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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIADARREN BROWNE, aka AARON  
BROWNE,

Plaintiff,

No. C 03-0047 PJH

v.

SAN FRANCISCO SHERIFF'S  
DEPARTMENT, et al.,

Defendants.

**ORDER GRANTING DEFENDANTS'  
MOTION FOR RECONSIDERATION  
AND MOTION FOR SUMMARY  
JUDGMENT**

Defendants' motion for reconsideration of the court's November 19, 2007 order granting summary judgment in part and denying it in part, and defendants' motion for summary judgment, came on for hearing before this court on May 13, 2009. Plaintiff did not appear, and defendants appeared by their counsel Robert A. Bonta. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motions.

**BACKGROUND**

In January 2003, plaintiff Darren Browne, aka Aaron Browne, a former California pretrial detainee proceeding in propria persona, filed this civil rights action against nearly fifty defendants, alleging that he had been injured by officers and medical staff of the San Francisco County Sheriff's Department. The court dismissed the original complaint and the first amended complaint, and plaintiff filed the second amended complaint on September 22, 2003. On December 11, 2006, the court dismissed several claims and approximately half of the defendants, and ordered service. On April 9, 2007, the remaining defendants

1 filed a motion for summary judgment. On November 19, 2007, the court granted the  
2 motion for summary judgment in part and denied it in part.

3 The factual background is as set forth in the November 19, 2007 order. Briefly,  
4 plaintiff alleged in the second amended complaint that on November 21, 2002, while in  
5 custody at the San Francisco County Jail, he was assaulted without cause by Deputies  
6 Madden, Huntoon, Im, Balmy, Rodriguez, and Wong; that on November 28, 2002, during a  
7 cell search, he was assaulted without cause by Deputy Castro; and that on December 10,  
8 2002, after complaining about Deputy Madden to Chief Dempsey, he was assaulted by  
9 Deputy Madden and Deputy Sung.

10 Plaintiff alleged further that after the November 21, 2002 assault, the December 10,  
11 2002 assault, and the December 22, 2002 assault, he was denied medical treatment by  
12 various deputies and nurses; and that on December 10, 2002, Deputy Sung threw cold  
13 water on him and turned on the air-conditioning.

14 Finally, plaintiff alleged that on January 14, 2003, while en route to new housing, he  
15 was assaulted by Deputy Miller because he had complained to Lieutenant Peacoo  
16 (correctly spelled "Pecot") that his artwork had been confiscated; and that he was attacked  
17 twice on January 22, 2003, once by Sgt. Freeman, Deputy Miller, and Deputy Fields, and a  
18 second time by Deputies Prato, Murphy, Sanprano, and Forde, with the acquiescence of  
19 Lieutenant Pecot.

20 The court found no evidence to support the excessive force claims as to fifteen of  
21 the defendants, and dismissed those defendants from the case. The court denied the  
22 motion for summary judgment as to the excessive force claims alleged against defendants  
23 Castro, Freeman, Fields, Miller, and Madden. In addition, the court granted the motion with  
24 respect to the claims of deliberate indifference to serious medical needs alleged against the  
25 non-medical staff, and also the claims alleged against the defendant medical personnel.

26 On February 29, 2008, the court appointed counsel to represent plaintiff in this  
27 action. On January 28, 2009, defendants moved pursuant to Civil Local Rule 7-9(a) for  
28 leave to file a motion for reconsideration of the November 19, 2007 order, arguing that the

1 court had made findings that were contrary to the record presented. At the same time,  
2 defendants moved for summary judgment as to the remaining defendants. On January 29,  
3 2009, the court granted the motion for leave to file a motion for reconsideration.

#### 4 **DISCUSSION**

##### 5 A. Motion for Reconsideration

##### 6 1. Legal Standard

7 The Federal Rules of Civil Procedure do not address motions for reconsideration of  
8 interlocutory orders. Under the Civil Local Rules of this court, a party may seek  
9 reconsideration of “any interlocutory order” made in a case “[b]efore the entry of judgment  
10 adjudicating all of the claims and the rights and liabilities of all the parties in a case.” Civil  
11 L.R. 7-9(a). In seeking reconsideration, the moving party must specifically show

12 (1) That at the time of the motion for leave, a material difference in  
13 fact or law exists from that which was presented to the Court before entry of  
14 the interlocutory order for which reconsideration is sought. The party must  
15 also show that in the exercise of reasonable diligence the party applying for  
16 reconsideration did not know such fact or law at the time of the interlocutory  
17 order; or

18 (2) The emergence of new material facts or a change of law  
19 occurring after the time of such order; or

20 (3) A manifest failure by the Court to consider material facts or  
21 dispositive legal arguments which were presented to the Court before such  
22 interlocutory order.

