

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Montgomery v. Culum

No. 2:22-cv-1156 DC CSK P (E.D. Cal. June 11, 2025) · No. No. 2:22-cv-1156 DC CSK P · Decided June 11,
2025

SUMMARY

The document is an order and findings and recommendations in a prisoner civil-rights action under 42 U.S.C. § 1983. The court grants the plaintiff's motion for an extension of time and recommends granting defendants' motion to dismiss under Heck v. Humphrey as to one excessive-force claim involving defendant Culum, while recommending denial of the motion in all other respects. The court also addresses requests for judicial notice concerning related criminal and prison disciplinary proceedings.

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 DWAYNE MONTGOMERY, No. 2:22-cv-1156 DC CSK P 12 Plaintiff, 13
v. ORDER AND FINDINGS AND RECOMMENDATIONS 14 M. CULUM, et al., 15
Defendants. 16 17 I. INTRODUCTION 18 Plaintiff is a state prisoner, proceeding without
counsel, with a civil rights action pursuant 19 to 42 U.S.C. § 1983.

Pending before the Court is defendants' motion to dismiss pursuant to 20 Federal Rule of Civil
Procedure 12(b)(6) on the grounds that this action is barred under the 21 favorable termination
doctrine in Heck v. Humphrey, 512 U.S. 477 (1994). (ECF No. 43). 22 Defendants' motion to
dismiss is fully briefed. (ECF Nos. 43, 50, 51.) Also pending is plaintiff's 23 motion for an
extension of time to file an opposition to the motion to dismiss.

(ECF No. 49.) 24 For the following reasons, plaintiff's motion for an extension of time is granted.
For the 25 following reasons, this Court recommends that defendants' motion to dismiss be
granted as to 26 plaintiff's claim alleging that defendant Culum used excessive force when he
yanked plaintiff out 27 of the holding cage, swung plaintiff 180 degrees, slammed plaintiff into
the wall and smashed his 28 heel down on plaintiff's foot; defendants' motion to dismiss should
be denied in all other 1 respects.

2 In the motion to dismiss, defendants state that records indicate that plaintiff's legal name 3 is
Dwayne Montgomery. (ECF No. 43 at 1 n. 1.) In his pleadings, plaintiff identifies himself as 4
Dwayne Montgomery. The caption of the instant action will continue to identify plaintiff as 5

Dwayne Montgomery. Several of the records referred to by defendants identify plaintiff as 6 Dwayne Montgomery.

To the extent this Court cites these records, this Court will refer to the 7 spelling of plaintiff's last name contained in these records. 8 II. PLAINTIFF'S MOTION FOR EXTENSION OF TIME 9 On January 21, 2025, plaintiff filed a motion for extension of time to file his opposition to 10 defendants' motion to dismiss. (ECF No. 49.)

After reviewing plaintiff's motion, this Court 11 finds good cause to grant plaintiff's motion for extension of time. Plaintiff subsequently filed an 12 opposition, and defendants filed a reply to this opposition. (ECF Nos. 50, 51.)

The Court has 13 reviewed plaintiff's opposition and defendants' reply. 14 III. LEGAL STANDARD FOR MOTION TO DISMISS 15 Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for 16 "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

In 17 considering a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true the 18 allegations of the complaint in question, *Erickson v. Pardus*, 551 U.S. 89 (2007), and construe the 19 pleading in the light most favorable to the plaintiff. See *Jenkins v. McKeithen*, 395 U.S. 411, 421 20 (1969); *Meek v. County of Riverside*, 183 F.3d 962, 965 (9th Cir.

1999). Still, to survive 21 dismissal for failure to state a claim, a pro se complaint must contain more than "naked 22 assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of 23 action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007).

In other words, 24 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory 25 statements do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Furthermore, a claim 26 upon which the court can grant relief must have facial plausibility. See *Twombly*, 550 U.S. at 27 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the 28 court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 1 *Iqbal*, 556 U.S. at 678.

A motion to dismiss for failure to state a claim should not be granted 2 unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims 3 which would entitle him to relief. See *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). 4 "Ordinarily, a court may look only at the face of the complaint to decide a motion to dismiss." 5 *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.

2002). "[I]f a district 6 court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into 7 a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to 8 respond." *United States v. Ritchie*, 342 F.3d 903, 907 (9th

Cir. 2003). “A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.” *Id.* at 908; see also *Tellabs, Inc. v. Makor Issues 12 & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated by reference, and matters of which a court may take judicial notice.”).

IV. PLAINTIFF’S CLAIMS This action proceeds on plaintiff’s amended complaint as to defendants Culum, Gamez, Clay, Kelly, Pesce, Sergeant, Hurtado and Mott. (ECF No. 15.) The alleged deprivations occurred at Mule Creek State Prison (“MCSP”). (*Id.*)

In the amended complaint, plaintiff seeks money damages. (*Id.* at 8.) Plaintiff alleges that on June 1, 2020, defendant Pesce illegally confiscated clothing items belonging to plaintiff. (*Id.* at 12.) When plaintiff asked defendant Pesce to return the property, defendant Pesce responded, “You can’t have it back, next time don’t leave your shit on my dayroom benches!” (*Id.*)

Plaintiff then asked defendant Pesce for a property confiscation receipt and a grievance form. (*Id.*) Defendant Pesce refused to give plaintiff the requested forms. (*Id.*) After reaching the conclusion that any further communication with defendant Pesce would be futile, plaintiff then put his hands behind his back and submitted to handcuffs. (*Id.* at 12-13.)

Defendant Pesce placed plaintiff in restraints and attempted to walk plaintiff toward his cell in order to prevent plaintiff from reporting his misconduct. (*Id.* at 13.) Plaintiff sat down on the dayroom floor and told defendants Pesce and Hurtado that he would not move until he spoke with the sergeant or the watch commander. (*Id.*) Defendant Pesce called for additional staff assistance.

(*Id.*) Defendants Kelly and Sergeant responded to this call. (*Id.*) Upon defendant Kelly’s arrival, defendant Kelly and Pesce stepped away and had a conversation. (*Id.*) Defendant Kelly then told plaintiff that he (plaintiff) could not talk to anyone and that plaintiff needed to take it to his cell. (*Id.*)

After plaintiff refused to go to his cell, defendant Kelly said, “He spit on me, did you see that, he spit on me!” (*Id.*) Plaintiff began to protest this lie. (*Id.*) Plaintiff contends that due to the presence of multiple inmates in the dayroom who saw that plaintiff did not spit on defendant Kelly, defendant Kelly “abandoned this ploy to falsify a fake battery charge on the plaintiff.” (*Id.*)

Because defendants Kelly and Pesce attempted to set plaintiff up with false charges of battery, plaintiff had an anxiety attack. (*Id.*) Plaintiff began shouting, “I’m having a mental breakdown...I need to see a mental health clinician...I need to talk to the Sergeant right now!”

