APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16516
D.C. No. 4:13-cv-00691-DCB

[Filed October 30, 2018]

HECTOR LOPEZ, an individual, Plaintiff-Appellee,	)
v.	)
P. SWANEY, Lieutenant; J. BENNETT, Sergeant, Defendants-Appellants.	)

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted August 15, 2018[**]
San Francisco, California

Before: SCHROEDER, SILER,[***] and GRABER, Circuit Judges.

Defendants J. Bennett and P. Swaney appeal the district court's denial of summary judgment on the issue of qualified immunity. On de novo review, Hamby v. Hammond, 821 F.3d 1085, 1090 (9th Cir. 2016), we affirm.

1. Viewing the evidence in the light most favorable to Plaintiff, id., there exist questions of fact as to whether Bennett actually knew of Plaintiff's serious medical needs and as to whether Bennett responded to those needs with deliberate indifference. See Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (stating elements of a claim of deliberate indifference under the Eighth Amendment).

First, some evidence suggests that Bennett knew of Plaintiff's serious medical needs. Plaintiff claims that, on the dates when Bennett saw him, he was unable to walk, eat, open his eyes, chew, talk, or breathe without gasping for air—all clearly observable and severe symptoms. There are thus questions of fact as to whether Bennett actually knew of Plaintiff's condition. See Farmer v. Brennan, 511 U.S. 825, 842 (1994)

[**] The panel unanimously concludes that this case is suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

[***] The Honorable Eugene E. Siler, Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

(explaining that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious").

Second, some evidence suggests that Bennett's response to Plaintiff's needs was unreasonable. Bennett observed Plaintiff suffering from grave symptoms and did nothing to obtain help for Plaintiff. The denial of medical care in the face of an obvious emergency constitutes deliberate indifference. Hoptowit v. Ray, 682 F.2d 1237, 1259 (9th Cir. 1982), overruled on other grounds by Sandin v. Conner, 515 U.S. 472 (1995).

The evidence, viewed in Plaintiff's favor, does not support Bennett's argument that he was relying on the medical opinions of the prison's nursing staff. Although non-medical staff are entitled to qualified immunity when they act (or fail to act) in reliance on a "bona fide medical opinion," Hamby, 821 F.3d at 1095,[1] on the present record, there was no bona fide medical opinion in this case—or, at least, not one of which Bennett was aware. Furthermore, Plaintiff's cellmate told Bennett that the nursing staff refused to help or examine him, and Bennett, after being told as much, did nothing, in the face of serious symptoms, to verify that Plaintiff was receiving adequate treatment. Accordingly, viewing the evidence in Plaintiff's favor, Bennett denied Plaintiff access to treatment even though he had reason to think that Plaintiff was receiving no care at all.

---

[1] We assume, without deciding, that Defendants would be entitled to rely on a nurse's opinion, as distinct from a doctor's opinion.

2. There exist questions of fact with respect to Swaney's conduct, too.

First, the obviousness of Plaintiff's alleged symptoms suggests that Swaney, like Bennett, actually knew of Defendant's serious medical needs. Farmer, 511 U.S. at 842.

Second, some evidence suggests that Swaney responded to those needs with deliberate indifference. Viewing the evidence in Plaintiff's favor, Swaney visited Plaintiff's cell on or around August 1, 2012, observed him suffering from grave symptoms, and did nothing. Although Swaney argues that he declined to take action because he was relying on the opinions of the prison's medical staff, Swaney testified that, before August 2, he was not personally aware of whether medical staff had seen Plaintiff. There is thus a question of fact as to whether Swaney acted with deliberate indifference by failing to obtain help for Plaintiff on August 1.

3. Viewing the evidence in Plaintiff's favor, Defendants violated clearly established law. Hamby, 821 F.3d at 1090–91. It is "beyond debate," id. at 1092, that a prison official acts with deliberate indifference when the official denies medical care to a prisoner exhibiting serious symptoms of pain or disease, Hunt v. Dental Dep't, 865 F.2d 198, 201 (9th Cir. 1989). Defendants' argument that they did not violate clearly established law because they acted pursuant to the nursing staff's opinions is unavailing because that argument depends on the resolution of disputed issues of fact, in Defendants' favor. See Wilkins v. City of Oakland, 350 F.3d 949, 956 (9th Cir. 2003) ("Where the

officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate.").

AFFIRMED.

SILER, Circuit Judge, dissenting.

I respectfully dissent from the conclusion that the officers in this case, Swaney and Bennett, are not entitled to qualified immunity. In order for the defendants to be liable to Lopez, it must be beyond debate at the time the officers acted that they did not clearly violate the constitutional rights of Lopez. *See Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016).

In this case, Bennett escorted a nurse to Lopez's cell and the nurse checked the vital signs of the prisoner. Bennett relied upon the fact that the sick inmates were being monitored and treated by the medical staff. A non-medical officer "will generally be justified in believing that the prisoner is in capable hands," *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004), when the prisoner is under the care of a medical officer. That is what Bennett thought when he escorted the nurse to Lopez's cell.

In the case of Swaney's conduct, although he saw that Lopez was having problems breathing, Swaney told Lopez that "medical doesn't want to help you!" Swaney told medical about Lopez's complaint that day and medical indicated that no further medical response was needed. When correctional officers rely upon medical professionals to diagnose and consider the sickness of a prisoner, they meet their constitutional obligations to the prisoners. I would grant qualified immunity to both officers in this case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 13-00691-TUC-DCB

[Filed June 26, 2017]

Hector Lopez,	)
Plaintiff,	)
	)
vs.	)
	)
CO II Bollweg, et al.,	)
Defendants.	)
	)

ORDER

Plaintiff Hector Lopez, through counsel, brought this civil rights action under 42 U.S.C. § 1983 against Arizona Department of Corrections (ADC) Sergeant J. Bennett, Correctional Officer (CO) Suarez, and Lieutenant P. Swaney. (Doc. 35.) Plaintiff alleged that Defendants violated his right to constitutionally adequate medical care. (*Id.*) Before the Court is Defendants' second Motion for Summary Judgment, which Plaintiff opposes. (Docs. 108, 121.)

The Court will grant the Motion in part and deny it in part.

I. Background

In his First Amended Complaint, Plaintiff alleged that on or around July 20, 2012, he and three other inmates consumed botulism-contaminated food. (Doc. 35 ¶¶ 13–14, 16.) He claimed that all four inmates fell ill, and one inmate was admitted to the hospital for botulism poisoning. (*Id.* ¶¶ 17, 23.)[1] Plaintiff alleged that from July 25–August 2, 2012, his condition deteriorated, and he experienced general weakness and difficulty breathing, chewing, swallowing, eating, walking, and speaking. (*Id.* ¶¶ 18, 24, 27.) According to Plaintiff, he was taken to the hospital for treatment on August 2, 2012, only after he lied and said that he had consumed hooch. (*Id.* ¶¶ 47–49.) Plaintiff alleged that Defendants acted with deliberate indifference because they were aware of his condition, but failed to ensure medical treatment. (*Id.* ¶¶ 34, 37–38, 43–45, 76–77, 81, 84.)

---

[1] According to the Centers for Disease Control and Prevention (CDC), botulism is a rare but serious illness caused by a toxin that attacks the body's nerves, causing weakness of muscles that control the face and throat, and this weakness may spread to the rest of the body, including to muscles that control breathing, which can lead to difficulty breathing and death. *See* https://www.cdc.gov/botulism/index.html (last visited June 9, 2017); *see also Holifield v. UNUM Life Ins. Co. of Am.*, 640 F. Supp. 2d 1224, 1234 n.8 (C.D. Cal. 2009) (finding it appropriate to take judicial notice of materials and publications from the CDC website); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670 SBA, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 9, 2008) (government agency websites are often treated as proper subjects for judicial notice) (citing cases).

Defendants previously moved for summary judgment on qualified immunity grounds. (Doc. 40.) The Court determined that Plaintiff established that the right at issue was clearly established; however, as to whether Defendants reasonably believed their conduct was lawful, the factual record was insufficient. (Doc. 64 at 10–11.) The Court therefore found that it was premature to resolve the qualified immunity issue. (*Id.* at 11.)

Defendants now move for summary judgment a second time, arguing that they did not act with deliberate indifference to Plaintiff's serious medical need and they are entitled to qualified immunity. (Doc. 108.)

II. Summary Judgment Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence

of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court does not make credibility determinations; it must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255; *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. Relevant Facts

At the relevant time, Plaintiff was housed in the Special Management Unit (SMU), a maximum custody unit. (Doc. 106, Defs.' Statement of Facts ¶ 6.) In the SMU, inmate movement is strictly controlled; inmates cannot come and go as they please. (*Id.*, Ex. C, Bennett

Decl. ¶ 25.) Inmates are put in restraints and escorted by COs to medical for treatment as appropriate. (*Id.* ¶ 26.) Correctional officers can also summon medical assistance for inmates in need of medical attention, such as when they observe an inmate who is non-responsive or in a medical crisis, by initiating an Incident Command System (ICS). (*Id.* ¶ 27.) Nursing staff visit the cell areas to deliver medication to inmates several times a day, and they visit cell fronts in response to Health Needs Requests (HNRs) that prisoners have submitted. (*Id.* ¶ 25.) When a nurse is in the housing area delivering medications or seeing inmates, he or she is accompanied by a CO. (*Id.*)

On or about Friday, July 20, 2012, Plaintiff and three other inmates—Thomas Granillo, Enrique Montijo, and Robert Aceves—shared food, and they all began to feel ill over the next few days. (Doc. 35 ¶¶ 13, 17.)

On or about July 25, 2012, Granillo was taken to the hospital. (*Id.* ¶ 23.)

By July 25, 2012, Plaintiff and his cellmate, Montijo, were complaining about their symptoms to every CO that passed by their cell. (Doc. 63, Pl. Decl. ¶ 17.) At the time, Plaintiff's symptoms included blurry vision, dizziness, extreme fatigue, drowsiness, throat tightness, a numb tongue, constant headache, stomach/neck/back pain, and a general feeling of being "drugged." (*Id.* ¶ 18.) As his condition deteriorated, Plaintiff was unable to control his body; he was unable to walk, eat, or drink. (*Id.* ¶ 19.)

By Friday, July 27, 2012, Plaintiff could barely open his eyelids, he could not walk straight, and his meals were collected uneaten. (*Id.* ¶¶ 20–23.) That night, shortly after midnight, a CO escorted Plaintiff to the medical unit. (*Id.* ¶ 24.) Plaintiff told the nurse that he had not taken drugs or alcohol, and he took a urinalysis test, which came back negative for drugs or alcohol. (*Id.* ¶¶ 27–29.)[2] The nurse told Plaintiff that there were no graveyard or weekend doctors, so the earliest he could see a doctor for diagnosis was Monday, July 30, 2012. (*Id.* ¶ 30.) Nurses were prohibited from making any assessment or diagnosis because they are not qualified to make such conclusions. (Doc. 122, Pl.'s Statement of Fact ¶ 19.)[3] Plaintiff was returned to his cell without treatment. (Doc. 63, Pl.'s Decl. ¶ 34.)

On July 29, 2012, Plaintiff's symptoms escalated; he was unable to breathe without struggling and he was unable to chew, talk clearly, walk, or otherwise function properly. (*Id.* ¶ 37.) Plaintiff's tongue and lips

---

[2] Defendants object to the reference to a urinalysis test on the ground that the factual assertion lacks foundation. (Doc. 124 at 4.) Defendants' objection is overruled. Plaintiff's states in his sworn declaration that he took a urinalysis test, and he has personal knowledge of this fact. *See* Fed. R. Civ. P. 56(c)(4).

[3] Defendants object to Plaintiff's Statement of Fact ¶ 19 on the ground that the statement and supporting evidence are irrelevant. (Doc. 124 at 3.) Defendants' objection is overruled. The Court finds that the factual assertion that nurses were not qualified to make any assessment or diagnosis is supported by declaration evidence, and this fact is relevant in light of Defendants' argument that they could not have been aware of a serious medical need because Plaintiff was not diagnosed with botulism until August 2, 2012. (*See* Doc. 106, Ex. F, Salyer Decl. ¶ 13; Doc. 108 at 7–8.)

were effectively paralyzed and he was gasping for breath. (*Id.* ¶ 39.) Plaintiff and his cellmate called over a CO, who then initiated an ICS. (*Id.* ¶¶ 40–41.) In the SMU, COs never opened cells without first cuffing inmates; however, when staff responded to the ICS, they did not bother to handcuff either Plaintiff or Montijo. (*Id.* ¶¶ 42–44.) Plaintiff was placed on a gurney and taken to the medical unit; however, medical simply checked his vitals and then sent him back to his cell. (*Id.* ¶¶ 46–48.)

The next day, July 30, 2012, Suarez came by Plaintiff and Montijo's cell, and Montijo told Suarez that he and Plaintiff had whatever Granillo had but no one would let them see a doctor. (*Id.* ¶¶ 53, 61, 62.) Suarez promised to arrange a visit to medical, but then he returned and told them that no one at medical wanted to see them. (*Id.* ¶¶ 63, 66.) Plaintiff and Montijo begged Suarez to activate an ICS, but he did not do so. (*Id.* ¶ 67.)

Around this time, Plaintiff was convinced that he was going to die, and he wrote a letter to his mother telling her he was going to die. (*Id.* ¶ 68; Doc. 106, Ex. G, Pl. Dep. 149:9–14, Aug. 23, 2016.)[4]

Also, around this time, COs began telling Plaintiff and Montijo that they would not get treatment unless they said what made them "drugged," and one CO told

---

[4] To the extent that Defendants object to the reference to Plaintiff's letter to his family, the objection is overruled. (Doc. 124 at 3.) Plaintiff has personal knowledge of the fact that he wrote the letter and what he stated in the letter. *See* Fed. R. Civ. P. 56(c)(4).

them to admit to drinking hooch or other contraband if they wanted treatment. (Doc. 63, Pl. Decl. ¶¶ 69–70.)

The next day, July 31, 2012, Bennett came to Plaintiff and Montijo's cell. (*Id.* ¶¶ 81, 92.) By this time, Plaintiff was in constant, visible agony. (*Id.* ¶ 101.) Montijo begged Bennett to get them to a doctor; Montijo told Bennett that the nurses refused to help or examine them and they needed to see a doctor to get a diagnosis. (*Id.* ¶ 95.) Plaintiff tried to tell Bennett that he was dying, but it was difficult for Bennett to understand him. (*Id.* ¶ 96.) Bennett promised to get them to a doctor; however, he later returned to the cell and told them that no one wanted to help them, and Bennett did not activate an ICS. (*Id.* ¶¶ 98–100.)

