

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

DONALD GLASS,)	1:09-CV- 00098 AWI BAM PC
)	
Plaintiff,)	PRETRIAL ORDER
)	
v.)	<u>Motions In Limine Hearing:</u>
)	<u>Date: April 16, 2013</u>
)	<u>Time: 8:30 a.m., Courtroom 2</u>
J. S. WOODFORD, et al.,)	
)	<u>Trial:</u>
Defendants)	<u>Date: April 16, 2013,</u>
)	<u>Time: 8:30 a.m., Courtroom 2</u>

This action proceeds on plaintiff Donald Glass’ original complaint filed on January 5, 2009. Donald Glass, an inmate in the custody of the California Department of Corrections, brings this civil rights action against correctional officials for violations of his civil rights. Various court orders have been issued during the pendency of this action that have narrowed the remaining legal issues for trial to the following: whether Defendants Hamilton, Robles, Logue and Bautista used excessive force on Plaintiff; whether Defendants Riddle and McDaniel were deliberately indifferent to Plaintiff’s serious medical need; and whether Defendants Hamilton, Bautista, Logue, Robles, Riddle, Cedillos and McDaniel retaliated against Plaintiff.

1 The parties have submitted pretrial statements. Having reviewed the statements and the
2 remainder of the file, the court now issues the Pretrial Order.

3
4 **I. Jurisdiction and Venue**

5 The court has subject matter jurisdiction over this federal civil rights action. 28 U.S.C. §
6 1331. Venue is proper because the conduct allegedly occurred in this judicial district.

7
8 **II. Jury Trial**

9 The parties timely requested trial by jury. This action shall be tried by a jury of eight.

10
11 **III. Facts**

12 **A. Undisputed Facts**

13 1. Plaintiff was an inmate at the California State Prison - Corcoran (CSP-Corcoran).

14 2. Defendants Cedillos, Bautista, Hamilton, Robles, Riddle and Logue were correctional
15 officers at CSP-Corcoran in 2004.

16 3. Defendant McDaniel was a Licensed Vocational Nurse at CSP-Corcoran in 2004.

17 4. On September 17, 2004, Defendant Cedillos was the control booth officer and
18 mechanically released Plaintiff from his cell so that he could go to the prison's law library.

19 5. Plaintiff was placed into mechanical restraints and escorted into the rotunda of the
20 housing unit.

21 1. **Plaintiff's Additional Proposed Undisputed Facts**

22 1. At all times during the September 17, 2004 incident, Plaintiff's hands were
23 cuffed behind his back.

24 2. Defendants Hamilton, Bautista, Robles, Cedillos, Logue and Riddle were
25 issued OC Pepper spray and PR 24 large metal side handle baton weapons.

26 3. Plaintiff had never fractured a bone in his body prior to his back and three ribs
27

1 being fractured in multiple places by defendants on September 17, 2004.

2 4. Plaintiff was on single cell status from September 22, 1997 to August 18,
3 2008, with no physical contact with other prisoners.

4 5. In September 2004, Plaintiff was examined by 4B Facility doctor, Thira
5 Komen, M.D., who ordered x-rays taken of Plaintiff's back and ribs.

6 6. Dr. Komen informed Plaintiff that x-rays and x-ray reports showed that
7 Plaintiff's back and three ribs had recently been fractured irreparably in multiple places.

8 7. During a personal audio taped interview on October 7, 2004, Plaintiff
9 described the September 17, 2004 incident and informed Facility 4B Captain R. Lopez that
10 Defendants Hamilton, Bautista, Robles and Logue used their PR 24 metal bats to fracture
11 Plaintiff's back and ribs.

12 8. On October 18, 2004, Captain R. Lopez had Plaintiff sign a CDC-Form
13 Authorization to Release Medical Records.

14 B. Disputed Facts

15 1. Whether Defendants Hamilton, Bautista, Robles and Logue used excessive force on
16 Plaintiff.

17 2. Whether Defendant Logue was a participant or witness to the incident involving
18 Plaintiff on September 17, 2004.

19 3. Whether Defendant Cedillos was merely a witness to the incident and did not himself
20 use any force towards Plaintiff on September 17, 2004.

21 4. Whether Defendant Riddle merely responded to the incident on September 17, 2004,
22 but did not himself use any force towards Plaintiff.

23 5. Whether, as the Defendants claim, their actions towards the Plaintiff on September 17,
24 2004, were made necessary by Plaintiff's threatening and resistive behavior.

25 6. Whether Plaintiff informed Defendants McDaniel and Riddle that Plaintiff was in
26 excruciating pain in his back/ribs and was having extreme difficulty breathing.

1 7. Whether Plaintiff asked Defendants McDaniel and Riddle to see a medical doctor
2 because he believed that his back or ribs were fractured.

3 8. Whether Defendants McDaniel and Riddle ignored Plaintiff's requests to see a
4 medical doctor because of chest pains.

5 9. Whether Defendants McDaniel and Riddle denied Plaintiff's request to take a shower
6 to decontaminated from OC pepper spray exposure.

7 10. Whether Defendants McDaniel and Riddle instructed Plaintiff on how to
8 decontaminate himself from OC pepper spray exposure.

9 11. Whether, as the Plaintiff claims, the Defendants' actions towards the Plaintiff on
10 September 17, 2004, were motivated out of a desire to retaliate for the Plaintiff's many inmate
11 appeals he previously filed.

12 1. Plaintiff's Additional Disputed Facts

13 1. Whether Defendant Hamilton was upset, hostile and yelling at Plaintiff prior to
14 placing Plaintiff's hands/wrists in cuffs behind his back.

15 2. Whether Defendant Hamilton, without provocation, grabbed Plaintiff in a
16 choke hold and then violently slammed Plaintiff to the ground the 4B2R rotunda area.

17 3. Whether Defendants Hamilton, Bautista, Robles and Logue attacked and beat
18 Plaintiff while he was inert and subdued on the ground.