(Id.) 17 Defendant Kelly then took plaintiff by the left bicep and defendant Pesce took plaintiff by 18 the right bicep.

(Id. at 14.) Defendants Kelly and Pesce began to drag plaintiff across the 19 dayroom floor toward his cell as defendants Sergeant, Hurtado and Mott watched. (Id. at 13-14.) 20 As defendants Kelly and Pesce dragged plaintiff, plaintiff felt a sharp pain in his shoulders and 21 back due to the aggressive way he was being handled and because plaintiff is mobility impaired.

22 (Id. at 14.) Plaintiff alleges that he had “no choice” but to swing his feet from beneath to the front 23 of his body and place his left foot on the floor. (Id.) This action caused everybody to abruptly 24 stop and defendant Pesce lost his balance, falling on top of plaintiff. (Id.) 25 Plaintiff alleges that as he fell, defendant Kelly “somehow forcefully slammed me face 26 first into the concrete floor,” causing plaintiff to hit the floor hard, disorienting plaintiff.

(Id.) 27 Defendants Kelly and Pesce began using wrist and finger restraint maneuvers to intentionally 28 inflict pain in plaintiff. (Id.) As defendants Kelly and Pesce restrained plaintiff, defendant Kelly 1 said, “Now it’s a battery.” (Id.) 2 Defendant Sergeant then placed plaintiff in ankle restraints. (Id.) Defendant Culum took 3 the ankle chain from defendant Sergeant.

(Id.) Defendant Culum crossed plaintiff’s feet over the 4 other and forcefully drove his full body weight onto plaintiff’s ankles and buttocks as hard as he 5 could, causing severe pain to shoot through plaintiff’s ankles and feet. (Id.) 6 Shortly thereafter, defendant Clay entered the housing unit and instructed defendants 7 Culum and Gamez to escort plaintiff to the facility A program office.

(Id. at 15.) Defendants 8 Culum and Gamez lifted plaintiff up from the floor and placed him in a wheelchair, then put 9 plaintiff in a holding cage. (Id.) Defendant Gamez then removed the restraints from plaintiff’s 10 wrists and ankles. (Id.) Defendant Culum then ordered plaintiff to remove his clothing. (Id.) 11 Plaintiff refused to remove his clothing because he felt anxiety and fear.

(Id.) Plaintiff again 12 asked to speak to a mental health clinician. (Id.) Defendant Culum put the hand restraints back 13 on plaintiff’s wrists. (Id.) 14 Defendant Gamez told defendant Culum that she was going to retrieve some scissors. 15 (Id.) Defendant Culum told plaintiff, “If you give me any more problems, I’m gonna fuck you up 16 nigger!” (Id.) Plaintiff responded, “You ain’t gonna do shit to me.” (Id.)

Defendant Culum then 17 yanked plaintiff from the holding cage, swung plaintiff 180 degrees and slammed plaintiff’s face 18 into the wall. (Id.) Defendant Culum then smashed the heel of his foot down into plaintiff’s right 19 foot, causing plaintiff pain. (Id. at 15-16.) Defendant Culum then lifted plaintiff up off of his feet 20 and slammed plaintiff to the floor.

(Id. at 16.) Defendant Culum struck plaintiff in the face with 21 his fists multiple times. (Id.) 22 As defendant Culum assaulted plaintiff, defendant Gamez returned. (Id.) Defendant 23 Gamez joined in the assault by dropping her full body weight into plaintiff's back and striking 24 plaintiff in the back and rib cage. (Id.) 25 After the assault, defendant Gamez asked defendant Culum what happened.

(Id.) 26 Defendant Culum said that plaintiff attempted to strike him. (Id.) Defendant Gamez reminded 27 defendant Culum that plaintiff was still handcuffed behind his back. (Id.) Defendant Culum then 28 revised his statement, stating that plaintiff struck him in the chest with his shoulder. (Id.) 1 After plaintiff was returned to the holding cage, plaintiff told defendant Clay that the 2 handcuffs on his wrists were too tight and that plaintiff was losing feeling in both of his wrists.

3 (Id.) Defendant Clay ignored plaintiff's request to loosen the handcuffs. (Id.) 4 After begging to see a mental health clinician, plaintiff was finally able to speak to a 5 psychiatrist. (Id.) After consulting with defendant Clay, the psychiatrist left without saying 6 anything. (Id. at 17.) 7 The Court ordered service of the following claims raised in the amended complaint: 1) on 8 June 1, 2020, defendants Culum, Gamez and Clay used excessive force in violation of the Eighth 9 Amendment when they allegedly applied handcuffs tightly and disregarded plaintiff's request to 10 loosen the handcuffs; 2) on June 1, 2020, defendants Kelly and Pesce used excessive force in 11 violation of the Eighth Amendment when they allegedly attempted to drag plaintiff to his cell; 12 3) on June 1, 2020, defendant Kelly used excessive force in violation of the Eighth Amendment 13 when he allegedly slammed plaintiff's face into the concrete; 4) on June 1, 2020, defendants 14 Kelly and Pesce used excessive force in violation of the Eighth Amendment when they allegedly 15 used finger and wrist restraint maneuvers to intentionally inflict pain on plaintiff; 5) on June 1, 16 2020, defendant Culum used excessive force in violation of the Eighth Amendment when he 17 allegedly drove his full body weight down onto plaintiff's ankles and buttocks as hard as he 18 could, causing plaintiff to suffer severe pain; 6) on June 1, 2020, defendants Culum and Gamez 19 used excessive force in violation of the Eighth Amendment when they allegedly assaulted 20 plaintiff; and 7) on June 1, 2020, defendants Pesce, Kelly, Sergeant, Hurtado and Mott violated 21 plaintiff's Eighth Amendment right to adequate mental health care when they allegedly failed to 22 provide plaintiff with mental health treatment.

(ECF No. 18 at 1-2.) 23 V. DEFENDANTS' MOTION TO DISMISS 24 A. Legal Standard 25 "[A] state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a 26 judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or 27 sentence,' unless the prisoner can demonstrate that the conviction or sentence has previously been 28 invalidated." *Edwards v. Balisok*, 520 U.S. 641, 643 (1997) (quoting *Heck*, 512 U.S. at 487).

In 1 Edwards, the Supreme Court applied Heck to prison disciplinary proceedings. See id. “[I]f the 2 district court determines that the plaintiff’s action, even if successful, will not demonstrate the 3 invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed 4 to proceed.” Heck, 512 U.S. at 487. (emphasis in original). “In evaluating whether claims are 5 barred by Heck, an important touchstone is whether a § 1983 plaintiff could prevail only by 6 negating ‘an element of the offense of which he has been convicted.’” Cunningham v. Gates, 312 7 F.3d 1148, 1153-54 (9th Cir.

