

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APR 18 2022

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

KEVIN KENNEDY,

Plaintiff-Appellant,

v.

DAN WATTS, Sheriff; et al.,

Defendants-Appellees.

No. 20-15414

D.C. No. 3:17-cv-00468-MMD-CLB
District of Nevada,
Reno

ORDER

Before: SILVERMAN, CLIFTON, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Kennedy's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 62) are denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

FILED

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FOR THE NINTH CIRCUIT

JAN 25 2022

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Plaintiff-Appellant,

v.

DAN WATTS, Sheriff; et al.,

Defendants-Appellees.

No. 20-15414

D.C. No. 3:17-cv-00468-MMD-CLB

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Submitted January 19, 2022**

Before: SILVERMAN, CLIFTON, and HURWITZ, Circuit Judges.

Nevada state prisoner Kevin Kennedy appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging violations of the Fourth and Fourteenth Amendments. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Gordon v. County of Orange*, 888 F.3d 1118, 1122 (9th Cir.

* 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).

2018). We affirm.

The district court properly granted summary judgment on Kennedy's Fourth Amendment excessive force claim because Kennedy failed to raise a genuine dispute of material fact as to whether defendants' actions in subjecting Kennedy to a blood draw were unreasonable in light of the facts and circumstances. *See Graham v. Connor*, 490 U.S. 386, 397-98 (1989) (setting forth the objective reasonableness standard for excessive force determinations); *Schmerber v. California*, 384 U.S. 757, 768 (1966) (explaining that the means and procedures used to extract an arrested person's blood must be "reasonable" under the Fourth Amendment).

The district court properly granted summary judgment on Kennedy's Fourteenth Amendment failure-to-protect claim arising from his pretrial detention because Kennedy failed to raise a triable dispute as to whether defendants caused Kennedy's injuries. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (setting forth elements of a pretrial detainee's Fourteenth Amendment failure-to-protect claim).

The district court properly granted summary judgment on Kennedy's Fourteenth Amendment due process claim because Kennedy failed to raise a triable dispute as to whether he had a protected liberty interest in not being placed in administrative segregation. *See Sandin v. Conner*, 515 U.S. 472, 483-84 (1995)

(no due process violation if restraint imposed is not an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life”); *Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000) (“[T]he *Sandin* analysis applies to [the] due process claims” of a plaintiff convicted but awaiting sentencing.”); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (“[A]dministrative segregation falls within the terms of confinement ordinarily contemplated by a sentence.”).

We reject as meritless Kennedy’s contentions that the district court was biased and that he was entitled to a jury trial.

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

Kennedy’s “motion to receive documents” (Docket Entry No. 59) is granted. The Clerk will send a copy of Kennedy’s motions for appointment of counsel (Docket Entry Nos. 3 and 9), opening brief (Docket Entry No. 13), reply brief (Docket Entry No. 29), motion for summary disposition (Docket Entry No. 9), emergency motions, requests, and inquiries (Docket Entry Nos. 35, 36, 50, 55, and 56), and a copy of the docket sheet to Kennedy. All other pending motions and requests are denied.

AFFIRMED.

COPY

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KEVIN LEE KENNEDY,

3:17-cv-00468-MMD-CLB

Plaintiff,

v.

DAN WATTS, et al.,

Defendants.

REPORT AND RECOMMENDATION **OF U.S. MAGISTRATE JUDGE¹**

This case involves a civil rights action filed by Plaintiff Kevin Lee Kennedy (nedy") against Defendants Shannon Casarez, Terrance Deeds, Scott Henriod, Nick z, Nathan Mingo, Brandi Sumrall, Caleb Sumrall, and Dan Watts (collectively ed to as "Defendants").² Currently pending before the court is Defendants' motion mmary judgment. (ECF No. 84). Kennedy opposed the motion (ECF No. 105) and dants replied (ECF No. 106). For the reasons stated below, the court mmons that Defendants' motion for summary judgment (ECF No. 84) be granted.

I. BACKGROUND AND PROCEDURAL HISTORY³

Kennedy is an inmate in the custody of the Nevada Department of Corrections ("NDOC"). At the time relevant to this action, Kennedy was incarcerated as a pretrial detainee at the White Pine County Jail ("WPCJ"). (ECF No. 21). Proceeding *pro se*,

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR 1B 1-4.