19 4. Whether Plaintiff's hands are small enough to slip the cuffs off of his wrists.

20 5. Whether Defendant Cedillos had his automatic mini-14 machine gun pointed at
21 Plaintiff's head at all times during the September 17, 2004 incident.

22 6. Whether Defendant Hamilton instructed Defendants Bautista and Robles to
23 remove the cuffs from Plaintiff's wrists.

24 7. Whether Defendant Hamilton stated to Plaintiff, while he was pinned against
25 the wall, that they were going to take the cuffs off of Plaintiff's wrists and beat his ass with their
26 PR 24 mental bats as punishment for Plaintiff filing prison grievances against them.

1 8. Whether Defendants ignored Plaintiff's plea not to remove the cuffs from his
2 wrists and to place Plaintiff in his cell.

3 9. Whether Plaintiff had a cuff dangling from his wrist or no cuffs prior to
4 Defendants beating him to the ground with their PR 24 batons and then reapplying the cuffs on
5 each wrist to allow them to use their PR 24 baton weapons to fracture Plaintiff's ribs in his back.

6 10. Whether Plaintiff informed Defendants McDaniel and Riddle, when they
7 arrived on the scene, that Defendants Hamilton, Bautista, Robles and Logue used the PR 24
8 baton weapons to beat and fracture Plaintiff's back or ribs.

9 11. Whether Defendants dragged Plaintiff inside the cell in a prone position with
10 a triangle lanyard attached to the cuffs behind his back.

11 2. Defendants' Additional Disputed Facts

12 1. As Defendants Bautista, Hamilton and Plaintiff walked to the yard door,
13 Plaintiff became disruptive, agitated, belligerent, and resistive towards Defendant Hamilton.

14 2. Plaintiff stated to the escorting officers "why don't you suck my nuts" and
15 "you shut the fuck up."

16 3. Defendant Hamilton had a hold of Plaintiff's left elbow with his right hand.

17 4. Plaintiff attempted to pull away from Defendant Hamilton's grip.

18 5. Defendant Hamilton ordered Plaintiff to stop resisting.

19 6. Defendant Hamilton ordered Plaintiff to return to his cell due to his disruptive
20 behavior, and Plaintiff complied with this order.

21 7. Defendants Bautista and Hamilton escorted Plaintiff back to his cell.

22 8. Due to Plaintiff's behavior, Defendant Robles followed Defendants Hamilton
23 and Bautista as they escorted Plaintiff back to his cell.

24 9. As Plaintiff and the officers were standing in front of Plaintiff's cell, waiting
25 for the cell door to open, Plaintiff slipped his right hand out of the handcuffs and suddenly turned
26 to his left side to confront Defendant Hamilton.

1 26. Plaintiff was standing against the wall when Defendant McDaniel arrived in
2 the unit.

3 27. Defendant McDaniel noted that Plaintiff was alert and oriented but that he had
4 been exposed to pepper spray and that his eyes were red and watery.

5 28. Defendant McDaniel noted no other visible injuries or any other condition
6 requiring medical treatment.

7 29. Due to the exposure to pepper spray, Plaintiff was offered the opportunity
8 to decontaminate in the shower.

9 30. Plaintiff declined the offer to decontaminate, responding "No I don't want
10 decontamination, I just want to return to my cell and take my nitro."

11 31. Plaintiff denied having any chest pain, stating "No, I'm not having any
12 pain. I just want to return to my cell."

13 32. Defendant McDaniel noted that Plaintiff was speaking clearly, had no signs of
14 respiratory distress, and no visible injuries.

15 33. Defendants Robles and Hamilton escorted Plaintiff back to his cell.

16 34. Defendant McDaniel observed Plaintiff being escorted back to his cell and
17 noted that he was walking without difficulty.

18 35. Defendant Riddle gave Plaintiff instructions on how to decontaminate himself
19 inside his cell and stayed there until Plaintiff had done so.

20 36. Defendant McDaniel called the emergency room and reported to the registered
21 nurse on duty that Plaintiff had been exposed to pepper spray.

22 37. Following the incident, a medical evaluation of Defendant Hamilton found
23 that he had swelling to his right hand, suffered when he struck his right hand on the floor.

24 38. Defendant Bautista suffered abrasions to both elbows when he scraped them
25 on the concrete while trying to gain control of GLASS.

26 C. Disputed Evidentiary Issues

1 Disputed evidentiary issues will be addressed by motions in limine.

2 D. Special Factual Information

3 Pursuant to Local Rule 281(b)(6), the following special factual information pertains to
4 this action:

5 None applicable.

6
7 **IV. Relief Sought**

8 Plaintiff seeks actual and punitive damages, along with costs of suit. He also seeks a
9 declaratory judgment, an order to notify the U.S. Department of Justice for federal criminal
10 prosecution for deprivation of rights, and injunctive relief in the form of future medical
11 treatment, a pain management specialist and a spine neurologist.

12 Declaratory Relief

13 “A declaratory judgment, like other forms of equitable relief, should be granted only as a
14 matter of judicial discretion, exercised in the public interest.” Eccles v. Peoples Bank of
15 Lakewood Village, 333 U.S. 426, 431 (1948). “Declaratory relief should be denied when it will
16 neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate
17 the proceedings and afford relief from the uncertainty and controversy faced by the parties.”
18 United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985). In the event the jury returns a
19 verdict in favor of Plaintiff, that verdict will be a finding that Plaintiff’s constitutional rights were
20 violated. Accordingly, a declaration that Defendants violated Plaintiff’s rights is unnecessary.

21 Injunctive Relief

22 Plaintiff seeks an injunction ordering future medical treatment, a pain management
23 specialist and a spine neurologist. The Prison Litigation Reform Act places limitations on
24 injunctive relief. Section 3626(a)(1)(A) provides in relevant part, “[p]rospective relief in any
25 civil action with respect to prison conditions shall extend no further than necessary to correct the
26 violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or
27

1 approve any prospective relief unless the court finds that such relief is narrowly drawn, extends
2 no further than necessary to correct the violation of the Federal right, and is the least intrusive
3 means necessary to correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A).

