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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 GERALD WILSON,
12 CDCR #B-93800,

13 Plaintiff,

14 vs.

15 A. CUEVAS; M. MOYA;
16 J. OLIVO; M.A. MENDOZA,

17 Defendants.
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Case No.: 3:16-cv-2100-BTM-MSB

ORDER:

(1) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO Fed. R. Civ. P. 56; AND

(2) ISSUING ORDER TO SHOW CAUSE WHY CLAIMS AGAINST MOYA SHOULD NOT BE DISMISSED PURSUANT TO FRCP 4(m)

[ECF No. 62]

24 Currently before the Court is a Motion for Summary Judgment filed pursuant to
25 Fed. R. Civ. P. 56 by Defendants Cuevas, Olivo, and Mendoza (ECF No. 62). After he
26 was notified of the requirements for opposing summary pursuant to *Rand v. Rowland*,
27 154 F.3d 952, 962-63 (9th Cir. 1998) (ECF No. 64), and granted extensions of time (ECF
28 Nos. 79, 92), Plaintiff filed his Opposition (“Opp’n”) (ECF No. 95).

1 For the reasons explained, the Court **GRANTS IN PART** and **DENIES IN PART**
2 Defendants' Motion for Summary Judgment (ECF No. 62). The Court also issues an
3 order to show cause no later than thirty (30) days from the date this Order is filed why the
4 claims against Defendant Moya should not be dismissed for want of prosecution pursuant
5 to Fed.R.Civ.P. 4(m).

6 **I. Procedural Background**

7 On August 17, 2016, Plaintiff filed a Complaint ("Compl.") pursuant to 42 U.S.C.
8 1983 alleging that Correctional Officers at Calipatria State Prison ("CAL") violated his
9 First and Eighth Amendment rights when he was housed there in 2016. On March 3,
10 2017, the Court granted Plaintiff leave to proceed in forma pauperis, screened his
11 Complaint pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A, and directed the U.S.
12 Marshal to effect service on his behalf. (*See* ECF No. 8.)

13 On June 2, 2017, Defendants brought a Motion to Dismiss Plaintiff's Complaint.
14 (*See* ECF No. 20.) They later filed a Motion for Partial Summary Judgment on July 19,
15 2017. (*See* ECF No. 21.) On January 16, 2018, the Court granted Defendants' Motion
16 for Partial Summary Judgment and found that Plaintiff had failed to properly exhaust his
17 administrative remedies as to his Eighth Amendment inadequate medical care claim as
18 required by 42 U.S.C. § 1997e. (*See* ECF No. 29.) However, the Court denied
19 Defendants' Motion to Dismiss Plaintiff's Complaint for failing to state a claim as to
20 Plaintiff's First Amendment retaliation claim and Eighth Amendment excessive force
21 claim. (*Id.*) Defendants filed their Answer to Plaintiff's Complaint on February 14,
22 2018. (*See* ECF No. 31.) Defendants have now filed a Motion for Summary Judgment
23 pursuant to Fed. R. Civ. P. 56. (*See* ECF No. 62.)

24 **II. Plaintiff's Claims**

25 Plaintiff was housed at CAL on January 27, 2016. (*See* Compl. at 12.) At noon on
26 that day, Plaintiff claims he went to the "Facility 'C' program office" to inquire "about a
27 young Black inmate" that an officer had taken to the program officer earlier that day. (*Id.*
28 at 13.) Plaintiff alleges Defendant Cuevas told Plaintiff that it was "none of [Plaintiff's]

1 business” and he should leave the office. (*Id.*) As Plaintiff began to leave, he claims
2 Cuevas stated “that [Plaintiff] walks around here as if [Plaintiff] owns the place.” (*Id.*)
3 Plaintiff alleges he said to Cuevas “why the disrespect?” (*Id.*) Cuevas responded by
4 stating “you are nothing but a snitch and an s-building telling [expletive].” (*Id.*) He
5 further claims Cuevas stated that Plaintiff “only writes officers up.” (*Id.*) Plaintiff
6 responded with an expletive and Cuevas allegedly asked Plaintiff “what was [he] going to
7 do about it?” (*Id.*)

8 Plaintiff alleges that this verbal exchange was witnessed by “both staff and
9 inmates,” including a sergeant who handcuffed Plaintiff. (*Id.*) Plaintiff was taken to a
10 holding cell inside the program office. (*See id.*) While Plaintiff was in the holding cell, a
11 sergeant and lieutenant came to question him about the incident. (*See id.* at 13-14.)
12 Plaintiff claims he was told that they “would talk to Officer Cuevas about his conduct.”
13 (*Id.* at 14.) Plaintiff was released back to his housing unit. (*Id.*)

14 Later that evening, Plaintiff was leaving the “chow hall” when he saw Cuevas.
15 (*Id.*) Plaintiff asked Cuevas why he called Plaintiff a “snitch” earlier that day. (*Id.*)
16 Plaintiff alleges Cuevas responded, “because I can” and asked Plaintiff “are you getting
17 up on me?” Plaintiff claims Cuevas then kicked his right ankle causing Plaintiff “to lose
18 [his] cane and balance.” (*Id.*) Plaintiff fell backward and “swung both of [his] arms out
19 trying to grab Cuevas” so he would not fall on his back. (*Id.*) However, he claims that
20 Defendant Olivo grabbed his arms and kicked both of his legs “away from [Plaintiff],”
21 which caused Plaintiff to fall on his back onto “the asphalt knocking the wind” out of
22 him. (*Id.*) Plaintiff claims he could not move after falling on the ground. (*See id.*)
23 Plaintiff was turned over onto his stomach by correctional officers and Cuevas placed his
24 knee on Plaintiff’s “left side” and back. (*Id.*) Plaintiff alleges Defendant Moya “came
25 over” and used his baton to “jab” Plaintiff in his left side “for no reason.” (*Id.* at 14-15.)