23 Civil L.R. 7-9(b).

##### 24 2. Defendants’ Motion

25 In opposing defendants’ prior motion for summary judgment, plaintiff supported his  
26 factual assertions with copies of several prisoner grievance forms attached to his  
27 opposition as Exhibit A. He had originally prepared and submitted these grievance forms  
28 while he was in custody at the San Francisco County Jail from November 2002 through  
January 2003. The court found that Exhibit A was the evidentiary equivalent of a  
declaration. November 19, 2007, Order at 8-9.

It was based on this evidence that the court found that “[o]f the defendants that are  
named in Ex. A, only five – Castro (Ex. A at 1), Madden (Exhibit A at 2), Freeman (Ex. A at

1 7, 9, 12), Fields (Ex. A at 9) and Miller (Ex. A at 9) – are accused of excessive force with a  
2 sufficient degree of particularity as to support a viable claim under [Rodriguez v. Airborne  
3 Express, 265 F.3d 890, 902 (9th Cir. 2001)].” November 19, 2007 Order at 9-10.

4 In their motion for reconsideration, defendants assert that the court mistook separate  
5 incidents relating to Deputies Castro, Madden, and Miller described in Exhibit A as support  
6 for entirely different incidents relating to Deputies Castro, Miller, and Madden alleged in the  
7 second amended complaint.

8 Defendants note that plaintiff alleged in the second amended complaint that Deputy  
9 Castro was involved in a November 28, 2002 incident involving excessive force against  
10 plaintiff, and that the court referred to this allegation in the November 19, 2007 order.  
11 Defendants note further that the court denied summary judgment as to the excessive force  
12 claims alleged against Deputy Castro, based on the evidence attached in Exhibit A.  
13 Defendants argue, however, that the evidence the court referred to and that plaintiff  
14 attached to his opposition related to a January 4, 2003 incident that was unrelated to the  
15 November 28, 2002 incident.

16 Defendants assert that the actual grievance form described an incident occurring on  
17 January 4, 2003, in which plaintiff was being escorted from a safety cell. They contend that  
18 the grievance form says nothing about a “cell search” (alleged as part of the November 28,  
19 2002 incident), and clearly indicates that the date of the incident was January 4, 2003. The  
20 grievance form states as follows:

21 Deputy Castro on escort from the safety cell applied unnecessary force in the  
22 bending and twisting of my right wrist – which I suffer from continue pain  
23 already due to prior deputies assaults & safety cells. I asked Castro to ease  
24 off & explained to Johnson who had my left hand to witness and look how  
upward high Castro was bending my wrist when it was unnecessary as I was  
being walked.

25 Thus, defendants contend, the grievance form and the allegations in the complaint relate to  
26 two separate and distinct incidents, and the “evidence” contained in the grievance form  
27 therefore cannot be used to oppose summary judgment on the claim regarding the use of  
28 excessive force on November 28, 2002.

1 For similar reasons, defendants argue that claims against Deputy Madden relating to  
2 the November 21, 2002 incident should be dismissed. Defendants note that plaintiff  
3 attached a grievance form as part of Exhibit A, which relates to the alleged December 10,  
4 2002 incident involving Deputy Madden, but that he provided no evidence whatsoever  
5 relating to the November 21, 2002 incident.

6 Defendants also contend that Deputy Miller should be dismissed as to allegations  
7 relating to the January 14, 2003 incident. Defendants note that plaintiff attached a  
8 grievance form as part of Exhibit A, which relates to the alleged January 22, 2003 incident  
9 involving Deputy Miller, but contend that he provides no evidence relating to the purported  
10 January 14, 2003 incident.

