

APPENDIX A

FILED

NOT FOR PUBLICATION

DEC 10 2024

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

ANDREW RICK LOPEZ,

No. 23-15255

Plaintiff-Appellant,

D.C. No. 4:21-cv-07136-PJH

v.

D. C. THOMAS, Correctional Officer,

MEMORANDUM*

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted December 10, 2024**
San Francisco, California

Before: O'SCANLAIN, FERNANDEZ, and SILVERMAN, Circuit Judges.

California prisoner Andrew Lopez appeals pro se from the district court's judgment in his 42 U.S.C. § 1983 action alleging that prison personnel violated his

* 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).*

rights during a fight with another inmate and during the ensuing disciplinary proceedings. We affirm.

Reviewing de novo,¹ we conclude that the district court correctly entered summary judgment on Lopez's excessive force² claim on the ground that Lopez failed to exhaust administrative remedies. *See* 42 U.S.C. § 1997e(a); Cal. Code Regs. tit. 15, §§ 3084.2(a), 3084.7(a)–(c) (2019); *Fordley v. Lizarraga*, 18 F.4th 344, 351–52 (9th Cir. 2021). The grievance form that Lopez submitted about the November 18, 2018, fight did not mention Defendant Thomas³ or his “taking . . . actions that deprived [Lopez] of any federally guaranteed right,” and thus failed to “alert[] the prison to the nature of th[at] wrong.” *Fordley*, 18 F.4th at 358 (internal quotation marks omitted). It was too late for Lopez to belatedly raise that new issue in the administrative appeal process. *See* Cal. Code Regs. tit. 15, §§ 3084.1(b), 3084.2(a)(3) (2019). Because we affirm the district court's summary judgment on that basis, we need not and do not consider the alternative grounds relied upon by the district court. *See City & County of San Francisco v. Barr*, 965 F.3d 753, 761 (9th Cir. 2020).

¹ *See Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc).

² *See* U.S. Const. amend. VIII.

³ *See* Cal. Code Regs. tit. 15, § 3084.1(b) (2019).

In light of our decision, we affirm the district court's denial of Lopez's motion to compel discovery and its reliance on excerpts from his deposition. Lopez cannot show that he suffered prejudice because those pieces of evidence are not relevant to the exhaustion issue. *See Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1127, 1129 (9th Cir. 2020); *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 677–78 (9th Cir. 2018).

Upon our de novo review, we likewise affirm the district court's dismissal of Lopez's due process and equal protection claims. *See* 28 U.S.C. § 1915A(b)(1); *Belanus v. Clark*, 796 F.3d 1021, 1024 (9th Cir. 2015); *see also* U.S. Const. amend. XIV. First, Lopez's bald assertion that the officer who conducted the prison disciplinary proceeding was biased⁴ does not plausibly suggest bias on the part of that officer or adequately state a due process claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557, 127 S. Ct. 1955, 1965–66, 167 L. Ed. 2d 929 (2007); *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975); *cf. Stivers v. Pierce*, 71 F.3d 732, 741–42 (9th Cir. 1995). Second, Lopez failed to identify any relevant, protected class to which he belonged, and his allegation that another inmate was acquitted at a separate disciplinary hearing did

⁴ *See Wolff v. McDonnell*, 418 U.S. 539, 570–71, 94 S. Ct. 2963, 2982, 41 L. Ed. 2d 935 (1974).

not state a cognizable equal protection claim. *See Furnace v. Sullivan*, 705 F.3d 1021, 1030–31 (9th Cir. 2013).

Lopez's request for a paper copy of video evidence (9th Cir. Dkt. 24) is denied.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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7 ANDREW LOPEZ,
8 Plaintiff,
9 v.
10 D. C. THOMAS,
11 Defendant.

Case No. 21-cv-07136-PJH

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 29, 39, 40, 47

12
13 This is a civil rights case brought pro se by a state prisoner under 42 U.S.C. §
14 1983. His claims arise from his detention at Pelican Bay State Prison ("PBSP"). Plaintiff
15 alleges that defendant Correctional Officer Thomas used excessive force against plaintiff
16 while stopping a fight. Plaintiff filed a motion for summary judgment on the merits, and
17 defendant filed a motion for summary judgment citing administrative exhaustion and on
18 the merits. Defendant also included video footage of the incident. The parties filed
19 oppositions and replies to the respective motions. The court has reviewed all of the
20 filings and video evidence, and for the reasons set forth below, defendant's motion for
21 summary judgment is granted and plaintiff's motion for summary judgment is denied.