4 Plaintiff’s requested injunctive relief is not narrowly drawn, it extends further than necessary to
5 correct any alleged violation of his Federal rights and is not the least intrusive means to correct
6 the violation.

7 Further, since Plaintiff is no longer incarcerated at CSP-Cor, the purported injunctive
8 relief he is seeking at that facility is moot. Nelson v. Heiss, 271 F.3d 891, 897 (9th Cir. 2001);
9 Dilley v. Gunn, 64 F.3d 1365, 1368 (9th Cir. 1995); Johnson v. Moore, 948 F.2d 517, 519 (9th
10 Cir. 1991).

11 Plaintiff’s request for injunctive relief is DENIED.

12 Notification of U.S. Attorney

13 The Court does not provide such notification following judgment in a civil rights action.
14 Plaintiff’s request for such notification is DENIED.

15 Defendants will seek costs and attorneys fees if they prevail at trial.

16 ///

17 ///

18
19 **V. Points of Law**

20 **A. Imposition of Liability Under Section 1983**

21 Under section 1983, Plaintiff is required to prove that each defendant (1) acted under
22 color of state law and (2) deprived him of rights secured by the Eighth Amendment of the United
23 States Constitution. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).

24 Plaintiff must prove that each defendant personally participated in the deprivation of his rights.

25 Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). There is no *respondeat superior* liability
26 under section 1983, and each defendant is only liable for his own misconduct. Ashcroft v. Iqbal,

27

28

1 556 U.S. 662, 677, 129 S. Ct. 1937, 1948-49 (2009).

2 **B. Eighth Amendment - Excessive Force**

3 “What is necessary to show sufficient harm for purposes of the Cruel and Unusual
4 Punishments Clause [of the Eighth Amendment] depends upon the claim at issue” Hudson
5 v. McMillian, 503 U.S. 1, 8 (1992). “The objective component of an Eighth Amendment claim is
6 . . . contextual and responsive to contemporary standards of decency.” Id. (internal quotation
7 marks and citations omitted). The malicious and sadistic use of force to cause harm always
8 violates contemporary standards of decency, regardless of whether or not significant injury is
9 evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth
10 Amendment excessive force standard examines *de minimis* uses of force, not *de minimis*
11 injuries)). However, not “every malevolent touch by a prison guard gives rise to a federal cause
12 of action.” Hudson, 503 U.S. at 9. “The Eighth Amendment’s prohibition of cruel and unusual
13 punishments necessarily excludes from constitutional recognition *de minimis* uses of physical
14 force, provided that the use of force is not of a sort repugnant to the conscience of mankind.” Id.
15 at 9-10 (internal quotations marks and citations omitted).

16 “[W]henver prison officials stand accused of using excessive physical force in violation
17 of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was
18 applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to
19 cause harm.” Id. at 6-7. “In determining whether the use of force was wanton and unnecessary, it
20 may also be proper to evaluate the need for application of force, the relationship between that
21 need and the amount of force used, the threat reasonably perceived by the responsible officials,
22 and any efforts made to temper the severity of a forceful response.” Id. at 7 (internal quotation
23 marks and citations omitted). “The absence of serious injury is . . . relevant to the Eighth
24 Amendment inquiry, but does not end it.” Id.

25 **C. Deliberate Indifference to Serious Medical Needs**

26 A prisoner’s claim of inadequate medical care does not constitute cruel and unusual
27
28

1 punishment unless the mistreatment rises to the level of "deliberate indifference to serious
2 medical needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble,
3 429 U.S. 97, 104, 97 U.S. 285, 291 (1976)). The "deliberate indifference" standard involves an
4 objective and a subjective prong. First, the alleged deprivation must be, in objective terms,
5 "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977 (1994)
6 (citing Wilson v. Seiter, 501 U.S. 294, 298, 111 S. Ct. 2321, 2324 (1991)). Second, the prison
7 official must act with a "sufficiently culpable state of mind," which entails more than mere
8 negligence, but less than conduct undertaken for the very purpose of causing harm. Farmer, 511
9 U.S. at 837, 114 S. Ct. at 1979.

10 The two part test for deliberate indifference requires the plaintiff to show (1) "a 'serious
11 medical need' by demonstrating that failure to treat a prisoner's condition could result in further
12 significant injury or the 'unnecessary and wanton infliction of pain,'" and (2) "the defendant's
13 response to the need was deliberately indifferent." Jett, 439 F.3d at 1096. A prison official does
14 not act in a deliberately indifferent manner unless the official "knows of and disregards an
15 excessive risk to inmate health or safety." Farmer, 511 U.S. at 837, 114 S. Ct. at 1979.
16 "Deliberate indifference is a high legal standard," Simmons v. Navajo County, Arizona, 609 F.3d
17 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and is
18 shown where there was "a purposeful act or failure to respond to a prisoner's pain or possible
19 medical need" and the indifference caused harm, Jett, 439 F.3d at 1096.