On August 1, 2012, Montijo began choking, and inmates in the pod started screaming "man down!" to get attention. (*Id.* ¶ 102.)[5] Swaney and other officers arrived. (*Id.* ¶ 103.) Swaney looked at Montijo and Plaintiff and shouted words to the effect "I can't do anything for you. Medical doesn't want to help you!" (*Id.* ¶ 104.) When Montijo begged to speak to Sawney's supervisor or doctor, Swaney yelled "no," shook a can of pepper spray at Montijo and Plaintiff, and threatened to pepper spray them if they kept asking for medical help. (*Id.* ¶ 105.) As Swaney left, other inmates in the

[5] Defendants object to the factual assertion that inmates in the pod were yelling "man down!" absent any evidence that any Defendant was aware of the inmates' calls. (Doc. 124 at 5.) The objection is overruled. The Court finds the factual assertion relevant, and Swaney testifies that inmates in the pod were yelling and he tried to get the inmates' attention; thus, he was aware of the yelling. (Doc. 106, Ex. J, Swaney Dep. 55:1–12, 62:20–24.)

pod pleaded for Swaney to help Plaintiff, Montijo, and Aceves, and Swaney responded by yelling "suck my dick," "shut the fuck up," and "they don't have shit coming." (*Id.* ¶¶ 109–110.) Swaney states that he yelled at the inmates to "shut the fuck up" in order to get the inmates' attention and make his presence known; however, he denies yelling "they don't have shit coming." (Doc. 106, Ex. J, Swaney Dep. 54:7–9, 55:1–12, May 19, 2016.) Swaney did not activate an ICS. (Doc. 63, Pl. Decl. ¶ 111.)

The parties dispute what transpired on August 2, 2012. Plaintiff states that Swaney came to his cell and said that unless one of the inmates confessed to using hooch, they could not see a doctor. (*Id.* ¶¶ 112–113.) Plaintiff indicated that he used hooch. (*Id.* ¶ 114.) Swaney said that he would write Plaintiff a disciplinary ticket, and then he made sure that Plaintiff, Montijo, and Aceves were taken to the medical unit. (*Id.* ¶¶ 115–116.) When Plaintiff got to medical, the doctor immediately diagnosed botulism, and Plaintiff was sent to the hospital. (*Id.* ¶ 119.)

Swaney states that on August 2, 2012, he was directed by the Deputy Warden to have Plaintiff and the other two sick inmates brought to medical. (Doc. 106, Ex. J, Swaney Dep. 11:4–6, 56:11–57:1.) When the inmates arrived at the medical unit, they were placed in separate, individual rooms to be seen by the doctor. (*Id.*, Ex. E, Swaney Decl. ¶¶ 37–38.) Swaney avers that he interviewed each of the inmates individually either before or after the doctor evaluated them. (*Id.* ¶ 39.) Swaney states that Plaintiff admitted to consuming hooch during the interview. (*Id.* ¶ 40.) Swaney denies

that he coerced Plaintiff into admitting that he had consumed hooch as a condition of receiving treatment or going to the hospital. (*Id.* ¶ 41.) Swaney states that the doctor made the medical decision to send Plaintiff and the other two inmates to the hospital, and Swaney coordinated the logistics for transport. (*Id.* ¶ 42.)

Plaintiff was hospitalized for seven days. (Doc. 35 ¶ 49.)

IV. Governing Standard

Under the Eighth Amendment standard, a prisoner must demonstrate "deliberate indifference to serious medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are two prongs to the deliberate-indifference analysis: an objective standard and a subjective standard. First, a prisoner must show a "serious medical need." *Jett*, 439 F.3d at 1096 (citations omitted). A "'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal citation omitted). Examples of indications that a prisoner has a serious medical need include "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *McGuckin*, 974 F.2d at 1059–60.

Second, a prisoner must show that the defendant's response to that need was deliberately indifferent. *Jett*, 439 F.3d at 1096. An official acts with deliberate indifference if he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A plaintiff may rely on "circumstantial evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of harm." *Lolli v. Cnty. of Orange*, 351 F.3d 410, 421 (9th Cir. 2003). "Prison officials are deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment," *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (internal citations and quotation marks omitted), or when they fail to respond to a prisoner's pain or possible medical need. *Jett*, 439 F.3d at 1096. "[A] prisoner need not prove that he was completely denied medical care in order to prevail" on a claim of deliberate indifference. *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (quotation omitted), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). Further, if prison officials "choos[e] to rely upon a medical opinion which a reasonable person would likely determine to be inferior," their actions may amount "to the denial of medical treatment[] and the 'unnecessary and wanton infliction of pain.'" *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) *overruled in part on other grounds as recognized in Snow*, 681 F.3d at 986.

Even if deliberate indifference is shown, to support an Eighth Amendment claim, the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at 1096; *see Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (delay in providing medical treatment does not constitute Eighth Amendment violation unless delay was harmful).

V. Discussion

A. Serious Medical Need

Defendants do not directly address this first prong of the deliberate indifference analysis; however, they acknowledge that "in hindsight, [Plaintiff] was suffering from a serious medical condition during the relevant time." (Doc. 108 at 8.) The Court finds that in light of Plaintiff's allegations of severe and progressively worsening symptoms, including difficulty breathing, and his botulism diagnosis, which required a seven-day hospital stay, a reasonable jury could find that Plaintiff suffered a serious medical need. *See McGuckin*, 974 F.2d at 1059–60.

B. Deliberate Indifference

The Court therefore turns to the subjective prong of the deliberate-indifference analysis, which requires Plaintiff to show that Defendants' responses to his serious medical need were deliberately indifferent. *Jett*, 439 F.3d at 1096. The Court must look at "whether [each] individual defendant was in a position to take steps to avert the [harm], but failed to do so intentionally or with deliberate indifference." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

1. Bennett

The initial inquiry in the subjective prong analysis is whether Bennett was aware of Plaintiff's serious medical need. Defendants argue that because they did not know at the time that Plaintiff had botulism, they could not have known that he had a serious medical need. (Doc. 108 at 8.) They further argue that Plaintiff's symptoms were not readily observable, and even the nurses could not identify anything wrong with him. (*Id.* at 8–9.)

Knowledge of a specific diagnosis is not required for a prison official to be aware of a risk of serious harm. Moreover, the record shows that nurses could not make an assessment or diagnosis; thus, Plaintiff could not get any diagnosis until he saw a doctor, which he alleges Defendants prevented. (Doc. 106, Ex. F, Salyer Decl. ¶ 16.)

Regarding Plaintiff's observable symptoms, Bennett avers that when he spoke to Plaintiff, Plaintiff described general symptoms that, to him, sounded like the flu, and Bennett did not observe any physical symptoms that he associated with serious illness. (Doc. 106, Ex. C, Bennett Decl. ¶ 31 (Doc. 106-1 at 30).) According to Bennett, due to the small size of Plaintiff's cell, he could not notice if Plaintiff had mobility or balance problems. (*Id.*) Bennett states that because he did not observe Plaintiff displaying symptoms he believed required immediate attention, he did not initiate an ICS. (*Id.* ¶ 32.)

Plaintiff avers that, by July, 31, 2012, when he spoke to Bennett, he was unable to control his body and

unable to walk or eat; he could barely open his eyelids; he could not chew, talk clearly, or otherwise function properly; and he was unable to breathe without struggling and gasping for breath. (Doc. 63, Pl. Decl. ¶¶ 17–19, 21–23, 37, 81, 92–93.) These are all observable symptoms. Also, Plaintiff avers that on July 31, 2012, Bennett saw him "barely able to move." (*Id.* ¶¶ 92–93.) And in his deposition, Plaintiff states that when he asked Bennett for help that day, Bennett replied that "you guys look bad," "you guys look really sick. You guys need help." (Doc. 106, Ex. G, Pl. Dep. 134:15–135:2, Aug. 23, 2016.)

Plaintiff notes that on July 29, 2012, when officers responded to an ICS and appeared at his cell, staff videotaped the incident, and this videotape would show his condition and that he was in need of emergency medical treatment. (Doc. 63, Pl. Decl. ¶¶ 42, 45.) Such evidence could be conclusive as to Plaintiff's objective appearance; however, no videotape was submitted.[6] *See Scott v. Harris*, 550 U.S 372, 380–81 (2007) (where the nonmovant's version of facts was blatantly contradicted by a videotape, the court should have viewed the facts in the light depicted by the videotape when ruling on summary judgment). Therefore, the Court must take as true Plaintiff's averments regarding his observable symptoms. Other courts have recognized that difficulty breathing constitutes a life threatening emergency. *See, e.g.*, *Culler v. San Quentin Med. Servs.*, No. C 13-03871 BLF (PR), 2015 WL 1205086, at *4 (N.D. Cal.

[6] Plaintiff states that defense counsel informed him that they do not have a copy of the video. (Doc. 121 at 8 n.5.) If necessary, the parties may raise spoliation-of-evidence issues in pretrial motions.

March 16, 2015) (undisputed that certain medical responses were reserved "only for emergencies, such as when an inmate has fallen and is unable to get up, appears to have difficulty breathing, is having chest pains or a seizure, or any other life threatening emergency"); *Jeffries v. Sullivan*, No. 3:06cv344/MCR/MD, 2008 WL 703818, at *16 (N.D. Fla. March 12, 2008) (where the plaintiff was short of breath, unable to talk without gasping for air, and required special posturing (arms raised overhead) in order to breathe, a factfinder could deduce that the defendant recognized the plaintiff had a serious medical need).

Believing Plaintiff's allegations regarding his condition, a jury could find that Defendants knew of Plaintiff's serious medical need from the fact that it was obvious. *See Farmer*, 511 U.S. at 842 ("[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . , and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"). Accordingly, there is a question of fact whether Bennett, when talking to Plaintiff and seeing his symptoms, knew or should have known that Plaintiff suffered a serious medical need.

Next, the Court considers Bennett's response to Plaintiff's serious medical need. The record shows that on July 30, 3012, Bennett escorted a nurse to Plaintiff's cell, and the nurse checked Plaintiff's vitals, which were normal. (Doc. 106, Ex. C, Bennett Decl. ¶ 13.)

Bennett avers that he observed nursing staff at Plaintiff's cell front twice during the relevant time frame; therefore, he believed that the sick inmates were being monitored and treated by medical staff. (*Id.* ¶¶ 34–35.) Defendants argue that Bennett had no reason to believe that Plaintiff was not receiving care or that the care he was receiving was grossly inadequate; therefore, Bennett could not have been deliberately indifferent to Plaintiff's medical needs. (Doc. 108 at 12.)

Plaintiff specifically avers, however, that, when Bennett came to his and Montijo's cell on July 31, 2012, Montijo explained to Bennett that the nurses refused to help or examine them and that they needed to see a doctor for a diagnosis. (Doc. 63, Pl. Decl. ¶ 95.) Thus, contrary to Defendants' argument, Bennett had reason to believe that Plaintiff was not receiving care. As Defendants acknowledge in their Motion for Summary Judgment, "non-medical personnel may rely on the medical opinions of healthcare professionals unless they have actual knowledge that prison doctors or staff are *not* treating a prisoner." (Doc. 108 at 7.) *See Caplinger v. CCA*, 999 F. Supp. 2d 1203, 1214 (D. Idaho 2014) (if "a reasonable person would likely determine [the medical treatment] to be inferior," the fact that an official is not medically trained will not shield that official from liability for deliberate indifference"); *see also McGee v. Adams*, 721 F.3d 474, 483 (7th Cir. 2013) (non-medical personnel may rely on medical opinions of health care professionals unless "they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner") (internal quotation marks omitted).

Defendants suggest that, regardless, Bennett could not have done anything more because he could not force a doctor to see Plaintiff or unlock Plaintiff's cell and drive him to the hospital. (Doc. 108 at 19.) But, according to Bennett's own testimony, he could have initiated an ICS to summon immediate medical attention to Plaintiff's cell—even if the line nurse refused to do anything. (Doc. 106, Ex. H, Bennett Dep. 31:3–21, May 19, 2016.) Or Bennett could have escorted Plaintiff to the medical unit. (*Id.*, Ex. C, Bennett Decl. ¶ 26.) At the very least, Bennett could have called a superior officer. Whether it was reasonable for Bennett not to take any of these actions on July 31, 2012, despite actual knowledge that nurses had refused to treat Plaintiff, turns on Plaintiff's observable symptoms. If a jury believes Plaintiff's allegations that, by this time, his condition had progressed to the point that he was struggling and gasping for breath, unable to walk, unable to talk clearly or open his eyes, in agony, and barely able to move, it could reasonably conclude that Bennett's failure to take any further action exhibited deliberate indifference. *See Leer*, 844 F.2d at 633; *Hunt*, 865 F.2d at 200 (reversing summary judgment for prison officials where the plaintiff specifically alleged that they were aware of his bleeding gums, breaking teeth, and inability to eat properly, yet they failed to take any action to relieve his pain); *see also Olson v. Bloomberg*, 339 F.3d 730, 738 (8th Cir. 2003) (an officer's conduct may be considered unreasonable even if the officer took "some measures in response" to a high medical risk).

2. Suarez

The record shows that Suarez interacted with Plaintiff on July, 30, 2012, and (Doc. 63, Pl. Decl. ¶ 53, 60; Doc. 106, Ex. G, Pl. Dep. 123:12–17.) Suarez avers that he did not observe Plaintiff struggling to breathe or exhibiting slurred speech or drooping eyelids. (Doc. 106, Ex. D, Suarez Decl. ¶ 18.) Suarez also avers that Plaintiff never complained to him of blurred vision, difficulty swallowing, or muscle weakness; rather, Plaintiff reported only generic, flu-like symptoms, and Plaintiff never claimed to Suarez that he had botulism. (*Id.* ¶¶ 19–20.)

As discussed, knowledge of a specific diagnosis is not required for a prison official to be aware of a risk of serious harm. And Defendants fail to submit a videotape that was made on July 29, 2012, which could show Plaintiff's condition. Also, according to Plaintiff's allegations, by July 30, 2012, his symptoms were quite severe and observable. In his deposition, Plaintiff testified that on July 30, 2012, he was mumbling his words and fighting for air while trying to talk to Suarez, and he told Suarez that he and Montijo were really sick and needed help. (Doc. 106, Ex. G, Pl. Dep. 123:18–124:17.) On this record, there is a question of fact whether Suarez knew or should have known that Plaintiff had a serious medical need.

