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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JAVON LAMAR TORBERT,
12 Plaintiff,

13 v.

14 WILLIAM D. GORE, Sheriff of San
15 Diego Sheriff Department; DEPUTY
16 DAILLY, Sheriff of San Diego Sheriff
17 Department; DEPUTY McMAHON,
18 Sheriff of San Diego Sheriff Department;
19 DEPUTY Y.G. GEBREBIORGIS, Sheriff
20 of San Diego Sheriff Department;
21 SERGEANT ESTRADA, Sheriff of San
22 Diego Sheriff Department; COUNTY OF
23 SAN DIEGO; and DOES 1-50,
24 Defendants.

Case No.: 3:14-cv-02911-BEN (NLS)

ORDER:

**(1) ADOPTING REPORT AND
RECOMMENDATION [ECF No.
100];**

**(2) GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT [ECF No.
71]; and**

**(3) GRANTING PLAINTIFF'S
MOTION TO AMEND COMPLAINT
[ECF No. 106]**

23 Plaintiff Javon Lamar Torbert, a state prisoner proceeding pro se and in forma
24 pauperis, brought this action under 42 U.S.C. § 1983, asserting claims under state law
25 and for violations of the Eighth Amendment arising from two alleged incidents. The
26 Court addresses two motions in this Order: (1) Defendant's motion for summary
27 judgment on all claims, and Magistrate Judge Stormes's Report and Recommendation
28 thereon; and (2) Plaintiff's motion to amend his complaint. Each is addressed in turn.

1 **I. Report and Recommendation on Defendants’ Motion for Summary Judgment**

2 After an extended discovery period, Defendants filed a motion for summary
3 judgment, seeking judgment in their favor on all claims. (Mot. Summ. J., ECF No. 71.)
4 On August 15, 2016, the Honorable Nita L. Stormes, United States Magistrate Judge,
5 issued a thorough and thoughtful Report and Recommendation in which she
6 recommended granting in part and denying in part Defendants’ motion for summary
7 judgment. (R&R at 2, ECF No. 100.) Plaintiff filed objections. (Obj., ECF No. 104.)
8 Where a timely objection to a report and recommendation has been filed, the district
9 court reviews *de novo* those portions of the report or specific proposed findings or
10 recommendations to which an objection was filed. 28 U.S.C. § 636(b)(1).

11 Plaintiff objects to the Report and Recommendation’s conclusions regarding his
12 deliberate indifference claim concerning Defendants’ failure to return his cane (claim
13 two) and his deliberate indifference claim related to having to wait to see a doctor and not
14 being referred to a neurologist (claim three). To prevail on an Eighth Amendment claim
15 based on prison medical treatment, an inmate must show “deliberate indifference to
16 serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A plaintiff must
17 establish a “serious medical need” by demonstrating that “failure to treat a prisoner’s
18 condition could result in further significant injury or the ‘unnecessary and wanton
19 infliction of pain.’” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citation
20 omitted).

21 With respect to Plaintiff’s deliberate indifference claim related to the cane, the
22 Report and Recommendation concluded that Plaintiff had not made an objective showing
23 that he had a serious medical need requiring the cane. (R&R at 15.) Plaintiff’s objection
24 argues that Defendants acted in bad faith by taking away his cane without a doctor’s
25 consent.

26 The Court finds that there is no genuine dispute whether Plaintiff suffered from a
27 serious medical need for a cane. He has failed to show he had such a need because he
28 was able to walk without the cane. In fact, there is video footage documenting him

1 pacing for at least six minutes without using his cane. Contemporaneous medical records
2 also support this finding. (Obj. Ex. D (“I/P is seen doing exercises throughout the day
3 and not using cane”); Ex. F (“IP observed by staff ambulating w/o cane”) Ex. I (noting
4 that Plaintiff’s “gait” was “steady”); Ex. K (“[A]mbulation stable without cane in clinic
5 today. Do not think this pt warrants use of a cane at this point.”)) Moreover, the cane
6 was taken away as a security measure because Plaintiff was upset and agitated, after he
7 had already been observed walking easily without it. Therefore, the Court overrules
8 Plaintiff’s objection on claim two.

9 As to Plaintiff’s deliberate indifference claim for having to wait 13 hours before he
10 was seen for an arm injury and not being referred to a neurologist, the Report and
11 Recommendation again found that Plaintiff had not established a serious medical need.
12 (R&R at 16-17 (“No objective medical evidence shows that either an immediate visit to a
13 doctor was necessary, or that referral to a neurologist was warranted.”). Plaintiff objects
14 that Defendants ignored his pain and intentionally misled medical staff about the source
15 of his pain. He contends that “Dr. Dillman wrote [in] her notes . . . that Plaintiff could
16 get an appointment with a nerve specialist if symptoms persisted.” (Obj. at 5.)

17 Again, the Court agrees with the Report and Recommendation. Plaintiff was
18 injured in the evening and received pain medicine shortly after the injury. He was seen
19 by medical staff the next morning and had numerous medical appointments to follow up
20 on his injury. None of the medical exams revealed a lasting injury, and no doctor
21 believed a neurology referral was necessary. Thus, there is no genuine dispute whether
22 Plaintiff suffered a serious medical need. The Court overrules Plaintiff’s objection.

23 In sum, this Court has carefully reviewed the Report and Recommendation,
24 Plaintiff’s Objections, and the remainder of the record in this matter and **ADOPTS** the
25 Report and Recommendation in full.

26 **II. Plaintiff’s Motion to Amend Complaint**

27 After the Magistrate Judge issued the Report and Recommendation, Plaintiff filed
28 a motion to amend his complaint. (Mot. to Amend Compl., ECF No. 106.) Plaintiff

1 seeks to reduce his request for compensatory damages from \$800,000 to \$75,000, to
2 reduce his request for punitive damages from \$1.5 million to \$125,000, and to change his
3 initial request for a jury trial to a request for a bench trial. (*Id.* at 1.)

4 Leave to amend under Federal Rule of Civil Procedure 15(a)(2) should be “freely
5 give[n] . . . when justice so requires.” Courts consider “undue delay, bad faith, dilatory
6 motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to
7 the opposing party, and futility of the proposed amendment” in deciding whether justice
8 requires granting leave to amend under Rule 15. *Moore v. Kayport Package Express,*
9 *Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*, 370 U.S. 178, 182
10 (1962)).

11 In light of the limited changes to Plaintiff’s complaint and the lack of prejudice to
12 Defendants, Plaintiff’s motion to amend his complaint is **GRANTED**. Plaintiff need not
13 file an Amended Complaint.

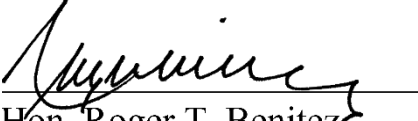
14 **III. Conclusion**

15 For the reasons discussed above, the Report and Recommendation is **ADOPTED**
16 in its entirety. Defendants’ Motion for Summary Judgment is **GRANTED IN PART**.
17 With this Order, the Court grants summary judgment on all claims except for one. The
18 only remaining claim for relief is claim one for excessive force as alleged against
19 Defendant Dailly related to the October 2, 2014 incident.

20 Plaintiff’s motion to amend his complaint is **GRANTED**.

21 **IT IS SO ORDERED.**

22
23 Dated: October 5, 2016

24 
25 Hon. Roger T. Benitez
26 United States District Judge
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