2002) (quoting Heck, 512 U.S. at 487 n.6). 8 “To decide whether success on a section 1983 claim would necessarily imply the 9 invalidity of a conviction, [the court] must determine which acts formed the basis for the 10 conviction.” Lemos v. County of Sonoma, 40 F.4th 1002, 1006 (9th Cir. 2022) (emphasis in 11 original). “When the conviction is based on a guilty plea, we look at the record to see which acts 12 formed the basis for the plea.” Lemos, 40 F.4th at 1006 (citations omitted).

It is the defendants’ 13 burden to establish the basis for the conviction. See Sanford v. Motts, 258 F.3d 1117, 1119 (9th 14 Cir. 2001) (“It was the burden of the defendants to establish their defense by showing what the 15 basis was.”).

The Ninth Circuit has applied Heck to no contest pleas. See Sanders v. City of 16 Pittsburg, 14 F.4th 968, 970-72 (9th Cir. 2021). 17 To determine the factual basis of a plea, for Heck purposes, the court looks at the record to 18 see which acts formed the basis for the plea. See Smith v. City of Hemet, 394 F.3d 689, 698 (9th 19 Cir. 2005) (en banc).

However, if the record is silent as to the factual basis for the plea, 20 defendants will be unable to establish their defense, and plaintiff’s § 1983 action will not be Heck 21 barred. See Martell v. Cole, 115 F.4th 1233, 1239 (9th Cir. 2024) (claim of excessive force was 22 not barred under Heck because the record was “silent about which one (or more) of [plaintiff’s] 23 resisting or obstructing acts was (or were) the factual predicate of his guilty plea.”).

24 B. Requests for Judicial Notice 25 1. Defendants’ Request for Judicial Notice 26 In the motion to dismiss, defendants request that the Court take judicial notice of several 27 documents. A court may “judicially notice a fact that is not subject to reasonable dispute because 28 it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately 1 and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed.

R. 2 Evid. 201(b). The court may also take judicial notice of matters of public record. See Lee v. City 3 of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001), abrogated on other grounds as stated in 4 Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). When a court takes judicial 5 notice of a document, “it may do so not for the truth of the facts recited therein, but for the 6

existence of the [record], which is not subject to reasonable dispute over its authenticity.” Lee, 7 250 F.3d at 690 (internal quotation marks and citation omitted).

8 Defendants request that the Court take judicial notice of seven documents filed in Amador 9 County Superior Court case *People v. Montgomery*, No. 20-CR-29878: 1) the docket (exhibit A-10 1); 2) the felony complaint (exhibit A-2); 3) the certified reporter’s transcript from the 11 preliminary hearing (exhibit A-3); 4) the information (exhibit A-4); 5) the felony plea form 12 (exhibit A-5); 6) the plea and sentencing minutes (exhibit A-6); and 7) the abstract of judgment 13 (exhibit A-7).

(ECF No. 43-2 at 3-4.) This Court takes judicial notice of these seven documents. 14 See *Lininger v. Pfleger*, 2017 WL 5128170, at *1 n.1 (N.D. Cal. Nov. 6, 2017) (“The documents 15 submitted for judicial notice are documents filed in Plaintiff’s state court criminal proceedings, 16 which are suitable for judicial notice under Fed. R. Evid. 201(b).”); *Arellano v. Haskins*, 2021 17 WL 1193814, at *6 (E.D.

Cal. Mar. 30, 2021) (taking judicial notice of state court criminal 18 docket, certified copy of preliminary hearing transcript and transcript from change of plea 19 hearing). 20 Defendants also request that the Court take judicial notice of records from two California 21 Department of Corrections and Rehabilitation (“CDCR”) Rules Violation Report Logs, nos. 22 7003864 and 7003865 (exhibits B-1 and B-2).

(ECF No. 43-2 at 4.) Plaintiff objects to the 23 request for judicial notice of the records from these rules violation reports on the grounds that the 24 factfinders at these disciplinary hearings were biased and one-sided. (ECF No. 50-2 at 2.) 25 Plaintiff alleges that he was denied due process during these disciplinary proceedings in that he 26 did not receive a thorough investigation.

(*Id.*) 27 Federal courts recognize that rules violation reports fall within the category of public 28 records subject to judicial notice. See *Daniels v. Valencia*, 2018 WL 3640321, at *3 (E.D. Cal. 1 July 30, 2018), findings and recommendations adopted, 2018 WL 4636186 (E.D. Cal. Sep. 26, 2 2018). Taking judicial notice of a rules violation report does not mean that the factual allegations 3 of the rules violation report are deemed to be true.

See *id.* “To the contrary, a court cannot 4 generally take judicial notice of the underlying ‘factual findings of proceedings or records in 5 another cause so as to supply, without formal introduction of evidence, facts essential to support a 6 contention in a cause then before it.’” *Id.* (quoting *M/V Am. Queen v. San Diego Marine Constr. 7 Corp.*, 708 F.3d 1483, 1491 (9th Cir.

1983)). Accordingly, this Court may take judicial notice of 8 the rules violation reports attached to the motion to dismiss, subject to the limitations noted 9 above. 10 Finally, defendants request that the Court take judicial notice of the docket from Los 11 Angeles County Superior Court case *People v. Montgomery*, No. PA036573 (exhibit C-1). 12 (ECF No. 43-2 at 4.)

This Court takes judicial notice of the docket from Los Angeles County 13 Superior Court case *People v. Montgomery*, No. PA036573. See *Lininger*, 2017 WL 5128170, 14 at *1 n.1. 15 2. Plaintiff's Request for Judicial Notice 16 In his opposition, plaintiff requests that the Court take judicial notice of various 17 documents identified as: 1) plaintiff's appeal nos. 969 and 17145, including all documents 18 submitted and considered by prison officials in responding to these grievances; 2) the office of 19 appeals finding that granted plaintiff's staff misconduct complaint; 3) all appeal data that relate to 20 plaintiff's opposition; and 4) documents related to the internal investigation attached as plaintiff's 21 exhibit 7.

(ECF No. 50-2 at 1-3.) The documents to which plaintiff refers in his request for 22 judicial notice are attached as exhibits to his opposition. (ECF No. 50-1 at 15-80.) 23 After reviewing the documents for which plaintiff seeks judicial notice, this Court finds 24 that none of these documents are relevant to the pending motion.

In the pending motion, 25 defendants argue that the instant action is barred pursuant to *Heck* based on plaintiff's criminal 26 conviction in Amador County Superior Court case *People v. Montgomery*, No. 20-CR-29878 27 and plaintiff's prison disciplinary convictions in rules violation report nos. 7003864 and 7003865. 28 None of the documents plaintiff requests be judicially noticed demonstrate that any of these 1 convictions have been invalidated.

