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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALTON JONES,

Plaintiff,

v.

U.S. BORDER PATROL AGENT GERARDO HERNANDEZ, et al.,

Defendants.

UNITED STATES OF AMERICA,

Counter-Claimant,

v.

ALTON JONES,

Counter-Defendant.

Case No. 16cv1986 W (WVG)

REPLY TO PLAINTIFF/COUNTER-DEFENDANT'S RESPONSE RE: COMBINED MOTION FOR SUMMARY JUDGMENT BY THE INDIVIDUAL DEFENDANTS AND BY THE UNITED STATES AS DEFENDANT AND COUNTER-CLAIMANT[1]

DATE: July 16, 2018
CTRM: The Hon. Thomas J. Whelan

[No oral argument pursuant to Civil L.R. 7.1(d)(1)]

[1] *See also* accompanying responses to Plaintiff/Counter-Defendant's evidentiary objections. [ECF Doc. 104-6.]

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UNWARRANTED EXTENSION OF *BIVENS* (Claims 1 through 3)

New context. This Court has already ruled that this case presents a new context because, "critically, this incident took place directly adjacent to the United States border." [ECF Doc. 71 at 20:4-5.] Without addressing this Court's ruling, Jones cites circuit court decisions, but the Supreme Court held that the "proper test" is whether a "case is different in a meaningful way from previous *Bivens* cases decided by *this Court*." *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017) (emphasis added).[2]

Jones argues that the agents here, like the agents in *Bivens*, were involved in "their ordinary law enforcement activities." [ECF Doc. 104 ("Jones Response") at 17:6.] But *Bivens* concerned a proactive law enforcement action in Bivens' home, whereas this case concerns reactive safety and security measures to remove a trespasser from a congressionally mandated border security zone known as the Border Infrastructure System ("BIS"), which lies *on* the border. [*See* Ex. 80.] Defendants are not arguing for a "Border Patrol exception" in cases "near" the border or in an undefined "border region." [Jones Response at 2:25, 3:2, 16:1, 16:10, 17:12, 17:21, 18:28, 19:2, 21:26.] By misstating Defendants' argument, Jones fails to address it.

Jones misleadingly suggests that the incident occurred in state-owned Border Field State Park [Jones Response at 1:7-8 ("afternoon jog through the park"); 3:15-23 (photo of the park)] and that the All-Weather Road is not restricted because Border Patrol periodically holds "Friendship Days." The incident in this case did not occur on a Friendship Day or anywhere near "Friendship Park," and regardless, such events are permitted and monitored by Border Patrol, consistent with the photograph and the unofficial website information that Jones includes in his Response. [Jones Response at 4:7-11 ("Friendship Park is located on federal property, and is heavily monitored 24/7 by U.S. Border Patrol.") (at /faq).]

[2] Furthermore, none of the cases that Jones cites are similar. *See Chavez v. United States*, 683 F.3d 1102 (9th Cir. 2012) (vehicle stop on public highway); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006) (pre-inspection of applicant for admission on city-owned Paso del Norte International Bridge); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) (immigration detainers issued by ICE to local jail and state prison); *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006) (alleged deprivation of medical treatment in a prison).

As Jones himself notes, there were "no trespassing" signs along the north side of the All-Weather Road, facing the park [Jones Response at 6:17-19; *see also* Exs. 2-4, 10-11 (photos of signs produced by Jones)], and he does not dispute the agents' consistent testimony that the road is restricted and that, *in every case*, people who wander onto the road are instructed to leave. [ECF Doc. 98-5 at 31 (Johnson depo Tr. 120:2-8, 121-22); ECF Doc. 98-6 (Hernandez depo Tr. 138:13-16, 188); ECF Doc. 98-7 (Bowen depo Tr. 90:1-15, 211-14); ECF Doc. 98-8 (Faatoalia depo Tr. 90:20—91:91:20, 95:8-12, 157); ECF Doc. 98-10 (Kulakowski depo Tr. 90:22—91:2); ECF Doc. 98-9 (McFarlin depo Tr. 75-76).]

