on are that “defendant Gustafson used excessive force in violation of the Eighth Amendment and  
28 retaliated against plaintiff for his exercise of First Amendment rights when he intentionally

1 sprayed oleoresin capsicum in plaintiff's face." (Id. at 5.) Thus, plaintiff is not claiming that the  
2 RVR was an act of retaliation, but rather that the use of excessive force was retaliation for  
3 plaintiff asserting that his medical accommodations should not have been discontinued. So,  
4 because plaintiff's excessive force and retaliation claims do not invoke the RVR that was filed  
5 against him and that resulted in his loss of credits, a finding against defendant Gustafson in this  
6 action would not undermine the validity of the RVR proceedings. See Rodriguez v. CDCR Dept.  
7 Review Bd., No. 1:12-cv-00757-AWI-JLT, 2014 WL 7337391, \*9 (E.D. Cal. Dec. 22, 2014).

8 Accordingly, the undersigned recommends that the summary judgment be denied  
9 concerning this claim.

10 **D. Defendant Gustafson's Handcuffing of Plaintiff**

11 Plaintiff alleges that defendant Gustafson used excessive force in violation of the Eighth  
12 Amendment, retaliated against plaintiff for his exercise of his First Amendment rights, and was  
13 deliberately indifferent to plaintiff's serious medical needs in violation of the Eighth Amendment  
14 when he handcuffed plaintiff behind his back rather than use waist restraints as authorized by  
15 plaintiff's prison chrono.

16 At the time defendant Gustafson allegedly participated in the handcuffing of plaintiff  
17 behind his back,<sup>4</sup> plaintiff's medical accommodation for waist restraints instead of handcuffs had  
18 been discontinued per the order of the primary care provider, defendant Miranda. (ECF No. 30-  
19 12 at 15.) While defendant Gustafson was aware that plaintiff was agitated about defendant  
20 Miranda's medical conclusions (ECF No. 30-8 at 1-2), the fact remains that plaintiff was not  
21 entitled to any special cuffing accommodations at the time he was handcuffed after the use of  
22 force incident. (See ECF No. 30-12 at 15.)

23 Furthermore, as the court recommended in the separate findings and recommendations on  
24 defendant Miranda's motion for summary judgment, there was no deliberate indifference to  
25 plaintiff's serious medical needs through the discontinuation of the medical accommodations.  
26 (See ECF No. 52 at 11-15.) In particular, the undersigned found that plaintiff's allegations

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27 <sup>4</sup> Defendant Gustafson denies participating in the handcuffing of plaintiff (ECF No. 30-8 at 2),  
28 however, this is contradicted by plaintiff's declaration (ECF No. 37 at 7).

1 concerning the discontinuation of the cuffing accommodation merely amounted to second  
2 guessing of a medical opinion, which cannot establish a deliberate indifference claim. (Id. at 13-  
3 15.) Thus, in addition to the accommodations being formally withdrawn, the court has already  
4 concluded that there was no impropriety in the manner that the chronos were discontinued.

5 Accordingly, in this scenario, the court cannot find that defendant Gustafson (or any other  
6 correctional officer) was deliberately indifferent, acting in a retaliatory fashion, or using  
7 excessive force when he followed standard procedure for cuffing an inmate behind his back. A  
8 medical practitioner had officially rescinded the chrono concerning waist restraints, so therefore,  
9 the standard cuffing procedure was appropriate under the circumstances. For these reasons, the  
10 court recommends granting summary judgment for defendants on this claim.

11 **E. Qualified Immunity**

12 Finally, defendants argue that they are entitled to qualified immunity concerning all  
13 claims against them. (ECF No. 30-3 at 20-25.) If the above recommendations are adopted by the  
14 district court, the only remaining claims for which the court to analyze qualified immunity are:  
15 (1) Excessive force and retaliation by defendant Gustafson for the use of the OC spray against  
16 plaintiff, and (2) Deliberate indifference by defendants Aguilera, Blomquist, Gustafson, and  
17 Walker for denying plaintiff access to medical care after the use of force incident. For the  
18 following reasons, the undersigned finds that defendants are not entitled to qualified immunity.

19 In analyzing the qualified immunity defense, the court looks at the facts in the light most  
20 favorable to plaintiff. Johnson v. Bay Area Rapid Transit Dist., 724 F.3d 1159, 1168 (9th Cir.  
21 2013). “To determine whether an officer is entitled to qualified immunity, a court must evaluate  
22 two independent prongs: (1) whether the officer’s conduct violated a constitutional right, and (2)  
23 whether that right was clearly established at the time of the incident. . . . These prongs may be  
24 addressed in either order.” Castro v. County of Los Angeles, 797 F.3d 654, 663 (9th Cir. 2015)  
25 (citing Pearson v. Callahan, 555 U.S. 223, 232, 236 (2009)).

26 “To determine that the law was clearly established, we need not look to a case with  
27 identical or even ‘materially similar’ facts.” Serrano v. Francis, 345 F.3d 1071, 1077 (9th Cir.  
28 2003) (quoting Hope v. Pelzer, 536 U.S. 730, 739–41 (2002)). The question instead is whether

1 the contours of the right were sufficiently clear that a reasonable official would understand that  
2 his actions violated that right. Id.; see also Saucier v. Katz, 533 U.S. 194, 202 (2001).