² Kennedy also named "Shady" as a defendant in this lawsuit. (See ECF No. 21). The claim against Defendant Shady was dismissed as service was not effectuated. (See ECF No. 99).

³ Kennedy's complaint is comprised of events related to two separate entities, White Pine County and the Nevada Department of Corrections. This Report and Recommendation discusses only the allegations surrounding the White Pine County Defendants and the White Pine County Defendants' motion for summary judgment (ECF No. 84).

1 Kennedy filed the instant civil rights action pursuant to 42 U.S.C. § 1983, alleging
 2 multiple counts and seeking monetary, declaratory, and injunctive relief. (*Id.*)

3 **A. Background Facts from Complaint**

4 According to Kennedy's First Amended Complaint ("FAC") (ECF No. 21), the
 5 alleged background events giving rise to his claims are as follows: Kennedy was
 6 involved in a fight at the Jailhouse Casino in Ely, Nevada. (*Id.* at 8, 18.) Officer Sumrall
 7 arrived at the casino to investigate a fight that allegedly had been perpetrated by
 8 Kennedy. (*Id.* at 18.) An anonymous third-party told Nicole Collard, an employee of the
 9 Jailhouse Casino, that the "Kennedy brothers" were involved. (*Id.* at 5.) Sergeant Shady
 10 saw Kennedy outside the casino and advised him to pull over. (*Id.* at 18.) Kennedy
 11 ignored him. (*Id.*) Kennedy exited the Jailhouse Casino's parking lot and stopped at the
 12 intersection of Lyons Avenue and 7th Street. (*Id.* at 9.)

13 Officer Sumrall identified Kennedy's vehicle based on description Sergeant Shady
 14 provided. (*Id.* at 18.) In order to affect an enforcement stop, Officer Sumrall pulled in
 15 front of Kennedy's vehicle. (*Id.* at 9.) Officer Sifre pulled in behind Kennedy's vehicle,
 16 boxing the vehicle in. (*Id.* at 8, 24.) Officer Sumrall shouted numerous commands while
 17 pointing his gun at Kennedy's face; Kennedy, fearing that Officer Sumrall may open fire,
 18 sat still and placed his hands on the steering wheel. (*Id.* at 9.) While Kennedy remained
 19 seated in his vehicle, Officer Sumrall grabbed Kennedy by the arm and pulled him out of
 20 the vehicle, and then Officer Sumrall slammed Kennedy's chest and face onto the
 21 ground. (*Id.*)

22 Kennedy was arrested and placed in the back of Officer Sumrall's vehicle. (*Id.* at
 23 14.) Kennedy escaped the vehicle on foot with his hands cuffed. (*Id.* at 28.) Sergeant
 24 Shady, Officer Sifre, and Officer Sumrall chased after Kennedy, yelling for him to stop
 25 and get on the ground. (*Id.*) Kennedy was re-apprehended and Sergeant Shady
 26 transported him to the Public Safety Building and placed him in a holding cell. (*Id.*)

27 //

28 //

1 **A. Excessive Force Claim**

2 In his Count III claim, Kennedy alleges the following: Sergeant Shady transported
3 Plaintiff to WPCJ. (*Id.* at 55.) Officer Sumrall and Officer Deeds escorted him to a room
4 where he was joined by Nurse Sumrall. (*Id.* at 57.) While in the room, Kennedy claims to
5 have been “strapped down in a restraint chair with an officer on each arm and leg.” (*Id.*)
6 Officer Sumrall’s and Officer Deed’s use of force in connection with the blood draw was
7 unnecessary, as Kennedy was cooperative and not refusing. (*Id.*) Kennedy repeatedly
8 asked to take a breath test instead, however, he was ignored. (*Id.*) As a result, Kennedy,
9 who has a phobia of needles and PTSD, suffered pain and undue stress. (*Id.* at 58.)
10 Kennedy asserts that Officer Sumrall, Officer Deeds, and Nurse Sumrall obtained the
11 results of the blood test in violation of his rights under the Fourth Amendment. (*Id.*)

12 Pursuant to 28 U.S.C. § 1915(A)(a), the District Court entered a screening order
13 allowing Kennedy to proceed with his Count III claim against Defendants Officer Sumrall,
14 Officer Deeds, and Nurse Sumrall. (ECF No. 24.) The District Court found that Kennedy
15 stated a colorable excessive force claim under the Fourth Amendment right to be free
16 from unreasonable searches and seizures related to his claim of a non-consensual blood
17 draw. (*Id.* at 8-9.)