Defendants submit that, during the relevant time, Suarez was in Plaintiff's pod three times. (Doc. 108 at 12.) Suarez testifies that during one of his visits, he collected HNRs from the sick inmates and personally delivered them to medical to make sure they did not get lost or misplaced. (Doc. 106, Ex. I, Suarez Dep.

24:17–25:5, May 24, 2016.) Suarez states that he personally contacted the medical unit about the sick inmates, and he was advised that medical staff were aware of the inmates' complaints, that they had already been seen, or that medical staff would go to see them at their cell fronts during medication delivery. (Doc. 106, Ex. D, Suarez Decl. ¶ 16.) Suarez explained that on one occasion, he personally escorted a nurse to the pod after contacting the medical unit about Plaintiff and the other sick inmates' complaints; however, he did not listen in or witness an exam of Plaintiff at that time. (*Id.*)

Plaintiff avers that Suarez came to his cell on July 30, 2012. (Doc. 63, Pl. Decl. ¶¶ 53, 60.) Plaintiff testifies that when he spoke to Suarez that day, Suarez said he would arrange a medical visit, and he called medical. (*Id.* ¶ 63; Doc. 106, Ex. G, Pl. Dep. 124: 18–19.) Plaintiff states that Suarez then returned to Plaintiff's cell and told him that medical said Plaintiff and his cellmate had already been treated and that no one at the medical unit wanted to see him. (Doc. 106, Ex. G, Pl. Dep. 124:19–20; Doc. 63, Pl. Decl. ¶ 66.)

Notably, Plaintiff does not allege that he or Montijo informed Suarez that they had not, in fact, been treated, and that the nurses had refused to examine them or help them. Absent that information, Suarez's reliance on the statements from the medical staff and belief that Plaintiff's medical needs were being addressed was reasonable. *See Caplinger*, 999 F. Supp. 2d at 1214. In these circumstances, where Suarez did not know about the lack of treatment, and he did not ignore Plaintiff or otherwise exhibit deliberate

indifference to Plaintiff's circumstances, Suarez cannot be liable for an Eighth Amendment violation. *See Caplinger*, 999 F. Supp. 2d at 1214; *see also King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012) (absent reasonable belief or knowledge that prison medical staff are mistreating or not treating a prisoner, nonmedical officers are entitled to defer to medical staff's judgment as long as the officers do not ignore the prisoner) (citations omitted). Summary judgment will therefore be granted to Suarez, and he will be dismissed from the action.

3. Swaney

Defendants submit that Swaney had contact with Plaintiff on July 26, August 1, and August 2, 2012. (Doc. 108 at 13.) Swaney testifies that he had the opportunity to see Plaintiff and his cellmate and to talk to them. (Doc. 106, Ex. J, Swaney Dep. 24:7–17.) Plaintiff alleges that his serious symptoms were observable by July 26, 2012, and his symptoms escalated prior to his August 2, 2012 hospitalization. (Doc. 63, Pl. Decl. ¶¶ 17–22, 36, 39.) Thus, there is a question of fact whether Swaney knew or should have known that Plaintiff suffered a serious medical need.

The Court next considers Swaney's response to Plaintiff's medical need. In his deposition, Swaney testifies that on or around August 1, 2012, inmates were banging on their cell fronts and yelling, and once Swaney got everybody quieted down, he assessed the situation, and the inmates told him they were not feeling well. (Doc. 106, Ex. J, Swaney Dep. 62:1–2, 20–24; 64:23–65:3.) Swaney states that *after* he spoke to the sick inmates, he went to speak to medical staff,

who told him that they already addressed the inmates' issues that morning and no further response was necessary. (*Id.* 62:25–63:10.) This statement appears to conflict, however, with other testimony from Swaney stating that he was not personally aware if Plaintiff had been seen by the medical staff prior to August 2, 2012—the date Plaintiff saw the doctor and went to the hospital. (*Id.* 62:1–10.) Then, in their Motion, Defendants assert that *before* Swaney spoke to the inmates that day, he confirmed with medical staff that the inmates had been seen and assessed. (Doc. 108 at 14.) But the materials cited in support of this assertion do not establish that Swaney spoke to medical on August 1, 2012, before he entered the pod and spoke to Plaintiff and Montijo. (*See id.*, citing Doc. 106 ¶¶ 64, 169, 172.) In short, Swaney's inconsistent statements create a question of fact as to whether he knew of and, thus, could have relied on, any medical determination when he interacted with Plaintiff prior to August 2, 2012.

Plaintiff's declaration statements also establish a question of fact on this issue. Plaintiff avers that when Swaney entered that pod, he looked at Plaintiff "wheezing for breath and shouted words to the effect, 'I can't do anything for you. Medical doesn't want to help you!'" (Doc. 63, Pl. Decl. ¶¶ 103–104.) Plaintiff avers that when Montijo begged to speak to Swaney's supervisor or a doctor, Swaney yelled "no!"; shook a can of pepper spray at Plaintiff and Montijo and threatened to pepper spray them if they kept asking for medical help; and yelled at inmates in the pod to shut up and that "they don't have shit coming." (*Id.* ¶¶ 105–106, 110.) Taking Plaintiff's facts as true, Swaney refused to

get Plaintiff medical help *before* he allegedly went and spoke to medical staff; thus, contrary to his deposition testimony, he could not have been relying on any medical determination at the time he yelled at Plaintiff and threatened him with pepper spray.

Consequently, the record does not support that Swaney was aware of and relied on any medical decisions or ongoing treatment related to Plaintiff. As mentioned, there was no diagnosis or medical assessment until Plaintiff finally saw a doctor on August 2, 2012, and Plaintiff alleges that the nurses refused to help him. *Cf. Peralta*, 744 F.3d 1076, 1087 (prison official not liable for deliberate indifference where he signed off on a medical grievance appeal because he was not a dentist and he relied on two dentists who investigated the plaintiff's complaints). Contrary to Defendants' argument, Swaney was not expected to drive Plaintiff to the hospital himself to avoid liability for deliberate indifference. (*See* Doc. 108 at 19.) Rather, the Eighth Amendment required him to take reasonable measures to abate a risk of serious harm to Plaintiff. Based on Swaney's own averments, this could have included escorting Plaintiff to the medical unit or initiating an ICS, but he did neither. (Doc. 106, Ex. E, Swaney Decl. ¶¶ 15–16.) When viewing the facts in Plaintiff's favor, a reasonable jury could conclude that Swaney's August 1, 2012 response to Plaintiff's serious medical need—his refusal to get medical care, yelling obscenities, and threats to pepper spray Plaintiff if he asked for care again—was not reasonable and exhibited deliberate indifference.

With respect to the events on August 2, 2012, the Court must take Plaintiff's facts as true. He alleges that Swaney came to his cell, said that unless one of the inmates confessed to using hooch, they could not see a doctor. (Doc. 63, Pl Decl. ¶¶ 112–133.) Plaintiff indicated that he used hooch in order to see a doctor. (*Id.* ¶¶ 114–116.)

In *Wesley v. Davis*, the prisoner plaintiff alleged that the defendants threatened to withhold necessary medical treatment unless the plaintiff withdrew his grievance appeal. 333 F. Supp. 2d 888, 893–94 (C.D. Cal. 2004). The District Court for the Central District of California held that this "form[] of corruption amount[s] to [an] Eighth Amendment violation, regardless of whether Plaintiff's [medical] condition demonstrably worsened" as a result of the defendants' conduct. *Id.* at 893. The district court held that, taking as true the plaintiff's allegations that the defendants threatened to withhold necessary medical treatment in order to blackmail the plaintiff, "this sort of conduct would rise to the level of cruel and unusual[,]" and "the conduct undoubtedly resulted in 'pain and suffering which no one suggests would serve any penological purpose.'" *Id.* at 893–94 (quoting *Estelle*, 429 U.S. at 103).

Following *Wesley*, the Court finds that there is a question of fact whether Swaney's intentional conduct—threatening to withhold medical treatment absent a confession to a disciplinary violation, despite knowing that Plaintiff suffered a serious medical need—resulted in unnecessary and gratuitous suffering. *See Wesley*, 333 F. Supp. 2d at 893–94; *see*

also Estelle, 429 U.S. at 103 (the Eighth Amendment "proscribes more than physically barbarous punishments[,]" it "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'") (internal quotation omitted). A reasonable jury could conclude that, in this instance, Swaney's conduct offended the Eighth Amendment.

C. Harm From the Indifference

Defendants contend that Plaintiff's claim against Bennett and Swaney fails because Plaintiff cannot show that their actions caused him harm. (Doc. 108 at 9.) Defendants argue that they did not cause Plaintiff to get botulism, nor did they ignore Plaintiff. (*Id.* at 10.) Defendants submit that each time they encountered Plaintiff, they responded in some fashion. (*Id.*) They further argue that there is no evidence Plaintiff was not receiving adequate medical care. (*Id.*). These arguments concern whether Defendants acted with deliberate indifference to Plaintiff's serious medical need, not whether Plaintiff suffered harm as a result, and the Court has already determined that material factual disputes exist on this issue.

Defendants next contend that because botulism is so rare and difficult to diagnose, it is pure speculation to conclude that Plaintiff would have recovered more quickly or avoided substantial pain had he gone to the hospital sooner. (*Id.*) Plaintiff responds that until he received treatment on August 2, 2012, he was in physical pain and suffered emotionally, and he even wrote a "farewell letter" to his family believing that he was going to die. (Doc. 121 at 14.) The reasonable inference can be made that had Plaintiff received

treatment earlier, he would have received relief for his pain and suffering sooner and not believed that he was going to die without treatment.

Lastly, Defendants argue that without competent medical evidence establishing a breach of the standard of care for botulism and medical causation, Plaintiff cannot show that Defendants' actions harmed him. (Doc. 108 at 10–11.) This standard-of-care argument is of no moment because Defendants are not medical providers being sued for medical negligence, and, regardless, Plaintiff alleges that he received *no* medical care. *See* Ariz. Rev. Stat. § 12-563 (1)–(2) (evidence of the applicable standard of care and causation applies to state law medical negligence claims against health providers).

On this record, a reasonable jury could find the Defendants' actions resulted in a delay in treatment that caused Plaintiff to suffer unnecessary pain and harm sufficient to support an Eighth Amendment claim.

VI. Qualified Immunity

A. Applicable Standard

Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There are two prongs in the qualified-immunity inquiry: "(1) whether the facts alleged show the official's conduct violated a constitutional right; and (2) if so, whether the right was clearly established as of the date of the involved events

in light of the specific context of the case." *Tarabochia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014) (internal quotation omitted.) In its analysis, the Court must view the facts "in the light most favorable to the injured party." *Chappell v. Mandeville*, 706 F.3d 1052, 1058 (9th Cir. 2013) (citation omitted).

B. Discussion

The Court has already determined that there exist material factual disputes whether Bennett and Swaney acted with deliberate indifference to Plaintiff's serious medical need in violation of the Eighth Amendment. Qualified immunity therefore turns on the second step of the analysis—whether Plaintiff's rights were clearly established such that a reasonable official would have known that the conduct alleged was unlawful.

In their second Motion for Summary Judgment, Defendants argue that Plaintiff does not have a clearly established right "to have the Defendants, who are all non-medical prison staff, override the medical directives of prison medical personnel—or more precisely, to require non-medical prison staff to make specific clinical decisions such as demanding that a doctor see an inmate who has already been seen and treated by medical staff." (Doc. 108 at 17.) This is not the right at issue in this case.

In the Ninth Circuit, the deliberate indifference standard sufficiently particularizes the right at issue in Eighth Amendment medical care cases. *See Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995) (explaining that the "Eighth Amendment rights in the prison medical context" have "already been particularized") (emphasis

omitted); *accord Newell v. Sauser*, 79 F.3d 115, 117 & n.3 (9th Cir. 1996). The Ninth Circuit has held that the Eighth Amendment's guarantee that prisoners have "a right to officials who are not 'deliberately indifferent to serious medical needs'" is clearly established. *Kelly*, 60 F.3d at 667. Thus, officers are not entitled to qualified immunity when they fail to provide medical assistance to an individual who has a serious medical need that was either obvious or reported to the officers. *See Hamilton*, 981 F.2d at 1067; *McRaven v. Sanders*, 577 F.3d 974, 980 (8th Cir. 2009); *see also Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 603–04 (6th Cir. 2005). Moreover, the right to adequate medical care encompasses the more specific right to adequate treatment in an emergency; "it is apparent that not just the right to medical care in general, but the specific right to be provided with adequate treatment in a medical emergency [is] indeed clearly established[.]" *Howarth v. Boundary Cnty.*, No. 2:14-cv-00312-REB, 2016 WL 5745101, at *12 (D. Idaho Sept. 30, 2016) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (abrogated on other grounds), and *Provencio v. Vasquez*, 258 F.R.D. 626, 637 (E.D. Cal. 2009) (collecting cases and holding that the right to emergency medical treatment under the Eighth Amendment is clearly established for purposes of the qualified immunity inquiry)).

In its first Summary Judgment Order, the Court found that Plaintiff met his burden of proving that the right at issue is clearly established. (Doc. 64 at 10.) *See LSO, Ltd. v. Stroh*, 205 F.3d 1145, 1157 (9th Cir. 2000) (the plaintiff bears the burden of proving that the right allegedly violated was clearly established). In

mischaracterizing the right at issue, Defendants fail to show that the Court's prior determination on this prong was in error. And to the extent that Defendants claim qualified immunity based on their version of disputed facts, qualified immunity is not proper. (*See* Doc. 108 at 18–20.) *See Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003) ("[w]here the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate").

Construing the facts in Plaintiff's favor, Defendants refused to ensure medical attention for Plaintiff despite his serious symptoms and desperate pleas for medical care. Before 2012, it was clearly established that officers could not intentionally deny or delay access to medical care, and that failing to respond to a prisoner's pain or possible medical need exhibited deliberate indifference. *Estelle*, 429 U.S. at 104; *Jett*, 439 F.3d at 1096. Accordingly, summary judgment based on qualified immunity is not appropriate.

IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. 108) is **granted in part** and **denied in part**. The Motion is **granted** as to Defendant Suarez, and he is dismissed as a Defendant; the Motion is **denied** as to Defendants Bennett and Swaney.

IT IS FURTHER ORDERED that a Joint Proposed Pretrial Order should be filed with the Court on or before **July 28, 2017**.

Dated this 26th day of June, 2017.