3 **1. Excessive Force and Retaliation Claims against Defendant Gustafson**

4 The court, in assessing the merits of defendants' summary judgment motion above,  
5 already found that plaintiff has established genuine issues of material fact concerning whether his  
6 First and Eighth Amendment rights were violated by defendant Gustafson's use of force. (See  
7 supra, pp. 19-21.) Thus, defendant Gustafson is not entitled to qualified immunity under the first  
8 prong of the qualified immunity test.

9 Concerning the second prong, defendant Gustafson claims that he is entitled to qualified  
10 immunity because it was not clearly established that discharging a single burst of pepper spray in  
11 response to a perceived threat was unlawful. (ECF No. 30-3 at 22-24.) Defendant Gustafson's  
12 argument requires the court to view the facts in the light most favorable to him, rather than  
13 plaintiff, however, and must be rejected. Specifically, defendant states that California regulations  
14 permit correctional staff to use "force that an objective, trained and competent correctional  
15 employee, faced with similar facts and circumstances, would consider necessary and reasonable  
16 to subdue an attacker, overcome resistance, effect custody, or gain compliance with a lawful  
17 order." Cal. Code. Regs. Tit. 15, § 3268.

18 Additionally, defendant Gustafson refers to Graham v. Connor, 490 U.S. 386, 396 (1989),  
19 which held that the "reasonableness of a particular use of force must be judged from the  
20 perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."  
21 However, at this summary judgment stage of the proceedings, the court is entitled to view the  
22 evidence in the light most favorable to plaintiff. Johnson, 724 F.3d at 1168. The undisputed facts  
23 here are that defendant Gustafson sprayed pepper spray at plaintiff through the bars of a locked  
24 cell. Plaintiff submitted a sworn statement claiming that this was done without provocation and  
25 with the stated intent of harming plaintiff because of his complaints about the discontinuation of  
26 his medical accommodations. (ECF No. 37 at 5-6.)

27 Thus, based upon this evidence, the court cannot conclude that an officer facing this  
28 situation -- i.e. an officer addressing a compliant inmate confined to his cell -- would be

1 reasonable in spraying the inmate in the face with pepper spray for asking a question about his  
2 medical accommodations. Accordingly, the undersigned recommends denying defendant  
3 Gustafson's claim of qualified immunity.

4 **2. Deliberate Indifference Claims against Defendants Aguilera,**  
5 **Blomquist, Gustafson, and Walker**

6 The court, in assessing the merits of defendants' summary judgment motion above,  
7 already found that plaintiff has established genuine issues of material fact concerning whether his  
8 Eighth Amendment rights were violated by defendants Aguilera, Blomquist, Gustafson, and  
9 Walker's denial of plaintiff's access to medical care after the use of force. (See supra, pp. 17-  
10 19.) Thus, defendants are not entitled to qualified immunity under the first prong of the qualified  
11 immunity test.

12 Defendants do not contest that the right to medical treatment after the use of force incident  
13 was clearly established. Accordingly, defendants are not entitled to qualified immunity.

14 **IV. Conclusion**

15 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

16 1. Defendants' motion for summary judgment (ECF No. 30) be granted in part and  
17 denied in part;

18 2. Summary judgment be granted on behalf of defendant Kesler concerning all  
19 deliberate indifference claims;

20 3. Summary judgment be granted on behalf of defendant Gustafson concerning the  
21 retaliation, deliberate indifference, and excessive force claims arising from the handcuffing of  
22 plaintiff;

23 4. Summary judgment be denied on behalf of defendants Aguilera, Blomquist,  
24 Gustafson, and Walker concerning the deliberate indifference claims arising from the alleged  
25 denial of medical treatment after the use of force incident;

26 5. Summary judgment be denied on behalf of defendant Gustafson concerning the  
27 excessive force claim arising from his use of pepper spray against plaintiff; and

28 ////

1           6.       Summary judgment be denied on behalf of defendants Aguilera, Blomquist,  
2 Gustafson, and Walker concerning their qualified immunity defenses.

3           These findings and recommendations are submitted to the United States District Judge  
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
5 after being served with these findings and recommendations, any party may file written  
6 objections with the court and serve a copy on all parties. Such a document should be captioned  
7 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
8 objections shall be filed and served within seven days after service of the objections.<sup>5</sup> The parties  
9 are advised that failure to file objections within the specified time may waive the right to appeal  
10 the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

11 Dated: March 7, 2017

12  
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14   
15 DEBORAH BARNES  
16 UNITED STATES MAGISTRATE JUDGE

17 TIM-DLB:10  
18 DB / ORDERS / ORDERS.PRISONER.CIVIL RIGHTS / wash.0628.ms2

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27 <sup>5</sup> Local Rule 304 provides the court with discretion to shorten deadlines concerning objections to  
28 findings and recommendations. The undersigned is exercising that discretion with regard to the  
response to any objections because this is a straightforward matter and the issues have been  
comprehensively briefed.