Special factors. Jones also fails to address this Court's ruling that special factors counsel against the extension of *Bivens* liability in this case, because "Congress has designed its regulatory authority in a guarded way as to border protection" and because of the "wide-reaching consequences as to the costs of enforcing the law at the border." [ECF Doc. 71 at 21:13-27.] Jones does not dispute that border security is synonymous with national security, citing only cases that arose in an airport (*Linlor*), a prison (*McLean*), and a bank (*Loumiet*). [Jones Response at 19-20.]

Jones does not dispute that the agents were assigned to a congressionally designated border security zone and that one of their responsibilities, relevant to this case, was to secure the zone by ejecting trespassers. That is not a traditional "search-and-seizure" function, *Linlor v. Polson*, 263 F. Supp. 3d 613, 625 (E.D. Va. 2017), and Jones is asking this Court to intervene on how to protect the border security zone: he argues that the agents had no authority to stop and eject him and that they should have "de-escalated" the situation by allowing him to run freely on the All-Weather Road,[3] with no knowledge of what he intended to do, risking injury to himself and other agents and further disrupting border security operations. The agents should not be required to weigh the "risk of personal damages liability" or "to second-guess difficult but necessary decisions concerning national-security policy." *Abbasi*, 137 S. Ct. at 1861.

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[3] Jones does not dispute that it was about three quarters of a mile from the beach when he started running west. [ECF Doc. 98-1 at 7:7-9.]

Jones claims that he did not pose a national security threat [Jones Response at 1-2], but clearly he compromised border security operations. He contends that the agents had "a routine encounter with an American jogger" [*id.* at 2:5-6], but there was nothing routine about encountering a jogger in a border security zone who refused to listen to them, who evaded them, and who continued to run when surrounded. Jones does not dispute ample testimony that it was unprecedented. [Johnson depo Tr. 122-23; Hernandez depo Tr. 188-89; Bowen depo Tr. 211; Faatoalia depo Tr. 96, 157; McFarlin depo Tr. 78:5-7.]

Jones argues that *Bivens* automatically applies to claims of unreasonable force [*id.* at 16:16-18, 27:4-6], but there is no authority to support the argument. *See Kisela*, 138 S. Ct. at 1153 ("Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness."). [*See also* ECF Doc. 98-1 at 18:11-22 (post-*Kisela* cases cited by Defendants in their memorandum of points and authorities).] He also argues that, if *Bivens* is not applied in this case, Border Patrol agents will have carte blanche to commit constitutional violations. [Jones Response at 2:23-25.] Apart from the argument's lack of relevance, this case concerns a trespasser in the BIS, and according to uncontroverted evidence, Jones is the first and only trespasser who has refused to leave, so the consequences of declining to extend *Bivens* liability are not as wide-ranging as he suggests.

<u>QUALIFIED IMMUNITY</u> (Claims 1 through 3)

Jones has the burden of citing "existing precedent [that] 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)). Jones attempts to sidestep his burden by asserting that *Kisela* stands for the opposite proposition, ironically citing pre-*Kisela* Ninth Circuit authority. [Jones Response at 30:17-21.] The Supreme Court has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1775-76 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

Although Jones need not cite "a case directly on point," "[s]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela*, 138 S. Ct. at 1152 (quoting *Mullenix*, 136 S. Ct. at 308 (internal quotation marks omitted). Jones has a burden to cite "[p]recedent involving similar facts." *Id.* at 1153 (citing similar, precedential cases "can help move a case beyond the otherwise 'hazy border between excessive and acceptable force' and thereby provide an officer notice that a specific use of force is unlawful.") (quoting *Mullenix*, 136 S. Ct. at 312)).

Jones cites no precedent involving similar facts--none that squarely govern the specific facts at issue in this case--which concern ejecting a trespasser from a restricted area. [Jones Response at 22-30]. He cites *United States v. Faulkner*, 450 F.3d 466, 470 (9th Cir. 2006), in support of his argument that the agents did not have authority to stop him on the All-Weather Road, but the facts of *Faulkner* have nothing to do with attempting to eject a trespasser from a restricted area,[4] plus the Ninth Circuit ruled in that case that the stop in question was *constitutional*. Other cases that Jones cites include: *Beck v. State of Ohio*, 379 U.S. 89 (1964) (arrest after a vehicle stop); *Hayes v. Florida*, 470 U.S. 811 (1985) (arrest at defendant's home); *Tortu v. L.V. Metro. Police Dep't*, 556 F.3d 1075 (9th Cir. 2009) (alleged unreasonable force by city police who escorted plaintiff from JetBlue flight; issue on appeal was whether district court abused discretion by granting Rule 50(a) motion/new trial); *LaLonde v. Cty. of Riverside*, 204 F.3d 947 (9th Cir. 2000) (alleged unreasonable force during arrest after warrantless entry of plaintiff's home); *United States v. Potter*, 895 F.2d 1231 (9th Cir. 1990) (ruling that there *was* probable cause for arresting defendant at an apartment complex for drug possession); *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003) (IRS agent arrested plaintiff at her home; no qualified immunity where the agent left