11 The court has reviewed the second amended complaint and plaintiff's opposition to  
12 the prior motion for summary judgment, along with the grievance forms attached as Exhibit  
13 A, and agrees with defendants that plaintiff has provided no evidence to support the claim  
14 against Deputy Castro regarding the alleged November 28, 2003 incident, the claim against  
15 Deputy Madden relating to the alleged November 21, 2002 incident, and the claim against  
16 Deputy Miller relating to the alleged January 14, 2003 incident.

17 The second amended complaint alleges incidents occurring on November 21, 22,  
18 25, 26, and 28, 2002; December 9, 10, 12, 27, 28, 29, 2002; and January 1, 3, 4, 6-7, 9,  
19 14, and 22, 2003. Exhibit A contains copies of grievance forms relating to incidents  
20 occurring on November 22, 2002; December 10, 15, 27-28, and 30, 2002; and January 4,  
21 8, 22, and 23, 2003.

22 Only five dates of incidents described in the grievance forms match dates of  
23 incidents alleged in the second amended complaint – November 22, 2002, December 10  
24 and 28, 2002, and January 4 and 22, 2003. However, of the incidents alleged on those five  
25 dates, only the January 22, 2003 incident is described in the second amended complaint  
26 and also in a grievance form.

27 There is no grievance form (and thus no evidence) relating to any incident occurring  
28 on November 28, 2002, November 21, 2002, or January 14, 2003. The November 22,

1 2002 grievance form – the only grievance relating to any incident in the month of November  
2 2002 – refers only to an alleged denial of medical treatment, and does not mention an  
3 attack by any of the defendant deputies. The December 15, 2002 grievance form  
4 references an alleged attack on plaintiff by Deputy Madden on December 10, 2002, but  
5 none of the grievance forms relate to an alleged attack on November 21, 2002. None of  
6 the grievance forms relate to any incident involving Deputy Miller assaulting plaintiff for  
7 complaining about the confiscation of his artwork (the alleged January 14, 2003 incident).

8 Accordingly, having reconsidered the evidence, the court finds that summary  
9 judgment must be GRANTED as to the claim against Deputy Castro regarding the alleged  
10 November 28, 2002 incident, the claim against Deputy Madden relating to the alleged  
11 November 21, 2002 incident, and the claim against Deputy Miller relating to the alleged  
12 January 14, 2003 incident.

13 Because the claim involving the alleged November 28, 2002 incident is the only  
14 claim asserted against Deputy Castro in the second amended complaint, and because  
15 plaintiff has provided no evidence to support this claim or to counter the evidence provided  
16 by defendants, the court finds that Deputy Castro must be dismissed from the case.  
17 Similarly, because the claim against Deputy Madden relating to the alleged November 21,  
18 2002 incident is unsupported by any evidence, and because the only other claim of  
19 excessive force asserted against Deputy Madden (the December 10, 2002 claim) is also  
20 unsupported by any evidence, the court finds that Deputy Madden must be dismissed from  
21 the case.

22 Thus, the only claims remaining in the case are the excessive force claims asserted  
23 against Sergeant Freeman and Deputies Fields and Miller, arising from the January 22,  
24 2003, incident.

25 B. Motion for Summary Judgment

26 1. Legal Standard

27 Summary judgment is appropriate when there is no genuine issue as to material  
28 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

1 Material facts are those that might affect the outcome of the case. Anderson v. Liberty  
2 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there  
3 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

4 A party seeking summary judgment bears the initial burden of informing the court of  
5 the basis for its motion, and of identifying those portions of the pleadings and discovery  
6 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp.  
7 v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof  
8 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other  
9 than for the moving party. Southern Calif. Gas. Co. v. City of Santa Ana, 336 F.3d 885,  
10 888 (9th Cir. 2003).

11 On an issue where the nonmoving party will bear the burden of proof at trial, the  
12 moving party can prevail merely by pointing out to the district court that there is an absence  
13 of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-25. If the  
14 moving party meets its initial burden, the opposing party must then set forth specific facts  
15 showing that there is some genuine issue for trial in order to defeat the motion. See Fed.  
16 R. Civ. P. 56(e); Anderson, 477 U.S. at 250.