26 Cuevas continued to place his knee on Plaintiff’s back and purposefully bent
27 Plaintiff’s “left fingers back.” (*Id.* at 15.) At the same time, he claims Cuevas was
28 “yelling out loud stop resisting” to have “justification for trying to break [Plaintiff’s]

1 fingers.” (*Id.*) Defendant Mendoza was instructed by Moya to escort Plaintiff to the
2 “Facility ‘C’ Program Office.” (*Id.*) As he was pulled up from the ground, Plaintiff
3 asked Mendoza for his cane because he was in pain. (*See id.*) However, Mendoza
4 ignored his request. (*Id.*)

5 Plaintiff informed the sergeant in administrative segregation (“ad-seg”) that he had
6 been subjected to excessive force and “therefore, a video was made.” (*Id.*) Plaintiff also
7 filed an inmate grievance. (*Id.*)

8 Plaintiff was engaged in litigation “against institutional head of [CSP]” for
9 violating his First Amendment rights for “redress petition of grievance against prison
10 officials” in the Eastern District of California in November of 2015. (*Id.* at 16.) Plaintiff
11 alleges that the actions of Cuevas in January of 2016 were in retaliation for Plaintiff filing
12 the previous lawsuit in 2015. (*See id.*)

13 Plaintiff seeks various forms of injunctive relief as well as compensatory and
14 punitive damages. (*Id.* at 19-20.)

15 **III. Defendant’s Claims**

16 Correctional Officers Cuevas, Olivo, and Mendoza “were all working on Facility
17 C, performing their usual duties outside the dining hall on the evening of January 27,
18 2016.” (*See* Defs.’ P&As in Supp. of Mot. for Summ. J., ECF No. 62-1 [hereafter
19 “Defs.’ P&As] at 7.) Cuevas was “approached” by Plaintiff who “began to mumble
20 words that Cuevas was not able to hear.” (*Id.*) In response, Cuevas “leaned forward to
21 try and hear Plaintiff, but still could not understand him.” (*Id.*) Cuevas told Plaintiff to
22 “keep moving towards his housing unit” but Plaintiff “ignored Cuevas, refused to move,
23 and continued to mumble.” (*Id.* at 7-8.) Instead, Plaintiff “suddenly” hit Cuevas “in the
24 face, hitting Cuevas on his lower lip and jaw.” (*Id.* at 8.)

25 Defendant Olivo “grabbed Plaintiff with both hands” and took him “to the ground
26 by sweeping Plaintiff’s right leg with Olivo’s left leg. (*Id.*) Plaintiff “swung both fists”
27 at Olivo and “Cuevas then assisted Olivo in gaining control of Plaintiff.” (*Id.*) While
28 Plaintiff was on the ground he was “being combative and resisting Olivo’s orders to

1 comply by moving his arms around and kicking.” (*Id.*)

2 Cuevas attempted to control Plaintiff by “plac[ing] his right knee over Plaintiff’s
3 torso” as Plaintiff “posed a threat to Olivo.” (*Id.*) Cueveas then “went into a mount
4 position by placing both of his legs over Plaintiff’s lower back once Olivo and Cuevas
5 were able to gain some compliance from Plaintiff.” (*Id.*)

6 Cuevas then “grabbed Plaintiff’s left wrist and Olivo had control of Plaintiff’s left
7 hand.” (*Id.*) Cuevas then “released Plaintiff’s left wrist and took control of Plaintiff’s
8 right hand and pulled it towards the middle of Plaintiff’s lower back.” (*Id.*) Plaintiff’s
9 wrists were “placed” in “restraints” by Cuevas. (*Id.*)

10 After Plaintiff was restrained, Cuevas “walked away” as Defendant Mendoza “took
11 custody of Plaintiff and escorted him to the Facility ‘C’ Program Office.” (*Id.*) Cuevas
12 “reported to the prison’s medical clinic for medical attention” as he “sustained serious
13 injuries from this incident.” (*Id.*) Specifically, Cuevas’s “right pinky finger was
14 dislocated, he suffered a mild concussion, and he tore his right hip labrum” which
15 required surgery to repair. (*Id.* at 8-9.) Cuevas had surgery “for a tear to his right hip
16 labrum in April, 2014.” (*Id.*) Cuevas indicates that he “did not kick Plaintiff’s cane out
17 from under him because that was physically impossible.” (*Id.*) Following the incident
18 with Plaintiff, Cuevas “was unable to return to work” at CAL and “went on worker’s
19 compensation” until he was “rehired by the CDCR at Richard J. Donovan Correctional
20 Facility in April 2018.” (*Id.*)

21 Plaintiff was later “criminally charged with battery by a prisoner on a non-prisoner
22 under California Penal Code section 4501.5. (*Id.* at 10.) Plaintiff was “found guilty” in
23 Imperial County Superior Court on July 20, 2018. (*Id.*) Plaintiff was given a “three-year
24 sentence.” (*Id.*) At trial, both Cuevas and Olivo testified that “Plaintiff punched Cuevas
25 in the face.” (*Id.*) Plaintiff “admitted at this trial that he struggled and resisted Cuevas
26 and Olivo when Plaintiff was on the ground because he was ‘trying to defend’” himself.
27 (*Id.*)

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1 **IV. Defendant’s Motion for Summary Judgment**

2 A. Standard of Review

3 Summary judgment is appropriate when the moving party “shows that there is no
4 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
5 of law.” Fed. R. Civ. P. 56(a). The “purpose of summary judgment is to ‘pierce the
6 pleadings and to assess the proof in order to see whether there is a genuine need for
7 trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)
8 (citations omitted).

9 As the moving parties, Defendants “initially bears the burden of proving the
10 absence of a genuine issue of material fact.” *Nursing Home Pension Fund, Local 144 v.*
11 *Oracle Corp. (In re Oracle Corp. Securities Litigation)*, 627 F.3d 376, 387 (9th Cir.
12 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). While Plaintiff bears
13 the burden of proof at trial, Defendants “need only prove that there is an absence of
14 evidence to support [Plaintiff’s] case.” *Oracle Corp.*, 627 F.3d at 387 (citing *Celotex*, 477
15 U.S. at 325); *see also* Fed. R. Civ. P. 56(c)(1)(B). Indeed, summary judgment should be
16 entered, after adequate time for discovery and upon motion, against a party who fails to
17 make a showing sufficient to establish the existence of an element essential to that party’s
18 case, and on which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S.
19 at 322. “[A] complete failure of proof concerning an essential element of the nonmoving
20 party’s case necessarily renders all other facts immaterial.” *Id.* In such a circumstance,
21 summary judgment should be granted, “so long as whatever is before the district court
22 demonstrates that the standard for entry of summary judgment ... is satisfied.” *Id.* at 323.