[4] In *Faulkner*, a park ranger stopped the defendant Faulkner at an information station just inside the national park and, when she observed an open container of beer in his car, detained him and cited him with violations of various federal regulations and state laws.

on tight handcuffs after plaintiff had complained several times that they were too tight); *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007) (*granting* qualified immunity as to arrest of plaintiff for trespassing at a shopping mall; denying qualified immunity as to unreasonable force claim because genuine issues of material fact existed given video evidence that officers gang-tackled, punched, and used hobble restraints on plaintiff); *Green v. City & Cty. of San Francisco*, 751 F.3d 1039 (9th Cir. 2014) (police held plaintiff at gun point during vehicle stop due to mistaken identity).

Jones has therefore failed to satisfy his burden under *Kisela*. He argues at length in the qualified immunity part of his Response that the agents lacked probable cause to arrest him [Jones Response at 22-26], but "the qualified immunity inquiry requires [a court] to consider whether, under the circumstances, it was objectively reasonable for the officers to believe that there was probable cause to arrest," not whether probable cause in fact existed. *Beier v. City of Lewiston*, 354 F.3d 1058, 1068 (9th Cir. 2004). *See also Blankenhorn*, 485 F.3d at 476 ("even if there were no probable cause [to arrest for trespassing], the Defendants would still be entitled to qualified immunity."). Although the existence of probable cause is an absolute defense to a *Bivens* claim of unconstitutional arrest, it is more appropriately analyzed in the context of Jones' FTCA false arrest/imprisonment claim.

PROBABLE CAUSE (Claim 4 (false arrest/imprisonment under FTCA))

Because the events of this case transitioned directly from the agents' attempts to eject Jones as a trespasser to their having probable cause to arrest him for criminal trespass and for resisting, delaying, or obstructing a public officer, reasonable suspicion is irrelevant. Jones argues that the agents had no authority to eject a trespasser, and misleadingly quotes, out-of-context, from the *Corlett* decision, suggesting that a landowner's authority to eject a trespasser is limited to situations where there is "imminent damage to property." [Jones Response at 35:1-7.] The *Corlett* decision concerned a different trespass crime, *see People v. Corlett*, 153 P.2d 595, 603 (1944) (current version is Calif. Pen. Code § 602(k)),[5] and

[5] *See Eberhard v. California Highway Patrol*, No. 3:14-CV-01910-JD, 2015 WL 6871750, at *4 (N.D. Cal. Nov. 9, 2015) ("California Penal Code Section 602… has a number of detailed subsections addressing different trespass situations").

Jones does not address cases cited by the Defendants specifically relating to Calif. Pen. Code § 602(o). [ECF Doc. 98-1 at 21:17-26.] *See also, e.g., McInerney v. City & Cty. of San Francisco*, 466 F. App'x 571, 573 (9th Cir. 2012) (officers had probable cause to arrest the plaintiff for violation of Calif. Pen. Code § 602(o)); *Brown v. Cty. of San Bernardino*, 250 F. Supp. 3d 568, 590 (C.D. Cal. 2017) (same).

Probable cause to arrest for criminal trespass and for resisting, delaying, or obstructing a public officer. Jones avoids the crucial fact that he ran around Agent Hernandez's Tahoe, which is evident in the video and which Jones admits. [RVSS 15:19:39-15:19:45; ECF Doc. 52-6 (Jones depo Tr. 67:4-7; 69:23—70:8; 74:24—75:21).] Jones acknowledges that Agent Hernandez "swerved in front of him" [Jones Response at 8:9-10], and he does not deny that Agents Johnson and Hernandez told him to stop running or that he could not be on the road. [*See* ECF Doc. 98-1 at 6 nn.9-10.] He responds only that he cannot remember, that he could not hear because of his earphones, and/or that he was "startled and unsure of what was happening." [Jones Response at 7:18-19, 8:12-13; *see also* Jones depo Tr. 65:11 ("I didn't hear [Agent Johnson]. I had my—I didn't hear anything."); 72:9-10 ("You're saying [Agent Hernandez] said something to me that I don't remember him saying"); 75:12 ("my reaction was just to go around him").]