/s/ David C. Bury
Honorable David C. Bury
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 13-00691-TUC-DCB

[Filed August 1, 2017]

Hector Lopez,	)
Plaintiff,	)
	)
vs.	)
	)
CO II Bollweg, et al.,	)
Defendants.	)
	)

ORDER

Plaintiff Hector Lopez, through counsel, brought this civil rights action under 42 U.S.C. § 1983 against Arizona Department of Corrections Sergeant J. Bennett and Lieutenant P. Swaney. (Doc. 35.) On June 26, 2017, the Court issued an Order denying Defendants' second Motion for Summary Judgment as to Bennett and Swaney. (Doc. 125.) Before the Court is Defendants' Motion for Reconsideration of that Order. (Doc. 128.) The Court did not direct Plaintiff to file a response. *See* LRCiv. 7.2(g)(2).

The Court will deny Defendants' Motion.

I. Background

The parties are familiar with the background of this case, in which Plaintiff alleges that Defendants acted with deliberate indifference when they were aware of his serious medical need caused by symptoms of botulism but failed to ensure treatment. (Doc. 125 at 1–2.)

In its June 26, 2017 Summary Judgment Order, the Court determined that a jury could find that Defendants knew of Plaintiff's serious medical need from the fact that it was obvious. (Doc. 125 at 10–11, 15.) The Court further found that, with respect to Bennett, there was a triable issue of fact whether his failure to take any action to ensure medical treatment after Plaintiff told him that nurses had refused to treat Plaintiff constituted deliberate indifference. (*Id.* at 12–13.) As to Swaney, the Court determined that there were questions of fact whether he was aware of any medical determination before his interaction with Plaintiff or whether he simply yelled at Plaintiff, refused to get medical help, and threatened Plaintiff with pepper spray if he continued to ask for medical help. (*Id.* at 15–16.) The Court also determined that there was a triable issue of fact whether Swaney's threat to withhold medical treatment absent a confession to a disciplinary violation—despite knowing that Plaintiff suffered a serious medical need—resulted in unnecessary and gratuitous suffering in violation of the Eighth Amendment. (*Id.* at 17.)

In their Motion for Reconsideration, Defendants argue that the Court committed clear error when it determined that Defendants knew or should have

known of Plaintiff's serious medical need. (Doc. 128 at 3.) Defendants contend that the Court improperly relied on Plaintiff's "self-reporting" of his symptoms and that the Court erred in finding that Defendants should have known or should have inferred from these symptoms that Plaintiff was at risk of serious harm. (*Id.* at 4.) Defendants further contend that the Court erroneously conflated whether Defendants had subjective knowledge of a risk of harm with whether their response to the risk was reasonable when it considered whether Defendants knew if Plaintiff was being treated by medical staff. (*Id.*)

In addition, Defendants assert that the Court erred because it improperly weighed the evidence; mistakenly relied on Plaintiff's "incomplete, incorrect, or unsupported" facts and speculation; improperly relied on declarations filed before discovery in this matter; misapprehended the fact that Plaintiff had not been diagnosed with botulism when Defendants encountered him; and incorrectly concluded that Defendants harmed Plaintiff. (*Id.* at 5–16.)

II. Governing Standard

Motions for reconsideration should be granted only in rare circumstances. *Defenders of Wildlife v. Browner,* 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Reconsideration is appropriate where the district court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A motion for reconsideration "may not

be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for reconsideration repeat any argument previously made in support of or in opposition to a motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D. Ariz. 2003). And mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988). Finally, "a motion for reconsideration should not be used to ask the court to rethink what the court had already thought through." *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998) (quotation omitted).

III. Discussion

Defendants do not present any newly discovered evidence or point to a change in controlling law. Instead, Defendants assert that the Court committed clear error in finding material issues of fact precluding summary judgment. But Defendants merely express disagreement with the Court's Order and present the same arguments that were raised in their second Motion for Summary Judgment. (*Compare* Doc. 108 at 8–12, 14–15 *with* Doc. 128 at 5, 9–12, 15–16.) As stated, this is not proper on a motion for reconsideration. *Motorola, Inc.*, 215 F.R.D. at 586; *see Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991) (a motion for reconsideration should not be used to reargue issues the court had already considered and rejected). Although Defendants fail to present valid

grounds for reconsideration, the Court will address some of their arguments.

Defendants contend that the Court applied the wrong standard to the subjective prong of deliberate indifference because, under *Farmer v. Brennan*, Plaintiff must present facts showing that Defendants were actually aware of a serious medical need, and it is not enough that Defendants "should have been aware." (Doc. 128 at 3, citing 511 U.S. 825, 837 (1994).) *Farmer* provides, however, that "[w]hether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." 511 U.S. at 842. And "a fact finder may conclude that a prison official knew of substantial risk *from the very fact that the risk was obvious*." *Id.* (emphasis added); *see Gibson v. City of Washoe, Nev.*, 290 F.3d 1175, 1197 (9th Cir. 2002) (acknowledging that the subjective component could be met if the risk was so obvious that the officers "must have known" of the risk). In the Summary Judgment Order, the Court recited this exact language from *Farmer* when it determined that, taking Plaintiff's allegations about his condition as true, "a jury could find that Defendants knew of Plaintiff's serious medical need from the fact that it was obvious." (Doc. 125 at 11, quoting 511 U.S. at 842.) Thus, the Court applied *Farmer's* "obviousness" standard, and there has been no change in the law regarding this standard.

Defendants' disagreement with the Court's conclusion as to Defendants' knowledge of a serious medical need appears to be based on their view that the

Court inappropriately weighed the evidence and believed Plaintiff's testimony and facts, and made inferences in his favor, instead of believing Defendants' testimony. But this is exactly what the Court was required to do on Defendants' motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Contrary to Defendants' suggestion, Plaintiff's declaration constitutes evidence in opposition to summary judgment, regardless of when it was filed. *See* Fed. R. Civ. P. 56(c)(3) (at summary judgment, the court may consider any materials in the record). Further, Plaintiff's testimony regarding his own symptoms and suffering is not speculative or unsupported; it is testimony based on personal knowledge, which the Court considers on a motion for summary judgment. *See* Fed. R. Civ. P. 56(c)(4); *S. Cal. Housing Rights Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F. Supp. 2d 1061, 1070 (C.D. Cal. 2005) (declarant has personal knowledge of her own symptoms); *United States v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999) ("[t]hat an affidavit is self-serving bears on its credibility, not on its cognizability for purposes of establishing a genuine issue of material fact").

To the extent that it appeared the Court conflated its analysis on whether Defendants knew if Plaintiff was receiving care with its analysis of Defendants' response to the risk, this was simply because the Court addressed Defendants' specific argument that conflated these two issues. In their Motion for Summary Judgment, Defendants argued that the record did not support a finding that either of them was deliberately

indifferent in responding to Plaintiff because they "had no reason to believe that [Plaintiff] was not receiving adequate medical care." (Doc. 108 at 12, 15.) The Court rejected this argument because the record showed that Defendants, in fact, had reason to believe that Plaintiff was not receiving care and there were questions of fact whether Defendants knew of and could have relied on any medical determination regarding Plaintiff's condition. (Doc. 125 at 12, 15.) Defendants' insistence that Plaintiff failed to present evidence to support a triable issue of fact as to their liability for deliberate indifference is, as discussed above, based on their incorrect view that the Court should not have believed Plaintiff's evidence. (*See* Doc. 128 at 5–6.)

In support of their argument that the Court misapprehended the significance of the lack of any medical diagnosis, Defendants rely on the 2006 decision in *Grayson v. Ross*, where the Eighth Circuit found that an inmate's medical needs were not objectively serious because he had not been diagnosed by a physician and he did not exhibit symptoms obvious to a lay person. (*Id.* at 8, citing 454 F.3d 802, 810 (8th Cir. 2006).) Defendants did not previously raise an argument based on *Grayson*. (*See* Docs. 108, 124.) *See Kona Enters., Inc.*, 229 F.3d at 890 (improper to raise argument for first time on motion for reconsideration if argument could have been raised earlier). Nonetheless, the case is not helpful. Again, the Court was required to take Plaintiff's allegations and facts as true, including that his symptoms were very serious and observable, even to a lay person. (*See* Doc. 125 at 5–6, 11.) Further, as the Court noted in the Summary Judgment Order, "Plaintiff could not get any

diagnosis until he saw a doctor, which he alleges Defendants prevented." (*Id.* at 9.)[1] It would turn the Eighth Amendment on its head if officials could prevent a prisoner from getting any diagnosis and then successfully argue that absent a diagnosis showing a serious condition, they could not have been aware of a serious medical need.

Defendants specifically criticize the Court for making the inference that a videotape taken of Plaintiff and his cellmate could be conclusive as to Plaintiff's appearance. (Doc. 128 at 7.) The Court noted that the videotape was not produced; therefore, no inference regarding the videotape was made, and the Court had to take Plaintiff's allegations regarding his observable symptoms and appearance as true. (Doc. 125 at 10–11.) Because the Court was required to view the evidence in this manner, there was no unwarranted inference or manifest error.

As to the Court's finding that there exists a question a fact whether Swaney's conduct on August 2, 2012 constituted deliberate indifference, Defendants assert that the Court failed to consider inconsistencies in Plaintiff's allegations. (Doc. 128 at 12–13.) They note that, in his amended pleading, Plaintiff alleged that he was taken to medical and then Swaney threatened that unless he admitted to using hooch, he could not go to the hospital; however, in his declaration, Plaintiff

---

[1] Evidence in the record showed that only doctors could make a diagnosis; nurses were prohibited from making any assessment or diagnosis because they are not qualified to make such conclusions. (Doc. 106, Ex. F, Salyer Decl. ¶ 13.)

alleged that Swaney came to his cell and made that threat before Plaintiff was taken to medical. (*Id.*) Defendants argue that the Court should not allow Plaintiff to create an issue of fact with an inconsistent affidavit. (*Id.*). This argument was not raised in Defendants' Reply in support of their Motion for Summary Judgment. Nonetheless, the argument is unavailing. As the Ninth Circuit has explained, "every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence[.]" *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (quoting *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980)). Here, Plaintiff's declaration is not a "sham" declaration that flatly contradicts the allegations in his pleading. *See Kennedy*, 952 F.2d at 267. Plaintiff's inconsistent statements as to *where* Swaney was when he made the threat to withhold medical treatment go to Plaintiff's credibility, which is a question for the jury that may not be resolved on summary judgment. *See Anderson*, 477 U.S. at 255 (the court may not made credibility determinations at summary judgment because that is a jury function); *see also Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (the sham affidavit rule has limited application "because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment").

Defendants also argue that the Court improperly relied on *Wesley v. Davis* in finding that Swaney's conduct on August 2, 2012, may rise to a constitutional violation because the Ninth Circuit has held that threats alone are not actionable under the Eighth

Amendment. (Doc. 128 at 13, citing 333 F. Supp. 2d 888 (C.D. Cal. 2004).) In *Gaut v. Sunn*, on which Defendants rely, the Ninth Circuit held that a mere naked threat to cause bodily harm does implicate the Eighth Amendment. 810 F.2d 923, 925 (9th Cir. 1987). Conversely, here, Swaney's threat was that he would not act to stop the harm that Plaintiff was *already suffering*. In light of this difference, the Court's reliance on *Wesley v. Davis* was appropriate. (Doc. 125 at 17, citing 333 F. Supp. 2d at 893–94 (finding that the defendants threat to withhold necessary medical treatment in order to blackmail the plaintiff constituted the "sort of conduct [that] would rise to the level of cruel and unusual" and "undoubtedly resulted in pain and suffering which no one suggests would serve any penological purpose") (quotation omitted)).

With respect to the Court's finding of a triable issue of fact whether Defendants caused Plaintiff harm, Defendants insist the Court improperly inferred that Plaintiff "would have received relief sooner if he had received the treatment earlier" and that Plaintiff's suffering could have been lessened sooner had Defendants acted differently. (Doc. 128 at 15.) Defendants' argue that these inferences failed to consider the scope of Defendants' duties. (*Id.* at 15–16.) But the Court did not make any inference as to what Defendants could have done—it considered Defendants' own testimony describing actions they could take if a prisoner needs medical attention. (Doc. 125 at 12, 16.) It was not unreasonable to infer that had Defendants taken such actions, Plaintiff could have received treatment sooner. And the obviousness of the need for treatment for botulism permits the inference that the

sooner treatment is received, the sooner a patient receives relief.

In short, Defendants fail to demonstrate clear error or any basis for reconsideration of the Summary Judgment Order. Accordingly,

IT IS ORDERED that Defendants' Motion for Reconsideration (Doc. 128) is **denied**.

Dated this 1st day of August, 2017.

/s/ David C. Bury
Honorable David C. Bury
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16516
D.C. No. 4:13-cv-00691-DCB
District of Arizona, Tucson

[Filed December 4, 2018]

HECTOR LOPEZ, an individual, Plaintiff-Appellee,	)
v.	)
P. SWANEY, Lieutenant; J. BENNETT, Sergeant, Defendants-Appellants.	)

ORDER

Before: SCHROEDER, SILER,* and GRABER, Circuit Judges.

The panel has voted to deny Appellants' petition for panel rehearing. Judge Graber has voted to deny Appellants' petition for rehearing en banc, and Judges Schroeder and Siler have so recommended.

* The Honorable Eugene E. Siler, United States Circuit Judge for the Court of Appeals for the Sixth Circuit, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for panel rehearing and rehearing en banc is DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16516
D.C. No. 4:13-cv-00691-DCB
U.S. District Court for Arizona, Tucson

[Filed December 12, 2018]

HECTOR LOPEZ, an individual, Plaintiff - Appellee,	)
v.	)
P. SWANEY, Lieutenant; J. BENNETT, Sergeant, Defendants - Appellants.	)

MANDATE

The judgment of this Court, entered October 30, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16465
D.C. No. 4:13-cv-01439-DCB

[Filed October 30, 2018]

ENRIQUE MONTIJO, Plaintiff-Appellee,	)
v.	)
UNKNOWN SWANEY; UNKNOWN BENNETT, Defendants-Appellants.	)

MEMORANDUM[*]

Appeal from the United States District Court
for the District of Arizona
David C. Bury, District Judge, Presiding

Argued and Submitted September 14, 2018
San Francisco, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: SCHROEDER, SILER,[**] and GRABER, Circuit Judges.