17 2. Defendants' Motion

18 Defendants argue that summary judgment should be granted as to plaintiff's  
19 remaining excessive force claims against Sergeant Freeman, and Deputies Fields and  
20 Miller,<sup>1</sup> for two reasons. First, they assert that plaintiff has served verified written discovery  
21 responses indicating that he suffered no physical injuries, and that any force used by  
22 defendants should therefore be considered, at best, de minimis. Second, they contend that  
23 plaintiff has no evidence that any defendant used force “maliciously and sadistically for the  
24 very purpose of causing harm.”

25 Defendants' first argument is that summary judgment is appropriate because there  
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27 <sup>1</sup> Defendants also move for summary judgment as to the claims asserted against  
28 Deputies Castro and Madden. Those claims, and the basis for their dismissal, are addressed  
above in the discussion of the motion for reconsideration.

1 was no violation of plaintiff's constitutional right regarding the use of force in the prison  
2 context. A plaintiff alleging a claim under 42 U.S.C. § 1983 must establish, first, that a  
3 person acting under color of state law committed the conduct at issue, and second, that the  
4 conduct deprived the claimant of some right, privilege, or immunity protected by the  
5 Constitution or laws of the United States. White v. Roper, 901 F.2d 1501, 1503 (9th Cir.  
6 1990).

7 The plaintiff must also show that the defendant's unconstitutional conduct was the  
8 actual and proximate cause of the plaintiff's injuries. Id. at 1505-06. Here, it is plaintiff's  
9 burden to establish, with evidence, both that his injuries were caused by defendants'  
10 conduct, and that defendants' conduct rises to the level of a substantive due process  
11 violation.

12 The Due Process Clause of the Fourteenth Amendment protects a post-arraignment  
13 pretrial detainee from the use of excessive force that amounts to punishment. Bell v.  
14 Wolfish, 441 U.S. 520, 535 n.16 (1979). In general, for a prisoner excessive force claim,  
15 the issue is whether the defendant applied force in a good faith effort to maintain or restore  
16 discipline, or instead, did so maliciously and sadistically for the purpose of causing harm.  
17 Hudson v. McMillian, 503 U.S. 1, 7 (1992); see also Martinez v. Stanford, 323 F.3d 1178,  
18 1184 (9th Cir. 2003).

19 The Ninth Circuit has held that in resolving a due process claim alleging excessive  
20 force, the court should consider the following factors: (1) the need for the application of  
21 force, (2) the relationship between the need and the amount of force that was used, (3) the  
22 extent of the injury inflicted, and (4) whether force was applied in a good faith effort to  
23 maintain and restore discipline. White, 901 F.2d at 1507.<sup>2</sup>

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24  
25 <sup>2</sup> These are similar to the factors set out in Hudson, which arose in the context of an  
26 excessive force claim brought by a prisoner under the Eighth Amendment. Those factors are  
27 (1) the need for application of force, (2) the relationship between the need and the amount of  
28 force used, (3) the threat reasonably perceived by the responsible officials, (4) any efforts  
made to temper the severity of the forceful response, and (5) the extent of injury suffered by  
an inmate. Hudson, 503 U.S. at 7. Even though pretrial detainees' claims arise under the Due  
Process Clause, the Eighth Amendment serves as a benchmark for evaluating those claims.  
See Carnell v. Grimm, 74 F.3d 977, 979 (9th Cir. 1996).

1 Here, defendants address only one of these four factors, arguing that because  
2 plaintiff has attested under oath that he suffered no physical injuries as a result of the  
3 alleged instances of use of force, the force used cannot be considered “excessive” under  
4 the governing law. Defendants cite to three interrogatory responses provided by plaintiff in  
5 response to interrogatories propounded by defendants in May 2008.

6 First, in response to Interrogatory No. 5, asking plaintiff to state whether he  
7 attributed “any physical mental or emotional injuries” to the incident, he responded, “Yes.  
8 Emotional PTSD and depression.” Plaintiff did not mention any physical injuries.

9 Second, in response to Interrogatory No. 6, asking him to identify “each injury” he  
10 attributed to the incident, and the area of his body affected, plaintiff responded, “PTSD,  
11 anxieties, depression and personality disorder,” but mentioned no physical injuries or any  
12 part of his body that was affected.

13 Third, in response to Interrogatory No. 17, asking him to identify all injuries or  
14 damages he received from the incident, plaintiff responded, “See answer to Interrogatory  
15 No. 6 [regarding purported psychological damages only] and 12 [regarding purported loss  
16 of income or earning capacity only].” Again, plaintiff did not claim any physical injuries.