Jones contends that he was not on sufficient notice that the All-Weather Road was restricted, that he never understood that the agents wanted him to leave the road, and that he assumed Agent Hernandez was instructing him to use the road to return to the beach.[6] [*See* Jones Response at 6-8, 25:8-11.] The probable cause analysis is objective, however, not subjective. The moment that Jones ran around Agent Hernandez's Tahoe, if not sooner, the agents had probable cause to arrest him, but Jones would rather dodge that fact, stating

[6] Jones argues that "[r]etracing his steps was the only feasible option off the paved road, because there was brush, a chain link fence, and a guard rail..." [ECF Doc. 104 at 9:3-4.] He alleges in the TAC, however, that he stayed on the All-Weather Road when he saw Agents Bowen and Faatoalia because he "fear[ed] that if he ran down from the paved road onto the trail, the agents on the quad bikes would collide with him..." [ECF Doc. 72, para. 34.] The RVSS video and Exhibit 1 show that there was no guardrail and that there were multiple egress paths. [*See, e.g.,* RVSS 15:20:05 (Agent Johnson enters the All-Weather Road from a dirt road, west of Jones' position); Ex 1 (guardrail begins west of incident).]

that the video shows "nothing more than a jogger who turned around after a brief exchange with two agents." [Jones Response at 25:6-7.]

But Jones does not dispute that he attempted to run past Agent Hernandez as the agent moved from side to side to block him from continuing eastward. [ECF Doc. 98-1 at 7:1-4.] This video evidence establishes further probable cause to arrest Jones for criminal trespass and for resisting, delaying, or obstructing a public officer. Instead, he skips to his argument that he complied when Agent Hernandez told him to turn around (although the video shows that he remained on the road), without any discussion about what he did before that (ignored Agent Johnson, ran around Agent Hernandez's Tahoe, and tried to run past Agent Hernandez) and what he did after that.

Jones does not dispute that, as he ran westward, he ran past Agent Johnson's Tahoe (again), turned to face Agent Johnson, flailed his arms, and resumed running westward, knowing that the agents were following him. [*Id.* at 7:11—8:4.] This video evidence, combined with Jones' deposition testimony, establishes even further probable cause to arrest him for criminal trespass and for resisting, delaying, or obstructing a public officer.

Jones also does not dispute that he could see that Agents Bowen and Faatoalia had entered the All-Weather Road in front of him, that he understood they were Border Patrol agents, that he knew the agents were trying to "surround" him, that he ran around Agent Bowen, and that he tried to run around Agent Faatoalia. These admissions, which he made in deposition testimony [*id.* at 8:5-18], establish further probable cause to arrest him for criminal trespass and for resisting, delaying, or obstructing a public officer.

Jones argues that there was no probable cause to arrest him for criminal trespass because his presence in a restricted area was not willful [Jones Response at 25, 39], but scienter is not part of the probable cause analysis for criminal trespass, because the crime "does not require proof of specific intent." 87 C.J.S. trespass § 4. Jones does not address the Defendants' argument on this point. [ECF Doc. 98-1 at 23:17-25.]

Jones has failed to rebut the existence of obvious probable cause to arrest him for criminal trespass and for resisting, delaying, or obstructing a public officer.