Defendants Bennett and Swaney appeal the district court's denial of summary judgment on the issue of qualified immunity. On de novo review, Hamby v. Hammond, 821 F.3d 1085, 1090 (9th Cir. 2016), we affirm.

1. Viewing the evidence in the light most favorable to Plaintiff, id., there exist questions of fact as to whether Bennett actually knew of Plaintiff's serious medical needs and as to whether Bennett responded to those needs with deliberate indifference. See Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (stating elements of a claim of deliberate indifference under the Eighth Amendment).

First, some evidence suggests that Bennett knew of Plaintiff's serious medical needs. Plaintiff claims that, on the dates when Bennett saw him, he was unable to walk, eat, open his eyes, chew, talk, or breathe without gasping for air—all clearly observable and severe symptoms. There are thus questions of fact as to whether Bennett actually knew of Plaintiff's condition. See Farmer v. Brennan, 511 U.S. 825, 842 (1994) (explaining that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious").

Second, some evidence suggests that Bennett's response to Plaintiff's needs was unreasonable. Bennett

---

[**] The Honorable Eugene E. Siler, Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

observed Plaintiff suffering from grave symptoms and did nothing to obtain help for Plaintiff. The denial of medical care in the face of an obvious emergency constitutes deliberate indifference. Hoptowit v. Ray, 682 F.2d 1237, 1259 (9th Cir. 1982), overruled on other grounds by Sandin v. Conner, 515 U.S. 472 (1995).

The evidence, viewed in Plaintiff's favor, does not support Bennett's argument that he was relying on the medical opinions of the prison's nursing staff. Although non-medical staff are entitled to qualified immunity when they act (or fail to act) in reliance on a "bona fide medical opinion," Hamby, 821 F.3d at 1095,[1] on the present record, there was no bona fide medical opinion in this case—or, at least, not one of which Bennett was aware. Furthermore, Plaintiff's cellmate told Bennett that the nursing staff refused to help or examine him, and Bennett, after being told as much, did nothing, in the face of serious symptoms, to verify that Plaintiff was receiving adequate treatment. Accordingly, viewing the evidence in Plaintiff's favor, Bennett denied Plaintiff access to treatment even though he had reason to think that Plaintiff was receiving no care at all.

2. There exist questions of fact with respect to Swaney's conduct, too.

First, the obviousness of Plaintiff's alleged symptoms suggests that Swaney, like Bennett, actually knew of Defendant's serious medical needs. Farmer, 511 U.S. at 842.

---

[1] We assume, without deciding, that Defendants would be entitled to rely on a nurse's opinion, as distinct from a doctor's opinion.

Second, some evidence suggests that Swaney responded to those needs with deliberate indifference. Viewing the evidence in Plaintiff's favor, Swaney visited Plaintiff's cell on or around August 1, 2012, observed him suffering from grave symptoms, and did nothing. Although Swaney argues that he declined to take action because he was relying on the opinions of the prison's medical staff, Swaney testified that, before August 2, he was not personally aware of whether medical staff had seen Plaintiff. There is thus a question of fact as to whether Swaney acted with deliberate indifference by failing to obtain help for Plaintiff on August 1.

3. Viewing the evidence in Plaintiff's favor, Defendants violated clearly established law. Hamby, 821 F.3d at 1090–91. It is "beyond debate," id. at 1092, that a prison official acts with deliberate indifference when the official denies medical care to a prisoner exhibiting serious symptoms of pain or disease, Hunt v. Dental Dep't, 865 F.2d 198, 201 (9th Cir. 1989). Defendants' argument that they did not violate clearly established law because they acted pursuant to the nursing staff's opinions is unavailing because that argument depends on the resolution of disputed issues of fact, in Defendants' favor. See Wilkins v. City of Oakland, 350 F.3d 949, 956 (9th Cir. 2003) ("Where the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate.").

AFFIRMED.

SILER, Circuit Judge, dissenting.

I respectfully dissent in this case with regard to the question of qualified immunity. There is no existing case law which describes the conduct of either Bennett or Swaney as having violated Montijo's constitutional rights. *See Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016). Bennett escorted a nurse to Montijo's cell when that nurse checked the vital signs of Montijo. On the following day, when Bennett came to Montijo's cell, Bennett went to medical, returned to the cell, and told Montijo that he had talked to the medical staff and a nurse said she had seen Montijo and there was nothing wrong with him.

In Swaney's case, he informed medical staff of Montijo's complaints either before or after he spoke to Montijo, but the medical staff said that they had already addressed the medical issues that morning and that whatever was wrong with Montijo "didn't require any further response." Both officers relied upon the medical staff at the institution and did not violate any clearly established constitutional right by taking no further action. They had a right to rely upon the professional staff. Therefore I would grant qualified immunity to both officers in this case.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 13-01439-TUC-DCB

[Filed June 19, 2017]

Enrique Montijo, Plaintiff,	)
vs.	)
Charles Ryan, et al., Defendants.	)

ORDER

Plaintiff Enrique Montijo, through counsel, brought this civil rights action under 42 U.S.C. § 1983 against Arizona Department of Corrections (ADC) Sergeant J. Bennett and Lieutenant P. Swaney. (Doc. 1–3.)[1] Plaintiff alleged that Defendants violated his right to constitutionally adequate medical care. (*Id.*) Before the Court is Defendants' second Motion for Summary Judgment, which Plaintiff opposes. (Docs. 93, 106.)

[1] Plaintiff filed his action in Pima County Superior Court on July 22, 2013. (Doc. 1-3, Ex. A, No. C20134044.) On September 20, 2013, he filed his First Amended Complaint. (*Id.*, Ex. B.) In October 2013, Defendants removed the action to federal court. (Doc. 1-1; Doc. 2.)

The Court will deny the Motion.

I. Background

In his First Amended Complaint, Plaintiff alleged that on or around July 20, 2012, he and three other inmates consumed botulism-contaminated food. (Doc. 1-3 at 9 ¶¶ 7–8.) He claimed that all four inmates fell ill, and one inmate was admitted to the hospital for botulism poisoning. (*Id.* at 10–11 ¶¶ 11, 20.)[2] Plaintiff stated that he began to experience progressively worsening symptoms, including difficulty breathing. (*Id.* at 10 ¶ 15.) Despite his pleas to Defendants for help, he was not seen by a physician until August 2, 2012, at which time he was transported to a hospital. (*Id.* at 11–13 ¶¶ 21–32.) Plaintiff alleged that Defendants were deliberately indifferent because they were aware of his serious health problem but failed to ensure treatment. (*Id.* at 15 ¶¶ 50–55.)

Defendants previously moved for summary judgment on the ground that they are entitled to

---

[2] According to the Centers for Disease Control and Prevention (CDC), botulism is a rare but serious illness caused by a toxin that attacks the body's nerves, causing weakness of muscles that control the face and throat, and this weakness may spread to the rest of the body, including to muscles that control breathing, which can lead to difficulty breathing and death. *See* https://www.cdc.gov/botulism/index.html (last visited June 9, 2017); *see also Holifield v. UNUM Life Ins. Co. of Am.*, 640 F. Supp. 2d 1224, 1234 n.8 (C.D. Cal. 2009) (finding it appropriate to take judicial notice of materials and publications from the CDC website); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670 SBA, 2008 WL 4183981, at *5 (N.D. Cal. Sept. 9, 2008) (government agency websites are often treated as proper subjects for judicial notice) (citing cases).

qualified immunity. (Doc. 28.) The Court denied summary judgment to both Bennett and Swaney, finding material factual disputes whether they were aware of Plaintiff's serious medical need and whether their response to that need was unreasonable and exhibited deliberate indifference. (Doc. 53 at 14–17.)

Defendants now move for summary judgment a second time, arguing that (1) Plaintiff cannot show Defendants knew he was suffering a serious medical need or that their conduct caused Plaintiff harm and (2) Defendants are entitled to qualified immunity. (Doc. 93.)

II. Summary Judgment Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of

the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court does not make credibility determinations; it must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255; *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

III. Relevant Facts[3]

At the relevant time, Plaintiff was housed in the Special Management Unit (SMU), a maximum custody unit. (Doc. 53 at 3.) In the SMU, inmate movement is strictly controlled; inmates cannot come and go as they please, and if they need medical attention, they cannot just leave their cells to go to medical. (*Id.*; Doc. 107, Ex. 5, Swaney Dep. 40:10–22, May 19, 2016; Bennett Dep. 29:19–22, May 19, 2016.) Inmates are put in restraints and escorted by correctional officers (COs) to medical for treatment as appropriate. (Doc. 91, Ex. D, Swaney Decl. ¶ 15.) Correctional officers can also summon medical assistance for inmates in need of medical attention, such as when they observe an inmate who is non-responsive or in a medical crisis, by initiating an Incident Command System (ICS). (Doc. 53 at 3.) Nursing staff visit the cell areas to deliver medication to inmates several times a day and they visit cell fronts in response to Health Needs Requests (HNRs) that prisoners have submitted. (*Id.*) When a nurse is in the housing area delivering medications or seeing inmates, he or she is accompanied by a CO. (*Id.*)

On or about Friday, July 20, 2012, Plaintiff, his cellmate Hector Lopez, and two inmates in nearby cells, including Thomas Granillo, shared food, and they all began to feel ill over the next few days. (*Id.*)

---

[3] Many of the relevant facts are taken from the Court's prior Summary Judgment Order because, in the current briefing, the parties provide only supplemental facts based on evidence gleaned from discovery conducted after the first Summary Judgment Order was issued. (*See* Docs. 91, 107.)

By July 25, 2012, Plaintiff was experiencing blurry vision, dizziness, extreme fatigue, drowsiness, throat tightness, a numb tongue, and a general feeling of being "drugged." (*Id.* at 4.) Plaintiff complained about his symptoms to every CO that passed by his cell. (*Id.*)

On July 26, 2012, Swaney was in Plaintiff's pod. (Doc. 107, Ex. D, Swaney Decl. ¶ 32.) At the time, Swaney was a Sergeant and responsible for supervising subordinate officers and maintaining security, order, and discipline of inmates. (*Id.* ¶ 6.) Swaney requested that medical staff come to the unit to assess the inmates who claimed they were sick, and Swaney brought one of the inmates to the medical unit in a wheelchair. (*Id.* ¶¶ 32, 34.) That same day, Granillo was taken to the hospital for treatment. (*Id.* ¶ 32; Doc. 53 at 3–4.) Swaney coordinated the hospital transport. (Doc. 107, Ex. D, Swaney Decl. ¶ 32.) According to the Incident Report that Swaney completed for the transport, the prison doctor believed that Granillo had a throat ulcer or tonsillitis. (*Id.* ¶ 29.) Granillo's evacuation to the hospital was a topic of conversation between inmates and guards, including Defendants. (Doc. 53 at 4.) Granillo was treated at the hospital and returned to the prison; it is not clear exactly what day he returned. (Doc. 91 ¶ 80.)

By July 27, 2012, Plaintiff was barely able to open his eyelids, he was unable to walk straight, he had to take gasping breaths to get air, and he could not eat—his meals were collected uneaten. (Doc. 53 at 4.) Shortly after midnight, Plaintiff told officers that he had shared a tamale with Granillo and believed he had some form of food poisoning; a CO II escorted Plaintiff

to the medical unit. (*Id.* at 4–5.) Plaintiff told medical staff that he had not taken drugs or alcohol, and he volunteered a urine sample, which came back negative. (*Id.* at 5.) The medical note for this encounter documents Plaintiff's reported symptoms and that Plaintiff's eyes were droopy and it appeared he was under the influence of drugs or alcohol, but there was no throat or tongue swelling and his respirations were clear. (*Id.*) The medical note stated that the assessment/diagnosis was "[d]eferred." (*Id.*) Nurses were prohibited from making any assessment or diagnosis because they are not qualified to make such a conclusion. (Doc. 107 ¶ 19.)[4] A nurse told Plaintiff that there were no weekend doctors and so he could not see a doctor until Monday, July 30, 2012; Plaintiff was returned to his cell without any treatment. (Doc. 53 at 5.)

Plaintiff continued to complain to any officers who came into his pod that he was seriously ill and that medical had advised him to let them know if he got worse. (*Id.*) Every day nurses would come through the housing area to pass out medication, and Plaintiff would inform them that he was deteriorating; however, the nurses accused him of lying or faking. (*Id.*) Plaintiff

---

[4] Defendants object to Plaintiff's Statement of Fact ¶ 19 on the ground that the statement and supporting evidence are irrelevant. (Doc. 109 at 3–4.) Defendants' objection is overruled. The Court finds that the factual assertion that nurses were not qualified to make any assessment or diagnosis is supported by declaration evidence, and this fact is relevant in light of Defendants' argument that they could not have been aware of a serious medical need because Plaintiff was not diagnosed with botulism until August 2, 2012. (*See* Doc. 91, Ex. E, Salyer Decl. ¶ 13; Doc. 93 at 9.)

states that one nurse came by his cell multiple times and witnessed his deterioration; however, she told him that his vitals were normal, there was nothing wrong with him, and she accused him of lying. (*Id.*)

By July 29, 2012, Plaintiff's symptoms had escalated—he was barely able to breathe and he was unable to chew, talk clearly, walk, or function properly. (*Id.*) Plaintiff's cellmate, Lopez, was suffering the same symptoms. (Doc. 107, Ex. 4, Lopez Decl. ¶ 37 (Doc. 107-1 at 51).) Plaintiff called CO Bollweg over to the cell, and Bollweg initiated an ICS. (*Id.* ¶¶ 40–41.) When medical and correctional staff responded to the ICS, they did not even bother to handcuff Plaintiff or Lopez before opening the cell—something that had never happened before. (*Id.* ¶¶ 43–44.) Normally, before taking an inmate to the medical unit, officers will strip search and cuff the inmate. (Doc. 107 ¶ 36.) Lopez was placed on a gurney and taken to medical, where his vitals were checked and then he was sent back to his cell. (*Id.*, Ex. 4, Lopez Decl. ¶¶ 46–48.) When officers returned Lopez to the cell, they refused to take Plaintiff to medical. (*Id.* ¶ 49.)

At some point on July 29, 2012, Plaintiff was placed on a clear liquid diet. (*Id.*)

Also on July 29, 2012, Bennett, who was a CO II at the time, helped arrange transportation back to the hospital for Granillo. (Doc. 91 ¶¶ 11, 19.)