17 Defendants’ second argument is that plaintiff has no evidence that any defendant  
18 used force with the requisite malice and sadism. Plaintiff’s only response to this argument  
19 is that “jumping on the back of a prone person” (apparently a reference to allegations in the  
20 second amended complaint to the November 10, 2002 incident involving Deputy Madden)  
21 “certainly meets the definition adequately.”

22 The Due Process Clause does not protect a pretrial detainee from the use of all  
23 force, but only from the use of excessive force that amounts to punishment. See Graham  
24 v. Connor, 490 U.S. 386, 395 n.10 (1989). Punishment in the constitutional sense refers to  
25 the imposition of penalties for an alleged crime. In the context of detention before trial, a  
26 custodial authority may impose restrictions or use force on a detainee in ways that are used  
27 in the detention facility to maintain safety and order – “legitimate governmental objectives”  
28 – justifying restraints on pretrial detainees. See Bell, 441 U.S. at 538 n.19.

1 In general, a prisoner plaintiff alleging a constitutional claim of excessive force must  
2 allege and prove the unnecessary and wanton infliction of pain. See Whitley v. Albers, 475  
3 U.S. 312, 320 (1986); see also Hudson, 503 U.S. at 5. In the Ninth Circuit, force resulting  
4 in the absence of any physical injury fails to rise to the level of a “malicious and sadistic”  
5 use of force. White, 901 F.2d at 1507.

6 Here, the evidence on both sides is thin. With their previous motion for summary  
7 judgment, defendants included declarations from most of the defendants, including  
8 Sergeant Freeman and Deputy Fields (but not Deputy Miller, whom defendants claimed  
9 was on extended medical leave), stating that they had not assaulted plaintiff. For his part,  
10 plaintiff provided no declaration, but instead relied on the allegations in the second  
11 amended complaint, and also submitted copies of various grievance forms that he had  
12 submitted to the Sheriff’s Department.

13 In the second amended complaint, plaintiff alleged as follows with regard to the  
14 January 22, 2003 incident:

15 On January 22, 2003 at County Jail Two I was assaulted and attacked  
16 physically by Sgt Freeman & Deputy Miller #1364 inside a safety cell. Sgt.  
17 Freeman enter the safety cell and punching me throwing me to the floor and  
18 kicking me then him & Miller #1364 drags me onto another safety cell room  
19 and Miller begins punching me twisting my wrist and smashed face into the  
20 floor urine hole. Deputy Fields CJ-2 Deputy along with Sgt Freeman began  
21 sitting on my body with their weight causing me to grasp for air./ medical  
22 treatment denied. Then later Sgt. Freeman delivered a white tip poisonous  
23 spider and placed it inside the safety cell.

24 Amended Cplt at 6-7.

25 In the relevant grievance form, which consists of only pages 1-4 of what is labeled a  
26 7-page form, plaintiff stated as follows:

27 Sgt Freeman used excessive force snatch me out of one safety cell &  
28 assault’n me in another. Freeman used excessive force that was not applied  
in good faith & effort to maintain or restore discipline & used it maliciously &  
sadistically to cause harm including placing a lethal venomous white tipped  
legged spider with white dots on its back inside the safety cell he was  
replacing me in. In violation of the eight Amendment Constitution against  
excessive force & cruel & unusual punishment as well as attempted murder  
on my life. [citing cases] In safety cell 1, Nikki from psych signed me out.  
9:00 a.m. Miller #1352 brings me medium size clothing. I explain pants are x-  
tra tight hugging my thighs and upon the back of me: well you’re stay’n in  
there till you put them on and leaves, Sr Martindale arrives tells me he’ll take