1 *Probable cause to arrest for assaulting or resisting an officer.* The agents also had
2 probable cause to arrest Jones under Calif. Pen. Code § 148(a)(1) (resisting, delaying, or
3 obstructing a public officer) and/or 18 U.S.C. § 111 (simple assault) when he continued to
4 run after being surrounded. [*See* Jones Response at 1:17 ("he was surrounded").] There is
5 no support for Jones' argument that there is automatically a genuine issue of material fact
6 as to things that happened in an obstructed area of the RVSS camera's field of view, or for
7 his "blind spot" conspiracy theory. Plus, Jones would have this Court consider only a small
8 portion of what he spontaneously said to investigators on August 9, 2014. [Jones Response
9 at 26:2 ("Jones states that Agent Johnson 'got knocked down and broke his ankle.'").]
10 In fact, after being *Mirandized*, Jones described the essence of what happened, twice,
11 without any prompting by the investigators, as follows:
12 "I'm away from my family right here sitting here because some Border Patrol
13 Agent *stepped in front of me* … okay… and got knocked down and broke his ankle. Well, I didn't, I didn't do anything wrong. *I'm running back. I'm running, I'm running back*, so I'm going … [stops talking]"
14 …
15 "I'm in the Border Patrol station here behind some walls because some guy *jumped out in front of me* and got knocked down."
16 Jones interview 8:26-8:31, 11:00 (emphasis added).
17 The only plausible interpretation of his own candid summary of what happened is
18 that he continued to run when the agents surrounded him and that, because Agent Johnson
19 was in front of him, he got knocked down. [*See also* Johnson depo Tr. 184:15-23 ("so I'm
20 arriving in my Tahoe and I'm running up… He went forward and lunged head first towards
21 me...").] When confronted at his deposition, Jones offered no explanation, not even an
22 "implausible" one. [*See* Jones Response at 15:17 (arguing that implausible evidence can
23 defeat the instant motion).] In his Response, Jones denies only that he knocked Agent
24 Johnson to the ground. [Jones Response at 11:6-18.] He does not deny running at or toward
25 Agent Johnson, and physical contact is not an element of simple assault (§ 111) or resisting,
26 delaying, or obstructing a public officer (§ 148(a)(1)). *See United States v. Rivera-Alonzo*,
27 584 F.3d 829, 834-35 (9th Cir. 2009). *See also* cases cited at ECF Doc. 98-1 at 22-23, which
28 Jones does not address.

Jones' impromptu synopsis of what happened is consistent with the agents' deposition testimony [ECF Doc. 98-1 at 9 n.22], which Jones does not address. Plus, Jones opens the door to discuss the agents' reports [Jones Response at 10-11] all of which are consistent with his own summary. Agent Johnson reported that Jones "lunged forward towards my direction head first." [ECF Doc. 52-2 at 38.] Agent Faatoalia reported that Jones "began moving forward to Agent Johnson." [*Id*. at 39.] Agent Bowen reported that Jones "began moving forward toward Agent Johnson." [*Id*. at 40.]

When Jones continued or resumed running toward Agent Johnson, after being surrounded, the agents had probable cause to arrest him for violation of Calif. Pen. Code § 148(a)(1) and/or 18 U.S.C. § 111.

Conspiracy theory. Jones articulates a new theory that his detention was unlawful, because the charges were fabricated, and "it is undisputed that Jones was not in fact detained on suspicion of … resisting a public officer" [Jones Response at 33:16-17 (emphasis added).] He presents no authority or evidence to support this new theory, and he himself testified: "They were going to charge me with assaulting a federal officer, and now the other guy is saying we're going to charge you with resisting arrest." [ECF Doc. 52-6 (Jones depo Tr. 229:2-4).] The argument should therefore be rejected.

INSUFFICIENT EVIDENCE OF UNREASONABLE FORCE (Claim 2 (unreasonable force under *Bivens*) and Claim 5 (battery under FTCA))

The United States cited California law that Jones bears the burden of proving unreasonable force as an element of the battery claim, and Jones cites no contrary authority. Instead, he misstates the United States' argument and therefore fails to address it. [Jones Response at 34:21-23.] As explained below, he has failed to present evidence of unreasonable force.

No evidence of "pummeling" or other physical abuse. Jones does not dispute that the agents were authorized to use reasonable force to effect a lawful arrest. Defendants dispute Jones' allegations that he was pummeled to/on the ground or otherwise physically abused in any way. Indeed, for purposes of this motion, Defendants dispute *only* those allegations,

and by the instant motion, they challenge Jones to back up his allegation with sufficient evidence to warrant having the issue decided by a trier of fact.[7]