Plaintiff submitted an HNR on July 29, 2012, requesting medical help because for days he had been dizzy, fatigued, and short of breath; he had started vomiting his food; it was hard to swallow and chew;

and his symptoms were worsening. (Doc. 53 at 6.) The July 30, 2012 HNR response from a nurse erroneously stated that Plaintiff was sent to the hospital on July 30, 2012, and that the HNR was resolved. (*Id.*)

Around this time, officers began telling Plaintiff and Lopez that they would not receive treatment unless they said what they took to make them "drugged." (Doc. 53 at 6.) One unidentified CO told Plaintiff and Lopez that they should admit to drinking "hooch" or other contraband if they wanted treatment. (*Id.*)

On July 30, 2012, around 4:00 p.m., Plaintiff choked on some water and was incapacitated on the floor of his cell; inmates in the pod started shouting for help by yelling "man down!" (Doc. 53 at 7; Doc. 29 at 124.) A CO arrived and called over a nurse who was in the pod passing out medications. (Doc. 53 at 7.) Plaintiff and Lopez told the nurse that they had consumed hooch about a week ago and had whatever Granillo had. (*Id.* at 6–7; Doc. 107, Ex. 4, Lopez Decl. ¶¶ 74–76.) The medical record for this cell-front visit documents that Plaintiff was able to answer questions, his lungs were clear, his skin was dry, he walked with a steady gait, and there were no signs of stress. (Doc. 53 at 7.) But Plaintiff avers he was never physically examined; instead, the nurse told him to "man up, it's all in your head." (*Id.*)

Later that day, at 4:40 p.m., Bennett conducted a "med pass escort" of Nurse Gold to Plaintiff's cell. (Doc. 107, Ex. C, Bennett Decl. ¶ 15.) The Service Log entry for this escort notes "vitals normal" as to Plaintiff and his cellmate. (*Id.*, Attach. 3 (Doc. 107-1 at 51).)

Around this time, Lopez sent a letter to his family informing them that he was convinced he was going to die. (Doc. 107, Ex. 4, Lopez Decl. ¶ 68.)[5]

On July 31, 2012, Bennett arrived at Plaintiff's cell and Plaintiff begged Bennett to take him and Lopez to a doctor. (*Id.* ¶ 94.) Plaintiff explained that the nurses refused to help or examine them and that they needed to see a doctor for a diagnosis. (*Id.* ¶ 95.) Bennet promised to get Plaintiff, Lopez, and a third sick prisoner to a doctor; however, he later returned and told Plaintiff that no one wanted to help, and Bennett did not activate an ICS. (*Id.* ¶¶ 99–100; Doc. 53 at 7.)

On August 1, 2012, Plaintiff collapsed on his cell floor choking on water, and other inmates yelled "man down!" (Doc. 53 at 7.) Swaney and other officers arrived at the cell. (*Id.*) When Plaintiff begged to see a doctor, Swaney refused to contact the medical unit and threatened to pepper spray Plaintiff and Lopez if they continued to ask for help. (*Id.*; Doc. 107, Ex. 4, Lopez Decl. ¶¶ 105–106.) Swaney denies that he threated to pepper spray Plaintiff and Lopez. (Doc. 53 at 7.) Swaney did not activate an ICS, and, when inmates continued to plead for help, Swaney yelled "suck my dick" and "shut the fuck up." (Doc. 107, Ex. 4, Lopez Decl. ¶¶ 109–110.)

---

[5] Defendants argue that this letter to Lopez's family was not disclosed and it constitutes hearsay. (Doc. 109 at 5.) To the extent that Defendants object to this evidence, the objection is overruled. Lopez has personal knowledge of the fact that he wrote a letter to his family and as to what was in the letter. *See* Fed. R. Civ. P. 56(c)(4).

The parties dispute the events on August 2, 2012:

Plaintiff states that Swaney approached the cell and said that unless one of the inmates confessed to using hooch, they could not see a doctor. (Doc. 53 at 7.) Lopez then confessed that he used hooch, and Swaney said he would write him a disciplinary ticket. (*Id.*) After Lopez's confession, Swaney made sure that Lopez, Plaintiff, and the third sick prisoner were taken to the medical unit. (*Id.*) The doctor immediately diagnosed botulism, and Plaintiff was sent the hospital. (*Id.* at 7–8.)

Swaney states that on that day, he was told by the Deputy Warden to bring the sick inmates to medical. (Doc. 91, Ex. I, Swaney Dep. 11:5–6.) The inmates were placed in individual holding cells, and Swaney interviewed the inmates while arrangements were being made to transport them to the hospital. (Doc. 53 at 8.) Swaney states that the purpose of his interviews was to ascertain if the inmates had consumed illicit hooch and, if they admitted doing so, to issue disciplinary tickets. (*Id.*) Physician's Assistant Salyer made the decision to send Plaintiff and the two other inmates to the hospital via ADC vehicles at approximately 1:00 p.m., and Swaney coordinated the transport. (Doc. 91, Ex. D, Swaney Decl. ¶ 42.)

Plaintiff was hospitalized and treated for botulism from August 2–7, 2012. (Doc. 53 at 7–8; Doc. 91, Ex. G, Pl. Dep. 121:8–19, Aug. 23, 2016.)

IV. Governing Standard

Under the Eighth Amendment standard, a prisoner must demonstrate "deliberate indifference to serious

medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are two prongs to the deliberate-indifference analysis: an objective standard and a subjective standard. First, a prisoner must show a "serious medical need." *Jett*, 439 F.3d at 1096 (citations omitted). A "'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal citation omitted). Examples of indications that a prisoner has a serious medical need include "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *McGuckin*, 974 F.2d at 1059–60.

Second, a prisoner must show that the defendant's response to that need was deliberately indifferent. *Jett*, 439 F.3d at 1096. An official acts with deliberate indifference if he "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A plaintiff may rely on "circumstantial evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of harm." *Lolli v. Cnty. of Orange*, 351 F.3d 410, 421 (9th Cir. 2003). "Prison officials are

deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment," *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (internal citations and quotation marks omitted), or when they fail to respond to a prisoner's pain or possible medical need. *Jett*, 439 F.3d at 1096. "[A] prisoner need not prove that he was completely denied medical care in order to prevail" on a claim of deliberate indifference. *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (quotation omitted), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). Further, if prison officials "choos[e] to rely upon a medical opinion which a reasonable person would likely determine to be inferior," their actions may amount "to the denial of medical treatment[] and the 'unnecessary and wanton infliction of pain.'" *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) *overruled in part on other grounds as recognized in Snow*, 681 F.3d at 986.

Even if deliberate indifference is shown, to support an Eighth Amendment claim, the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at 1096; *see Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (delay in providing medical treatment does not constitute Eighth Amendment violation unless delay was harmful).

V. Discussion

A. Serious Medical Need

In its prior Summary Judgment Order, the Court noted that, according to the record, from July 25–August 2, 2012, Plaintiff suffered progressively

worsening symptoms, some quite serious; a doctor diagnosed botulism on August 2, 2012; and Plaintiff's condition required hospitalization for five days. (Doc. 53 at 10–11.) The Court determined that, based on these facts, a reasonable jury could find that Plaintiff suffered a serious medical need. (*Id.* at 11.)

In the pending Motion for Summary Judgment, Defendants do not dispute that Plaintiff suffered a serious medical need, nor is there any new evidence to alter the Court's prior determination on this prong. (Doc. 93 at 8.)

B. Deliberate Indifference

The Court therefore turns to the subjective prong of the deliberate-indifference analysis, which requires Plaintiff to show that Defendants' responses to his serious medical need were deliberately indifferent. *Jett*, 439 F.3d at 1096. The Court must look at "whether [each] individual defendant was in a position to take steps to avert the [harm], but failed to do so intentionally or with deliberate indifference." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

1. Bennett

The Court previously found that Bennett was aware or should have been aware of Plaintiff's serious medical need. (Doc. 53 at 15–16.) The Court noted that "by the time Bennett saw Plaintiff on July 31, 2012, Plaintiff had been experiencing worsening symptoms for 6–7 days and he states he was in agony and barely able to move." (*Id.* at 15.)

In the pending Motion for Summary Judgment, Defendants argue that Bennett had no reason to believe that Plaintiff suffered a serious medical need because there was no botulism diagnosis until later, most of Plaintiff's symptoms were either subjective or not readily observable, and even nurses were unable to identify anything wrong with him. (Doc. 93 at 8–9.)

Knowledge of a specific diagnosis is not required for a prison official to be aware that there exists a risk of serious harm. Indeed, Plaintiff could not get any diagnosis until he saw a doctor, which he alleges Defendants prevented.

The parties dispute whether Plaintiff's symptoms were observable. Bennett avers that when he spoke to Plaintiff, Plaintiff described general symptoms that, to him, sounded like the flu, and Bennett did not observe any physical symptoms that he associated with serious illness. (Doc. 91, Ex. C, Bennett Decl. ¶ 34.) According to Bennett, due to the small size of Plaintiff's cell, he could not notice if Plaintiff had mobility or balance problems. (*Id.*) Bennett states that because he did not observe Plaintiff displaying symptoms he believed required immediate attention, he did not initiate an ICS. (*Id.* ¶ 35.)

Plaintiff avers that by July 29, 2012—two days before his interaction with Bennett—he was struggling and gasping for breath and he was unable to talk clearly, walk, or otherwise function properly. (Doc. 39, Ex. 4, Pl. Decl. ¶ 37 (Doc. 39-1 at 15).) These are all observable symptoms, and Plaintiff states that his symptoms grew progressively worse; he was unable to control his body or to walk, eat or drink, and he could

barely open his eyelids. (Doc. 39, Ex. 4, Pl. Decl. ¶¶ 17–20.) Also, Plaintiff avers that on July 31, 2012, Bennett saw him "barely able to move." (*Id.* ¶¶ 88–89.) Plaintiff notes that on July 29, 2012, when officers responded to an ICS and opened his cell, staff videotaped the incident, and this videotape would show his condition and that he was in need of emergency medical treatment. (*Id.* ¶¶ 42–43.) Such evidence could be conclusive as to Plaintiff's objective appearance; however, no videotape was submitted.[6] *See Scott v. Harris*, 550 U.S 372, 380–81 (2007) (where the nonmovant's version of facts was blatantly contradicted by a videotape, the court should have viewed the facts in the light depicted by the videotape when ruling on summary judgment). Therefore, the Court must take as true Plaintiff's averments regarding his observable symptoms. Other courts have recognized that difficulty breathing constitutes a life threatening emergency. *See e.g.*, *Culler v. San Quentin Med. Servs.*, No. C 13-03871 BLF (PR), 2015 WL 1205086, at *4 (N.D. Cal. March 16, 2015) (undisputed that certain medical responses were reserved "only for emergencies, such as when an inmate has fallen and is unable to get up, appears to have difficulty breathing, is having chest pains or a seizure, or any other life threatening emergency"); *Jeffries v. Sullivan*, No. 3:06cv344/MCR/MD, 2008 WL 703818, at *16 (N.D. Fla. March 12, 2008) (where the plaintiff was short of breath, unable to talk without gasping for air, and required special posturing (arms raised overhead) in

[6] Plaintiff states that defense counsel informed him that they do not have a copy of the video. (Doc. 106 at 8 n.5.) If necessary, the parties may raise spoliation-of-evidence issues in pretrial motions.

order to breathe, a factfinder could deduce that the defendant recognized the plaintiff had a serious medical need). Accordingly, there remains a question of fact whether Bennett knew or should have known that Plaintiff suffered a serious medical need.

Next, the Court considers Bennett's response to Plaintiff's serious medical need. The Court previously determined that Bennett was specifically informed that Plaintiff was not receiving any help or treatment, and there was no evidence medical staff informed Bennett of any ongoing treatment. (Doc. 53 at 16.) The Court therefore could not find that Bennett reasonably relied on any medical opinion with respect to treatment of Plaintiff, and a reasonable jury could find that Bennet's failure to ensure medical attention in the circumstances constituted deliberate indifference. (*Id.*)

Defendants submit evidence showing that on July 30, 3012, Bennett escorted a nurse to Plaintiff's cell, and the nurse checked Plaintiff's vitals. (Doc. 91, Ex. C, Bennett Decl. ¶ 15.) They also submit Plaintiff's deposition, in which he testified that when Bennett came to his cell the next day, Plaintiff begged him for help, and Bennet tried to get help. (Doc. 91, Ex. G, Pl. Dep. 82:7–83:1 (Doc. 91-1 at 109–110).) Bennett went to medical but came back and told Plaintiff that he and Lopez would not be getting help and there was nothing Bennett could do. (*Id.* 82:18–22.) Bennett told Plaintiff that he talked to medical staff and a nurse told him she had already seen Plaintiff and that there was nothing wrong with him. (*Id.* 83:5–11.) Defendants conclude that Bennet had no reason to believe that medical staff was not treating Plaintiff; therefore, Bennett's response

did not exhibit deliberate indifference to Plaintiff's needs. (Doc. 93 at 12.)

Plaintiff specifically avers, however, that, during their interaction, he told Bennett the nurses had refused to examine him or help him. (Doc. 39, Ex. 4, Pl. Decl. ¶¶ 91–92.) Thus, contrary to Defendants' argument, Bennett had reason to believe that Plaintiff was not receiving care. As Defendants acknowledge in their Motion for Summary Judgment, "non-medical personnel may rely on the medical opinions of healthcare professionals unless they have actual knowledge that prison doctors or staff are *not* treating a prisoner." (Doc. 93 at 7.) *See Caplinger v. CCA*, 999 F. Supp. 2d 1203, 1214 (D. Idaho 2014) (if "a reasonable person would likely determine [the medical treatment] to be inferior," the fact that an official is not medically trained will not shield that official from liability for deliberate indifference"); *see also McGee v. Adams*, 721 F.3d 474, 483 (7th Cir. 2013) (non-medical personnel may rely on medical opinions of health care professionals unless "they have a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner") (internal quotation marks omitted).

Defendants suggest that, regardless, Bennett could not have done anything more because he could not force a doctor to see Plaintiff or unlock Plaintiff's cell and drive him to the hospital. (Doc. 93 at 18.) But, according to Defendants' testimony, Bennett could have initiated an ICS to summon immediate medical attention to Plaintiff's cell—even if the line nurse refused to do anything. (Doc. 107, Ex. 5, Swaney Dep.