Judicial notice is inappropriate where, as here, the facts to be 2 noticed are not relevant to the disposition of the issues before the Court. See *Ruiz v. City of 3 Santa Maria*, 160 F.3d 543, 548 n. 13 (9th Cir. 1998).

Accordingly, plaintiff's request for judicial 4 notice is denied. 5 This Court observes that plaintiff seeks judicial notice of a CDCR Appeal Claims 6 Decision Response in grievance no. 969 dated September 13, 2020. (ECF No. 50-1 at 33.)

In this 7 grievance, plaintiff claimed that defendants Culum and Gamez assaulted plaintiff on June 1, 8 2020. (Id.) Plaintiff claimed that defendant Culum threatened plaintiff using vulgar language and 9 that plaintiff responded, resulting in defendant Culum slamming plaintiff into the wall. (Id.) 10 Plaintiff claimed that defendants Culum and Gamez battered plaintiff while plaintiff was in 11 restraints and then fabricated the statement that plaintiff "took a swing at me." (Id.)

The 12 institution level response to grievance no. 969 found that staff did not violate policy as to the 13 allegations/claims. (Id.) The CDCR Appeals Claim Decision Response states that the examiner 14 reviewed the above documents and was unable to support the institution's conclusion that staff 15 did not violate policy. (Id.)

The CDCR Appeals Claim Decision Response found that a remedy 16 was warranted and directed the institution to take appropriate action to address all issues 17 adequately that staff used excessive force as alleged by plaintiff. (Id.)

The CDCR Appeals Claim 18 Decision Response directed the institution to review the allegation of the threat involving profane 19 language and the allegation of fabricating statements during the emergency code announcement. 20 (Id.) 21 Plaintiff also seeks judicial notice of the institution level response to the CDCR Appeals 22 Claim Decision Response to grievance no. 969.

(Id. at 36-37.) This response dated November 2, 23 2020 states, in relevant part, “For the allegation of verbal threats, it happened in an isolated area 24 and no additional staff or inmate were identified for interviews.

For the allegations of fabricated 25 statements, witnesses were interviewed and no policy violations were discovered. For the 26 allegation of misuse of force no policy violations were discovered.” (Id. at 36.) Plaintiff’s 27 handwritten note on this document claims that the institution did not thoroughly investigate his 28 claims. (Id. at 37.) 1 This Court observes that the CDCR Appeals Claim Decision Response and the institution 2 level response to the CDCR Appeals Claim Decision Response to grievance no. 969 do not 3 demonstrate that plaintiff’s conviction for the rules violation related to this grievance, i.e., rules 4 violation report No. 7003864, has been invalidated.

5 C. Background 6 In the motion to dismiss, defendants argue that a finding in plaintiff’s favor would 7 necessarily undermine the validity of plaintiff’s rules violation convictions, nos. 7003864 and 8 7003865, and plaintiff’s conviction in Amador County Superior Court case People v. 9 Montgomery, No. 20-CR-29878.

To put this argument in context, this Court next sets forth the 10 background of plaintiff’s state court and rules violation convictions. 11 1. Case No. 20-CR-29878 12 On August 21, 2020, the Amador County District Attorney charged plaintiff with two 13 counts of battery on a non-confined person by a prisoner in violation of California Penal Code 14 section 4501.5.

(Def. Exhibit A-2.) Count 1 alleged that on June 1, 2020, plaintiff battered 15 defendant Pesce. (Id.) Count 2 alleged that on June 1, 2020, plaintiff battered defendant Culum. 16 (Id.) Plaintiff was also charged with two strike enhancements. (Id.)

On August 16, 2024, 17 plaintiff pleaded no contest to Count 1 in exchange for dismissing Count 2 and the strike 18 enhancements. (Def. Exhibit A-5.) The Amador County Superior Court sentenced plaintiff to 19 two years for Count 1, to be served consecutively to his underlying offense in Los Angeles 20 County case no. PA036573. (Def. Exhibits A-5, A-6.) 21 On November 1, 2000, in Los Angeles County case no. PA036573, plaintiff was found 22 guilty of one count of robbery, in violation of California Penal Code section 211, and one count 23 of petty theft with a prior, in violation of California Penal Code section 666.

(Def. Exhibit C-1.) 24 Plaintiff was sentenced to 40 years to life. (Id.) 25 On the plea form signed by plaintiff in Amador County case No. 20-CR-29878, plaintiff 26 initialed the following

statement: 27 I understand that the court is required to find a factual basis for my plea to make sure that I am entering a plea to the proper offenses 28 under the facts of the case.

I offer to the court the following as the 1 basis for my plea of no contest and any admissions: 2 (1) I understand that the court may consider the following as proof of the factual basis for my plea: 3 (a) Preliminary Hearing Transcript. 4 (Def. Exhibit A-5 at 4.) 5 Plaintiff also initialed the section of the plea form stating that his attorney would stipulate 6 to a factual basis for the plea.

(Id. at 5.) Plaintiff's attorney stipulated "that there is a factual 7 basis for the plea," and referred the court to the preliminary hearing transcript. (Id. at 6.) 8 This Court next summarizes the testimony from the preliminary hearing transcript. This 9 Court refers to the page numbers from the preliminary hearing transcript, which begin at page 10 147. (Def.

Exhibit A-3 at p. 147.) Defendants Pesce and Culum were the only witnesses to 11 testify at the preliminary hearing. 12 Defendant Pesce testified that on June 1, 2020, he observed plaintiff pacing around the 13 dayroom yelling that plaintiff was having a mental breakdown. (Id. at p. 149.) Plaintiff seemed 14 to be in a state of panic almost. (Id.) Defendant Pesce placed plaintiff in mechanical restraints 15 "to get him some mental health." (Id.)

After placing plaintiff in mechanical restraints, defendant 16 Pesce called for an escort out of building two so that plaintiff could be escorted to the program 17 office. (Id. at 150.) Once the escorting officer arrived and began escorting plaintiff to the sally 18 port, plaintiff was still being very erratic. (Id.) Plaintiff said, "If you are going to use force on 19 me, do it, do it." (Id.)

Defendant Pesce told plaintiff to stop striking and kicking defendant 20 Pesce. (Id.) Plaintiff stopped the escort, kicked back with his right foot and struck defendant 21 Pesce on his left knee. (Id.) Defendant Pesce then fell, maintaining possession of plaintiff's right 22 arm. (Id.) Defendant Pesce fell as a result of being struck by plaintiff. (Id.)