MOTION FOR SUMMARY JUDGMENT

22
23 **Legal Standard**

24 Summary judgment is proper where the pleadings, discovery and affidavits show
25 that there is "no genuine dispute as to any material fact and the movant is entitled to
26 judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may
27 affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
28 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a

1 reasonable jury to return a verdict for the nonmoving party. *Id.*

2 The moving party for summary judgment bears the initial burden of identifying
3 those portions of the pleadings, discovery and affidavits which demonstrate the absence
4 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986);
5 *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). When
6 the moving party has met this burden of production, the nonmoving party must go beyond
7 the pleadings and, by its own affidavits or discovery, set forth specific facts showing that
8 there is a genuine issue for trial. *Id.* If the nonmoving party fails to produce enough
9 evidence to show a genuine issue of material fact, the moving party wins. *Id.*

10 At summary judgment, the judge must view the evidence in the light most
11 favorable to the nonmoving party. If evidence produced by the moving party conflicts
12 with evidence produced by the nonmoving party, the judge must assume the truth of the
13 evidence set forth by the nonmoving party with respect to that fact. See *Tolan v. Cotton*,
14 572 U.S. 650, 656-57 (2014); *Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).

15 **Exhaustion**

16 "The PLRA [Prison Litigation Reform Act] mandates that inmates exhaust all
17 available administrative remedies before filing 'any suit challenging prison conditions,'
18 including, but not limited to, suits under § 1983." *Albino v. Baca*, 747 F.3d 1162, 1171
19 (9th Cir. 2014) (quoting *Woodford v. Ngo*, 548 U.S. 81, 85 (2006)). To the extent that the
20 evidence in the record permits, the appropriate procedural device for pretrial
21 determination of whether administrative remedies have been exhausted under the PLRA
22 is a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.
23 *Id.* at 1168. The burden is on the defendant to prove that there was an available
24 administrative remedy that the plaintiff failed to exhaust. *Id.* at 1172. If the defendant
25 meets that burden, the burden shifts to the prisoner to present evidence showing that
26 there is something in his particular case that made the existing and generally available
27 administrative remedies effectively unavailable to him. *Id.* The ultimate burden of proof
28 remains with the defendant, however. *Id.* If undisputed evidence viewed in the light most

1 favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary
2 judgment under Rule 56. *Id.* at 1166. But if material facts are disputed, summary
3 judgment should be denied and the district judge rather than a jury should determine the
4 facts in a preliminary proceeding. *Id.*

5 An inmate “need not exhaust unavailable [remedies].” *Ross v. Blake*, 578 U.S.
6 632, 642 (2016). An administrative remedy is unavailable “when (despite what
7 regulations or guidance materials may promise) it operates as a simple dead end with
8 officers unable or consistently unwilling to provide any relief to aggrieved inmates’; or
9 when “an administrative scheme [is] so opaque that it becomes, practically speaking,
10 incapable of use, [i.e.,] some mechanism exists to provide relief, but no ordinary prisoner
11 can discern or navigate [the mechanism]”; or “when prison administrators thwart inmates
12 from taking advantage of a grievance process through machination, misrepresentation, or
13 intimidation.” *Id.* at 643-44.

14 **Eighth Amendment**

15 The treatment a convicted prisoner receives in prison and the conditions under
16 which he is confined are subject to scrutiny under the Eighth Amendment. *Helling v.*
17 *McKinney*, 509 U.S. 25, 31 (1993). “After incarceration, only the unnecessary and
18 wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the
19 Eighth Amendment.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (omission in original)
20 (internal quotation marks and citation omitted). When a prison official stands accused of
21 using excessive force in violation of the Eighth Amendment, the core judicial inquiry is
22 whether force was applied in a good-faith effort to maintain or restore discipline, or
23 maliciously and sadistically to cause harm. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).

24 In determining whether the use of force was for the purpose of maintaining or
25 restoring discipline, or for the malicious and sadistic purpose of causing harm, a court
26 may evaluate the need for application of force, the relationship between that need and
27 the amount of force used, the extent of any injury inflicted, the threat reasonably
28 perceived by the responsible officials, and any efforts made to temper the severity of a

1 forceful response. *Id.* at 7; see, e.g., *Simmons v. Arnett*, 47 F.4th 927, 933 (9th Cir. 2
2 2022) (guard's decision to shoot the closer of two fighting inmates with sponge rounds, 3
3 which was the lowest level of force available to him, to stop the fight and keep staff and 4
4 prisoners safe was not an excessive use of force).