20 In applying this standard, the Ninth Circuit has held that before it can be said that a
21 prisoner's civil rights have been abridged, "the indifference to his medical needs must be
22 substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause
23 of action." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980), citing Estelle,
24 429 U.S. at 105-06, 97 S.Ct. at 292. "[A] complaint that a physician has been negligent in
25 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment
26 under the Eighth Amendment. Medical malpractice does not become a constitutional violation
27

1 merely because the victim is a prisoner.” Estelle, 429 U.S. at 106; see also Anderson v. County of
2 Kern, 45 F.3d 1310, 1316 (9th Cir. 1995); McGuckin v. Smith, 974 F.2d 1050, 1050 (9th Cir.
3 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir.
4 1997)(en banc). Even gross negligence is insufficient to establish deliberate indifference to
5 serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).
6 Additionally, a prisoner’s mere disagreement with diagnosis or treatment does not support a
7 claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

8 **D. First Amendment Retaliation**

9 An allegation of retaliation against a prisoner’s First Amendment right to file a prison
10 grievance is sufficient to support claim under section 1983. Bruce v. Ylst, 351 F.3d 1283, 1288
11 (9th Cir. 2003). Retaliation against a prisoner for the exercise of his right to file a grievance is
12 itself a constitutional violation, prohibited as a matter of clearly established law. Pratt v.
13 Rowland, 65 F.3d 802, 806 (9th Cir. 1995.) Within the prison context “[a] viable claim of
14 retaliation in violation of the First Amendment consists of five elements: “(1) An assertion that a
15 state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected
16 conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and
17 (5) the action did not reasonable advance a legitimate correctional goal.” Rhodes v. Robinson,
18 408 F.3d 559, 567 (9th Cir. 2005); accord Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009).
19 The court must “‘afford appropriate deference and flexibility’ to prison officials in the evaluation
20 of proffered legitimate penological reasons for conduct alleged to be retaliatory.” Pratt, 65 F.3d at
21 807 (quoting Sandin v. Conner, 515 U.S. 472, 482, 115 S. Ct. 2293 (1995)). The burden is on
22 plaintiff to demonstrate “that there were no legitimate correctional purposes motivating the
23 actions he complains of.” Pratt, 65 F.3d at 808.

24
25 **D. Punitive Damages**

26 Plaintiff has the burden of proving what, if any, punitive damages should be awarded by a
27
28

1 preponderance of the evidence. NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 5.5 (2008).
2 The jury must find that Defendants’ conduct was “motivated by evil motive or intent, or . . .
3 involves reckless or callous indifference to the federally protected rights of others.” Smith v.
4 Wade, 461 U.S. 30, 56 (1986).

5
6 **VI. Abandoned Issues**

7 None applicable.

8
9 **VII. Witnesses**

10 The following is a list of witnesses that the parties expect to call at trial, including
11 rebuttal and impeachment witnesses. NO WITNESS, OTHER THAN THOSE LISTED IN THIS
12 SECTION, MAY BE CALLED AT TRIAL UNLESS THE PARTIES STIPULATE OR UPON
13 A SHOWING THAT THIS ORDER SHOULD BE MODIFIED TO PREVENT “MANIFEST
14 INJUSTICE.” Fed. R. Civ. P. 16(e); Local Rule 281(b)(10).

15 **A. Plaintiff’s Witnesses**

- 16 1. Defendant Hamilton
17 2. Defendant Bautista
18 3. Defendant Robles
19 4. Defendant Cedillos
20 5. Defendant Logue
21 6. Defendant Riddle
22 7. Defendant McDaniel
23 8. L. Watson, Chief Deputy Warden
24 9. R. Halberg, Facility Captain
25 10. R. Lopez, Facility Captain
26 11. D. Indendi, Corrections Lieutenant

1 12. T. S. Huo, Radiologist

2 13. Inmate E. Jackson

3 14. Inmate B. Ransom

4 15. Inmate L. Rencher

5 16. D. D. Sheppard-Brooks

6 **B. Defendants' Witnesses**

7 1. Defendant Hamilton

8 2. Defendant Bautista

9 3. Defendant Logue (Blevins)

10 4. Defendant Robles

11 5. Defendant Cedillos

12 6. Defendant McDaniel

13 7. Defendant Riddle

14 8. Sergeant Eric Lawton, CSP-Corcoran

15 9. Registered Nurse M. Martinez, CSP-Corcoran

16 10. Registered Nurse Maxine, CSP-Corcoran

17 11. Dr. Reynolds, CSP-Corcoran

18 12. Dr. Thirakomen, CSP-Corcoran

19 13. Family Nurse Practitioner A. Gage, CSP-Corcoran

20 14. Dr. Friedman, CSP-Corcoran

21 15. Dr. Neubarth, CSP-Corcoran

22 16. Family Nurse Practitioner Anitra, CSP-Corcoran

23 Defendants also state that they wish to call the unidentified Custodian of Records for
24 plaintiff's CDCR medical chart and central file. Because defendants have not identified the
25 name of the witness, defendants may not offer substantive testimony from the witness. If
26 defendants wish to offer the unidentified witness solely to authenticate documents, defendants

1 may use the witnesses identified only by title for that limited purpose.

2 ///

3 ///

4
5 **VIII. Exhibits**

6 The following is a list of documents or other exhibits that the parties expect to offer at
7 trial. NO EXHIBIT, OTHER THAN THOSE LISTED IN THIS SECTION, MAY BE
8 ADMITTED UNLESS THE PARTIES STIPULATE OR UPON A SHOWING THAT THIS
9 ORDER SHOULD BE MODIFIED TO PREVENT “MANIFEST INJUSTICE.” Fed. R. Civ. P.
10 16(e); Local Rule 281(b)(11).

11 A. Plaintiff’s Exhibits

- 12 1. Radiology report of spine and skull dated 12/24/97 from California Medical Facility
13 2. Radiology report of cervical spine dated 12/8/98 from San Quentin State Prison
14 3. Radiology report of lower left rib cage dated 9/23/04 by radiologist Tsung-Yi Stephen
15 Huo at CSP-Corcoran
16 4. CDCR 7230 Form Nurses Progress Notes from CSP-Corcoran dated 9/18/04
17 5. CDCR 7254 Form Outpatient Interdisciplinary Progress Notes from CSP-Corcoran by
18 Dr. K. Thirakomen, M.D. on 9/21/04
19 6. CDCR 114A Form Inmate Segregation Record of Daily Activity dated 9/12/04
20 through 9/21/04
21 7. CDCR 114A Form Inmate Segregation Record of Daily Activity dated 10/1/04
22 through 10/09/04
23 8. CDCR 7385 Form California Youth and Adult Corrections Agency Authorization to
24 Release Medical, Psychiatric, AIDS/ARE, Alcohol or Drug Abuse Patient Records dated 9/16/04
25 signed by R. Lopez
26 9. Memorandum on zero tolerance regarding the “code of silence” dated 2/17/04 by R. Q.