1 care of it, doesn't return, Freeman appears opens the door I'm half dressed  
2 (no pants) tells me to put them on he wants to see tells me to turn around to  
3 see how they further fit I tell him I've always worn 2xs and I don't wanna be  
4 seen in such tight clothing. Freeman then agrees to go get 2x pants also  
5 asks me why I'm in the safety cell: I explained due to late night security  
6 housing with Lt. Pecot. About an half hour Freeman reappears Miller #1352  
7 & Fields (not youg deputy Fields) Freeman opens up the door again and  
8 saids so Browne you're refusing to get dressed I thought you were getting me  
9 an 2x I said Freeman then saids So you're refusing to come out & get housed  
10 before I could finish shak'n my head I was suddenly attacked and grabbed  
11 hold of by Freeman say'n I'm tired of your shit snote[unclear] and throws me  
12 out the safety cell Miller immediately also attacks me bending my arm Field  
13 grabs me too - I'm forcibly being pushed Freman yells don't put him in two,  
14 put him in three I then am being pushed face down Sgt Freeman lands a knee  
15 into the center of my back Miller #1352 pushes my face near into the urine  
16 drain and holds me there Fields saids Browne be cool and follow instruction  
17 preventing from further harm happening I remained silent until they left./  
18 Afterward Sr Martindale is told what just happen Freeman reappears all red in  
19 the face I tell him look at you you're all red in the face and you just added an  
20 assault claim now against you on top of being renamed as an defendant  
21 again Freeman responds & winks his eye and saids its just beginning I'm not  
22 through with you yet youll see and winks his eye again and leaves off. I said  
23 to Sr Martindale did you just here that I did Martindale said: I then said  
24 Freeman knows this is his second time being named as a defendant and  
25 when you have a lot of years in your career and do stupid things like this you  
26 can't blame me Sr. Martindale then replied to me you know Browne I don't do  
27 my job that way I come to work and only do my job thats it nothing else I  
28 always come and talk to you don't I I listen to you don't I then strangely  
enough he said Browne I have a grievance of yours that I found in my box-  
mail Nov. 26, 2002 incident with Espinoza yelling top of the morning antics  
[copy of grievance ends here].

17 The January 23, 2003 grievance form also appears to refer to the incident of  
18 January 22, 2003. In this grievance form, plaintiff states as follows:

19 Sgt. Freeman & Sr Deputy Martindale attempted to end my life inside a safety  
20 cell using a poisonous white tip spider (lethal venom). Folded inside of a  
21 safety blanket being handed to me inside. Sgt Freeman had just recently  
22 finished assaulting me placing me inside from one safety cell to another  
23 before pass'n it to me. I saw him and Sr Martindale placing something inside  
24 the blanket over near the locker area carrying my food with the safety blanket  
underneath. Before handing it to me Sgt Freeman stated its just beginning  
and weeks his eye and saids on I'm not done with you yet you'll see as he  
hands me the blanket & Food suspicious I don't eat the food & places it to the  
side and unfolds the blanket and wraps it around me and lay down on the  
floor.

25 In the present motion, defendants rely on plaintiff's responses to Interrogatories Nos.  
26 5, 6, and 17. Plaintiff provides no additional evidence. He states in his opposition that  
27 "[d]epositions of four of the defendant deputy sheriffs have been taken," and that all agree  
28 that they do not remember plaintiff as a violent inmate; and that defendants also deposed

1 plaintiff's former cell mate, who "was able to verify some of the events leading to the  
2 defendant being removed from the cell and also corroborated the fact of the rough scare  
3 tactics used by the deputies in the jail."

4 With regard to defendants' argument that summary judgment must be granted  
5 because plaintiff has denied any physical injuries, plaintiff contends that in his deposition,  
6 he "did describe the discomfort he experiences with his back as a result of the rough  
7 treatment he received." In addition, he claims that defendants had him examined by an  
8 orthopedist and a psychiatrist, and that they failed to produce copies of the reports, and  
9 also asserts that defendants "have obtained extensive medical records of the plaintiff."  
10 Plaintiff refers again to the copies of the grievances he previously filed, and contends that  
11 he "lodged the shoes that were cut up by the deputies."

12 None of plaintiff's assertions, however, are supported by any actual evidence  
13 presently before the court (other than the previously-filed grievance forms). Plaintiff  
14 provided no declaration in opposition to the prior motion for summary judgment (other than  
15 the grievances, which the court construed as the evidentiary equivalent of a declaration),  
16 and has provided none in opposition to the present motion. Neither plaintiff nor defendants  
17 have provided the court with copies of any deposition transcripts, or even any excerpts  
18 from deposition transcripts, and neither side has included any medical evidence, whether  
19 records, reports, or results of examinations.