18 **B. Failure to Protect Claim**

19 In his Count IV claim, Kennedy alleges that Watts, Henriod, Sawyer, Mingo,
20 Lopez, Wall, and Casarez knew that Inmate Hollis was violent and mentally ill but
21 housed Hollis with Kennedy because WPCJ is not designed to hold mentally ill inmates
22 separately. (ECF No. 21 at 72, 75, 78.) Kennedy submitted numerous kites at different
23 times about the situation. (*Id.* at 74, 77.) Mingo and Lopez told Kennedy that they were
24 aware of the situation, yet neither of them acted because “there is nothing that can be
25 done.” (*Id.* at 75, 77.) Over time, Kennedy became more and more fearful for his safety.
26 (*Id.* at 74.) Because of his constant fear, he was unable to sleep, and his mental health
27 deteriorated. (*Id.*) On June 10, 2017, Hollis attacked Kennedy by beating him, causing
28 serious injuries. (*Id.* at 76.) Kennedy sustained injuries including a cut across his nose,

1 scraped knees and feet, a black eye, and a broken tooth that later fell out. (*Id.* at 76, 79.)
2 The next day, he complained vocally and in writing, but no action was taken to move him
3 to a more secure location. (*Id.* at 77.)

4 Pursuant to 28 U.S.C. § 1915(A)(a), the District Court entered a screening order
5 allowing Kennedy to proceed with his Count IV claim against Defendants Watts, Henriod,
6 Sawyer, Mingo, Lopez, Wall, and Casarez. (ECF No. 24.) The District Court found that
7 Kennedy stated a colorable Fourteenth Amendment due process claim related to his
8 failure to protect allegations. (*Id.* at 10-11.)

9 **C. Defendants' Motion for Summary Judgment**

10 On July 3, 2019, Defendants filed their motion for summary judgment asserting
11 they are entitled to summary judgment because (1) the level of restraint used during the
12 blood draw was appropriate, (2) Kennedy presents no evidence that Defendants were
13 aware of the risk another inmate posed to Kennedy's safety, yet ignored the problem
14 resulting in Kennedy being assaulted, (3) Defendants are entitled to qualified immunity,
15 and (4) Kennedy has no evidence sufficient to continue with his official capacity claims
16 under *Monell*. (ECF No. 84.) Kennedy opposed the motion (ECF No. 105) and
17 Defendants replied (ECF No. 106).

18 **II. LEGAL STANDARD**

19 Summary judgment allows the court to avoid unnecessary trials. *Nw. Motorcycle*
20 *Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly
21 grants summary judgment when the record demonstrates that "there is no genuine
22 issue as to any material fact and the movant is entitled to judgment as a matter of law."
23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). "[T]he substantive law will identify
24 which facts are material. Only disputes over facts that might affect the outcome of the
25 suit under the governing law will properly preclude the entry of summary judgment.
26 Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v.*
27 *Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is "genuine" only where a
28 reasonable jury could find for the nonmoving party. *Id.* Conclusory statements,

1 speculative opinions, pleading allegations, or other assertions uncorroborated by facts
2 are insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509
3 F.3d 978, 984 (9th Cir. 2007); *Nelson v. Pima Cnty. Coll.*, 83 F.3d 1075, 1081–82 (9th
4 Cir. 1996). At this stage, the court’s role is to verify that reasonable minds could differ
5 when interpreting the record; the court does not weigh the evidence or determine its
6 truth. *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Nw. Motorcycle Ass’n*, 18 F.3d at 1472.

8 Summary judgment proceeds in burden-shifting steps. A moving party who does
9 not bear the burden of proof at trial “must either produce evidence negating an essential
10 element of the nonmoving party’s claim or defense or show that the nonmoving party
11 does not have enough evidence of an essential element” to support its case. *Nissan
12 Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the
13 moving party must demonstrate, on the basis of authenticated evidence, that the record
14 forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as
15 to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT & SA*, 285
16 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences arising
17 therefrom in the light most favorable to the nonmoving party. *Colwell v. Bannister*, 763
18 F.3d 1060, 1065 (9th Cir. 2014).

