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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) DENYING PLAINTIFF'S  
MOTION TO AMEND CLAIM OF  
EXCESSIVE FORCE; and**

**(2) DENYING PLAINTIFF'S  
MOTION FOR EXTENSION OF  
PRETRIAL PROCEEDINGS**

23 Presently before the Court are two motions brought by Plaintiff Javon Lamar  
24 Torbert: (1) a motion to amend to add a claim of excessive force; and (2) a motion for an  
25 extension of pretrial proceedings. Both motions are **DENIED**.

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1 **I. Motion to Amend**

2 **A. Background**

3 Plaintiff moves to amend his complaint to state a new claim for excessive force.  
4 As background, the only remaining claim is one for excessive force against Defendant  
5 Dailly related to closing a prison door on Plaintiff’s hand. In his complaint, Plaintiff  
6 alleged that he “was the victim of excessive force from Deputy Dailly by having the  
7 metal door . . . slammed on Plaintiff’s left forearm” “after snatching a walking cane out  
8 of Plaintiff’s left hand.” (Compl. at 3, 4, ECF No. 1.) There is video footage of the  
9 incident. In the Report and Recommendation on Defendants’ motion for summary  
10 judgment, Magistrate Judge Stormes described the incident as follows:

11 The video footage shows that Torbert backed into the cell with his left arm  
12 outstretched—either maintaining a grasp on his cane or trying to reach for  
13 his cane—and Dailly shut the door on Torbert’s arm. D-NOL Ex. G,  
14 10/2/16 Video at 19:25:19. The incident took place over three seconds. *Id.*  
15 According to the video, Torbert had not completely entered the cell before  
16 the door was slammed on his arm. *Id.* After the arm was slammed, Deputy  
Dailly reopened the door, at which [point] Torbert pulled his arm into the  
cell, and then Dailly closed it. *Id.*

17 (Report & Recommendation at 4, ECF No. 100.) The Report and Recommendation  
18 concluded that “[t]here is a question of fact as to whether Deputy Dailly intended to  
19 apply the force of the door on Torbert’s arm to get him to release the cane.” (*Id.* at 11.)  
20 This Court adopted the Report and Recommendation. (ECF No. 109.)

21 Plaintiff’s excessive force claim has been framed in terms of the force of the door  
22 slamming on Plaintiff’s arm while he was holding or reaching for his cane. He now  
23 seeks to add a separate claim for excessive force in connection with Defendant Dailly  
24 “snatching the cane.” (Mot. to Amend at 1, 3, ECF No. 146.) In his motion, Plaintiff  
25 admits, “[i]n the original complaint, the excessive force claim was only against . . . Dailly  
26 for slamming the metal door on Plaintiff’s left arm while trying to snatch Plaintiff’s cane.  
27 . . . In all of Plaintiff’s motions . . . he has maintained the defendant snatching the cane  
28 and slamming the metal door as one act.” (Mot. to Amend at 1.) He now claims,

1 however, that “[t]he two are in fact separate and will be presented at trial as so.” (*Id.*) In  
2 Plaintiff’s view, slamming the door was one act of excessive force and taking the cane  
3 was another act of excessive force.

#### 4 **B. Legal Standard**

5 If a party seeks leave to amend a pleading after the time period specified in the  
6 court’s scheduling order, as is the case here, Federal Rule of Civil Procedure 16(b)’s  
7 “good cause” standard governs the motion for leave to amend. *Johnson v. Mammoth*  
8 *Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992). The “‘good cause’ standard  
9 primarily considers the diligence of the party seeking the amendment.” *Id.* at 609.

10 “While a court may take into account any prejudice to the party opposing modification of  
11 the scheduling order, ‘the focus of the [Rule 16(b)] inquiry is upon the moving party’s  
12 reasons for seeking modification. If that party was not diligent, the inquiry should end.’”  
13 *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 736 (9th Cir. 2013)  
14 (quoting *Johnson*, 975 F.3d at 609).