5 **Qualified Immunity**

6 The defense of qualified immunity protects "government officials . . . from liability 7
7 for civil damages insofar as their conduct does not violate clearly established statutory or 8
8 constitutional rights of which a reasonable person would have known." *Harlow v. 9
9 Fitzgerald*, 457 U.S. 800, 818 (1982). The rule of "qualified immunity protects 'all but the 10
10 plainly incompetent or those who knowingly violate the law.'" *Saucier v. Katz*, 533 U.S. 11
11 194, 202 (2001) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Defendants can 12
12 have a reasonable, but mistaken, belief about the facts or about what the law requires in 13
13 any given situation. *Id.* at 205. A court considering a claim of qualified immunity must 14
14 determine whether the plaintiff has alleged the deprivation of an actual constitutional right 15
15 and whether such a right was clearly established such that it would be clear to a 16
16 reasonable officer that his conduct was unlawful in the situation he confronted. See 17
17 *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (overruling the sequence of the two-part 18
18 test that required determining a deprivation first and then deciding whether such right was 19
19 clearly established, as required by *Saucier*). The court may exercise its discretion in 20
20 deciding which prong to address first, in light of the particular circumstances of each 21
21 case. *Pearson*, 555 U.S. at 236.

22 **Facts**

23 A review of the record indicates that the following facts are undisputed unless 24
24 otherwise noted:

25 **Incident**

26 On November 18, 2018, at approximately 12:30 p.m., plaintiff was on the yard with 27
27 inmate Ramirez and the two were walking around a track. MSJ, Thomas Decl. ¶ 4; Duan 28

1 Decl., Ex. D. Plaintiff's Deposition at 58-59.¹ As they were walking, inmate Raper called
2 to them, but plaintiff was not sure if Raper was calling to him or Ramirez. Plaintiff's
3 Deposition at 61. Plaintiff and Ramirez walked towards Raper. *Id.*; Duan Decl. Ex. B
4 Video Footage #35913292 at 12:30:58. Raper and Ramirez exchanged words about
5 "disrespect" and then Raper "started swinging." Plaintiff's Deposition at 63. Plaintiff and
6 Ramirez are acquaintances. *Id.* at 66-67. Plaintiff did not know Raper and did not know
7 why Ramirez and Raper were interacting. *Id.*

8 Plaintiff, Ramirez and Raper began to fight. Video Footage #35913292 at
9 12:31:04. Plaintiff participated in the altercation and did "make a few swings" to "defend
10 himself." Plaintiff's Deposition at 121. Plaintiff hit Raper with his fists. Video Footage
11 #35913292 at 12:31:03-12:31:20.

12 At the start of the fight defendant Thomas heard an unidentified correctional officer
13 yell "get down." MSJ, Thomas Decl. ¶ 4. Defendant looked around the yard and
14 observed three inmates hitting each other in the face and upper torso area with their fists.
15 *Id.* Defendant responded to the situation because, based on his training and experience,
16 serious bodily injury could occur if the fight continued. *Id.* ¶ 5.

17 As the fight continued, Raper grabbed plaintiff's jacket and held onto it while he hit
18 Ramirez. Plaintiff's Deposition at 66. Plaintiff responded by hitting Raper and twisting his
19 arm. *Id.* at 73, 75; Video Footage #35913292 at 12:31:07. Plaintiff stated that he was
20 only trying to free himself from Raper's grip. Plaintiff's Deposition at 73. Plaintiff broke
21 free from Raper's grip but reengaged in the fight. Video Footage #35913292 at 12:31:10-
22 11.

23 Correctional officers gave multiple verbal warnings to stop fighting and get down.
24 Thomas Decl. ¶¶ 4, 7. Smoke grenades were deployed near the fight, but the three
25 continued fighting. *Id.* ¶ 6; Video Footage #35913292 at 12:31:14. Plaintiff did not recall
26

27 ¹ To the extent plaintiff argues that the deposition should be stricken pursuant to Federal
28 Rule of Civil Procedure 30(e), any such request is denied. Plaintiff has not requested any
changes or explained the reasons for such changes.

1 hearing anyone order them to "get down," but conceded the order was likely given
2 because "that's the protocol". Plaintiff's Deposition at 77-78. Plaintiff did witness smoke
3 in the area. *Id.* at 77.