1 Hickman

2 10. Radiology report of cervical spine dated 5/20/05 by Radiologist Tsung-Yi Stephen

3 Huo

4 11. Retire Warden whistle blower on (CDCR) and the California Correctional Peace
5 officers Association (CPOA) corrupt influence, intimidation and retaliation on its union members
6 who break or think about breaking the (criminal) “code of silence”

7 12. CDCR/CSP-COR Procedure on the use of the PR 24 side handle baton

8 13. CDCR/CSP-COR Use of Force Review Committee (Instructional Memo #3) pp. 1-4

9 14. Memorandum on use of force video tapes, 837 A - Information

10 15. CSP-COR Supplemental of DOM 51030.3.1 Reporting the Processing of CDCR 837

11 form

12 16. CDCR Memorandum to facility managers instructing them to take photos of all
13 victims and weapons used by employees involved in any use of force

14 17. CDCR Use of Force Review Committee (Instructional Memorandum #4) pp. 1-4

15 18. CDCR Memorandum for Oleoresin Capsicum Aerosol Evaluation

16 19. CDCR Use of Force Review Committee (Instructional Memorandum #5)

17 20. CDCR Memorandum on proper procedure on decontamination

18 21. Two page letter to Inspector General Matthew L. Cate regarding the 9/17/04 beating

19 22. Response by Office of Inspector General (OIG) regarding the 9/17/04 beating

20 23. Response from OIG to a second letter regarding the 9/17/04 beating

21 24. Two page investigative report regarding the 1/18/04 unnecessary excessive force by

22 Defendants Riddle and McDaniel in support of their retaliatory denial and refusal of medical care
23 on 9/17/04

24 25. CSP-Cor memorandum for Licensed Vocational Nurses (LVNs) to note whether or
25 not a prisoner refused a CDCR-7219 evaluation

26 26. Three page letter to CSP-Corcoran Investigative Security Unit (“ISU”)/Internal

27

28

1 Affairs (“IA”) that alleges excessive force, deliberate indifference against Defendants Riddle and
2 McDaniel on 1/18/04

3 27. Verified declaration of Donald Glass

4 28. Verified declaration of Steven Coeville

5 29. Verified declaration of James Evans

6 30. Verified declaration of Lamonte Rencher

7 31. Verified Declaration of James A. Diesso

8 32. Verified 602 Appeal No CSP-C-6-04-0501

9 33. Verified 602 Appeal dated 3/16/04

10 34. Verified 602 Appeal No. CSP-C-604-1574

11 35. Verified 602 Appeal No. CSP-C-5-04-1574

12 35. Verified 602 Appeal No. CSP-C-6-04-2853

13 36. Verified 602 Appeal No. CSP-C-6-04-3670

14 37. Verified 602 Appeal No. CSP-C-5-04-3780

15 38. Verified 602 Appeal No. CSP-C-5-04-4691

16 39. Verified 602 Appeal No. CSP-C-5-05-3722

17 40. Personnel file of Defendant Hamilton

18 41. Personnel file of CDCR-OIA and CSP-Cor-IA findings pertaining to 9/17/04
19 excessive force investigation against Defendant Bautista

20 42. Personnel file of CDCR-OIA and CSP-Cor-IA findings pertaining to 9/17/04
21 excessive force investigation against Defendant Robles

22 43. Personnel file of CDCR-OIA and CSP-Cor-IA findings pertaining to 9/17/04
23 excessive force investigation against Defendant Logue

24 44. Personnel file of CDCR-OIA and CSP-Cor-IA findings pertaining to 9/17/04
25 excessive force investigation against Defendant Cedillos

26 45. Personnel file of CDCR-OIA and CSP-Cor-IA findings pertaining to 9/17/04

1 excessive force investigation against Defendant Riddle

2 46. Personnel file of CDCR-OIA and CSP-Cor-IA findings pertaining to 9/17/04

3 excessive force investigation against Defendant McDaniel

4 47. Excessive force interview camcorder/CD videotape recording dated 10/14/07

5 48. X-ray films of cervical spine dated 12/07/98

6 49. X-ray films of left lower rib cage dated 9/23/04

7 50. X-ray film of spine dated 05/20/05

8 51. PR 24 Side Handle Baton

9 52. A pair of hinged handcuffs

10 53. An audiotape/CD recording of the voice stress analysis polygraph test conducted by
11 OIA Captain Mason in late 2004 or early 2005

12 54. Audiocassette tape recording conducted by R. Lopez in 10/04

13
14 B. Defendants' Exhibits

15 1. Crime/Incident report, including supplements and staff reports, Log No.

16 COR-04B-04-09-0495

17 2. Medical report of injury or unusual occurrence regarding Plaintiff, dated September 17,
18 2004

19 3. Medical report of injury or unusual occurrence regarding Defendant Hamilton, dated
20 September 17, 2004

21 4. Medical report of injury or unusual occurrence regarding Defendant Bautista, dated
22 September 17, 2004