23 If Defendants meet their initial responsibility, the burden then shifts to Plaintiff to
24 establish that a genuine dispute as to any material fact actually does exist. *Matsushita*
25 *Elec. Indus. Co.*, 475 U.S. at 586. In attempting to establish the existence of this factual
26 dispute, Plaintiff may not rely upon the allegations or denials of his pleadings, but is
27 instead required to tender evidence of specific facts in the form of affidavits, and/or
28 admissible discovery material, to support his contention that the dispute exists. *See* Fed.

1 R. Civ. P. 56(c)(1); *Matsushita*, 475 U.S. at 586 n.11. “A [p]laintiff’s verified complaint
2 may be considered as an affidavit in opposition to summary judgment if it is based on
3 personal knowledge and sets forth specific facts admissible in evidence.” *Lopez v. Smith*,
4 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc).

5 Plaintiff must also demonstrate that the fact in contention is material, *i.e.*, a fact
6 that might affect the outcome of his suit under the governing law, *see Anderson v. Liberty*
7 *Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*
8 *Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, *i.e.*, the
9 evidence is such that a reasonable jury could return a verdict for him. *See Wool v.*
10 *Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

11 Finally, district courts must “construe liberally motion papers and pleadings filed
12 by pro se inmates and ... avoid applying summary judgment rules strictly.” *Thomas v.*
13 *Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). However, if Plaintiff “fails to properly
14 support an assertion of fact or fails to properly address [Defendants’] assertion of fact, as
15 required by Rule 56(c), the court may ... consider the fact undisputed for purposes of the
16 motion ...” Fed. R. Civ. P. 56(e)(2). Nor may the Court permit Plaintiff, as the opposing
17 party, to rest solely on conclusory allegations of fact or law. *Berg v. Kincheloe*, 794 F.2d
18 457, 459 (9th Cir. 1986). A “motion for summary judgment may not be defeated ... by
19 evidence that is ‘merely colorable’ or ‘is not significantly probative.’” *Anderson*, 477
20 U.S. at 249-50 (1986); *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1183 (9th Cir. 2006);
21 *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) (“[M]ere allegation and
22 speculation do not create a factual dispute for purposes of summary judgment.”)
23 (quoting *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081 (9th Cir. 1996)) (brackets in
24 original)).

25 B. Defendant’s Arguments

26 Defendants seek summary judgment as to Plaintiff’s First and Eighth Amendment
27 claims on the grounds that: (1) no genuine issue of material fact shows that they
28 retaliated against Plaintiff or used excessive force against him; (2) his claims are barred

1 by *Heck v. Humphrey*, 512 U.S. 477 (1994) and (3) they are entitled to qualified
2 immunity. (See Defs.’ P&As at 11-23.)

3 C. Plaintiff’s Opposition

4 Plaintiff contends Defendants are not entitled to summary judgment because their
5 Motion has “failed to meet their burden of demonstrating that there is no dispute as to any
6 material fact, and because the facts set forth in Plaintiff’s Separate Statement of Material
7 Facts and the attached countervailing evidences show that Defendants’ violated
8 Plaintiff’s clearly established constitutional rights.” (Pl.’s Opp’n, ECF No. 95 at 20.)

9 D. Eighth Amendment Excessive Force claims

10 In general, an Eighth Amendment violation occurs only when an inmate is
11 subjected to the “unnecessary and wanton infliction of pain.” *Whitley v. Albers*, 475 U.S.
12 312, 319 (1986); *Jeffers v. Gomez*, 267 F.3d 895, 900 (9th Cir. 2001). With respect to
13 Plaintiff’s claims that Defendants used excessive force against him, the “core judicial
14 inquiry” is “whether force was applied in a good faith effort to maintain or restore
15 discipline or maliciously and sadistically for the very purpose of causing harm.” *Hudson*
16 *v. McMillian*, 503 U.S. 1, 6 (1992) (extending *Whitley*’s Eighth Amendment analysis
17 from prison riots to “whenever guards use force to keep order.”); *Wilkins v. Gaddy*, 559
18 U.S. 34, 40 (2010). In making this determination, courts consider factors such as: (1)
19 extent of the injury, (2) need to use the force, (3) relationship between the need and the
20 amount of force used, (4) the threat “reasonably perceived” by the officials, and (5) “any
21 efforts made to temper the severity” of the force. *Hudson*, 503 U.S. at 7 (citations
22 omitted).

23 Ultimately, however, Plaintiff must show more than “merely objectively
24 unreasonable force,” *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002), in order to
25 prove that Defendants acted in bad faith with the intent to harm him. *Wilkins*, 559 U.S. at
26 37; *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 795 (9th Cir. 2018); *Hoard v.*
27 *Hartman*, 904 F.3d 780, 790 (9th Cir. 2018); *Jeffers v. Gomez*, 267 F.3d 895, 912 (9th
28 Cir. 2001) (affirming summary judgment on behalf of correctional officers because there

1 was an “absence of evidence showing that either officer acted purposely to injure” and
2 the officers’ actions did not suggest “malice or sadism or otherwise create an inference of
3 impermissible motive.”).

4 Defendants maintain that “Cuevas and Olivo simply protected themselves, and
5 acted to ensure each other’s safety, and the safety of other inmates on January 27, 2016,
6 in compliance with CDCR’s safety protocols and use-of-force policies.” (Defs.’ P&As at
7 14.) The force at issue in this matter occurred after a physical altercation between
8 Plaintiff and Cuevas. Cuevas attests that “Plaintiff swung his right fist towards the left
9 side of [his] face, striking [him] in [his] lower lip and jaw area.” (Cuevas Decl. at ¶ 2.)
10 Plaintiff disputes that he struck Cuevas and instead maintains that Cuevas kicked his leg
11 causing Plaintiff to “lose his balance and started falling back.” (Pl.’s Decl. at 5.)
12 Plaintiff attests that he “threw both of [his] hands out trying to catch a hold of [Cuevas]”
13 so he would “not fall on [his] back to the asphalt.” (*Id.*)