4 Correctional officers, including defendant, proceeded to the area, but they did not
5 have time to discuss a strategy. Thomas Decl. ¶ 7. Based on his training and
6 experience, defendant knew that when responding to an incident such as this, staff is
7 expected to evaluate the totality of the circumstances involved, including an inmate's
8 actions, demeanor, and behavior, in an effort to determine the best course of action and
9 tactics needed to resolve the situation. *Id.* ¶ 3.

10 As staff responded, Raper lost his balance and fell to the ground, leaving
11 approximately eight feet between Raper and plaintiff. Plaintiff's Deposition at 78-79;
12 Video Footage #35913292 at 12:31:18. At this time, Ramirez was also on the ground.
13 Plaintiff's Deposition at 80; Video Footage #35913292 at 12:31:19. Plaintiff remained
14 standing. Video Footage #35913292 at 12:31:24.

15 At this time approximately nine correctional officers arrived. Video Footage
16 #35913292 at 12:31:23. Based on how the other correctional officers dispersed into the
17 area, defendant believed he was in a better position to respond to plaintiff and allow the
18 other officers to respond to Raper and Ramirez. Thomas Decl. ¶ 8; Video Footage
19 #35913292 at 12:31:25.

20 Defendant observed plaintiff standing in a combative stance near Raper, who by
21 this time had stood back up. Thomas Decl. ¶ 8; Video Footage #35913292 at 12:31:26.
22 Defendant also observed that plaintiff was not getting on the ground. *Id.* To get plaintiff
23 to comply with the commands to get down and to stop further escalation of the fight,
24 defendant used a single forward strike with his baton to plaintiff's upper leg. Thomas
25 Decl. ¶ 8; Video Footage #35913292 at 12:31:28. Defendant had to stretch out to strike
26 plaintiff's leg, causing defendant to lose his balance and fall down. Thomas Decl. ¶ 8;
27 Video Footage #35913292 at 12:31:28. Plaintiff remained in a standing position, for a
28 moment, after the strike from defendant's baton. Video Footage #35913292 at 12:31:29.

1 Defendant stood up and gave plaintiff another verbal command to get down, and plaintiff
2 complied. Thomas Decl. ¶ 8; Video Footage #35913292 at 12:31:30.

3 Plaintiff was then restrained, taken away for a medical evaluation and offered new
4 clothes that were not contaminated with smoke. Thomas Decl. ¶¶ 9, 10. Plaintiff's leg
5 was in pain for three months, and he had a large black bruise on the leg for three months.
6 Docket No. 29-1 at 1.

7 **Administrative Appeals**

8 For the relevant time period, the California Department of Corrections and
9 Rehabilitation ("CDCR") provided an administrative appeals process, in accordance with
10 Title 15 of the California Code of Regulations, that permitted an inmate to appeal any
11 departmental decision, action, condition, or policy that has a material adverse effect on
12 the inmate's health, safety, or welfare. Cal. Code Regs. tit. 15, § 3084.1(a) (repealed
13 2021). To resolve their issues through the administrative appeals process, inmates must
14 have submitted a CDCR 602 Form, commonly referred to as an appeal form, describing
15 the issue and action requested. Cal. Code Regs. tit. 15, § 3084.2(a) (repealed 2021).

16 At the time of this incident, the inmate appeal process consisted of three levels of
17 appeal: (1) first-level appeal, (2) second-level appeal to the institution head or designee,
18 and (3) third-level appeal to the Secretary of CDCR. Cal. Code Regs. tit. 15, § 3084.7
19 (repealed 2021). First- and second-level appeals were handled by staff located at the
20 respective institutions. *Id.* Third-level nonmedical appeals were received and decided by
21 CDCR staff at the Office of Appeals. Cal. Code Regs. tit. 15, § 3084.7(d) (repealed
22 2021). An inmate needed to exhaust all three levels of review for an appeal to be
23 considered exhausted. Cal. Code Regs. tit. 15, §§ 3084.1(b); 3084.7 (repealed 2021).

24 Plaintiff is familiar with the administrative appeal process and has filed
25 approximately 500 appeals. Plaintiff Deposition at 93. Plaintiff filed two appeals
26 regarding the November 18, 2018, incident. MSJ, Moseley Decl. ¶¶ 8, 9.

