

TSHOMBE M. KELLEY # T-06593
High Desert State Prison
P.O. Box # 3030
Susanville, CA. 96127-3030
In Pro Se

SUPREME COURT OF UNITED STATES

TSHOMBE KELLEY
Petitioner,

V.

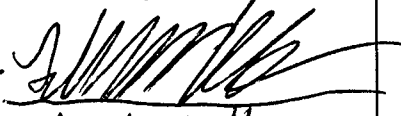
A. HERRERA, et al.,
Respondents.

No. USCA9 No. 18-17157

MOTION Directing Honorable Court
Clerk TO File PETITION For Writ OF
Certiorari Out of Time w/ Petition.

Petitioner moves pursuant to Rule 36(a), Fed. R. App. P and Rule 13.3
Supreme Court Rules for the Honorable Court Clerk to file Petition
for Writ of Certiorari out of time with (normal tolling calculations
of) petition, in the interest of Fairness and Justice. The reasons
for this motion are outlined in accompanying "Declaration in
Support of this Motion to Compel, Rule 13.3 of Supreme Court Rules
stipulates the date resolving lower court rulings is the date
which begins tolling. Lower court ruled on Petition for Rehearing
OVER SIXTY-days after filing; this prejudicial action is an issue
raised in Petition for Writ of Certiorari. This Petition for Writ of Certiorari
was submitted May 13, 2020 eighty-two days after Ruling on Petition
for Rehearing En Banc was filed (not received by Petitioner).

Date: August 5, 2020

Signed: 
Tshombe Kelley
In Pro Se

TSHOMBE M. KELLEY, #T-06593
High Desert State Prison
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Susanville, CA. 96127-3030
In Pro Se

SUPREME COURT OF UNITED STATES

TSHOMBE M. KELLEY
Petitioner,

V.

A. HERRERA, et al.,
Respondents.

No. USCA9 No. 18-17157

Declaration In Support of Motion
Directing Honorable Court Clerk To File
Petition For Writ of Certiorari Out of Time
With Petition.

DECLARATION IN SUPPORT OF MOTION

TSHOMBE M. KELLEY declares under penalty of perjury:

RECEIVED

AUG 17 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

1.) I am The Petitioner in this case, and make this declaration in support of my motion to direct the clerk to file my petition for writ of certiorari out of time.

2.) I received Ninth Circuit Memorandum by Mail after Nov. 26, 2019.

3.) Given Three-additional-days under Rule 26(c), Fed. R. App. P. I submitted Petition for Rehearing En Banc December 12, 2019.

4.) I received an untimely ruling on Petition for Rehearing En Banc by Mail after February 20, 2020 from lower court.

5.) The foregoing documents are submitted in Petition for Writ of Certiorari.

6.) I raised objection to untimely ruling and submitted Judicial

1 Notice of error for untimely ruling to lower appeals court.

2 7.) I submitted Petition for Writ of Certiorari by mail May 13, 2020.

3 8.) I received Notification from Honorable Clerk of U.S. Supreme
4 Court by mail after May 23, 2020 stating my time to file Petition
5 for Writ of Certiorari had expired due to untimely ruling of Petition
6 for Rehearing En Banc by the lower court. Due to that ruling my
7 time to file started November 26, 2019 and ended February 24, 2020.

8 9.) On June 1, 2020 I submitted motion for the honorable court
9 clerk of this court to examine the (prejudicial) date on the untimely
10 ruling given (for) denying Petition for Rehearing En Banc (by lower
11 court) which I did not receive by mail until after Feb. 24, 2020.

12 10.) On August 4, 2020 I received another Notification from
13 the honorable clerk of this court dated July 13, 2020 (stamped
14 received by the prison July 30, 2020) stating I (must) file motion
15 and submit declaration to proceed in Forma Pauperis.

16 11.) This issue has been raised with exhibits in detail in Petition
17 for Writ of Certiorari.

18
19 Pursuant to 28 U.S.C. § 1746, I declare under penalty of
20 Perjury that the foregoing is true and correct.

21
22 Dated: August 5, 2020

23 Signed: 

24 Tshombe Kelloy
25 In Pro Se
26
27
28

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 26 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TSHOMBE KELLEY,

Plaintiff-Appellant,

v.

A. HERRERA, Correctional Officer; et al.,

Defendants-Appellees.

No. 18-17157

D.C. No. 2:16-cv-01894-JAM-CKD

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Submitted November 18, 2019**

Before: CANBY, TASHIMA, and CHRISTEN, Circuit Judges.

California state prisoner Tshombe Kelley appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging excessive force and failure to protect. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's ruling on cross-motions for summary judgment.

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

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

Hamby v. Hammond, 821 F.3d 1085, 1090 (9th Cir. 2016). We affirm.

The district court properly granted summary judgment for defendants on Kelley's excessive force claim because Kelley failed to raise a genuine dispute of material fact as to whether defendants maliciously and sadistically used force against him. *See Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (the "core judicial inquiry" in resolving an Eighth Amendment excessive force claim is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm").

Because Kelley failed to raise a genuine dispute of material fact as to whether defendants used excessive force against him, the district court properly granted summary judgment for defendants on Kelley's claim that defendants failed to protect him from the use of excessive force. *See Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000) (officers "have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen" (citation and internal quotation marks omitted)).

We reject as unsupported by the record Kelley's contention that the district court improperly sealed confidential materials.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 20 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TSHOMBE KELLEY,

Plaintiff-Appellant,

v.

A. HERRERA, Correctional Officer; et al.,

Defendants-Appellees.

No. 18-17157

D.C. No. 2:16-cv-01894-JAM-CKD
Eastern District of California,
Sacramento

ORDER

Before: CANBY, TASHIMA, and CHRISTEN, Circuit Judges.

Kelley's petition for rehearing en banc (Docket Entry No. 24) is rejected as untimely.

No further filings will be entertained in this closed case.

**Additional material
from this filing is
available in the
Clerk's Office.**