23 5. Pertinent portions of plaintiff's Unit Health Records

24 6. Nurses progress notes regarding Plaintiff, dated September 17, 2004

25 7. Physician's orders regarding Plaintiff, dated September 17, 2004

26 8. Nurses progress notes regarding Plaintiff, dated September 18, 2004

- 1 9. Progress notes regarding Plaintiff, dated September 21, 2004
- 2 10. Physician's orders regarding Plaintiff, dated September 21, 2004
- 3 11. Radiology report regarding Plaintiff, dated September 24, 2004
- 4 12. Progress notes regarding Plaintiff, dated October 8, 2004
- 5 13. Physician's orders regarding Plaintiff, dated October 8, 2004
- 6 14. Emergency care flow sheet regarding Plaintiff, dated October 14, 2004
- 7 15. Progress notes regarding Plaintiff, dated October 14, 2004
- 8 16. Physician's orders regarding Plaintiff, dated October 14, 2004
- 9 17. Progress notes regarding Plaintiff, dated November 30, 2004
- 10 18. Physician's orders regarding Plaintiff, dated November 30, 2004
- 11 19. Health care services request form regarding Plaintiff, dated April 24, 2005
- 12 20. Health care services request form regarding Plaintiff, dated May 5, 2005
- 13 21. Progress notes regarding Plaintiff, dated May 12, 2005
- 14 22. Physician's orders regarding Plaintiff, dated May 12, 2005
- 15 23. Physician's request for services regarding Plaintiff, dated May 12, 2005
- 16 24. Radiology report regarding lumbosacral spine regarding Plaintiff, dated May 20, 2005
- 17 25. Radiology report regarding cervical spine regarding Plaintiff, dated May 20, 2005
- 18 26. Progress notes regarding Plaintiff, dated June 9, 2005
- 19 27. Physician's orders regarding Plaintiff, dated June 9, 2005
- 20 28. Physician's request for services regarding Plaintiff, dated June 9, 2005
- 21 29. Specialty consult progress notes regarding Plaintiff, dated June 9, 2005
- 22 30. Progress notes regarding Plaintiff, dated June 27, 2005
- 23 31. Radiology report regarding Plaintiff, dated July 22, 2005
- 24 32. Progress notes regarding Plaintiff, dated August 11, 2005
- 25 33. Physician's orders regarding Plaintiff, dated August 11, 2005
- 26 34. Progress notes regarding Plaintiff, dated September 19, 2005

1 35. Physician's orders regarding Plaintiff, dated September 21, 2005

2 36. Pain consultation record regarding Plaintiff, dated September 21, 2005

3 37. Progress notes regarding Plaintiff, dated November 17, 2005

4 38. Physician's orders regarding Plaintiff, dated November 17, 2005

5 39. Progress notes regarding Plaintiff, dated December 12, 2005

6 40. Physician's orders regarding Plaintiff, dated December 12, 2005

7
8 **IX. Discovery Documents To Be Used At Trial (Answers To Interrogatories And Responses To Requests For Admissions)**

9 No party indicates that any specific answers to interrogatories or any responses to
10 requests for admission will be offered at trial.

11
12
13 **X. Further Discovery or Motions**

14 Plaintiff contends that the Court abused its discretion in denying his motion to amend the
15 complaint and in denying his motion to modify the discovery and scheduling order to allow
16 further discovery past the time for filing his motion for summary judgment. Plaintiff does not
17 specify any proposed amendment to his complaint or any additional discovery that he currently is
18 seeking.

19 On September 13, 2010, the Court issued a Scheduling Order setting the deadline to
20 amend pleadings as March 13, 2011, and the deadline to complete discovery as May 13, 2011.
21 (ECF No. 34.) The Court denied Plaintiff's motions to modify the scheduling order to extend the
22 deadline to file an amended complaint and the deadline to complete discovery on September 1,
23 2011. (ECF No. 59.) There is no indication that Plaintiff renewed his motions to modify the
24 scheduling order after that date.

25 Modification of the scheduling order requires a showing of good cause, Fed. R. Civ. P.
26 16(b), and good cause requires a showing of due diligence, Johnson v. Mammoth Recreations,

1 Inc., 975 F.2d 604, 609 (9th Cir. 1992). If the party seeking to amend the scheduling order fails
2 to show diligence, then the inquiry should end and the court should not grant the motion to
3 modify. Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087 (9th Cir. 2002).
4 Plaintiff has made no showing of diligence in seeking to amend the scheduling order to either
5 amend his complaint or to conduct further discovery. To the extent Plaintiff requests
6 modification of the scheduling order, his request is DENIED.

7 Even though discovery is closed, all parties are reminded of their continuing obligation to
8 update all discovery responses previously made if that party becomes aware of new information
9 or becomes aware that an answer in a previous response is incomplete or incorrect. Fed. R. Civ.
10 P. 26(e)(2).

11 If any party intends to file motions in limine, the procedure and time requirements are set
12 forth below.

13 ///

14
15 **XI. Stipulations**

16 Plaintiff has requested stipulations, however, Defendants have not offered to stipulate to
17 any matter at issue.

18
19 **XII. Amendments/Dismissals**

20 The Court has dismissed former defendant Grandy from this action because Plaintiff did
21 not provide sufficient information to effectuate service of process.

22
23 **XIII. Settlement Negotiations**

24 Plaintiff reports that the parties are engaged in settlement discussions. The parties are
25 amenable to a settlement conference.

1 **XIV. Agreed Statement**

2 Plaintiff believes that a presentation of some or all of the evidence by agreed statement is
3 feasible or advisable. Defendants do not believe that a presentation of some or all of the
4 evidence by agreed statement is feasible or advisable.
5

6 **XV. Separate Trial Of Issues**

7 The punitive damages phase, if any, will be bifurcated.
8

9 **XVI. Impartial Experts - Limitation Of Experts**

10 Plaintiff asks the Court to appoint an expert witness or, in the alternative, provide him the
11 names and addresses of expert witnesses in the fields of excessive force and great bodily injury.
12 Defendants do not believe this case warrants the appointment of an impartial expert.