27 In appeal No. PBSP-18-03389, plaintiff raised issues with the rules violation report
28 that he received for being involved in the fight. MSJ, Moseley Decl., Ex. 2. He argued

1 that he was erroneously found guilty of fighting with another inmate and that the guilty
2 finding should be reversed. There was no mention in the appeal of excessive force being
3 used against him or defendant. *Id.* This appeal was exhausted through the third level of
4 review. Moseley Decl. ¶ 9; Ex. 2.

5 Plaintiff also filed appeal No. PBSP-20-00630, in which he alleged that prison
6 officials never disclosed a confidential memorandum related to the incident. *Id.* ¶ 10; Ex.
7 3. This appeal was screened out and never reached the final, third level, of review. *Id.*

8 ANALYSIS

9 Exhaustion

10 In this case defendant demonstrated that there was an available administrative
11 remedy that plaintiff failed to exhaust. Plaintiff has failed to meet his burden in showing
12 that the administrative appeals process in general was unavailable and incapable of use
13 or that there was something in his particular case that made the existing and generally
14 available administrative remedies effectively unavailable to him.

15 It is undisputed that only one appeal related to the fight in the yard was submitted
16 and fully exhausted. That appeal, No. PBSP-18-03389, raised issues with the rules
17 violation report plaintiff received for being involved in the fight, arguing that plaintiff was
18 erroneously found guilty of fighting with the other inmate and that the guilty finding should
19 be reversed. The appeal did not mention excessive force or defendant.

20 In *Griffin v. Arpaio*, 557 F.3d 1117 (9th Cir. 2009), the Ninth Circuit noted that “the
21 primary purpose of a grievance is to alert the prison to a problem and facilitate its
22 resolution, not to lay groundwork for litigation.” *Id.* at 1120. In *Griffin*, the plaintiff failed to
23 mention in his grievance that prison staff were ignoring a nurse’s order that remedied the
24 problem. *Id.* at 1118-19. As a result the prison officials, who were aware of the nurse’s
25 order, reasonably believed that the order had been carried out and had solved the
26 problem. In view of these facts, the Ninth Circuit concluded that the plaintiff failed to
27 properly exhaust his administrative remedies because he did not provide notice of the
28 prison staff’s disregard of the nurse’s order and thus never alerted prison officials “to the

1 nature of his problem." *Id.* at 1121.

2 Similar to *Griffin*, plaintiff failed to sufficiently alert prison officials to the nature of
3 his problem. The one appeal he submitted and exhausted failed to mention both the
4 defendant and claim in this case. Prison officials could not know from this appeal that
5 plaintiff was alleging he was the victim of excessive force by defendant.

6 Plaintiff argues that while he did not discuss the excessive force in the appeal, he
7 raised the issue verbally in an interview about the appeal with a prison official.

8 Opposition (Docket No. 45) at 12. Plaintiff states that he was informed by this official that
9 he would receive a separate response regarding the allegation of excessive force by
10 defendant, but he never received a response. Plaintiff further states that the prison
11 official who provided this information retired and he was never informed that he had to file
12 a separate appeal. *Id.* at 12-13.

13 Plaintiff's argument is unavailing. Proper exhaustion during the relevant time
14 period required a substantive decision at each level of review. Cal. Code Regs. tit. 15, §
15 3084.1(b). An inmate could not circumvent the appeals process by raising new issues for
16 the first time at the second or third level of review. Cal. Code Regs. tit. 15, §
17 3084.6(b)(16).

18 Plaintiff's inclusion of a new allegation during an interview that occurred after the
19 filing of his appeal was improper and did not exhaust his claim. The PLRA's exhaustion
20 requirement cannot be satisfied "by filing an untimely or otherwise procedurally defective
21 administrative grievance or appeal." *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). "Proper
22 exhaustion demands compliance with an agency's deadlines and other critical procedural
23 rules because no adjudicative system can function effectively without imposing some
24 orderly structure on the course of its proceedings." *Id.* at 90-91 (footnote omitted).

25 Nor does plaintiff provide more information to support his assertion that he was not
26 informed that he had to file a separate appeal with the excessive force claim. Plaintiff
27 noted in his deposition that he was familiar with the appeals system and had filed
28 hundreds of appeals. For all these reasons, plaintiff has not exhausted his administrative

1 remedies. Even assuming plaintiff did properly exhaust, as will be discussed below, his
2 claim fails on the merits.