49:15–22; Bennett Dep. 32:14–18.) Or Bennett could have escorted Plaintiff to the medical unit. (*Id.*, Ex. C, Bennett Decl. ¶ 36; Ex. D, Swaney Decl. ¶ 15.) At the very least, Bennett could have called a superior officer. Whether it was reasonable for Bennett not to take any of these actions on July 31, 2012, despite actual knowledge that nurses had refused to treat Plaintiff, turns on Plaintiff's observable symptoms. If a jury believes Plaintiff's allegations that, by this time, his condition had progressed to the point that he was struggling and gasping for breath, unable to walk, unable to talk clearly or open his eyes, in agony, and barely able to move, it could reasonably conclude that Bennett's failure to take any further action exhibited deliberate indifference. *See Hunt*, 865 F.2d at 200 (reversing summary judgment for prison officials where the plaintiff specifically alleged that they were aware of his bleeding gums, breaking teeth, and inability to eat properly, yet they failed to take any action to relieve his pain); *see also Olson v. Bloomberg*, 339 F.3d 730, 738 (8th Cir. 2003) (an officer's conduct may be considered unreasonable even if officer took "some measures in response" to a high medical risk).

2. Swaney

The Court previously found a question of fact whether Swaney was aware of a serious medical need warranting medical attention. (Doc. 53 at 17.) As discussed above, knowledge of a specific diagnosis is not required for a prison official to be aware that there exists a risk of serious harm, and Plaintiff's symptoms were observable and grew progressively worse during the week prior to his hospitalization. The record shows

that Swaney had contact with Plaintiff on July 26, August 1, and August 2, 2012. (Doc. 93 at 13.) And Swaney testifies that he had the opportunity to see Plaintiff and his cellmate and to talk to them. (Doc. 91, Ex. I, Swaney Dep. 24:7–17.) Thus, there remains a question of fact whether Swaney knew or should have known that Plaintiff suffered a serious medical need.

The Court next considers Swaney's response to Plaintiff's medical need during their interactions on August 1 and 2, 2012. In his deposition, Swaney testifies that on or around August 1, 2012, inmates were banging on their cell fronts and yelling—including Plaintiff and Lopez, and, once Swaney got everybody quieted down, he assessed the situation, and the inmates told him they were not feeling well. (Doc. 91, Ex. I, Swaney Dep. 62:1–2, 20–24; 64:23–65:3.) Swaney states that he told the inmates that he will let medical know, and then he went to speak to medical staff, who told him that they already addressed the inmates' issues that morning and no further response was necessary. (*Id.* 62:25–63:10.) This statement appears to conflict, however, with other testimony from Swaney stating that he was not personally aware if Plaintiff had been seen by the medical staff prior to August 2, 2012—the date Plaintiff saw the provider and went to the hospital. (*Id.* 62:1–10.) Swaney's inconsistent statements create a question of fact as to whether he knew of and, thus, could have relied on, any medical determination when he interacted with Plaintiff prior to August 2, 2012.

Plaintiff's testimony also establishes a question of fact on this issue. He alleges that when Swaney came

into the pod on August 1, 2012, other inmates were banging on their cell fronts to get officers' attention; however, Plaintiff could not bang, he did not have the strength. (*Id.*, Ex. G, Pl. Dep. 100:1–5.) Plaintiff states that Swaney looked at him "wheezing for breath and shouted words to the effect, 'I can't do anything for you. Medical doesn't want to help you!'" (Doc. 39, Ex. 4, Pl. Decl. ¶ 99.) Plaintiff avers that when he begged to speak to Swaney's supervisor or a doctor, Swaney yelled "no!"; threatened to pepper spray Plaintiff if he kept asking for medical help; and yelled at inmates in the pod to shut up, "suck my dick," and "they don't have shit coming." (*Id.* ¶¶ 100, 104–105.) Taking Plaintiff's facts as true, Swaney refused to get Plaintiff medical help *before* he went and spoke to medical staff; thus, he could not have been relying on any medical determination at the time he yelled at Plaintiff and threatened him with pepper spray. And, as mentioned, Plaintiff alleges that the nurses refused to help him and, since he had not seen a doctor, there was no diagnosis or medical assessment; thus, there was no medical determination or ongoing treatment on which to rely.

On this record, there exist questions of fact whether Swaney was relying on any medical determination when he refused to get Plaintiff medical attention on August 1, 2012, and whether Swaney's response to Plaintiff's medical need that day was reasonable in light of Plaintiff's serious condition at the time.

With respect to events on August 2, 2012, the Court previously found that Plaintiff's facts supported that Swaney agreed to take the sick inmates to medical only

if one of them admitted to drinking hooch, and that "Swaney's alleged conscious, and even malicious, refusal to ensure that Plaintiff received medical attention absent a confession is sufficient to present a triable issue of fact as to whether his conduct reflected deliberate indifference to Plaintiff's medical need." (Doc. 53 at 17.)

In their current Motion for Summary Judgment, Defendants point to Plaintiff's deposition testimony, in which he states that he is not sure whether he alleged that Swaney coerced him to confessing to drinking hooch. (Doc. 93 at 15; Doc. 91, Ex. G, Pl. Dep. 103:14–19.) In his description of what transpired on August 2, 2012, Plaintiff explains that random COs came and pulled Lopez out of the cell to go to medical, and the COs told Plaintiff they would be coming back to pull him out, too. (*Id.* 92:23–95:5.) About 15 or 20 minutes later, the COs came and pulled Plaintiff out and escorted him to medical. (*Id.* 95:6–14.) During the escort to medical, the COs were talking about botulism, and then, when Dr. Salyer saw Plaintiff, he told Plaintiff that he suspected botulism and he was sending Plaintiff to the hospital. (*Id.* 111:11–21.) Plaintiff states he did not have a meeting or interview with Swaney after seeing Dr. Salyer. (*Id.* 98:16–17.)

Plaintiff's evidence in opposition to Defendants' current Motion for Summary Judgment includes Lopez's declaration, in which he states that Swaney came to their cell and said that unless one of them admitted to using hooch, they could not see a doctor. (Doc. 107, Ex. 4, Lopez Decl. ¶¶ 112–116.) Lopez avers that he indicated that he used hooch and, thereafter,

the inmates were taken to medical. (*Id.* ¶¶ 112–116.) In his memorandum, however, Plaintiff simply recites Lopez's claim, but otherwise argues that Swaney admitted the only reason he took the inmates to medical was because administration ordered him to do so. (Doc. 106 at 5, 9.)

Although the Court must take Plaintiff's evidence, including Lopez's declaration, as true, it cannot conclude that Plaintiff suffered any harm as a result of Swaney's coercive statement to Lopez if Plaintiff was not aware of it. Given Plaintiff's admission that he did not meet with Swaney on August 2, 2012, and no longer recalls making a specific complaint that Swaney conditioned medical treatment on a confession to drinking hooch, the Court finds that Plaintiff cannot establish that Swaney acted with deliberate indifference to Plaintiff's need for medical treatment on August 2, 2012.

C. Harm From the Indifference

In its prior Summary Judgment Order, the Court found that a reasonable jury could conclude that Defendants' failure to ensure medical attention and the resulting delay in seeing a doctor and getting to the hospital for treatment caused Plaintiff to suffer unnecessary pain and harm sufficient to support an Eighth Amendment claim. (Doc. 53 at 16.)

In their current Motion for Summary Judgment, Defendants posit that Plaintiff cannot establish that Defendants' actions or failure to act harmed him. (Doc. 93 at 10.) Defendants argue that they did not ignore Plaintiff; rather, they responded in some way every

time they encountered him. (*Id.*) They further argue that there is no evidence Plaintiff was not receiving adequate medical care or that they delayed or denied treatment. (*Id.*). These arguments concern whether Defendants acted with deliberate indifference to Plaintiff's serious medical need, not whether Plaintiff suffered harm as a result, and the Court has already determined that material factual disputes exist on this issue.

Defendants next contend that because botulism is so rare and difficult to diagnose, it is pure speculation to conclude that Plaintiff would have recovered more quickly or avoided substantial pain had he gone to the hospital sooner. (*Id.* at 11.) Plaintiff responds that until he received treatment on August 2, 2012, he suffered physical pain and suffered emotionally, including mental anguish to the point where he feared he would die. (Doc. 106 at 14.) Further, Plaintiff testifies that when he was at the hospital, it was confirmed that he had botulism because he was given "the anti-treatment for it, and sure enough, it was." (Doc. 91, Ex. G, Pl. Dep. 121:14–19.) The inference from this evidence is that Plaintiff received the botulism antitoxin and it treated his symptoms.[7] It follows that had Plaintiff gotten to the hospital sooner, he would have received relief sooner.

---

[7] The Botulism Antitoxin Heptavalent is available only from the CDC and is supplied on an emergency basis for the treatment of persons thought to be suffering from botulism. *See* https://www.cdc.gov/laboratory/drugservice/formulary.html#bat (last visited June 9, 2017).

Lastly, Defendants argue that because there is no competent medical evidence establishing a breach of the standard of care for botulism and medical causation, Plaintiff cannot show that Defendants' actions harmed him. (Doc. 93 at 11.) This standard-of-care argument is of no moment because Defendants are not medical providers being sued for medical negligence, and, regardless, Plaintiff alleges that he received *no* medical care. *See* Ariz. Rev. Stat. § 12-563 (1)–(2) (evidence of the applicable standard of care and causation applies to state law medical negligence claims against health providers).

In short, Defendants fail to present any evidence or legal argument to alter the Court's prior determination that a reasonable jury could find Defendants' actions resulted in a delay in treatment that caused Plaintiff to suffer unnecessary pain and harm sufficient to support an Eighth Amendment claim.

VI. Qualified Immunity

A. Applicable Standard

Government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). There are two prongs in the qualified-immunity inquiry: "(1) whether the facts alleged show the official's conduct violated a constitutional right; and (2) if so, whether the right was clearly established as of the date of the involved events in light of the specific context of the case." *Tarabochia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014) (internal

quotation omitted.) In its analysis, the Court must view the facts "in the light most favorable to the injured party." *Chappell v. Mandeville*, 706 F.3d 1052, 1058 (9th Cir. 2013) (citation omitted).

B. Discussion

The Court has already determined that there exist material factual disputes whether Bennett and Swaney acted with deliberate indifference to Plaintiff's serious medical need in violation of the Eighth Amendment. Qualified immunity therefore turns on the second step of the analysis—whether Plaintiff's rights were clearly established such that a reasonable official would have known that the conduct alleged was unlawful.

In their first Summary Judgment Motion, Defendants argued that they were entitled to qualified immunity on this prong because there is no clearly established right "to have non-medical prison officials override or circumvent the decisions and ongoing treatment by prison medical staff." (Doc. 28 at 4–5.) The Court held that Defendants' characterization of the right at issue was not applicable because Plaintiff alleged that he did not receive any medical treatment; thus, there were no medical opinions or ongoing treatment on which to rely. (Doc. 53 at 20.)

More importantly, as the Court previously explained, in the Ninth Circuit, the deliberate indifference standard sufficiently particularizes the right at issue in Eighth Amendment medical care cases. *See Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995) (explaining that the "Eighth Amendment rights in the prison medical context" have "already been

particularized") (emphasis omitted); *accord Newell v. Sauser*, 79 F.3d 115, 117 & n.3 (9th Cir. 1996). The Ninth Circuit has held that the Eighth Amendment's guarantee that prisoners have "a right to officials who are not 'deliberately indifferent to serious medical needs'" is clearly established. *Kelly*, 60 F.3d at 667. Thus, officers are not entitled to qualified immunity when they fail to provide medical assistance to an individual who has a serious medical need that was either obvious or reported to the officers. *See Hamilton*, 981 F.2d at 1067; *McRaven v. Sanders*, 577 F.3d 974, 980 (8th Cir. 2009); *see also Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 603–04 (6th Cir. 2005). Moreover, the right to adequate medical care encompasses the more specific right to adequate treatment in an emergency; "it is apparent that not just the right to medical care in general, but the specific right to be provided with adequate treatment in a medical emergency [is] indeed clearly established[.]" *Howarth v. Boundary Cnty.*, No. 2:14-cv-00312-REB, 2016 WL 5745101, at *12 (D. Idaho Sept. 30, 2016) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (abrogated on other grounds), and *Provencio v. Vasquez*, 258 F.R.D. 626, 637 (E.D. Cal. 2009) (collecting cases and holding that the right to emergency medical treatment under the Eighth Amendment is clearly established for purposes of the qualified immunity inquiry)).

In their second Motion for Summary Judgment, Defendants again mischaracterize the right at issue. They argue that Plaintiff does not have a clearly established right "to have non-medical prison staff override the medical directives of prison medical

personnel—or more precisely, to require non-medical prison staff to make specific clinical decisions such as demanding that a doctor see an inmate who has already been seen and treated by medical staff." (Doc. 93 at 16.) Again, this is not the right at issue in this case. Further, to the extent that Defendants claim qualified immunity based on their version of disputed facts, qualified immunity is not proper. (*See id* at 17–19.) *See Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003) ("[w]here the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate").

Construing the facts in Plaintiff's favor, Defendants refused to ensure medical attention for Plaintiff despite his serious symptoms and desperate pleas for medical care. Before 2012, it was clearly established that officers could not intentionally deny or delay access to medical care, and that failing to respond to a prisoner's pain or possible medical need exhibited deliberate indifference. *Estelle*, 429 U.S. at 104; *Jett*, 439 F.3d at 1096. Accordingly, summary judgment based on qualified immunity is not appropriate.

IT IS ORDERED that Defendants Bennett and Swaney's Motion for Summary Judgment (Doc. 93) is **denied**.

IT IS FURTHER ORDERED that a joint proposed pretrial order should be filed with the Court on or before **July 28, 2017**.

Dated this 19th day of June, 2017.

/s/ David C. Bury
Honorable David C. Bury
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 13-01439-TUC-DCB

[Filed August 28, 2017]

Enrique Montijo, Plaintiff,	)
vs.	)
Charles Ryan, et al., Defendants.	)

ORDER

Plaintiff Enrique Montijo, through counsel, brought this civil rights action under 42 U.S.C. § 1983 against Arizona Department of Corrections Sergeant J. Bennett and Lieutenant P. Swaney. (Doc. 1-3.)[1] Before the Court is Defendants' Motion for a New Trial under

[1] Plaintiff filed his action in Pima County Superior Court on July 22, 2013. (Doc. 1-3, Ex. A, No. C20134044.) On September 20, 2013, he filed his First Amended Complaint. (*Id.*, Ex. B.) In October 2013, Defendants removed the action to federal court. (Doc. 1-1; Doc. 2.)

Federal Rule of Civil Procedure 59(e). (Doc. 115.)[2] No response is necessary from Plaintiff.

The Court will deny Defendants' Motion.