14 Following this incident, Olivo declares that he “immediately grabbed Plaintiff’s
15 upper torso area with both hands.” (Olivo Decl. at ¶ 3.) He then “simultaneously swept
16 Plaintiff’s right leg with [his] leg, causing Plaintiff to fall to the ground.” (*Id.*) Plaintiff
17 does not dispute this set of facts. Plaintiff attests that Olivo “kick[ed] both of [his] legs
18 from under Plaintiff.” (Pl.’s Decl. at 5.) However, Plaintiff and Olivo present different
19 facts as to what happened after Plaintiff fell to the ground. Olivo declares that “as
20 Plaintiff was falling to the ground, Plaintiff spun around, broke from [his] grasp, and
21 landed on his stomach.” (Olivo Decl. at ¶ 3.) Olivo further attests that “Plaintiff
22 attempted to hit [him] by swinging both fists at [his] torso” but Plaintiff “did not make
23 contact.” (*Id.*) Plaintiff, however, declares that he “fell on [his] back on to the asphalt
24 knocking the air out of Plaintiff.” (Pl.’s Decl. at 6.) Plaintiff then states that at some
25 point, unnamed individuals “turn[ed] Plaintiff over onto Plaintiff’s stomach.” (*Id.*)

26 Cuevas maintains that Plaintiff was “on the ground, resisting Correctional Officer
27 Olivo’s order to comply by moving his arms around and kicking.” (Cuevas Decl. at ¶ 4.)
28 He declares that he “placed [his] right knee over Plaintiff’s torso to control his

1 movement” and “went into a mount position by placing both of his legs over Plaintiff’s
2 lower back area.” (*Id.* at ¶ 5.) Plaintiff’s version of what happened at this point is
3 virtually identical to Cuevas’s representation. Plaintiff declares that after he was lying on
4 the ground, Cuevas put his knee “in the lower part of Plaintiff’s back” and then
5 “mount[ed] Plaintiff by putting his full body weight on top of Plaintiff.” (Pl.’s Decl. at
6 6.) He further claims as he was lying on the floor with Cuevas on top of him, Defendant
7 Moya¹ “jab[ed] Plaintiff in the lower left side of Plaintiff’s back.” (*Id.*)

8 Cuevas declares he then “grabbed Plaintiff’s left wrist and noticed Correctional
9 Officer Olivo had control of Plaintiff’s left hand.” (Cuevas Decl. at ¶ 6.) Cuevas then
10 “released Plaintiff’s left wrist and took control of Plaintiff’s right hand and pulled it
11 towards the middle of his lower back.” (*Id.*) Cuevas attests that he “retrieved [his] state-
12 issued handcuffs and placed both of Plaintiff’s wrists in restraints” and he then “stood up
13 and walked away as Sergeant Moya maintained control of Plaintiff.” (*Id.* at ¶¶ 6-7.)

14 Plaintiff, however, attests that Cuevas did not place handcuffs on his wrists
15 immediately after he was on Plaintiff’s back but instead “started to bend Plaintiff’s
16 fingers on Plaintiff’s left hand backward in a maliciously and sadistically manner to try
17 and break Plaintiff’s fingers.” (Pl.’s Decl. at 7.) Plaintiff claims Defendant Moya told
18 Defendant Mendoza to “escort Plaintiff to the facility “C” program office.” (*Id.*)

19 1. Defendant Mendoza

20 As an initial matter, the Court finds that Defendant Mendoza is entitled to
21 summary judgment as to Plaintiff’s Eighth Amendment excessive force claims. In his
22 deposition, Plaintiff testifies that he did not “see [Mendoza] use any force.” (Defs.’
23 P&As at 62-1, Ex. A, Pl.’s Depo. at 76:4-6.) Instead, Plaintiff admits the “only thing
24 [Mendoza] did was he refused to give me my cane to walk to the program office.” (*Id.* at
25 76:6-8). Plaintiff raised this claim as an Eighth Amendment deliberate indifference to a
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27
28 ¹ Defendant Moya has not been served in this matter.

1 serious medical need claim in his Complaint rather than an Eighth Amendment excessive
2 force claim. (*See* Pl.’s Compl. at 15.) On January 16, 2018, the Court granted
3 Defendants’ Motion for Partial Summary Judgment as to Plaintiff’s Eighth Amendment
4 deliberate indifference to serious medical needs claim for failing to exhaust his
5 administrative remedies pursuant to 42 U.S.C. § 1997e(a). (*See* Jan. 16, 2018 Order,
6 ECF No. 29 at 16.)

7 Therefore, Defendant Mendoza’s Motion for Summary Judgment as to Plaintiff’s
8 Eighth Amendment excessive force claim is GRANTED.

9 2. Remaining Defendants

10 a. Extent of Injury

11 The Supreme Court has made clear that the Eighth Amendment may be violated by
12 the use of excessive force against a prison inmate “[even] when the inmate does not
13 suffer serious injury.” *Wilkins*, 559 U.S. at 34 (2010) (quoting *Hudson*, 503 U.S. at 4).
14 While the extent of an inmate’s injury is relevant to the Eighth Amendment inquiry,
15 “[i]njury and force . . . are only imperfectly correlated, and it is the latter that ultimately
16 counts.” *Id.* at 38.

17 At the same time:

18 [N]ot “every malevolent touch by a prison guard gives rise to a federal cause of
19 action.” [*Hudson*,] 503 U.S. at 9[.]. “The Eighth Amendment’s prohibition of
20 ‘cruel and unusual’ punishments necessarily excludes from constitutional
21 recognition de minimis uses of physical force, provided that the use of force is not
22 of a sort repugnant to the conscience of mankind.” *Ibid.* (some internal quotation
23 marks omitted). An inmate who complains of a “push or shove” that causes no
discernible injury almost certainly fails to state a valid excessive force claim. *Ibid.*
(quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

24 *Wilkins*, 559 U.S. at 38; *Hudson*, 503 U.S. at 7-9; *Martinez v. Stanford*, 323 F.3d 1178,
25 1184 (9th Cir. 2003).

26 Plaintiff maintains that he has “suffered a life lasting injury that cannot be
27 classified as ‘trivial.’” (Pl.’s Opp’n at 45.) Plaintiff claims to have a “mobility
28 impairment” that he will “have to endure for the rest of [his] life” as a result of this

1 incident. (*Id.*) Defendants do not point to any evidence in the record to dispute
2 Plaintiff’s claims that he suffered more than de minimis injuries. This factor weighs in
3 favor of Plaintiff.

