

1 **I. PLAINTIFF’S ALLEGATIONS**

2 This action proceeds on plaintiff’s second amended complaint, captioned “Second
3 Amended Complaint as to Genuine Facts of Excessive Force – “Taser Use” (underlining in
4 original). Attached to the amended complaint and incorporated by reference is a “Supplemental
5 Report” prepared by defendant James, a police officer with the Sacramento County Sheriff’s
6 Department. The report states:

7 1432 Hrs, 1-4-2011, I, Officer M. James . . . was on patrol when a dispatch
8 call of an armed bank robbery was dispatched from the First Bank located
at 2880 Sunrise Bl.

9 I asked dispatch for the nearest cross street and advised I would be
10 checking the area. Dispatch advised the suspect was a black male adult
wearing a gray suit with stripes and armed with a large handgun.

11 I check the businesses in the surrounding area north of the bank. An
12 officer advised radio dispatch to contract the RT light rail and have them
check their cameras. At that time, I drove to the corner of Sunrise Gold
13 Center and Sunrise Bl. and noticed what appeared to be a black male adult,
later identified as S-1 William GRANVILLE, standing inside the business
14 at the time. I saw GRANVILLE was wearing an oversize coat and hair
pulled back in a pony tail. As I drove north in Sunrise Bl. I also saw a
15 bicycle laying down in front of the business.

16 I then rode to the RT light rail station to check for the person matching the
description. I did not see anyone matching that description. At that time,
17 Officer Aubuchon . . . met up with me and I relayed to him the information
regarding the subject inside the restaurant. Officer Aubuchon and I then
18 rode back to the business, riding through the parking lot from the south
around to the front. GRANVILLE was still inside and Officer Aubuchon
19 thought he to be wearing jeans. We drove to the front of the business and
parked in the parking lot just north, waiting for the person to exit.

20 1451 HRS: GRANVILLE exited the business, carrying a food bag. He
picked up the bicycle that was placed near the front door. At that time,
21 Officer Aubuchon noticed GRANVILLE to be wearing gray striped slacks
which was the description given in the call. As GRANVILLE rode north
22 through the parking lot, Officer Aubuchon asked if he could talk to him.
GRANVILLE looked back at us and continued to ride away from us.
23 Officer Aubuchon, this time using his PA, asked GRANVILLE if we
could speak with him. GRANVILLE started pedaling faster as he rode up
24 and over the grassy knoll and continued north on Sunrise Bl.

25 We then rode our marked police motorcycles over the same grassy knoll
and drove north. I was in front of Officer Aubuchon as he radioed
26 dispatch that we had a person matching the description riding a bicycle

1 away from us. As I was closing in on GRANVILLE, I could see he was
2 reaching towards his waistband with his right hand as he controlled the
3 handlebars with his left. I caught up to him as he placed both hands on the
4 handlebars and I ordered him to stop his bicycle. GRANVILLE continued
5 pedaling faster away. I positioned my motorcycle as close to the sidewalk
as I could and I pushed GRANVILLE in his left shoulder with my right
hand. GRANVILLE rode towards the edge of the sidewalk and off into
the field causing him to flip over the handlebars where he came to rest on
his stomach.

6 Officer Aubuchon and I parked in the gas station parking lot and
7 dismounted. GRANVILLE was now on his feet and trying to retrieve his
8 bicycle from the tangled weeds and grass. GRANVILLE had his back to
9 us and I could not see his front side or his hands. We ordered
10 GRANVILLE to get on the ground which he did not comply. Officer
11 Aubuchon had GRANVILLE at gunpoint as I drew my taser. I ordered
12 GRANVILLE to get on the ground which he did not comply. At that
13 timed, I yelled taser, taser, taser to let Officer Aubuchon know I was
14 deploying my taser. I deployed my taser . . . from approximately 10 feet
15 away. GRANVILLE then fell forward onto the ground with his arms
16 under his torso. Officer Aubuchon along with Officer Baldwin then
17 approached GRANVILLE, still ordering him to show his hands. I
18 maintained taser trigger pull due to the fact GRANVILLE would not show
19 his hands and the call had indicated a large firearm was seen in the
20 waistband. Officer Aubuchon handcuffed GRANVILLE without further
21 incident.

22 It is worth noting that plaintiff was granted leave to file a second amended
23 complaint following this court's denial of defendants' prior motion to dismiss. Specifically,
24 while the court agreed with defendants that plaintiff's first amended complaint failed to state any
25 claims for relief, plaintiff had alleged new facts in opposition to defendants' prior motion
26 warranting leave to amend. The court observed:

. . . In his opposition, plaintiff argues:

Defendants James and Aubuchon use of excessive
force is shown by not properly call for an ambulance or
seek any medical for the removal of usage of tasers on
plaintiff.