I. Background

The parties are familiar with the background of this case, in which Plaintiff alleges that Defendants acted with deliberate indifference when they were aware of his serious medical need caused by symptoms of botulism but failed to ensure treatment. (*See* Doc. 110 at 1–2.)

In January 2015, Defendants moved for summary judgment on qualified immunity grounds. (Doc. 28.) The Court denied summary judgment, finding material factual disputes as to whether Bennett and Swaney were aware of Plaintiff's serious medical need and whether their response to that need was unreasonable and exhibited deliberate indifference. (Doc. 53 at 14–17.)[3]

In November 2016, Defendants moved again for summary judgment, arguing that they were not deliberately indifferent and that they are entitled to qualified immunity. (Doc. 93.) In its June 19, 2017 Order denying Defendants' second Motion for Summary Judgment, the Court found that summary

---

[2] There has not yet been a trial in this matter; thus, Defendants' Motion is more properly characterized as a motion to alter or amend the judgment under Rule 59(e).

[3] In its Order, the Court granted summary judgment to three other Defendants. (Doc. 53.)

judgment based on qualified immunity was not appropriate. (Doc. 110 at 19–20.) *See Tarabochhia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014) (setting forth two prongs in the qualified immunity inquiry: whether the facts show a constitutional violation and whether the right at issue was clearly established). As to the first prong in the qualified immunity analysis, the Court found a triable issue of fact as to whether Defendants knew or should have known that Plaintiff had a serious medical need given his serious and observable symptoms and Defendants' contacts with Plaintiff. (Doc. 110 at 11–12, 14.) The Court further found that there were triable issues of fact as to whether Bennett's response (failing to ensure medical help after he was told nurses had refused to treat Plaintiff) and Swaney's response (yelling at Plaintiff, refusing to get medical help, and threatening Plaintiff with pepper spray if he continued to ask for medical help) constituted deliberate indifference. (*Id.* at 13–16.) With respect to the second prong in the qualified immunity analysis, the Court found that Defendants mischaracterized the right at issue, that the right at issue was clearly established, and that Defendants' claim for qualified immunity was based on their version of disputed facts; therefore, qualified immunity was not proper. (*Id.* at 19–20.)

On July 6, 2017, Defendants moved for reconsideration of the Summary Judgment Order. (Doc. 113.) They argued that the Court erred when it found that Defendants "had the requisite subjective intent to be deliberately indifferent to [Plaintiff's] serious medical need" and when it relied on Plaintiff's "self-reporting" of his symptoms to find that

Defendants should have known or should have inferred from the symptoms that Plaintiff was at a risk of serious harm. (*Id.* at 1, 5, 10.) Defendants further argued that the Court erred when it misapprehended the fact that Plaintiff had not been diagnosed with botulism when Defendants encountered him. (*Id.* at 8.) According to Defendants, as a result, they could not have drawn the inference that Plaintiff required medical attention. (*Id.*)

On July 11, 2017, the Court denied Defendants' Motion for Reconsideration. (Doc. 114.)

A week later, on July 17, 2017, Defendants filed the pending Rule 59(e) Motion for New Trial, which asks the Court to reconsider its denial of qualified immunity. (Doc. 115.) Defendants again argue that the Court "erred when it found that Defendants could have had the requisite subjective intent based on facts about which they were not aware." (*Id.* at 2.) Defendants reassert that in the absence of a reported diagnosis or obvious symptoms, a reasonable official in their position would not have been on clear notice that Plaintiff had an urgent need for medical attention. (*Id.* at 4–5.)

On July 19, 2017, Defendants filed a Notice of Appeal to the Ninth Circuit Court of Appeals on the June 19, 2017 Summary Judgment Order. (Doc. 118.)

II. Governing Standard

Under Federal Rule of Appellate Procedure 4(a)(4), if a party files a notice of appeal before the district court disposes of a motion filed under Federal Rule of Civil Procedure 59, the notice becomes effective when

the order disposing of the Rule 59 motion is entered. Fed. R. App. P. 4(a)(A)(iv) and (B)(i). Accordingly, the Court may address the pending Rule 59(e) Motion.

Relief under Rule 59(e) is "an extraordinary remedy which should be used sparingly." *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (citing 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed.1995)). The Ninth Circuit has described four circumstances that justify relief under Rule 59:(1) where the motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) where the motion is necessary to present newly discovered or previously unavailable evidence; (3) where the motion is necessary to prevent manifest injustice; and (4) where the amendment is justified by an intervening change in controlling law. *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been made prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted); *see Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009).

III. Discussion

A. Rule 59(e) Does Not Support Defendants' Motion

Rule 59(e) provides for the altering or amending of a judgment. *See* Fed. R. Civ. P. 59(e). The Court's Order denying summary judgment did not result in the entry of a judgment. *See Quinn v. Fresno Cnty. Sheriff*,

No. 1:10-cv-1617 LJO, 2012 WL 2839648 at *1 (E.D. Cal. July 10, 2012) (quoting *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 669 (Fed. Cir. 1986) ("[a] denial of summary judgment is not only not a 'final judgment,' and not appealable, it is not a judgment at all. It is quite simply and solely a determination that one or more issues require a trial")).

Defendants maintain, however, that their Rule 59(e) Motion is proper because the denial of summary judgment on qualified immunity grounds can serve as a final judgment for purposes of appeal and, therefore, the Court has discretion to rule on the Rule 59(e) Motion. (Doc. 115 at 2.) But the Supreme Court has held that immediate appeal from the denial of summary judgment on qualified immunity grounds is available only when the appeal presents a "purely legal issue." *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011). A "purely legal issue" relates to the determination of "what law was 'clearly established'" at the relevant time, which can be resolved "with reference only to undisputed facts." *Id.* at 188–89; *see Johnson v. Jones*, 515 U.S. 304, 313–20 (1995) (the denial of a defendant's motion for summary judgment based on a qualified immunity defense is an immediately appealable collateral order only if the denial was based on a ruling of law and not a determination of contested facts and whether there exists a triable issue of fact). Cases presenting a purely legal issue "typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law." *Ortiz*, 562 U.S. at 189.

Here, Defendants agree with the Summary Judgment Order's finding that the law at the relevant time provided that "officers are not entitled to qualified immunity when they fail to provide medical assistance to an individual who has a serious medical need that was either obvious or reported to the officers." (Doc. 115 at 3, citing Doc. 110 at 19–20.) Defendants claim, however, that reasonable officials in their positions would not have been on clear notice that they were violating Plaintiff's rights. (Doc. 110 at 4–5.) But this claim is not based on insufficiently established law; rather, it is based on Defendants' version of the facts. (*See id.*) Defendants argue that because there was no reported diagnosis or physician's instructions, and because Plaintiff's symptoms were not obvious, a reasonable official in their position could not have recognized that Plaintiff had an urgent need for medical attention and that failing to respond to that need violated Plaintiff's rights. (*Id.* at 5.) This misinterprets the qualified immunity question, which "is whether the *state of the law* in [2012] gave [Defendants] fair warning that [their] alleged treatment of [Plaintiff] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added). Because Defendants' Rule 59(e) Motion challenges the Court's determination of contested facts, and not the determination of the state of the law, they do not raise a purely legal issue that supports the filing of a Rule 59(e) Motion.

B. Multiple Motions for Reconsideration are Improper

Defendants' Rule 59(e) Motion repeats the same arguments presented in the prior Motion for Reconsideration, which was denied. There is nothing in the Local Rules of Civil Procedure that provides for multiple motions for reconsideration, and filing a successive motion for reconsideration with the same unsuccessful arguments wastes valuable Court resources. *See Adams v. Hedgpeth*, No. LA CV 11-03852 VBF-FFM, 2016 WL 4035607, at *3 (C.D. Cal. June 8, 2016) (noting that post-judgment motions that continue to re-evaluate judgments can divert the court's time and resources from other matters), citing *In re Shelbourne N. Water St., L.P., Debtor (Kelleher v. Nat'l Asset Loan Mgmt., Ltd.*), No. 13 B 44315, 2016 WL 1730089, at *12 (N.D. Ill. Bankr. Apr. 28, 2016) (lamenting that a "serious and studied disregard for the orderly process of justice" had "become all too familiar in federal courts" and "[e]xamples of this are filing multiple motions for reconsideration") (quotation omitted), and *Veasley v. Fed. Nat'l Mortg. Ass'n*, No. 12-CV-13642, 2014 WL 6686765, at *2 (E.D. Mich. Nov. 26, 2014) ("plaintiff seeks a third bite at the apple with another Rule 59(e) motion. But the Local Rules do not provide that a party is allowed to file multiple motions for reconsideration of an order") (internal quotation omitted)).

C. Rule 59(e) Motion is Meritless

Finally, even if the Court considers Defendants' Rule 59(e) Motion on the merits, it fails. Defendants contend that the Court improperly stated the right at

issue as a broad, general proposition instead of particularizing the right at issue based on the context of the case as required under Ninth Circuit law. (Doc. 115 at 6, citing *Hamby v. Hammond*, 821 F.3d 1085, 1095 (9th Cir. 2016).) But the Summary Judgment Order cited specific cases establishing that it is unlawful for officers to refuse to provide medical assistance to an individual who has a serious medical need that was either obvious or reported to the officers, or to intentionally deny or delay access to medical care, or to refuse to respond to a prisoner's pain or possible medical need, or to deny adequate treatment in a medical emergency. (Doc. 110 at 19–20, citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McRaven v. Sanders*, 577 F.3d 974, 980 (8th Cir. 2009); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Hamilton v. Endell*, 981 F.2d 1062, 1066–67 (9th Cir. 1992), *overruled in part on other grounds as recognized in Snow v. McDaniel*, 681 F.3d 978, 986 (9th Cir. 2012); and *Howarth v. Boundary Cnty.*, No. 2:14-cv-00312-REB, 2016 WL 5745101, at *12 (D. Idaho Sept. 30, 2016).) These precedents govern the facts in this case. *See Hamby*, 821 F.3d at 1091–92. Defendants argue that the facts in some of these cases are distinguishable from the facts in the instant case, such that these cases could not have put Defendants on notice that their conduct was unlawful. (Doc. 115 at 5–7.) But this argument is based on Defendants' version of the facts and is therefore unavailing; the Court was required to view the facts in Plaintiff's favor. (*See id.*) *See Hamby*, 821 F.3d at 1092; *see also Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003) ("[w]here the officers' entitlement to qualified immunity depends on the resolution of the disputed issues of fact in their favor,

and against the non-moving party, summary judgment is not appropriate").

Defendants otherwise do not point to any newly discovered evidence or change in controlling law. Instead, they improperly raise the same arguments that were made in their Motion for Reconsideration and their second Motion for Summary Judgment. (*See* Doc. 110 at 1–2, 4–5; Doc. 113 at 5–16; Doc. 93 at 9–15, 17–19.) *See Exxon Shipping Co.*, 554 U.S. at 485 n.5. These arguments fail for the reasons set forth in the Order denying the Motion for Reconsideration. (Doc. 114.)

Defendants claim that they are not asking the Court to resolve disputed issues of fact in their favor; however, they effectively ask that the Court consider only the facts as asserted by them. (Doc. 115 at 2.) Moreover, Defendants misrepresent facts in the record,[4] and they dismiss Plaintiff's facts as simply

---

[4] Defendants assert that "there is no allegation that Bennett or Swaney prevented [Plaintiff] from making his medical problems known to medical staff, that [Plaintiff] had no access to adequate medical care, or that medical staff was not competent to deal with his problems." (Doc. 115 at 8.) As noted in the Summary Judgment Order, Plaintiff alleged that Defendants failed to ensure medical care for his serious medical need; Defendants prevented him from seeing a doctor to get a diagnosis; he received no care or treatment; and Defendants refused to get him medical help. (Doc. 110 at 1, 5, 7, 11, 13–15.) Defendants also assert that there was "difficulty in diagnosing [Plaintiff's] condition[.]" (Doc. 115 at 8.) But the record shows that nurses were prohibited from assessing or diagnosing inmates because they are not qualified to do so, and as soon as Plaintiff finally saw a doctor, he was immediately diagnosed. (Doc. 115 at 5, 8.) And Defendants insinuate that Plaintiff received

"self-reporting of his symptoms that were not obvious[.]" (*Id.* at 4.) As much as it frustrates Defendants, at summary judgment, the Court was required to believe Plaintiff's testimony and facts and make all inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). When doing so, it determined that Defendants refused to respond to Plaintiff's serious symptoms and desperate pleas for medical care. (Doc. 110 at 20.) The Court stated that, at the time, it was clearly established that officers could not intentionally deny or delay access to medical care, and that failing to respond to a prisoner's pain or possible medical need exhibited deliberate indifference; therefore, qualified immunity was not appropriate. (*Id.* (citing *Estelle*, 429 U.S. at 104, and *Jett*, 439 F.3d at 1096.) Defendants fail to present any basis for reconsideration of this determination.

IT IS ORDERED that Defendants' Rule 59(e) Motion for a New Trial (Doc. 115) is **denied**.

Dated this 28th day of August, 2017.

/s/ David C. Bury
Honorable David C. Bury
United States District Judge

---

monitoring and conservative treatment. (Doc. 115 at 5.) Plaintiff alleged he received no examination, no help, and no treatment until he finally saw a doctor on August 2, 2012. (Doc. 110 at 2, 5, 7–8, 13.)

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16465
D.C. No. 4:13-cv-01439-DCB
District of Arizona, Tucson

[Filed December 4, 2018]

ENRIQUE MONTIJO, Plaintiff-Appellee,	)
v.	)
UNKNOWN SWANEY and UNKNOWN BENNETT, Defendants-Appellants.	)

ORDER

Before: SCHROEDER, SILER,* and GRABER, Circuit Judges.

The panel has voted to deny Appellants' petition for panel rehearing. Judge Graber has voted to deny Appellants' petition for rehearing en banc, and Judges Schroeder and Siler have so recommended.

* The Honorable Eugene E. Siler, United States Circuit Judge for the Court of Appeals for the Sixth Circuit, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for panel rehearing and rehearing en banc is DENIED.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-16465
D.C. No. 4:13-cv-01439-DCB
U.S. District Court for Arizona, Tucson

[Filed December 12, 2018]

ENRIQUE MONTIJO, Plaintiff - Appellee,	)
v.	)
UNKNOWN SWANEY and UNKNOWN BENNETT, Defendants - Appellants.	)

MANDATE

The judgment of this Court, entered October 30, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rebecca Lopez
Deputy Clerk
Ninth Circuit Rule 27-7