20 A party opposing summary judgment "may not rely merely on allegations or denials  
21 in its own pleading; rather, its response must – by affidavits or as otherwise provided in  
22 [Rule 56] – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P.  
23 56(e)(2). Thus, it is the burden of the party opposing summary judgment to make an  
24 affirmative showing on all matters placed in issue by the motion as to which it will have the  
25 burden of proof at trial. See Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure  
26 Before Trial § 14:144 (2008) (citing Celotex, 477 U.S. at 323-24). The opposing party's  
27 burden is not excused by the fact that the evidence to oppose the motion is possessed by  
28 the moving party, so long as there has been full opportunity to conduct discovery.

1 Anderson, 477 U.S. at 257.

2 Here, as noted above, there is no evidence supporting the claims regarding any  
3 incident except the January 22, 2003, incident involving Sergeant Freeman and Deputies  
4 Fields and Miller. As to that incident, the court finds that plaintiff has failed to meet his  
5 burden.

6 In White, the plaintiff alleged that jail officers violated his due process rights when  
7 they attempted to place him in a cell with a dangerous inmate. The plaintiff did not dispute  
8 that he refused to enter the cell and backed away from the defendant officer. The court  
9 found that plaintiff's actions created a need for the officers to apply reasonable force to  
10 control him. While the amount and type of force used was disputed by the parties, the  
11 court found that White had "not shown that he required or even that he requested medical  
12 treatment for the cut wrist and the bruises he allegedly suffered." Id., 901 F.2d at 1507.  
13 Nor did he allege that "he lost consciousness at any time, or that he suffered any  
14 permanent injury." Id. The court concluded that White had "not made a showing sufficient  
15 to establish that the use of force against him was 'excessive' or 'brutal.'" Id.

16 Here, plaintiff's main claim in the January 22, 2003 grievance form appears to be  
17 that Sergeant Freeman used excessive force "maliciously and sadistically to cause harm"  
18 by placing a spider in the safety cell before moving plaintiff back in. The court ruled in the  
19 November 19, 2007 order, however, that plaintiff could not support his excessive force  
20 claim with the "fantastical allegation that Sergeant Freeman tried to kill him by putting a  
21 'lethal venomous [sic] white tipped legged spider with white dots on its back' inside  
22 plaintiff's cell." November 19, 2007 Order, at 10 n.4.

23 Other than the claim regarding the spider, plaintiff asserts that after complaining that  
24 plaintiff had refused to dress himself in the clothes provided, Sergeant Freeman "grabbed"  
25 him and threw him out of the cell and bent his arm; that Deputy Miller also bent his arm;  
26 that Deputy Fields grabbed him; that someone pushed him; that Sergeant Freeman put a  
27 knee into the center of his back; and that Deputy Miller pushed his face near the urine  
28 drain. None of these claims are sufficient to constitute excessive or brutal force, and

1 plaintiff has provided no evidence that he was in fact injured or that he sought medical  
2 treatment for any injuries resulting from this incident.

3 Moreover, the court notes that plaintiff's description of this incident is immediately  
4 followed by a description of a seemingly calm discussion between plaintiff and Sergeant  
5 Freeman regarding plaintiff's intention to file assault charges against Freeman; and a  
6 recounting of an encounter between himself and Senior Deputy Martindale, in which  
7 plaintiff complained about Sergeant Freeman, and Senior Deputy Martindale discussed his  
8 own personal work philosophy with plaintiff.

9 Plaintiff claims in his responses to interrogatories that he suffers from "PTSD,  
10 anxieties, depression, and personality disorder," but he provides no evidence showing that  
11 these alleged injuries were caused by the conduct of Sergeant Freeman or Deputies Fields  
12 and Miller on January 22, 2003. Accordingly, the court finds that summary judgment must  
13 be GRANTED as to this remaining excessive force claim.

14 **CONCLUSION**

15 In accordance with the foregoing, the court GRANTS defendants' motion for  
16 reconsideration, and GRANTS defendants' motion for summary judgment. Defendants'  
17 motions to strike are DENIED.

18  
19 **IT IS SO ORDERED.**

20 Dated: May 13, 2009

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23 PHYLLIS J. HAMILTON  
24 United States District Judge  
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