19 Where the moving party meets its burden, the burden shifts to the nonmoving
20 party to “designate specific facts demonstrating the existence of genuine issues for
21 trial.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted).
22 “This burden is not a light one,” and requires the nonmoving party to “show more than
23 the mere existence of a scintilla of evidence. . . . In fact, the non-moving party must
24 come forth with evidence from which a jury could reasonably render a verdict in the
25 non-moving party’s favor.” *Id.* (citations omitted). The nonmoving party may defeat the
26 summary judgment motion only by setting forth specific facts that illustrate a genuine
27 dispute requiring a factfinder’s resolution. *Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477
28 U.S. at 324. Although the nonmoving party need not produce authenticated evidence,

1 Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and “metaphysical doubt as
2 to the material facts” will not defeat a properly-supported and meritorious summary
3 judgment motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
4 586–87 (1986).

5 For purposes of opposing summary judgment, the contentions offered by a pro se
6 litigant in motions and pleadings are admissible to the extent that the contents are based
7 on personal knowledge and set forth facts that would be admissible into evidence and
8 the litigant attested under penalty of perjury that they were true and correct. *Jones v.*
9 *Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

10 III. DISCUSSION

11 A. Civil Rights Claims under 42 U.S.C. § 1983

12 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their
13 authority to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*,
14 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135 1139 (9th
15 Cir. 2000)). The statute “provides a federal cause of action against any person who,
16 acting under color of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*,
17 526 U.S. 286, 290 (1999), and therefore “serves as the procedural device for enforcing
18 substantive provisions of the Constitution and federal statutes.” *Crumpton v. Almy*, 947
19 F.2d 1418, 1420 (9th Cir. 1991). Claims under section 1983 require a plaintiff to allege
20 (1) the violation of a federally-protected right by (2) a person or official acting under the
21 color of state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983 claim, the
22 plaintiff must establish each of the elements required to prove an infringement of the
23 underlying constitutional or statutory right.

24 B. Fourth Amendment – Excessive Force

25 Kennedy’s first claim for relief is based on allegations of excessive force used
26 during a blood draw performed by Nurse Sumrall at the direction of law enforcement on
27 the night of Kennedy’s arrest. (ECF No. 21.) The Court allowed Kennedy to proceed on
28 his claim on the basis that the “alleged excessive force used in furtherance of, or in

1 connection with, the blood draw, was unnecessary because [Kennedy] was cooperative
 2 and did not refuse the draw." (ECF No. 24 at 9.)

3 Defendants argue that Kennedy's own testimony provides justification for the use
 4 of restraint, given Kennedy's resistance to the lawful blood draw. (ECF No. 84 at 15-16.)
 5 In support of their motion for summary judgment, Defendants provide portions of
 6 Kennedy's deposition testimony, an affidavit in support of search warrant, the search
 7 warrant authorizing the blood draw, video showing Kennedy refusing to submit to testing,
 8 video of the blood draw, and photos of Kennedy taken the day after his arrest and the
 9 blood draw. (See ECF Nos. 84-1, 84-6, 84-7, 84-8, 112, 114.)⁴

10 The Fourth Amendment prohibits unreasonable searches and seizures. A forced
 11 blood draw can violate the Fourth Amendment if it is unreasonable under the
 12 circumstances, see *Schmerber v. California*, 384 U.S. 757, 771-72 (1966), such as
 13 where it is "conducted in an unnecessarily cruel, painful, or dangerous manner."
 14 *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 n.7 (9th Cir. 1989) *overruled on*
 15 *other grounds by Bull v. City & County of San Francisco*, 595 F.3d 964, 981 (9th Cir.
 16 2010) (en banc). The blood draw must "be taken by trained medical personnel in
 17 accordance with accepted practices." *United States v. Chapel*, 55 F.3d 1416, 1418 (9th
 18 Cir. 1995) (en banc) (quoting the original panel opinion).