4 b. Need for Application of Force

5 It is undisputed that there was a physical altercation between Plaintiff and Cuevas
6 prior to the use of force. While Plaintiff attempts to characterize this altercation as
7 accidental, it is also undisputed that he was convicted of “Battery by Prisoner on Non-
8 Prisoner” by a jury and sentenced to three years. (*See* Defs. P&As, Ex. B, Felony
9 Abstract of Judgment dated Sept. 5, 2018.) These facts support a finding that the need
10 for some use of force was necessary following the physical altercation between Plaintiff
11 and Cuevas.

12 c. Relationship Between Need for Force and Force Used

13 “Force does not amount to a constitutional violation . . . if it is applied in a good
14 faith effort to restore discipline and order and not ‘maliciously and sadistically for the
15 very purpose of causing harm.’” *Clement v. Gomez*, 298 F.3d 898, 903 (9th Cir. 2002)
16 (quoting *Whitley*, 475 U.S. at 320-21). Here, neither party disputes that Olivo used his
17 legs to cause Plaintiff to fall to the ground. (*See* Olivo Decl. at ¶ 3; Pl.’s Compl. at 14.)
18 However, Plaintiff does not provide any evidence or point to any evidence in the record
19 that would demonstrate that Olivo’s actions were anything other than an attempt to
20 restore discipline following the physical altercation between Plaintiff and Cuevas. Thus,
21 the Court finds that Plaintiff fails to demonstrate that Olivo had malicious or sadistic
22 intent when he used force against Plaintiff. *See Furnace v. Sullivan*, 705 F.3d 1021, 1029
23 n. 4 (9th Cir. 2013) (noting the “spontaneous use of force can be necessary . . . in
24 response to a [reasonably] perceived danger or threat.”).

25 However, as to Cuevas, Plaintiff claims that he was “on [his] stomach in a prone
26 position when [Cuevas] came over” and “put all his 230 pounds on top of Plaintiff and
27 began to try and break Plaintiff’s fingers.” (Pl.’s Opp’n at 47.) Cuevas alleges that he
28

1 only grabbed Plaintiff’s hand in order to place him in wrist restraints. (See Cuevas Decl.
2 at ¶ 6.)

3 While a reasonable jury could conclude that Cuevas’s claim that the amount of
4 force he used was appropriately tempered and only the amount necessary under the
5 circumstances for him to maintain or restore discipline, see *Hudson*, 503 U.S. at 7, they
6 could also reasonably find, based on Plaintiff’s allegations regarding the incident, that
7 Cuevas acted “maliciously and sadistically for the very purpose of causing harm.”
8 *Hudson*, 503 U.S. at 6.

9 Accordingly, while this factor weighs in favor of Defendant Olivo but there is a
10 material dispute as to whether Cuevas used the appropriate amount of force and whether
11 his use of force rose the level of being malicious or sadistic.

12 d. Threat Perceived by Defendants

13 As stated previously, there is no dispute that there was a physical altercation
14 between Plaintiff and Cuevas that initiated the series of events that are alleged in this
15 action. While Plaintiff claims that he accidentally came into contact with Cuevas, he was
16 convicted of battery on Cuevas by a jury. So as to the initial response by Oliva to take
17 Plaintiff to the ground, this action can be viewed as a reasonable response that was
18 necessary because Plaintiff arguably presented a real security risk. However, there is a
19 dispute as to whether Plaintiff complied with commands after he was on the ground and
20 whether the use of force after Plaintiff was prone on the ground was excessive.

21 Defendants maintain Plaintiff was “being combative and resisting Olivo’s order to
22 comply by moving his arms around and kicking.” (Defs. Sep. Stmt. Undisp. Facts, No.
23 11 citing Cuevas Decl. at ¶4; Olivo Decl. at ¶ 4.) Plaintiff, on the other hand, claims he
24 was in a “non threatening position on my stomach prone position.” (Pl.’s Sep. Stmt.
25 Undisp. Facts, No. 33.)

26 The Court may not resolve disputed issues of material fact by crediting one party’s
27 version of events and ignoring another. *Wall v. County of Orange*, 364 F.3d 1107, 1111
28 (9th Cir. 2004) (“By deciding to rely on the defendants’ statement of fact [in deciding a

1 summary judgment motion], the district court became a jury.”); *see also Smith v. City of*
2 *Hemet*, 396 F.3d 689, 701 (9th Cir. 2005) (“Because [the excessive force inquiry] nearly
3 always requires a jury to sift through factual contentions, and to draw inferences
4 therefrom, we have held on many occasions that summary judgment or judgment as a
5 matter of law in excessive force cases should be granted sparingly.” (citing *Santos v.*
6 *Gates*, 287 F.3d 846, 853 (9th Cir. 2002)).

7 e. Attempts to Temper the Severity of the Force

8 Plaintiff argues that force used by Defendants was excessive and they “decided to
9 prolong and therefore, increase the severity of the force.” (Pl.’s Opp’n at 53.)

10 Defendants maintain that the Plaintiff provoked the entire incident and continued to
11 refuse to comply with their orders which required the amount of force that was used.
12 (Cuevas Decl. at ¶ 5.) The allegations regarding the purported prolonging use of force
13 involve the allegations against Cuevas. In his Opposition, Plaintiff argues that the force
14 used by Cuevas after Plaintiff was lying prone on the ground demonstrates that Cuevas
15 did nothing to temper the severity of the force used. (Pl.’s Opp’n at 53.) Plaintiff does
16 not allege or argue that Olivo used any force after he purportedly was lying prone on the
17 floor.

18 Therefore, as to the alleged actions taken by Cuevas, the Court finds that there is a
19 disputed fact as to whether Cuevas tempered his response when using force but there is
20 no disputed fact as to Olivo.

21 f. Conclusion

22 Plaintiff fails to raise a triable issue of material fact as to whether Olivo used
23 “malicious and sadistic force” against him in violation of the Eighth Amendment.
24 *Clement*, 298 F.3d at 903. Moreover, in analyzing Plaintiff’s claims under the *Hudson*
25 factors, the Court finds that most of these factors weigh heavily in favor of Olivo.
26 Accordingly, the Court GRANTS Defendant Olivo’s Motion for Summary Judgment as
27 to Plaintiff’s Eighth Amendment excessive force claims. However, the Court finds that
28 the *Hudson* factors as to the claims against Cuevas weigh heavily in favor of Plaintiff.