15 Once good cause is shown, the moving party must demonstrate that the amendment  
16 is proper under Federal Rule of Civil Procedure 15. *Johnson*, 975 F.3d at 608. Rule 15  
17 directs courts to “freely give leave [to amend] when justice so requires.” Fed. R. Civ. P.  
18 15(a)(2). Courts generally consider five factors when assessing the propriety of a motion  
19 for leave to amend: undue delay, bad faith, futility of amendment, prejudice to the  
20 opposing party, and whether the party has previously amended the pleadings. *Ahlmeyer*  
21 *v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1055 n.3 (9th Cir. 2009).

#### 22 **C. Discussion**

23 Plaintiff’s motion is **DENIED**. Plaintiff cannot show diligence in seeking the  
24 amendment. The deadline for filing a motion to amend the pleadings was April 30, 2015.  
25 (ECF No. 14.) Plaintiff now moves, on the eve of the pretrial conference, to add a claim  
26 whose facts he has admittedly known since the beginning of this litigation. He provides  
27 no explanation for this delay. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)  
28 (“[A] district court does not abuse its discretion in denying a motion to amend where the

1 movant presents no new facts but only new theories and provides no satisfactory  
2 explanation for his failure to fully develop his contentions originally.”).

3 Moreover, the amendment would probably be futile and would further delay the  
4 case. If the Court grants the amendment, Defendant will move to dismiss the claim  
5 because the force applied to remove the cane was *de minimis* and not a cognizable injury.  
6 “The Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments necessarily  
7 excludes from constitutional recognition *de minimis* uses of physical force, provided that  
8 the use of force is not of a sort ‘repugnant to the conscience of mankind.’” *Hudson v.*  
9 *McMillian*, 503 U.S. 1, 9-10 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 327  
10 (1986)). Here, even assuming Dailly did “snatch” the cane, it would likely constitute *de*  
11 *minimis* force and the claim would be dismissed. *See Anthony v. Schackmann*, 402 F.  
12 App’x 207, 208 (9th Cir. 2010) (“Summary judgment on qualified immunity grounds was  
13 proper as to Anthony’s excessive force claim because, even construing the facts in his  
14 favor, defendant Schackmann’s unprovoked, single slap constituted only *de minimis*  
15 force.”).

## 16 **II. Motion for Extension**

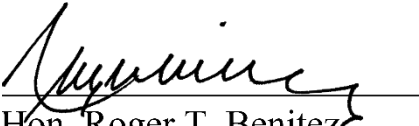
17 Plaintiff seeks a second extension of the pretrial proceedings. (ECF No. 155.) He  
18 previously sought to extend the deadlines by 60 days because he had been transferred to a  
19 new institution and had not received his property yet. The Court granted that motion in  
20 part, extending the deadlines by 28 days. In that order, the Court noted that the pretrial  
21 deadlines had already been extended once by 90 days. Plaintiff now moves for another  
22 extension. He again asserts that he does not have his property yet, but he also raises a  
23 new ground—that he suffers from borderline personality disorder and dissociation  
24 identity disorder, which “cause significant disruption in the plaintiff’s everyday life and  
25 prevent[] his functioning in the general population without disturbing or endangering  
26 others or himself.” (*Id.*) He contends that “more time is needed in order to receive care  
27 for the plaintiff to be able to (competently) proceed further with the pretrial proceedings.”  
28 (*Id.*)

1           The motion is **DENIED**. The pretrial conference has been rescheduled several  
2 times and will proceed on April 7, 2017. To the extent Plaintiff does not have court  
3 filings from this case, he has shown that he is capable of requesting copies. (*See* ECF  
4 No. 133, Plaintiff's Motion for Request of Lost Documents, and ECF No. 134, Order  
5 Granting Motion for Lost Documents and Directing Clerk to Mail Court-Filed  
6 Documents to Plaintiff.) With respect to the mental illnesses, Plaintiff does not allege  
7 that these disorders are new. He has been able to litigate this case capably for three  
8 years. Nothing suggests that he is incompetent to proceed. Plaintiff may raise his  
9 concerns at the pretrial conference.

10           Plaintiff's motion to amend (ECF No. 146) and motion for extension (ECF No.  
11 155) are **DENIED**.

12           **IT IS SO ORDERED.**

13 Dated: April 5, 2017

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15 Hon. Roger T. Benitez  
16 United States District Judge  
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