19 Under the circumstances of this case, the court finds that the blood draw was not
 20 unreasonable under the Fourth Amendment. First, the Defendants lawfully obtained a
 21 warrant to draw Kennedy's blood based upon his refusal to submit to other forms of
 22 evidentiary testing. (See ECF Nos. 84-6, 84-7, 84-8.) Video footage clearly shows
 23 Kennedy refusing to submit to testing, necessitating the need to obtain a warrant. (See

24
 25
 26
 27 ⁴ The court notes that the video has not been authenticated. However, because
 28 Kennedy relies on the same evidence in support of his opposition and does not object to
 its authenticity, the court will accept the evidence as authentic for purposes of ruling on
 the motion for summary judgment.

1 ECF No. 84-8.)⁵ Video footage also shows that before the blood draw occurred,
2 Kennedy was notified that a warrant had been obtained and he was shown a copy of the
3 warrant. (See *id.*) Next, the facts are uncontested as to how the blood draw was
4 performed. Kennedy was removed from his cell by officers who placed him in a restraint
5 chair. Kennedy was then moved to the intake desk where Defendant Nurse Sumrall
6 performed the blood draw. Video footage of the blood draw shows Kennedy being
7 argumentative and making threats to the officers. (See *id.*) During the blood draw,
8 Kennedy grabbed Nurse Sumrall's thumb, requiring the officers to hold Kennedy down to
9 complete the draw. (See *id.*) Importantly, Kennedy was convicted for battery upon
10 Nurse Sumrall. (ECF No. 84-5.) Kennedy also testified during his deposition that he
11 was physically resisting during the blood draw. (See ECF No. 84-1 at 40-41.) Based on
12 the evidence, Kennedy was refusing to submit to a lawful blood draw and the
13 Defendants used the appropriate force necessary to obtain a sample.⁶ Kennedy has
14 provided no evidence to contradict this evidence. Rather, his own deposition statements
15 are in line with the video footage. Therefore, Kennedy has failed to come forward with
16 the necessary evidence to create an issue of fact. Because the court finds that there are
17 no issues of material fact, the court recommends that summary judgment be granted in
18 favor of Defendants.

19 **C. Fourteenth Amendment – Failure to Protect**

20 Kennedy's second claim for relief is based upon allegations that Defendants
21 Watts, Henriod, Sawyer, Mingo, Lopez, Wall, and Casarez failed to protect Kennedy
22 from assault by an inmate who they knew was violent and mentally ill. (ECF No. 21 at
23 72, 75, 78.)

24
25 ⁵ While the court cites to the ECF number that corresponds with the video as
26 submitted with the motion for summary judgment, the court relied on the manual filing of
the DVD, which was submitted at ECF No. 112.

27 ⁶ To the extent Kennedy attempts to argue that the search warrant was invalid or
28 results of the blood draw are invalid, those claims are barred by *Heck v. Humphrey*, 512
U.S. 477 (1994).

1 A pretrial detainee's constitutional rights relative to failure to protect claims are
2 addressed under the Due Process Clause of the Fourteenth Amendment. See *Castro v.*
3 *County of Los Angeles*, 833 F.3d 1060, 1069–70 (9th Cir. 2016). To state a colorable
4 Fourteenth Amendment Due Process Clause claim, Plaintiff must allege that (1) the
5 defendant made an intentional decision with respect to the conditions under which the
6 plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering
7 serious harm; (3) the defendant did not take reasonable available measures to abate
8 that risk, even though a reasonable officer in the circumstances would have appreciated
9 the high degree of risk involved—making the consequences of the defendant's conduct
10 obvious; and (4) by not taking such measures, the defendant caused the plaintiff's
11 injuries. *Castro*, 833 F.3d at 1071.