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1 Plaintiff adds – for the first time in this litigation – the following
2 allegations:

3 Also, by using a pit maneuver (by way of)
4 pushing plaintiff over the handlebars of bicycle
5 which caused plaintiff to flip over and land in some
6 palm trees leafs, unprofessional by their own
7 admittance there is no procedure or training to stop
8 a person on a bicycle. Defendant tasered plaintiff
9 for an untimely amount of time which caused
10 plaintiff to have severe pain in his knees, spinal
11 area, bottom of both feet (needle type of shooting
12 pain), lack of breath (causing plaintiff to use an
13 asthma inhaler) since the time of incident.

14 Plaintiff also newly alleges that the taser had embedded in his
15 spinal column.

16 Plaintiff has not included any of these allegations in the second amended complaint.

17 **II. STANDARD FOR MOTION TO DISMISS**

18 In considering a motion to dismiss, the court must accept all allegations of
19 material fact in the complaint as true. See Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). The
20 court must also construe the alleged facts in the light most favorable to the plaintiff. See Scheuer
21 v. Rhodes, 416 U.S. 232, 236 (1974); see also Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S.
22 738, 740 (1976); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). All
23 ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen,
24 395 U.S. 411, 421 (1969). However, legally conclusory statements, not supported by actual
25 factual allegations, need not be accepted. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50
26 (2009). In addition, pro se pleadings are held to a less stringent standard than those drafted by
lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

Rule 8(a)(2) requires only “a short and plain statement of the claim showing that
the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is
and the grounds upon which it rests.” Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007)
(quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to survive dismissal for

1 failure to state a claim under Rule 12(b)(6), a complaint must contain more than “a formulaic
2 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to
3 raise a right to relief above the speculative level.” Id. at 555-56. The complaint must contain
4 “enough facts to state a claim to relief that is plausible on its face.” Id. at 570. “A claim has
5 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
6 reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S. Ct. at
7 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more
8 than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting Twombly, 550 U.S.
9 at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,
10 it ‘stops short of the line between possibility and plausibility for entitlement to relief.’” Id.
11 (quoting Twombly, 550 U.S. at 557).

12 In deciding a Rule 12(b)(6) motion, the court generally may not consider materials
13 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);
14 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The court may, however, consider: (1)
15 documents whose contents are alleged in or attached to the complaint and whose authenticity no
16 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,
17 and upon which the complaint necessarily relies, but which are not attached to the complaint, see
18 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials
19 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.
20 1994).

21 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no
22 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per
23 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

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1 **III. DISCUSSION**

2 Defendants argue that plaintiff’s second amended complaint fails to state any
3 cognizable claim for relief. Plaintiff has not filed an opposition.

4 Plaintiff presents a claim of excessive force under the Fourth Amendment.¹ In
5 Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that police officers have “the
6 right to use some degree of physical coercion or threat thereof” to effectuate an arrest. Id. at 396.
7 The use of force must be objectively reasonable under the circumstances when viewing the facts
8 from the perspective of a reasonable police officer on the scene. See id. at 396-97. In this case,
9 the court finds that defendants acted reasonably under the circumstances. Specifically,
10 defendants had reasonable suspicion to detain plaintiff given the description provided by
11 dispatch. Defendants’ suspicion was reasonably heightened when plaintiff attempted to evade
12 them on his bicycle. A potential threat to defendants and the public was then presented when
13 plaintiff reached towards the waistband of his pants. At this point, defendant Smith acted
14 reasonably in pushing plaintiff off his bicycle. After plaintiff refused to comply with the officers’
15 orders, defendant Smith acted reasonably in deploying a taser.

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25 ¹ While the first amended complaint and plaintiff’s opposition to defendants’ prior
26 motion to dismiss suggested a claim of deliberate indifference to a serious medical need, plaintiff
appears to have abandoned any such claim for relief in the second amended complaint.

1 **IV. CONCLUSION**

2 Based on the foregoing, the undersigned recommends that defendants' unopposed
3 motion to dismiss (Doc. 61) be granted and that this action be dismissed in its entirety without
4 further leave to amend and with prejudice.

5 These findings and recommendations are submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
7 after being served with these findings and recommendations, any party may file written
8 objections with the court. Responses to objections shall be filed within 14 days after service of
9 objections. Failure to file objections within the specified time may waive the right to appeal.
10 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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12 DATED: August 31, 2017

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14 **CRAIG M. KELLISON**
15 UNITED STATES MAGISTRATE JUDGE
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