As soon as 23 defendant Pesce and plaintiff fell, responding staff grabbed plaintiff's legs and put plaintiff in leg 24 restraints. (Id.) Defendant Pesce then left and went to get a medical evaluation done on his left 25 knee due to the trauma. (Id.) When plaintiff fell to the ground, plaintiff was compliant and not 26 resisting. (Id. at 159.) Defendant Pesce testified that defendants Kelly, Sargent, Culum and 27 Gamez were present.

(Id. at 151.) Defendants Gamez and Culum escorted plaintiff away in a 28 1 wheelchair. (Id. at 161.) 2 Defendant Culum testified at the preliminary hearing that on June 1, 2020, defendant 3 Culum responded to a code one, resistive inmate, building two. (Id. at 165-66.) When defendant 4 Culum arrived, he observed an inmate in restraints on the floor. (Id. at 166.)

Defendant Culum 5 did not see any force being used. (Id.) Plaintiff was not resisting. (Id.) Several officers were 6 around plaintiff. (Id.) Defendant Culum walked over to plaintiff to assist another

officer place 7 ankle restraints on plaintiff. (Id. at 166-67.) Defendant Culum held plaintiff's ankles up. (Id.) 8 After that a wheelchair arrived, and defendant Culum assisted plaintiff into the wheelchair with 9 defendant Gamez.

(Id.) Defendants Culum and Gamez then escorted plaintiff to the alpha 10 program office. (Id. at 167.) On the way to the office, plaintiff did not speak. (Id.) When they 11 arrived at the office, defendant Culum conducted a search of the holding cell. (Id.) Defendants 12 Culum and Gamez then brought plaintiff to his feet and placed him in the holding cell. (Id.)

13 Defendant Culum testified that plaintiff went into the holding cell on his own free will: "We 14 assisted him. To the best of my knowledge, he stood up on his own and walked into the cell." 15 (Id. at 173.) Defendant Gamez then removed plaintiff's ankle restraints and handcuffs. (Id.) At 16 this time, plaintiff was facing away from defendant Culum. (Id. at 167.)

Defendant Culum then 17 instructed plaintiff to remove his clothes so that defendants could perform an unclothed body 18 search. (Id. at 167-68.) Plaintiff refused to remove his clothes. (Id. at 168.) Defendant Culum 19 then put the handcuffs back on plaintiff. (Id.) Defendant Gamez then said that she was going to 20 get the scissors, which were needed to cut plaintiff's clothes off.

(Id.) Plaintiff then said, "I'll 21 make you use force." (Id.) Plaintiff spun dramatically to his right and his right shoulder hit 22 defendant Culum's chest. (Id.) Defendant Culum remembers his hand coming up, plaintiff's 23 right arm hit defendant Culum's left hand, defendant Culum's left hand was on plaintiff's upper 24 back and lower neck area, and defendant Culum forced plaintiff to the ground.

(Id.) Later, 25 another officer came and put leg restraints on plaintiff. (Id. at 177-78.) An officer escorted 26 plaintiff to the program office. (Id. at 178.) 27 2. Rules Violation Report No. 7003864 28 On August 24, 2020, plaintiff was found guilty of battery on a peace officer in violation 1 of California Code of Regulations title 15, § 3005(d)(1). (Def.

Exhibit at p. B-1.) The charges 2 against plaintiff in this rules violation report are based on the same incident with defendant 3 Culum for which plaintiff was charged with battery on a non-confined person in Amador County 4 case no. 20-CR-29878. At the disciplinary hearing, plaintiff made the following statement: 5 As I was placed into the Holding Cell, the ankle restraints and handcuffs were removed and I was asked to strip out.

I did not say, 6 "F" no. I simply said I am not strip[p]ing out. I was placed back in handcuffs at which time I heard Officer Gamez say, "I am going to 7 get the scissors." After her departure, C/O Culum told me, "You give me anymore problems, I'm going to fuck you up." I simply stated, 8 "You are not going to do nothing to me." Culum then snatched me by my handcuffs and my shirt, pulled me out of the cage and 9 slammed me into the wall.

He took his left leg and slammed his boot into my right foot. Then he slammed me to the floor and drove his 10 left knee into my back and then struck me four times on the side of my face with his left fist. After that he drove his right knee about 11 three or four times into the right side of my rib cage.

After that Officer Gamez had returned with the scissors, she drove her right 12 knee into the middle of my back and started striking me with her right fist into the left side of my rib. After they finished they called 13 for back up or assistance. He cut all my cloth[e]s off with the scissors[,] covered me and put me back into the wheelchair and then 14 they took me to medical.

I never struck with my shoulder, I never did, I never said I will make you use force. Culum is a 40 year old 15 Caucasian guard and I am a 57 year old African American[.] I would never call a white man a nigger. I wouldn't call a black man a nigger. 16 Culum stated when I drove my shoulder he fell onto the floor and hurt himself but he never stated that into the incident report.

17 18 (Id. at 6-7.) 19 In finding plaintiff guilty, the disciplinary hearing officer cited the following section of 20 defendant Culum's report: 21 After MONTGOMERY was placed into a wheelchair Officer Gamez and I escorted MONTGOMERY to Facility "A" Program 22 Office. I searched Holding Cell #2 for contraband with negative results. I placed MONTGOMERY into Holding Cell # 2.

Officer 23 Gamez removed the leg restraints and handcuffs. I gave MONTGOMERY a direct order to submit to an unclothed body 24 search. MONTGOMERY stated "Fuck no, I ain't strippin out." I secured MONTGOMERY back into handcuffs.

As Officer Gamez 25 left to retrieve the scissors, MONTGOMERY stated "I'll make you use force, nigga!" MONTGOMERY aggressively spun to his right, 26 pushing his right shoulder into my chest. I grabbed MONTGOMERY'S right arm with my right hand and put my left 27 hand in the center of his back. Using my physical strength and body weight I forced MONTGOMERY to the ground.

Officer Gamez 28 responded and took control of MONTGOMERY'S left side." 1 (Id. at 7.) 2 The disciplinary hearing officer also cited the following section of defendant Gamez's 3 report: 4 I heard inmate MONTGOMERY yell, "I'm going to make you use force!" I redirected my attention towards the holding cells and 5 observed MONTGOMERY aggressively turn to the right and strike Officer M. Culum in the chest with his right shoulder.

Utilizing my 6 institutional radio, I summoned a code one response. I observed Officer M. Culum utilize Physical Force to place 7 MONTGOMERY on the ground. Due to my vantage point I was unable to see the hand placement of Officer M. Culum. 8 MONTGOMERY started to resist by thrashing his shoulders to the left and right and kicking his legs. 9 10 (Id.) 11 The disciplinary

hearing officer also reviewed the CDCR 7219 Medical Report of Injury 12 or Unusual Occurrence on defendants Culum, Gamez and plaintiff.

