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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CLYDE REGINALD ELLIS, an individual,

Plaintiff,

v.

OFFICER BRADY; SAN DIEGO SHERIFF'S OFFICE, DOES 1-7,

Defendants.

Case No.: 16cv1419 WQH (NLS)

**ORDER REQUIRING
SUPPLEMENTAL BRIEFING RE:
MOTION FOR SUMMARY
JUDGMENT ON BEHALF OF
DEFENDANT DERRICK BRADY**

Plaintiff Clyde Reginald Ellis, a prisoner proceeding *pro se* and *in forma pauperis*, filed this civil rights action alleging various claims stemming from an altercation with Defendant on June 7, 2015. In his first claim under 42 U.S.C. § 1983, Plaintiff alleges that Defendant used excessive force in violation of the Fourth Amendment. ECF No. 1 ¶¶23-35.¹ Plaintiff was in custody at the time of the altercation, so the Fourth Amendment would not apply. See Graham v. Connor, 490 U.S. 386, 388 (1989) (explaining that the Fourth Amendment applies to claims that excessive force was used in the course of an investigatory stop, an arrest, or any other “seizure” of the individual).

¹ The remaining four claims that pertain to Defendant Derrick Brady arise under California state law.

1 This alone does not warrant dismissal of the claim, because courts are directed to
2 construe *pro se* pleadings liberally. See Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th
3 Cir. 2012) (quoting Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010)) (in the Ninth
4 Circuit, it has long been established that ““where the petitioner is *pro se*, particularly in
5 civil rights cases, [courts should] construe the pleadings liberally and ... afford the
6 petitioner the benefit of any doubt”). However, as the Court explained in its initial
7 screening order, it is not clear from Plaintiff’s complaint “whether Plaintiff was a pretrial
8 detainee or a convicted prisoner at the time” of the alleged incident. ECF No. 3 at 5-6.

9 On August 14, 2017, Defendant Brady filed a motion for summary judgment. ECF
10 No. 19. In this motion, Defendant never clarifies whether Plaintiff was a pretrial detainee
11 or a convicted prisoner. If Plaintiff was a pretrial detainee, his claim would be analyzed
12 under the Fourteenth Amendment’s Due Process Clause. Kingsley v. Hendrickson, ___
13 U.S. ___, 135 S.Ct 2466, 2473 (2015) (quoting Graham, 490 U.S. at 395 n.10) (“the Due
14 Process Clause protects a pretrial detainee from the use of excessive force that amounts to
15 punishment”). Post-conviction, his claim would be considered under the Eighth
16 Amendment’s cruel and unusual punishment standard. See Hudson v. McMill, 503 U.S.
17 1, 6-7 (1992). Instead of confirming Plaintiff’s status through discovery and presenting
18 arguments under the appropriate Constitutional amendment, Defendant sets forth all three
19 legal standards and alternatively argues for summary judgment under the Fourth
20 Amendment, which does not apply, and the Eighth Amendment, which may or may not
21 apply.

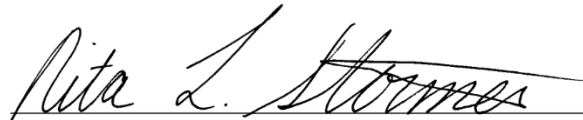
22 In his recently filed opposition, Plaintiff states that before the incident, “Plaintiff
23 was sentenced by the court in his case to serve time in state prison.” ECF No. 32 at 11.
24 This suggests that Plaintiff was a convicted prisoner, but there is no other evidence before
25 this Court confirming that fact.

26 It is not this Court’s burden to make Defendant’s argument for him. Defendant’s
27 summary judgment motion failed to identify the critical fact of Plaintiff’s detainment
28 status. It appears Plaintiff now has provided that fact. However, before the Court can

1 address whether Defendant Brady is entitled to qualified immunity and whether summary
2 judgment is appropriate, Defendant must present argument under the appropriate
3 Constitutional Amendment. Defendant, therefore, is ordered to provide supplemental
4 briefing on or before **November 1, 2017**. Plaintiff may file a supplemental opposition by
5 **November 15, 2017** and Defendant's reply, if any, is due by **November 22, 2017**. The
6 Court then will take the matter under submission pursuant to Civil Local Rule 7.1(d)(1).

7 **IT IS SO ORDERED.**

8 Dated: October 17, 2017

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10 Hon. Nita L. Stormes
11 United States Magistrate Judge
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