3 **Excessive Force**

4 There are no facts in dispute in this case. It is undisputed that while plaintiff did
5 not initiate the fight with the other inmate, plaintiff was fighting and continued to fight
6 when he could have moved away. It is also undisputed that plaintiff continued to fight
7 after smoke grenades were deployed among plaintiff and the other inmates. It is also
8 undisputed that defendant struck plaintiff once on the leg with a baton while plaintiff was
9 in a combative stance near the other inmate and not complying with orders to get on the
10 ground.

11 Even looking at the evidence in the light most favorable to plaintiff, defendant is
12 entitled to summary judgment. After viewing the video and other evidence submitted,
13 there is nothing to support plaintiff's assertion that defendant's one baton strike to the leg
14 was for the malicious and sadistic purpose of causing him harm.

15 The evidence demonstrates that the three inmates were engaged in a fight and did
16 not stop even when they were enveloped in smoke. Multiple correctional officers
17 responded immediately to stop the fight in order to prevent any serious injuries. Plaintiff
18 was in a combative stance in close proximity to the inmate he was fighting when
19 defendant struck him once on the leg with the baton. No other force was used against
20 plaintiff once he lowered himself to the ground. Defendant has met his burden in
21 demonstrating the use of force was to maintain or restore discipline and prevent the
22 fighting inmates from suffering further injuries.

23 The Ninth Circuit recently found that there was no constitutional violation when a
24 correctional officer fired three sponge-tipped plastic rounds at an inmate who was
25 engaged in a fight despite the rounds breaking the inmate's leg and injuring his butt and
26 thigh. *Simmons*, 47 F.4th at 930. Similar to the instant case, the Ninth Circuit noted that
27 there was no improper motive and that the correctional officer had a duty to keep staff
28 and inmates safe. *Id.* at 933; see also *Williams v. Austen*, No. 4:19-cv-06882 YGR, 2021

United States District Court
Northern District of California

1 WL 4222079, at *6 (N.D. Cal. Sept. 16, 2021) (holding a defendant's use of a more lethal
2 weapon, a 40-mm. launcher, to stop a plaintiff and another inmate from fighting was
3 reasonable given the circumstances: that the inmates continued to fight, ignoring verbal
4 commands and chemical agent grenades dispersed to the area, and defendant intended,
5 in good-faith, to restore discipline with his conduct and did not intend to act maliciously
6 and sadistically to cause harm to the plaintiff.) For all these reasons, summary judgment
7 is granted for defendant.

8 The court has not found a constitutional violation, and even if there was a violation,
9 defendant would be entitled to qualified immunity. It would not have been clear to a
10 reasonable official that striking an inmate once in the leg with a baton was unlawful when
11 the inmate had been fighting and remained in a combative stance near the opposing
12 inmate. Defendant is entitled to qualified immunity.

13 CONCLUSION

14 1. For the reasons set forth above, defendant's motion for summary judgment
15 (Docket No. 40) is **GRANTED** and plaintiff's motions for summary judgment (Docket Nos.
16 29, 39) are **DENIED**. The case is dismissed with prejudice. Plaintiff's motion to file a
17 supplemental response (Docket No. 47) is **GRANTED** and the court has reviewed the
18 filing.

19 2. The clerk shall close the file.

20 **IT IS SO ORDERED.**

21 Dated: 1/20/2023

23 /s/ Phyllis J. Hamilton

24 PHYLLIS J. HAMILTON
United States District Judge

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United States District Court
Northern District of California

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4 ANDREW LOPEZ,
5 Plaintiff,
6 v.
7 D. C. THOMAS,
8 Defendant.
9

10 Case No. 21-cv-07136-PJH
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12 **JUDGMENT**
13

14 Pursuant to the order granting summary judgement, this case is dismissed with
15 prejudice and closed.
16

IT IS SO ORDERED.

17 Dated: January 20, 2023
18

/s/ Phyllis J. Hamilton

19 PHYLLIS J. HAMILTON
20 United States District Judge
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APPENDIX C

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 20 2024

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

ANDREW RICK LOPEZ,

Plaintiff-Appellant,

v.

D. C. THOMAS, Correctional Officer,

Defendant-Appellee.

No. 23-15255

D.C. No. 4:21-cv-07136-PJH
Northern District of California,
Oakland

ORDER

Before: O'SCANLAIN, FERNANDEZ, and SILVERMAN, Circuit Judges.

Appellant's Petition for Panel Rehearing is DENIED.

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