1 Therefore, the Court finds that there is a triable issue of material fact as to Plaintiff's
2 Eighth Amendment excessive force claims against Defendant Cuevas and his Motion is
3 DENIED.

4 E. Retaliation Claim

5 Defendants' seek summary judgment as to Plaintiff's First Amendment retaliation
6 claim. (See Defs.' P&As at 15-16.) A retaliation claim has five elements. *Brodheim v.*
7 *Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). First, Plaintiff must allege that the retaliated-
8 against conduct is protected. *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012).²
9 Second, Plaintiff must allege Defendants took adverse action against him.³ *Rhodes v.*
10 *Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). Third, Plaintiff must allege a causal
11 connection between the adverse action and the protected conduct.⁴ *Watison*, 668 F.3d at
12 1114. Fourth, Plaintiff must allege the "official's acts would chill or silence a person of
13 ordinary firmness from future First Amendment activities." *Rhodes*, 408 F.3d at 568
14 (internal quotation marks and emphasis omitted).⁵ Fifth, Plaintiff must allege "that the
15 prison authorities' retaliatory action did not advance legitimate goals of the correctional
16 institution..." *Rizzo*, 778 F.2d at 532; *Watison*, 668 F.3d at 1114-15.

17 ///

18 ///

19 ///

21 ² The filing of an inmate grievance is protected conduct. *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th
22 Cir. 2005).

23 ³ The adverse action need not be an independent constitutional violation. *Pratt*, 65 F.3d at 806. "[T]he
24 mere threat of harm can be an adverse action..." *Brodheim*, 584 F.3d at 1270.

25 ⁴ Because direct evidence of retaliatory intent rarely can be pleaded in a complaint, allegation of a
26 chronology of events from which retaliation can be inferred is sufficient to survive dismissal. *Watison*,
27 668 F.3d at 1114 (citing *Pratt*, 65 F.3d at 808 ("[T]iming can properly be considered as circumstantial
evidence of retaliatory intent.")).

28 ⁵ "[A] plaintiff who fails to allege a chilling effect may still state a claim if he alleges he suffered some
other harm," *Brodheim*, 584 F.3d at 1269, that is "more than minimal," *Robinson*, 408 F.3d at 568 n.11.

1 In his Complaint, Plaintiff alleges Defendants retaliated against him because he
2 was engaged in litigation “against institutional head of [CSP]” for violating his First
3 Amendment rights for “redress petition of grievance against prison officials” in the
4 Eastern District of California in November of 2015. (Compl. at 16.) Plaintiff alleges that
5 the actions of Cuevas in January of 2016 were in retaliation for Plaintiff filing the
6 previous lawsuit in 2015. (*See id.*)

7 Defendants argue that they “never retaliated against Plaintiff for his exercise of
8 free speech” and they had “no knowledge that Plaintiff was suing the warden or any other
9 staff member of the California Department of Corrections and Rehabilitation.” (Defs.’
10 P&As at 16; Defs.’ Sep. Stmt. Undisp. Facts No. 39 citing Cuevas Decl. at ¶ 12; Olivo
11 Decl. at ¶ 10; Mendoza Decl. ¶ 8.) Plaintiff points to no evidence in the record to
12 support his claim that Defendants were aware that he was engaged in litigation.
13 However, he does state that prior to the incident involving force, he attempted to address
14 an issue with Cuevas regarding Plaintiff’s concern with Cuevas’s interaction with a
15 younger inmate. (*See Pl. Decl. at 4.*) Plaintiff maintains that Cuevas was disrespectful
16 towards him and when he protested, Cuevas responded “what are you going to do about
17 it, you only write stuff up.” (*Id.*) Cuevas then purportedly called Plaintiff an “[expletive]
18 S Building snitch.” (*Id.*) Plaintiff also claims that he had previously filed grievances
19 against Cuevas. (*Id. at 3-4.*)

20 Plaintiff must show the causal connection between the adverse action and the
21 protected conduct. *Watison*, 668 F.3d at 1114. At the summary judgment stage, Plaintiff
22 must offer “either direct evidence of retaliatory motive” or circumstantial evidence of
23 Defendants’ purported retaliatory motive. *McCullum v. Cal. Dep’t of Corr. and Rehab.*,
24 647 F.3d 870, 882 (9th Cir. 2011) (quoting *Allen v. Iranon*, 283 F.3d 1070, 1077 (9th Cir.
25 2002)). In this matter, Plaintiff offers neither direct or circumstantial evidence of
26 Defendants Olivo or Mendoza’s alleged retaliatory motive. However, Plaintiff does
27 attest, through his verified Declaration, that he had filed a grievance against Cuevas prior
28

1 to the use of force incident and Cuevas told Plaintiff that he was aware that Plaintiff had
2 written grievances against prison officials.

3 Therefore, the Court GRANTS Defendant Olivo and Mendoza’s Motion for
4 Summary Judgment but DENIES Defendant Cueva’s Motion for Summary Judgment as
5 to Plaintiff’s retaliation claim.

6 E. Heck Bar

7 Defendants argue that both Plaintiff’s excessive force claims and his retaliation
8 claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994)

9 In *Heck*, the Supreme Court held:

10 in order to recover damages for allegedly unconstitutional
11 conviction or imprisonment, or for other harm caused by actions
12 whose unlawfulness would render a conviction or sentence
13 invalid, a § 1983 plaintiff must prove that the conviction or
14 sentence has been reversed on direct appeal, expunged by
15 executive order, declared invalid by a state tribunal authorized to
16 make such determination, or called into question by a federal
17 court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A
claim for damages bearing that relationship to a conviction or
sentence that has not been so invalidated is not cognizable under
§ 1983.

18 *Id.* at 486-87.

19
20 “Suits challenging the validity of the prisoner’s continued incarceration lie within
21 ‘the heart of habeas corpus,’ whereas ‘a § 1983 action is a proper remedy for a state
22 prisoner who is making a constitutional challenge to the conditions of his prison life, but
23 not to the fact or length of his custody.’” *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir.
24 2003), *quoting Preiser v. Rodriguez*, 411 U.S. 475, 489-99 (1973) (holding that a writ of
25 habeas corpus is “explicitly and historically designed” to provide a state prisoner with the
26 “exclusive” means to “attack the validity of his confinement” in federal court).