(Id.) The disciplinary 13 hearing officer also took into consideration plaintiff's statement made during the disciplinary 14 hearing. (Id.) This Court observes that defendant Culum's report is attached to defendants' 15 exhibit B-1. (Id. at 1.) Defendants' exhibit B-1 does not include defendant Gamez's statement or 16 the CDCR 7219 Medical Report of Injury or Unusual Occurrence forms referred to by the 17 disciplinary hearing officer.

Plaintiff was assessed 150 days of credit loss after being found 18 guilty of the rules violation. (Id. at 3.) 19 3. Rules Violation Report No. 7003865 20 On August 24, 2020, plaintiff was found guilty of battery on a peace officer in violation of 21 California Code of Regulations title 15, § 3005(d) (1). (Def. Exhibit at p. B-2.)

The charges 22 against plaintiff in this rules violation report are based on the same incident with defendant Pesce 23 for which plaintiff was charged with battery on a non-confined person in Amador County case no. 24 20-CR-29878. 25 At the disciplinary hearing, plaintiff made the following statement: 26 The report is inaccurate. Pesce had confiscated personal clothing items[.]

[W]hen I came out I requested for my clothing back. He 27 refused to return it. I then asked for a property receipt, he refused to issue me a property receipt. I then requested to talk to the yard 28 sergeant, he said I couldn't talk to anybody and to take it back to my 1 cell. I refused and did not comply, I refused to take it back to my cell. He placed me in handcuffs[.]

[A]fter he placed me in handcuffs 2 he tried to escort me back to my cell. I refused to go and I sat down in the middle of the dayroom. He called for back up. C/O Kelly and 3 C/O Sergeant responded. Kelly grabbed me by my left arm and Pesce grabbed me by my right arm. They snatched me up off the floor and 4 started dragging me towards my cell. I planted my feet in front of me and attempt to resist them dragging me[.]

[A]s I done so Kelly 5 forcefully lifted me up and Pesce followed suit. Kelly brought me down hard on my face taking me off balance. My right leg went out 6 (back) in a kicking motion causing Pesce to fall on top of me. I was on the ground[.] Kelly put his right knee into my back and Pesce put 7 his right knee on top of my head and they both restrained me until other officers arrived.

I was placed in leg restraints and in a 8 wheelchair and escorted to the program office. 9 (Id. at 8-9.) 10 At the disciplinary hearing, the disciplinary hearing officer asked plaintiff if he stated, 11 "You're going to have to use force on me now." (Id. at 9.) Plaintiff denied making this 12 statement. (Id.) At the disciplinary hearing, plaintiff also called six inmate witnesses.

(Id. at 6- 13 7.) 14 In finding plaintiff guilty, the disciplinary officer cited the following section of defendant 15 Pesce's report: "Officer B. Kelly responded and grabbed MONTGOMERY's left arm as I had 16 MONTGOMERY'S right arm. MONTGOMERY continued stating, 'I'm having a mental 17 breakdown, you're going to use force on me, do it, do it.' Simultaneously, MONTGOMERY 18 stopped the escort and kicked back with his right leg striking my left knee causing me to fall 19 forward onto the ground." (Id. at 7.)

The disciplinary hearing officer also cited the following 20 section of defendant Kelly's report: "I took Inmate MONTGOMERY'S left bicep with my right 21 hand and began to escort Inmate MONTGOMERY towards the sally port. Inmate 22 MONTGOMERY was shouting 'Fuck you Kelly, I'm going to make you use force.' Inmate 23 MONTGOMERY planted his left and right feet firmly on the ground and stopped the escort.

24 Inmate MONTGOMERY raised his right foot off the ground and kicked backwards, striking 25 Officer M. Pesce in his left knee." (Id.) The disciplinary hearing officer also cited the following 26 section of defendant Sergeant's report: "MONTGOMERY lifted his right leg and kicked back 27 striking Officer M. Pesce in the left knee area." (Id.)

The disciplinary hearing officer also cited 28 the following section of defendant Mott's report: "I opened the yard door as I observed Officer B. 1 Kelly secured MONTGOMERY'S left arm as Officer Pesce secured MONTGOMERY'S 2 right arm. MONTGOMERY proceeded to yell, 'I'm not going anywhere mother fucker unless 3 you use force do it now!' As Inmate MONTGOMERY was being escorted I observed him 4 lifting his right leg kicking Officer Pesce in the left knee." (Id.)

The disciplinary hearing officer 5 also reviewed the Investigative Employee's report, the CDCR 7219 Medical Report of Injury or 6 Unusual Occurrence on plaintiff and defendants Pesce and Kelly. (Id.) Plaintiff was assessed 7 150 days of credit loss. (Id.) This Court observes that defendant Pesce's report and the 8 Investigative Employee's report are attached to defendants' Exhibit B-2.

(Id. at 10, 14-15.) 9 Defendants' Exhibit B-2 does not contain the other documents referred to by the disciplinary 10 hearing officer. 11 D. Application of Heck to People v. Montgomery, No. 20-CR-29878 12 Defendants argue that plaintiff's plea of no contest and stipulation to the facts in the 13 preliminary hearing transcript in Amador County Superior Court No. 20-CR-29878 render all of 14 plaintiff's claims Heck barred, including those claims related to dismissed count 2.

Defendants 15 argue that the preliminary hearing testimony reveals that plaintiff was the true aggressor and that 16 no staff members punched plaintiff or used excessive force against him. Defendants further argue 17 that plaintiff's claim alleging that defendants denied him mental health care conflicts with the 18 stipulated facts from the preliminary hearing transcript which

reveal that defendant Pesce placed 19 plaintiff in mechanical restraints in order to get plaintiff mental health care.

Defendants argues 20 that plaintiff stipulated to these facts and cannot now say that defendants were deliberately 21 indifferent to his mental health needs. In the opposition, plaintiff argues that his no contest plea 22 to count 1, alleging battery on defendant Pesce, does not mean that his claims based on dismissed 23 count 2 involving defendant Culum are Heck barred.

24 As discussed above, in case No. 20-CR-29878, plaintiff pled no contest to count 1 alleging 25 battery on defendant Pesce. In the plea form, plaintiff and his counsel stipulated to the 26 preliminary hearing transcript as the factual basis for plaintiff's no contest plea to count 1.

The 27 preliminary hearing transcript makes clear that plaintiff kicking defendant Pesce in the left knee 28 formed the factual basis of plaintiff's plea to the battery charged in count 1. Therefore, plaintiff 1 stipulated only to those facts in the preliminary hearing transcript showing that plaintiff kicked 2 defendant Pesce in the left knee. See Lemos, 40 F.4th at 1006.