13 Federal Rule of Evidence 706(a) provides that “[t]he court may order the parties to show
14 cause why expert witnesses should not be appointed. . . .” Fed. R. Evid. 706(a); Walker v.
15 American Home Shield Long Term Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999). The
16 instant action involves allegations of excessive force and deliberate indifference in violation of
17 the Eighth Amendment and retaliation in violation of the First Amendment. These issues are not
18 so complex as to require the testimony of an expert witness. Plaintiff’s request for the
19 appointment of an expert witness is DENIED.
20

21 **XVII. Attorneys’ Fees**

22 Plaintiff is proceeding pro se and is not entitled to attorney’s fees. Defendants will seek
23 attorneys fees if Defendants prevail at trial.
24

25 **XVIII. Further Trial Preparation**

26 A. Motions In Limine Hearing and Briefing Schedule
27
28

1 Any party may file a motion in limine. The purpose of a motion in limine is to establish
2 in advance of the trial that certain evidence should not be offered at trial. Although the Federal
3 Rules do not explicitly provide for the filing of motions in limine, the court has the inherent
4 power to hear and decide such motions as a function of its duty to expeditiously manage trials by
5 eliminating evidence that is clearly inadmissible for any purpose. Luce v. United States, 469
6 U.S. 38, 41 n. 4 (1984); Jonasson v. Lutheran Child and Family Services, 115 F. 3d 436, 440 (7th
7 Cir. 1997). The court will grant a motion in limine, and thereby bar use of the evidence in
8 question, only if the moving party establishes that the evidence clearly is not admissible for any
9 valid purpose. Id; Hawthorne Partners v. AT & T Technologies, Inc., 831 F. Supp. 1398, 1400
10 (N.D. Ill. 1993).

11 All motions in limine must be served on the other party or parties, and filed with the
12 court, by March 18, 2013. Any motion in limine must clearly identify the nature of the evidence
13 that the moving party seeks to prohibit the other side from offering at trial.

14 Any opposition to a motion in limine must be served on the other party or parties, and
15 filed with the court, by April 1, 2013.

16 If any party files a motion in limine, the court will hear and decide such motions on the
17 morning of trial at 8:30 a.m.

18 Whether or not a party files a motion in limine, that party may still object to the
19 introduction of evidence during the trial.

20 B. Duty of Counsel to Pre-Mark Exhibits

21 The parties are ordered to confer no later than February 25, 2013, for purposes of pre-
22 marking and examining each other's exhibits. All joint exhibits must be pre-marked with
23 numbers preceded by the designation JT/-- (e.g., JT/1, JT/2). All of Plaintiffs' exhibits shall be
24 pre-marked with numbers. All of Defendants' exhibits shall be pre-marked with letters.

- 25 1. Counsel shall create four (4) complete, legible sets of exhibits in binders as
26 follows:

1 (a) Two sets of binders to be delivered to Courtroom Clerk Harold Nazaroff
2 April 11, 2013, one for use by the Courtroom Clerk and the other for the
3 court; and

4 (b) One set for each counsel's own use.

5 If the parties desire, they may have a fifth set of binders to be used for the
6 purposes of questioning witnesses.

7 2. Counsel are to confer and make the following determination with respect to each
8 proposed exhibit to be introduced into evidence, and to prepare separate indexes -
9 one listing joint exhibits, and one listing each party's separate exhibits:

10 (a) Duplicate exhibits, i.e., documents which both sides desire to introduce
11 into evidence, shall be marked as a joint exhibit, and numbered as directed
12 above. Joint exhibits shall be listed on a separate index, and shall be
13 admitted into evidence on the motion of any party, without further
14 foundation.

15 (b) As to exhibits that are not jointly offered, and to which there is no
16 objection to introduction, those exhibits will likewise be appropriately
17 marked, e.g., Plaintiffs' Exhibit 1 or Defendants' Exhibit A, and shall be
18 listed in the offering party's index in a column entitled "Admitted In
19 Evidence." Such exhibits will be admitted upon introduction and motion
20 of the party, without further foundation.

21 (c) Those exhibits to which the only objection is a lack of foundation shall be
22 marked appropriately, e.g., Plaintiffs' Exhibit 2 - For Identification, or
23 Defendants' Exhibit B - For Identification, and indexed in a column
24 entitled "Objection Foundation."

25 (d) Remaining exhibits as to which there are objections to admissibility not
26 solely based on a lack of foundation shall likewise be marked

1 appropriately, e.g., Plaintiffs' Exhibit 3 - For Identification or Defendants'
2 Exhibit C - For Identification, and indexed in a third column entitled
3 "Other Objection" on the offering party's index.

- 4 3. Each separate index shall consist of the exhibit number or letter, a brief
5 description of the exhibit, and the three columns outlined above, as demonstrated
6 in the example below:

7 INDEX OF EXHIBITS

8

<u>EXHIBIT #</u>	<u>DESCRIPTION</u>	<u>ADMITTED</u> <u>IN EVIDENCE</u>	<u>OBJECTION</u> <u>FOUNDATION</u>	<u>OTHER</u> <u>OBJECTION</u>
------------------	--------------------	---------------------------------------	---------------------------------------	----------------------------------

9

10 Two sets of the completed joint index and the separate indexes shall be delivered to the
11 Courtroom Clerk with the two sets of binders.

12 The court has no objection to counsel using copies. However, the copies must be legible.
13 If any document is offered into evidence that is partially illegible, the court may sua sponte
14 exclude it from evidence.

15 C. Discovery Documents

16 By April 11, 2013, each party shall file a list of all discovery documents the party intends
17 to use at trial. The list shall indicate whether each discovery document has previously been
18 lodged with the Clerk. If the discovery document has not been previously lodged, the party shall
19 so lodge the document with the Courtroom Clerk by April 11, 2013.

20 D. Trial Briefs

21 The parties are directed to file and serve a Trial Brief by April 3, 2013. Local Rule 285.
22 The parties need not include in the Trial Brief any issue that is adequately addressed in a motion
23 in limine, or in an opposition brief to a motion in limine.

24 E. Voir Dire

25 The parties shall file and serve proposed voir dire questions, if any, by 4:00 p.m. on
26 Thursday, April 11, 2013. Further, in order to aid the court in the proper voir dire examination of
27

1 the prospective jurors, the parties should lodge with the court on the first morning of trial a list of
2 all prospective witnesses, including rebuttal witnesses, that the parties reasonably expect to call.
3 The purpose of the lists is to advise the prospective jurors of possible witnesses to determine if a
4 prospective juror is familiar with any potential witness.