27 In support of their argument, Defendants argue that a jury found that Plaintiff had
28 “battered Cuevas” and the “use of force to restrain Plaintiff was reasonable and

1 necessary.” (Defs.’ P&As at 19.) It is undisputed that “Plaintiff was criminally charged
2 with battery by a prisoner on a non-prisoner under California Penal Code section
3 4501.5.” (Defs. Sep. Stmt. Undisp. Facts No. 42.) Plaintiff was found guilty in 2018 in
4 Imperial County Superior Court and a three-year sentence was imposed. (*Id.* No. 43;
5 Defs.’ P&As, Ex. B. Felony Abstract of Judgment dated Sept. 5, 2018.) Defendants
6 argue that Plaintiff’s excessive force claims are *Heck* barred because his criminal
7 conviction arose “out of the same facts stands and is fundamentally inconsistent with the
8 unlawful behavior for which section 1983 claims are sought, the 1983 action must be
9 dismissed.” (*Id.* at 19 citing *Cunningham v. Gates*, 312 F.3d 1148, 1153 (9th Cir. 2002)
10 (quoting *Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996)).)

11 However, Plaintiff is not barred from bringing this action by *Heck* “if the use of
12 excessive force occurred *subsequent* to the conduct on which his conviction was based.”
13 *Smith v. City of Hemet*, 394 F.3d 689, 698 (9th Cir. 2005). Here, the evidence supplied
14 by Defendants does not make clear whether Plaintiff’s criminal conviction of battery on
15 Cuevas was based on the initial interaction or the interaction that followed when Plaintiff
16 was taken to the ground by Olivo. If Plaintiff were to prevail in this action, it is not at all
17 clear that it would invalidate his conviction of battery on Cuevas. Even if Plaintiff did
18 commit a battery, that does not exclude the possibility that the force used in response to
19 this battery was excessive. *Id.*

20 Defendants cite to a recent unpublished Ninth Circuit opinion in which it was held
21 that a plaintiff’s First Amendment retaliation claim was barred by *Heck* to support their
22 argument that Plaintiff’s retaliation claim is similarly barred. (*See* Defs.’ P&As at 20
23 citing *Moschref v. Stratton*, 697 Fed.Appx. 532 (9th Cir. 2017). In *Moschref*, the Ninth
24 Circuit did find that the plaintiff’s retaliation claim was barred by *Heck*. *Id.* However,
25 while the facts in this unpublished opinion are not fully set forth, it appears that the
26 plaintiff in that matter was claiming that the officer who arrested him had made
27 retaliatory false statements that led to his conviction. *Id.* Thus, the Ninth Circuit found
28 that the plaintiff’s claims of false statements would imply the invalidity of his conviction

1 that was based on those purportedly false statements. *Id.* In the matter before this Court,
2 Plaintiff alleges that the amount of force used was excessive and it was used in retaliation
3 for grievances he had previously filed against Cuevas. The facts in *Moschref* are not at
4 all in line with the allegations in the matter before this Court.

5 Defendants also cite to another unpublished Ninth Circuit opinion in which the
6 Ninth Circuit stated “[w]e pause to note that consideration of [plaintiff’s] First
7 Amendment claim is likely barred by [*Heck*] because prevailing on her claim would
8 imply the invalidity of her criminal convictions arising from the same events.” (Defs.’
9 P&As at 20 citing *Smith v. Ball*, 278 Fed.Appx. 739, 741.)

10 It is undisputed that Plaintiff was convicted of battery. However, if he were to
11 prevail on his retaliation claim there are no facts to show that it would imply the
12 invalidity of his conviction. Plaintiff’s claim for retaliation does not arise from the event
13 for which he was convicted of battery, it relates to the alleged excessive force purportedly
14 used in retaliation *after* the battery that is at issue in this matter.

15 Accordingly, Defendants Motion for Summary Judgment based on *Heck* grounds
16 is DENIED.

17 **V. Qualified Immunity**

18 Finally, Defendants move for summary judgment as to Plaintiff’s excessive force
19 claims on the ground that they are entitled to qualified immunity. (*See* Defs. P&As at 22-
20 24.) Because the Court has found that Defendants Olivo and Mendoza are entitled to
21 summary judgment as to all of Plaintiff’s claims, it need not reach any issues regarding
22 qualified immunity as to these Defendants. *See Saucier v. Katz*, 533 U.S. 194, 201
23 (2001) (“If no constitutional right would have been violated were the allegations
24 established, there is no necessity for further inquiries concerning qualified immunity.”).

25 However, the Court will determine whether Defendant Cuevas is entitled to
26 qualified immunity as to Plaintiff’s Eighth Amendment excessive force claims.

27 “Government officials enjoy qualified immunity from civil damages unless their
28 conduct violates ‘clearly established statutory or constitutional rights of which a

1 reasonable person would have known.” *Jeffers v. Gomez*, 267 F.3d 895, 910 (9th Cir.
2 2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). When presented with a
3 qualified immunity defense, the central questions for the court are: (1) whether the facts
4 alleged, taken in the light most favorable to Plaintiff, demonstrate that the Defendant’s
5 conduct violated a statutory or constitutional right; and (2) whether the right at issue was
6 “clearly established” at the time it is alleged to have been violated. *Saucier v. Katz*, 533
7 U.S. 194, 201 (2001). Although *Saucier* originally required the Court to answer these
8 questions in order, the U.S. Supreme Court has since held that “while the sequence set
9 forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory.”
10 *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

11 If the Court finds that Plaintiff’s allegations do not make out a statutory or
12 constitutional violation, “there is no necessity for further inquiries concerning qualified
13 immunity.” *Saucier*, 533 U.S. at 201. Similarly, if the Court determines that the right at
14 issue was not clearly established at the time of the defendant’s alleged misconduct, the
15 court may end further inquiries concerning qualified immunity without determining
16 whether the allegations in fact make out a statutory or constitutional violation. *Pearson*,
17 555 U.S. at 236-37.

