

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

6

7 SUPREME COURT OF UNITED STATES

8

9 TSHOMBE KELLEY

10 Petitioner,

11 V.

12 A. HERRERA, ET AL.,
13 Respondents.

14

15 No. USCA9 No. 18-17157

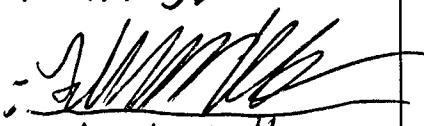
16

17 MOTION Directing Honorable Court
18 Clerk To File Petition For Writ Of
19 Certiorari Out of Time w/ Petition.

20

21 Petitioner moves pursuant to Rule 36(a), Fed. R. App. P and Rule 13.3
22 Supreme Court Rules for the Honorable Court Clerk to file Petition
23 for Writ of Certiorari out of time with (normal) tolling calculations
24 of petition, in the interest of Fairness and Justice. The reasons
25 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).

26 Date: August 5, 2020

27 Signed: 
28 Tshombe Kelley
In Pro Se

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

7 SUPREME COURT OF UNITED STATES

9 TSHOMBE M. KELLEY
10 Petitioner,

11 V.
12 A. HERRERA, et al.,
13 Respondents.

14 No. USCA9 No. 18-17157

15 Declaration In Support of Motion
16 Directing Honorable Court Clerk To File
17 Petition for Writ of Certiorari OUT of Time
18 WITH PETITION.

19 DECLARATION IN SUPPORT OF MOTION

20 TSHOMBE M. KELLEY declares under penalty of perjury.

21

RECEIVED AUG 17 2020
OFFICE OF THE CLERK SUPREME COURT, U.S.

22 1.) I am the Petitioner in this case, and make this declaration
23 in support of my motion to direct the Clerk to file my Petition
24 for Writ of Certiorari OUT of Time.
25 2.) I received Ninth Circuit Memorandum by Mail after Nov. 26, 2019.
26 3.) Given Three-additional-days under Rule 26(c), Fed. R. App. P. I
27 submitted Petition for Rehearing En Banc December 12, 2019.
28 4.) I received an untimely ruling on Petition for Rehearing
En Banc by Mail after February 20, 2020 from lower court.
29 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

3 7.) I Submitted Petition for Writ of Certiorari by mail May 13, 2020
4

5 8.) I received Notification from Honorable Clerk of U.S. Supreme
6 Court by mail after May 23, 2020 stating my time to file Petition
7 for Writ of Certiorari had expired due to untimely ruling of Petition
8 for Rehearing En Banc by the lower court. Due to that ruling my
9 time to file started November 26, 2019 and ended February 24, 2020.
10

11 9.) On June 1, 2020 I submitted motion for the honorable court
12 Clerk of this court to examine the (prejudicial) date on the untimely
13 ruling given (for) denying Petition for Rehearing En Banc (by lower
14 court) which I did not receive by mail until after Feb. 24, 2020.
15

16 10.) On August 4, 2020 I received another Notification from
17 the honorable Clerk of this court dated July 13, 2020 (stamped
18 received by the prison July 30, 2020) stating I (must) file motion
19 and submit declaration to proceed in Forma Pauperis.
20

21 11.) This issue has been raised with exhibits in detail in Petition
22 for Writ of Certiorari.
23

24 Pursuant to 28 U.S.C. § 1746, I declare under penalty of
25 perjury that the foregoing is true and correct.
26

27 Dated: August 5, 2020

28 Signed: Tshombe Kelley

Tshombe Kelley
In Pro Se

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOV 26 2019

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

TSHOMBE KELLEY,

No. 18-17157

Plaintiff-Appellant,

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

v.

A. HERRERA, Correctional Officer; et al.,

MEMORANDUM*

Defendants-Appellees.

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.

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

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.**