5 F. Agreed Summary Of The Case

6 The parties shall lodge with the Courtroom Clerk a joint agreed summary of the case,
7 briefly outlining the positions of the parties by 4:00 p.m. on Thursday, April 11, 2013. The
8 summary will be read to the jury panel at the outset of the trial solely for the purposes of assisting
9 in the jury selection process. The contents of the summary shall not be deemed to be evidence or
10 an admission or stipulation by a party as to any contested fact or issue.

11 G. Proposed Jury Instructions

12 The parties shall file and serve proposed jury instructions by 4:00 p.m. on Thursday,
13 April 11, 2013). Electronic filers shall also attach a copy of their proposed jury instructions to
14 an e-mail, which the party shall send to: awiorders@caed.uscourts.gov.

15 All proposed jury instructions shall be in duplicate. One set shall indicate the party
16 proposing the instruction, with each instruction numbered or lettered, shall cite supporting
17 authority, and shall include the customary "Given, Given as Modified, or Refused," showing the
18 court's action with regard to each instruction. The other set shall be an exact copy of the first set,
19 but shall be a "clean" copy that does not contain the identification of the offering party,
20 instruction number or letter, supporting authority, or reference to the court's disposition of the
21 proposed instruction.

22 The parties are ordered to confer after the trial confirmation hearing to determine which
23 instructions they agree should be given. As soon as possible thereafter, the parties shall submit a
24 list of joint, unopposed instructions. As to those instructions to which the parties dispute, the
25 court will conduct its jury instruction conference during trial at a convenient time.

26 H. Proposed Verdict Form

1 The parties shall file and serve a proposed verdict form by 4:00 p.m. on Thursday, April
2 11, 2013.

3 I. Use Of Videotape and Computers

4 Any party wishing to use a videotape for any purpose during trial shall lodge a copy of the
5 videotape with the Courtroom Clerk by 4:00 p.m. on Thursday, April 11, 2013. If a written
6 transcript of audible words on the tape is available, the court requests that the transcript be
7 lodged with the court, solely for the aid of the court.

8 If counsel intends to use a laptop computer for presentation of evidence, they shall
9 contact the courtroom deputy clerk at least one week prior to trial. The courtroom deputy clerk
10 will then arrange a time for counsel to bring the laptop to the courtroom, and meet with a
11 representative of the Information and Technology Department and receive a brief training session
12 on how counsel's equipment interacts with the court's audio/visual equipment. If counsel
13 intends to use PowerPoint, the resolution should be set no higher than 1024 x 768 when
14 preparing the presentation.

15 J. Morning Conferences During Trial

16 During the trial, it is the obligation of the parties to meet with the court each morning to
17 advise the court and opposing counsel as to what documents are proposed to be put into evidence
18 that have not previously been admitted by stipulation, court order, or otherwise ruled upon. The
19 court will rule on those documents, to the extent possible, prior to the commencement of trial
20 each day out of the presence of the jury. If the ruling depends upon the receipt of testimony, the
21 court will rule as requested upon the receipt of such testimony.

22 The court shall consider any other legal matter at morning conferences as well. The court
23 does not wish to recess the trial to hear legal argument outside of the presence of the jury, and
24 proper preparation by Plaintiff and counsel will eliminate the need for that result.

25 K. Order Of Witnesses

26 In order to make the trial operate efficiently and smoothly, each counsel has the
27

1 continuing obligation to advise opposing counsel as to what witnesses he or she intends to call at
2 each trial session.

3
4 **XIX. Objections to Pretrial Order**

5 Any party may, within ten (10) calendar days after the date of service of this Order, file
6 and serve written objections to any of the provisions of this Order. Such objections shall specify
7 the requested modifications, corrections, additions or deletions.

8
9 **XX. Miscellaneous Matters**

10 None.

11
12 **XX. Rules of Conduct During Trial**

13 A. General Rules

- 14 1. All participants in the trial shall conduct themselves in a civil manner. There shall
15 be no hostile interchanges between any of the participants.
- 16 2. All oral presentations shall be made from the podium, unless otherwise permitted
17 by the court.
- 18 3. Sidebar conferences are discouraged. Legal arguments or discussion of issues
19 outside the presence of the jury should be done during recesses.
- 20 4. Counsel shall advise their respective clients and witnesses not to discuss any
21 aspect of the case in the common areas of the courthouse accessible to the jurors,
22 such as the lobby, the elevators, the hallways and the cafeteria.

23 B. Jury Selection

- 24 1. The court will conduct voir dire to be supplemented by any written questions
25 submitted by counsel prior to trial and after the court has concluded its
26 questioning of the jury panel. In some circumstances, the court may allow brief
27

1 direct questioning by counsel.

2 C. Opening Statements

3 1. Counsel may use visual aids in presenting the opening statement. However, any
4 proposed visual aids shall be shown to opposing counsel before opening
5 statement.

6 D. Case in Chief

7 1. Counsel shall have his/her witnesses readily available to testify so that there are
8 no delays in the presentation of evidence to the trier of fact.

9 2. At the close of each trial day, counsel shall disclose his/her anticipated witnesses
10 and order of presentation for the next day, so that any scheduling or evidentiary
11 issues may be raised at that time.

12 E. Witnesses

13 1. Before approaching a witness, counsel shall secure leave of court to approach the
14 witness.

15 2. Before approaching a witness with a writing, counsel shall first show the writing
16 to opposing counsel.

17 F. Exhibits

18 1. All exhibits shall be marked and identified in accordance with the instructions in
19 the Pretrial Order.

20 2. An exhibit shall not be published to the jury until it has been admitted into
21 evidence and counsel has secured leave of court to publish the exhibit.

22 3. The court usually will conduct an on the record review of the exhibits that have
23 been admitted in evidence at the conclusion of each party's case in chief and after
24 each party has rested its entire case.

25 G. Objections

26 1. No speaking objections or arguments are permitted in the presence of the jury.
27