18 As noted above, genuine disputes of material fact exist as to whether Defendant
19 Cuevas violated Plaintiff’s Eighth Amendment rights. If Plaintiff’s claims are presumed
20 true, this evidence could establish that Plaintiff was non-resistant, laying prone, and
21 posing no discernible threat to Cuevas, and that therefore, Cuevas’ actions were
22 “unnecessary” and “wanton.” See *Jeffers*, 267 F.3d at 907 (citing *Crawford-El v.*
23 *Britton*, 523 U.S. 574, 598 (1998)). Thus, “the next . . . step is to ask whether the right
24 was clearly established.” *Saucier*, 533 U.S. at 201.

25 A right is “clearly established” when its contours are “sufficiently clear that a
26 reasonable official would understand that what he is doing violates that right.” *Id.* at 202.
27 However, “the clearly established right must be defined with specificity.” *City of*
28 *Escondido v. Emmons*, ___ U.S. ___, 139 S.Ct. 500, 503 (2019). “Qualified immunity

1 attaches when an official’s conduct does not violate clearly established statutory or
2 constitutional rights of which a reasonable person would have known.” *Kinsela v.*
3 *Hughes*, 584 U.S. ___, 138 S.Ct. 1148, 1152 (2018).

4 The Ninth Circuit has specifically noted that “a prison guard’s use of excessive
5 force was clearly established” by 1992 when the Supreme Court held that the “settled rule
6 [is] that ‘the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual
7 punishment forbidden by the Eighth Amendment.’” *Martinez*, 323 F.3d at 1184 (quoting
8 *Hudson*, 503 U.S. at 5). Indeed, *Hudson* itself held unconstitutional the unjustified use
9 of physical force upon a non-resistant prisoner. *See Hudson*, 503 U.S. at 7-10 (holding
10 that guards violated Hudson’s Eighth Amendment rights when they gratuitously punched
11 and hit him, causing only minor injuries, while escorting him between prison facilities);
12 *see also Martinez*, 323 F.3d at 1184 (finding qualified immunity improperly granted to
13 officers who allegedly beat an inmate during a cell extraction, despite his lack of
14 resistance); *McRorie v. Shimoda*, 795 F.3d 780, 784 (9th Cir. 1986) (finding Eighth
15 Amendment violation when prisoner was assaulted while not resisting). Here, there are
16 triable issues of fact as to whether the amount of force used by Cuevas after Plaintiff was
17 laying prone on the ground was excessive.

18 Accordingly, viewing the facts in the light most favorable to Plaintiff, the Court
19 finds Plaintiff has sufficiently produced evidence to satisfy both prongs of the qualified
20 immunity analysis as to Defendant Cuevas. Therefore, Defendant Cuevas’ Motion for
21 Summary Judgment on qualified immunity grounds is DENIED.

22 **VI. Order to Show Cause why Defendant Moya should not be dismissed**

23 A review of the Clerk’s docket indicates that Defendant Moya has not been served
24 in this action. *See Walker v. Sumner*, 14 F.3d 1415, 1421-22 (9th Cir. 1994) (where a
25 pro se plaintiff fails to provide the Marshal with sufficient information to effect service,
26 the court’s sua sponte dismissal of those unserved defendants is appropriate under
27 Fed.R.Civ.P. 4(m)). According to the summons returned to the Court on May 3, 2017,
28 the litigation coordinator at CAL would not accept service on Moya’s behalf because he

1 had retired. (ECF No. 15.) In the more than two years since the summons was returned
2 unexecuted, Plaintiff has not sought an extension of time to properly serve Moya.

3 Accordingly, this Court **ORDERS** Plaintiff to show cause no later than thirty days
4 (30) after this Order is filed, why the claims against this Defendant should not be
5 dismissed for want of prosecution pursuant to Fed.R.Civ.P. 4(m). If Plaintiff wishes to
6 proceed with his claims against Defendant Moya he must provide the Court with proof of
7 proper service within thirty (30) days from the date this Order is filed or a valid excuse
8 for not taking further efforts to effect service. Otherwise, Defendant Moya will be
9 dismissed from this action without prejudice.

10 **V. Conclusion and Order**

11 In light of the above, the Court;

12 (1) **GRANTS** Defendants Olivo and Mendoza's Motion for Summary
13 Judgment pursuant to Fed. R. Civ. P. 56(a) as to Plaintiff's Eighth Amendment excessive
14 force claims;

15 (2) **DENIES** Defendant Cuevas' Motion for Summary Judgment pursuant to
16 Fed. R. Civ. P. 56(a) as to Plaintiff's Eighth Amendment excessive force claims;

17 (3) **GRANTS** Defendants Olivo and Mendoza's Motion for Summary
18 Judgment pursuant to Fed. R. Civ. P. 56(a) as to Plaintiff's First Amendment retaliation
19 claims;

20 (4) **DENIES** Defendant Cuevas' Motion for Summary Judgment pursuant to
21 Fed. R.Civ.P. 56(a) as to Plaintiff's First Amendment retaliation claims;

22 (5) **DENIES** Defendants' Motion for Summary Judgment as to Plaintiff's
23 Eighth Amendment excessive force and First Amendment retaliation claims as barred by
24 *Heck*;

25 (6) **DENIES** Defendant Cuevas' Motion for Summary Judgment as to
26 Plaintiff's Eighth Amendment excessive force claims on qualified immunity grounds.

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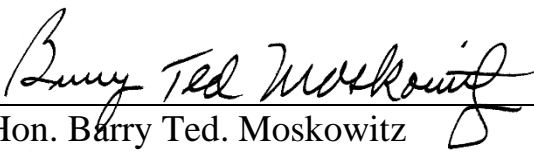
2 It is further ordered that:

3 (7) Plaintiff must show cause no later than thirty (30) days from the date this
4 Order is filed why the claims against Defendant Moya should not be dismissed for want
5 of prosecution pursuant to Fed.R.Civ.P. 4(m).

6 If Plaintiff fails to provide the Court with documentation demonstrating proper
7 service on this Defendant within thirty (30) days from the date this Order is filed or a
8 valid excuse for not taking further efforts to effect service, the claims against him in this
9 action will be dismissed without prejudice.

10 **IT IS SO ORDERED.**

11
12
13 Dated: October 3, 2019


14 Hon. Barry Ted. Moskowitz
15 United States District Judge