12 Defendants argue that they are entitled to summary judgment on the failure to
13 protect claim because Kennedy has no evidence to support his claim and cannot meet
14 any of the elements required under *Castro*. (ECF No. 84 at 18-24.) In support of their
15 argument, Defendants provide portions of Kennedy's deposition testimony, in which
16 Kennedy testifies that he voluntarily entered the other inmate's cell after he was
17 "challenged." (See ECF No. 84-1 at 49-54.) Kennedy has not addressed these
18 arguments or offered any evidence to show that Defendants failed to protect him from
19 assault by another inmate. (See ECF No. 105.) Given that Defendants have asserted
20 the absence of a genuine issue of material fact as to whether their action or inaction
21 caused Kennedy's injury (ECF No. 84 at 18-24), and Kennedy has not responded to
22 Defendants' argument or produced any evidence to show that a genuine issue of
23 material fact exists, the court recommends that summary judgment be granted in favor
24 of Defendants.⁷

25 //

27 7 Because the court finds that Kennedy's rights were not violated, it need not
28 address Defendants' other arguments related to personal participation or qualified
immunity.

IV. CONCLUSION

Based upon the foregoing, the court recommends Defendants' motion for summary judgment (ECF No. 84) be granted. The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Defendants' motion for summary judgment (ECF No. 84) be **GRANTED**.

DATED: January 23, 2020.



UNITED STATES MAGISTRATE JUDGE

COPY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KEVIN LEE KENNEDY,

v.

DAN WATTS, *et al.*,

Plaintiff,

Case No. 3:17-cv-00468-MMD-CLB

ORDER

Defendants.

I. SUMMARY

Plaintiff Kevin Lee Kennedy brings this civil rights case asserting claims under 42 U.S.C. § 1983. Magistrate Judge Carla L. Baldwin issued a Report and Recommendation (“R&R”) (ECF No. 117), recommending that the Court grant Defendants’¹ (collectively, “White Pine Defendants”) motion for summary judgment (ECF No. 84). Objections to the R&R were due by February 6, 2020, but none has been filed. The Court accepts the R&R in full.

II. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC).² This action concerns events that occurred while Kennedy was a pretrial detainee at the White Pine County Jail (“WPCJ”). (ECF No. 21).

Upon screening, Plaintiff was allowed to proceed on two claims (Counts III and IV) against the relevant Defendants. (ECF No. 24 at 8–11, 18.) Count III is a claim for excessive force asserted against Caleb Sumrall, Terrence Deeds, and Brandi Sumrall. (*Id.* at 8, 18.) Plaintiff contends that these Defendants used excessive force in connection with

///

¹Defendants and associated claims are specifically identified *infra*.

²The Court previously granted summary judgment in favor of NDOC Defendants. (See ECF No. 116.)

1 a blood draw in violation of his rights under the Fourth Amendment. (*Id.* at 8–9.) Count IV
 2 is a claim for failure to protect asserted against Dan Watts, Scott Henriod, Sawyer, Nathan
 3 Mingo, Nick Lopez, Wall,³ and Shannon Casarez. (*Id.* at 9–11.) Plaintiff's claim is
 4 particularly that these Defendants failed to protect him from assault by another inmate who
 5 Defendants knew was violent and mentally ill. (*Id.* at 10–11; ECF No. 21 at 72, 75, 78.)

6 Further background regarding this matter is included in the R&R (ECF No. 117),
 7 which the Court adopts.

8 **III. LEGAL STANDARD**

9 **A. Review of Magistrate Judge's Recommendation**

10 This Court "may accept, reject, or modify, in whole or in part, the findings or
 11 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
 12 fails to object the Court is not required to conduct "any review at all . . . of any issue that
 13 is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985); see also
 14 *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) ("De novo review of the
 15 magistrate judges' findings and recommendations is required if, but *only* if, one or both
 16 parties file objections to the findings and recommendations.") (emphasis in original); Fed.
 17 R. Civ. P. 72, Advisory Committee Notes (1983) (providing that the court "need only satisfy
 18 itself that there is no clear error on the face of the record in order to accept the
 19 recommendation").

20 Although there is no objection, the Court conducts de novo review to determine
 21 whether to adopt the R&R. Having reviewed the R&R, the pertinent briefs (ECF Nos. 84,
 22 105, 106) and accompanying exhibits (ECF Nos. 84-1, 84-2, 84-3, 84-4, 84-5, 84-6, 84-7,
 23 ///

24
 25 ³While Wall is noted among the Defendants, Wall is not listed as part of Defendants' summary judgment briefing (ECF Nos. 84, 106). Further, no proof of service has been filed to show service of process on Wall. (ECF No. 59 (noting "[u]nable to locate as to Wall").) The Court will therefore assume that Wall has never been served in this action and will therefore dismiss the claim as against him under Fed. R. Civ. P. 4(m). Moreover, the same reasoning supporting summary judgment against the other Defendants apply against Wall. The Court also notes, as the R&R provides, Defendant "Shady" was dismissed as service was not effectuated. (See ECF No. 99; ECF No. 117 at 1 n.2).