For this reason, this Court does 3 not agree with defendants' argument that plaintiff's stipulation to the preliminary hearing 4 transcript as the basis for his plea to count 1 meant that plaintiff stipulated to all facts in the 5 preliminary hearing transcript, including facts involving dismissed count 2.1 6 Having determined the factual basis of plaintiff's no contest plea to count 1, this Court 7 next considers application of Heck to plaintiff's claims.

To put this discussion in context, this 8 Court observes that a "§ 1983 claim is not barred by Heck even when the allegedly excessive 9 force and the obstructive act that forms the basis of plaintiff's conviction occur 'in a single 10 continuous chain of events lasting a very brief time.'" Martell, 115 F.4th at 1238 (quoting 11 Hooper v. County of San Diego, 629 F.3d 1127, 1131 (9th Cir.

2011)); see also Hooper, 629 F.3d 12 at 1129 (noting that the full encounter took place 'in a span of 45 second); Sanders, 14 F.4th at 13 971 (explaining excessive force claim can survive Heck if acts constituting excessive force 14 occurred "before or after" acts forming basis for conviction for resisting arrest, but Heck applies 15 if excessive force and acts underlying conviction occurred "at the same time."); Smith, 394 F.3d 16 at 693 (excessive force claim is not barred by Heck where excessive force takes place 17 "subsequent to the time [plaintiff] engaged in the conduct that constituted the basis for his 18 conviction").

19 For the following reasons, this Court finds that none of plaintiff's claims are Heck barred 20 based on plaintiff's Amador County criminal conviction for battery on defendant Pesce because a 21 1 This Court notes that in cases alleging excessive force where the plaintiff pled no contest to 22 resisting arrest and stipulated without any restriction or limitation to the preliminary hearing 23 transcript, courts have considered the entire preliminary hearing transcript to determine whether the excessive force claims are Heck barred.

For example, in *Winder v. McMahon*, 345 F. Supp. 2d 1197 (C.D. Cal. 2018), the “defendant was charged with a single-act offense [of resisting arrest] but there are multiple acts involved each of which could serve as the basis for a 25 conviction...” 345 F. Supp. 2d at 1206 (internal citations omitted). “[T]his single factual context, all of which was presented at [a] preliminary hearing and adopted by [plaintiff] as the 26 factual basis of his plea, may not be, in hindsight, subject to temporal hairsplitting [in order to 27 avoid the Heck bar].” *Id.* at 1206-07.

The instant case is different from *Winder* because here, plaintiff’s battery conviction was based on one discrete act: plaintiff kicking defendant Pesce in 28 the left knee. 1 finding in plaintiff’s favor as to these claims would not necessarily imply the invalidity of this 2 conviction. Plaintiff’s claim that defendants Culum, Gamez and Clay used excessive force in 3 violation of the Eighth Amendment when they allegedly applied handcuffs tightly and 4 disregarded plaintiff’s request to loosen the handcuffs is not Heck barred because a finding in 5 plaintiff’s favor as to this claim would not necessarily imply the invalidity of plaintiff’s battery 6 conviction.

Plaintiff’s claim that defendants Kelly and Pesce used excessive force in violation of 7 the Eighth Amendment when they allegedly attempted to drag plaintiff to his cell is not Heck 8 barred because a finding in plaintiff’s favor as to this claim would not necessarily imply the 9 invalidity of plaintiff’s battery conviction. A finding that defendant Kelly used excessive force in 10 violation of the Eighth Amendment when he allegedly slammed plaintiff’s face into the concrete 11 is not Heck barred.

Plaintiff alleges that defendant Kelly slammed plaintiff’s face into the 12 concrete floor as plaintiff fell after the kicking incident on which plaintiff’s conviction is based. 13 A finding that defendant Kelly slammed plaintiff’s face into the floor as plaintiff fell after 14 plaintiff kicked defendant Pesce in the left knee would not necessarily imply the invalidity of 15 plaintiff’s battery conviction.

Plaintiff’s claim that defendants Kelly and Pesce allegedly used 16 excessive force in violation of the Eighth Amendment when they used finger and wrist restraint 17 maneuvers to intentionally inflict pain on plaintiff is not Heck barred. Defendants allegedly used 18 the finger and wrist maneuvers on plaintiff after plaintiff fell to the floor after the kicking 19 incident.

A finding in plaintiff’s favor as to this claim would not necessarily imply the invalidity 20 of plaintiff’s battery conviction. Plaintiff’s claim that defendant Culum used excessive force in 21 violation of the Eighth Amendment when he allegedly drove his full body weight down onto 22 plaintiff’s ankles and buttocks as hard as he could, causing plaintiff severe pain, is not Heck 23 barred because a finding in plaintiff’s favor as to this claim would not necessarily imply the 24 invalidity of plaintiff’s battery conviction.

Plaintiff's claim that defendants Culum and Gamez 25 used excessive force in violation of the Eighth Amendment when they allegedly assaulted 26 plaintiff is not Heck barred because a finding in plaintiff's favor as to this claim would not 27 necessarily imply the invalidity of plaintiff's battery conviction.

Finally, plaintiff's claim that 28 defendants Pesce, Kelly, Sergeant, Hurtado and Mott violated plaintiff's Eighth Amendment right 1 to adequate mental health care when they allegedly failed to provide mental health treatment to 2 plaintiff is not Heck barred because a finding in plaintiff's favor as to this claim would not 3 necessarily imply the invalidity of plaintiff's battery conviction.

Accordingly, defendants' 4 motion to dismiss on these grounds should be denied. 5 E. Application of Heck to Rules Violation Report No. 7003865 6 Defendants argue that a finding in plaintiff's favor would directly negate plaintiff's 7 conviction in rules violation report no. 7003865.

In rules violation report no. 7003865, plaintiff 8 was found guilty of battery on defendant Pesce based on the same facts on which plaintiff's 9 Amador County criminal conviction was based, i.e., plaintiff kicked defendant Pesce in the left 10 knee. "[A] disciplinary conviction for battery does not pose a Heck bar when the plaintiff alleges 11 "a factual scenario that would potentially allow his § 1983 claims to coexist with his prison 12 disciplinary finding." *Blocker v. Solis*, 2023 WL 10479566, at *5 (C.D.

Cal. Dec. 18, 2023), 13 findings and recommendation adopted, 2024 WL 1257431 (C.D. Cal. Mar. 25, 2024) (quoting 14 *Brown v. Holland*, 2014 WL 1339687, at *4 (N.D. Cal. Mar. 28, 2014). "Such a situation exists 15 when the complaint alleges a continuous chain of events with two separate factual predicates— 16 first, acts by the prisoner leading to the rules violation and, second, acts of excessive force by the 17 officer giving rise to potential § 1983 liability." *Blocker*, 2023 WL 10479566, at *5. "By 18 contrast, when the disciplinary conviction and the excessive force claims are premised on 19 different versions of the same event, Heck applies." *Id.* 20 For the same reasons plaintiff's claims are not Heck barred by plaintiff's Amador County 21 criminal conviction, plaintiff's claims are not Heck barred by plaintiff's conviction in rules 22 violation report no. 7003865.