1 84-8, 84-9, 84-10; ECF No. 105 at 20–146; ECF Nos. 110, 110-1 (reflecting resubmitted
2 delivery of video concerning Plaintiff's blood draw)), the Court agrees with Judge Baldwin.

3 **B. Summary Judgment Standard**

4 Summary judgment is appropriate when the pleadings, the discovery and
5 disclosure materials on file, and any affidavits "show that there is no genuine issue as to
6 any material fact and that the moving party is entitled to a judgment as a matter of law."
7 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "genuine" if there is a
8 sufficient evidentiary basis on which a reasonable fact-finder could find for the nonmoving
9 party and a dispute is "material" if it could affect the outcome of the suit under the
10 governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court views
11 all facts and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*
12 *Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986)

13 The moving party bears the burden of showing that there are no genuine issues of
14 material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once the
15 moving party satisfies Rule 56's requirements, the burden shifts to the party resisting the
16 motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*,
17 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but must
18 produce specific evidence, through affidavits or admissible discovery material, to show
19 that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991),
20 and "must do more than simply show that there is some metaphysical doubt as to the
21 material facts." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting
22 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

23 **IV. DISCUSSION**

24 In the R&R, Judge Baldwin concluded that there are no disputes of material fact to
25 preclude granting summary judgment for Defendants on either of Plaintiff's noted claims.
26 (ECF No. 117 at 8–9.) This Court finds accordingly.

27 Preliminarily, the Court notes that the R&R properly reflects the applicable legal
28 frameworks (see ECF No. 117 at 6–7, 9). The Court will therefore not rehash them here.

1 As to Plaintiff's claim of excessive force related to the blood draw, Judge Baldwin
2 specifically concluded that uncontradicted evidence shows that Plaintiff refused to submit
3 to a lawful blood draw and Defendants used appropriate force to obtain his blood sample.
4 (*Id.* at 8.) Having reviewed that evidence—particularly the DVD with multiple videos on
5 file—the Court agrees. The Court will therefore grant summary judgment for Defendants
6 Officer Sumrall, Officer Deeds, and Nurse Sumrall on Plaintiff's Count III claim for
7 excessive force.

8 As to Plaintiff's claim of failure to protect, Judge Baldwin concluded that summary
9 judgment was warranted based on Plaintiff's own deposition testimony, which Defendants
10 provided (ECF No. 84-1 at 49–54), and lack of any counter evidence by Plaintiff to create
11 a genuine dispute on the claim. The Court agrees that summary judgment is warranted
12 based on the evidence and facts established. The Court will therefore grant summary
13 judgment for Defendants Watts, Henriod, Sawyer, Mingo, Lopez, and Casarez on
14 Plaintiff's Count IV claim for failure to protect.⁴

15 In sum, the Court finds in accord with the R&R and therefore adopts it in full.

16 **V. CONCLUSION**

17 The Court notes that the parties made several arguments and cited to several cases
18 not discussed above. The Court has reviewed these arguments and cases and determines
19 that they do not warrant discussion as they do not affect the outcome of the issues before
20 the Court.

21 It is therefore ordered that the Report and Recommendation (ECF No. 117) is
22 accepted and adopted in its entirety.

23 It is further ordered that Defendants' motion for summary judgment (ECF No. 84)
24 is granted.

25 It is further ordered that claims against Defendant Wall is dismissed as it appears
26 upon review of the docket that Wall was never served in this action.

27 ///

28 ⁴The Court does not reach Defendants' additional arguments (see ECF No. 84 at
25–27).

1 The Clerk of the Court is directed to enter judgment accordingly and close this case.
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3 DATED THIS 11th day of February 2020.
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5 MIRANDA M. DU
6 CHIEF UNITED STATES DISTRICT JUDGE
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**Additional material
from this filing is
available in the
Clerk's Office.**