A finding in plaintiff's favor as to his claims would not necessarily 23 imply the invalidity of plaintiff's disciplinary conviction in rules violation report no. 7003865. 24 Accordingly, defendants' motion to dismiss on these grounds should be denied. 25 F. Application of Heck to Rules Violation Report No. 7003864 26 Defendants argue that a finding in plaintiff's favor would directly negate plaintiff's 27 conviction in rules violation report no. 7003864.

In rules violation report no. 7003864, plaintiff 28 was found guilty of battery on a peace officer based on plaintiff pushing his right shoulder into 1 defendant Culum's chest after defendant Culum placed plaintiff in the holding cell, i.e., the same 2 facts on which dismissed count 2 in

Amador County case no. 20-CR-29878 was based. This Court finds that the following claims are not Heck barred based on plaintiff's conviction in rules 4 violation report no. 7003864 because a finding in plaintiff's favor as to these claims would not necessarily imply the invalidity of this disciplinary conviction: 1) defendants Culum, Gamez and Clay used excessive force in violation of the Eighth Amendment when they allegedly applied 7 handcuffs tightly and disregarded plaintiff's request to loosen the handcuffs; 2) defendants Kelly 8 and Pesce used excessive force in violation of the Eighth Amendment when they allegedly 9 attempted to drag plaintiff to his cell; 3) defendant Kelly used excessive force in violation of the 10 Eighth Amendment when he allegedly slammed plaintiff's face to the concrete; 4) defendants 11 Kelly and Pesce used excessive force in violation of the Eighth Amendment when they allegedly 12 used finger and wrist maneuvers to intentionally inflict pain on plaintiff; 5) defendant Culum used 13 excessive force in violation of the Eighth Amendment when he allegedly drove his full body 14 weight down onto plaintiff's ankles and buttocks as hard as he could (this incident allegedly 15 occurred before defendant Culum escorted plaintiff away in a wheelchair and put plaintiff in the 16 holding cage); and 6) defendants Pesce, Kelly, Sergeant, Hurtado and Mott allegedly failed to 17 provide plaintiff with mental health treatment in violation of the Eighth Amendment.

18 Whether plaintiff's claim alleging that defendants Culum and Gamez used excessive force 19 against plaintiff after placing plaintiff in the holding cage is Heck barred requires further 20 discussion. As discussed above, plaintiff was found guilty of battery on defendant Culum based 21 on evidence that as defendant Gamez left to retrieve the scissors, plaintiff aggressively spun to his 22 right and pushed his right shoulder into defendant Culum's chest.

In the amended complaint, 23 plaintiff alleges that after defendant Gamez went to retrieve the scissors, defendant Culum yanked 24 plaintiff from the cage, swung plaintiff 180 degrees, slammed plaintiff's face into the wall and 25 smashed the heel of his foot down into plaintiff's right foot, causing plaintiff pain. Plaintiff 26 alleges that defendant Culum then lifted plaintiff up off his feet and slammed plaintiff to the floor, 27 striking plaintiff in the face.

Plaintiff alleges that defendant Gamez joined in the assault after she 28 returned. 1 This Court finds that plaintiff's claims alleging that defendant Culum yanked plaintiff out 2 of the holding cage, swung plaintiff 180 degrees, slammed plaintiff into the wall and smashed his 3 heel down on plaintiff's foot, are inconsistent with the findings at the disciplinary hearing that 4 plaintiff aggressively spun to his right and pushed his right shoulder into defendant Culum's 5 chest.

These claims of excessive force and plaintiff's disciplinary conviction are premised on 6 different versions of the same event. A finding in plaintiff's favor as to these claims would 7 invalidate plaintiff's disciplinary conviction.

Accordingly, these claims of excessive force are 8 Heck barred. 9 Plaintiff alleges that defendant Culum used excessive force against plaintiff after the 10 incident for which plaintiff was

convicted of battery. Plaintiff alleges that defendant Culum lifted 11 plaintiff up off his feet and slammed plaintiff to the floor, striking plaintiff in the face. A finding 12 in plaintiff's favor as to these claims would not necessarily invalidate plaintiff's rules violation 13 conviction for battery on defendant Culum.

Accordingly, these claims are not Heck barred. 14 Plaintiff's claim alleging that defendant Gamez used excessive force when she joined defendant 15 Culum in assaulting plaintiff is also not Heck barred as a finding in plaintiff's favor as to this 16 claim would not necessarily invalidate plaintiff's rules violation conviction for battery on 17 defendant Culum.

18 Accordingly, this Court recommends granting defendants' motion to dismiss plaintiff's 19 claims alleging that defendant Culum used excessive force when he yanked plaintiff out of the 20 holding cage, swung plaintiff 180 degrees, slammed plaintiff into the wall and smashed his heel 21 down on plaintiff's foot as Heck barred based on plaintiff's disciplinary conviction in rules 22 violation report No. 7003864.

The Court recommends denying defendants' motion to dismiss 23 plaintiff's remaining claims as Heck barred based on plaintiff's disciplinary conviction in rules 24 violation report No. 7003864. 25 VI. CONCLUSION 26 Accordingly, IT IS HEREBY ORDERED that plaintiff's motion for an extension of time 27 to file his opposition to defendants' motion to dismiss (ECF No. 49) is granted; and 28 IT IS HEREBY RECOMMENDED that defendants' motion to dismiss (ECF No. 43) be 1 || granted as to plaintiff's claim alleging that defendant Culum used excessive force when he 2 | yanked plaintiff out of the holding cage, swung plaintiff 180 degrees, slammed plaintiff into the 3 || wall and smashed his heel down on plaintiff's foot; defendants' motion to dismiss be denied in 4 || all other respects.

5 These findings and recommendations are submitted to the United States District Judge 6 || assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days 7 || after being served with these findings and recommendations, any party may file written 8 || objections with the court and serve a copy on all parties. Such a document should be captioned 9 || "Objections to Magistrate Judge's Findings and Recommendations." Any response to the 10 || objections shall be filed and served within fourteen days after service of the objections.

The 11 || parties are advised that failure to file objections within the specified time may waive the right to 12 || appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). 13 14 | Dated: June 11, 2025 4 aA i Aan Spe | CHI SOO KIM 16 UNITED STATES MAGISTRATE JUDGE 17 18 19 20 21 22 23 || Montl156.mtd(2)/2 24 25 26 27 28 23