Jones does not dispute that, apart from minor injuries consistent with handcuffing (sore right shoulder and sore wrists) and anxiety over being "captured," he sustained only slight scrapes to his elbows and knees and no bruising whatsoever. [Jones Response at 10:21-22 (referring to wrist injury); 28:2-3, 28:22-23 (referring to right shoulder and mental injuries).] Jones responds that he "reported the physical abuse he experienced to several third parties immediately following his release" [Doc. 104 at 29:17-18], but none of his citations support this contention. He cites Physician Assistant Moser's testimony that Jones said "he was hurt," his spouse's testimony that "he was upset" and "in pain," and his friend Mike Wintz's testimony that Jones said he had "spent the whole night in jail." Jones' only explanation for not reporting physical abuse to Senator Feinstein, his SEAL community friends, his spouse, his friend Mike Wintz, or his doctors is that "he chose to highlight other facts in his early communications." [Jones Response at 30:2.] His choice demonstrates that his physical injuries, if any, were *de minimis*; all he complained about was being "captured."

Jones does not dispute that he had a preexisting right shoulder condition and PTSD. *See Richman v. Sheahan*, 512 F.3d 876, 883 (7th Cir. 2008) (explaining that a claim of a "hidden vulnerability...would undermine the plaintiff's case that the defendants had used excessive force"). His fragile right shoulder explains why he had soreness *only in his right shoulder* after handcuffing [*see* ECF Doc. 72, para. 36 (allegation in TAC that "both arms" were twisted up hard behind him)], and his own photos, taken the day after the incident, show that the soreness was temporary and/or not debilitating. For example, he was able to raise his right arm to pose for photos. [*See* ECF Doc. 98-2 at 66-67.] His preexisting PTSD explains his hypersensitivity to being arrested and detained, which he described as being "captured" and "taken hostage." [ECF Doc. 98-1 at 25:26.]

[7] Jones states in passing in his statement of facts, without citing any evidence, that an agent "pointed a weapon at him." [ECF Doc. 104 at 1:19.] He has never made the allegation before. Because he offers no evidence or argument, Defendants are unable to determine whether/how he is attempting to raise a genuine issue of material fact. Defendants nevertheless flatly deny that any agent pointed a firearm at Jones.

Relatively insignificant injuries and purely psychological injuries are cognizable, but they are not, by themselves, sufficient evidence of unreasonable force. *See Alexander v. City of Round Rock*, 854 F.3d 298, 309 (5th Cir. 2017) (relatively insignificant injuries and purely psychological injuries will prove cognizable "when resulting from an officer's unreasonably excessive force.") (quoting *Brown v. Lynch*, 524 Fed. App'x 69, 79 (5th Cir. 2013)); *Tarver v. City of Edna*, 410 F.3d 745, 751 (5th Cir. 2005) (concluding that allegations of "suffer[ing] 'acute contusions of the wrist,' and psychological injury from being handcuffed" stated only *de minimis* injuries).

Jones complained to the interviewing investigators only about his wrists [Jones interview at 7:15], and the only evidence of injury to his wrists is the photographs that his wife took the next day, showing redness. He was examined by doctors within days after the incident, but no wrist injury was noted. [ECF Doc. 52-6 (Jones depo at 138:19—145, 224-25).] This evidence shows that his wrist injury was superficial and temporary, and he presents no evidence to the contrary. *See also Little v. Gore*, 148 F. Supp. 3d 936, 949 (S.D. Cal. 2015) (discussion of Ninth Circuit cases on tight handcuffs). Jones also does not dispute that he never complained to anyone about tight handcuffs, and he does not address the case law cited by Defendants. [ECF Doc. 98-1 at 25:3-13.]

Jones attempts to manufacture a factual dispute over whether the agents executed a takedown (or "tackling") maneuver [Jones Response at 11 n.7], but he alleges no injuries whatsoever from making contact with the ground. Jones does not dispute that he sustained only slight scrapes to his knees and elbows. And he does not dispute that his sore right shoulder and sore wrists were caused by handcuffing; he does not allege that they were the result of a takedown. Regardless of how Jones ended up on the ground, he sustained virtually no injury because of it (likely because he landed on top of Agent Johnson).

Jones contends that none of the *Graham* factors justify the use of any force [Jones Response at 27-28], but clearly assaulting an officer is a serious crime that poses a serious threat and injury, as it did to Agent Johnson. Also, the video shows, and Jones admitted in deposition, that he evaded the agents' efforts to stop him from running on the All-Weather

Road, and he does not dispute that his presence on the All-Weather Road posed a threat to his safety and Border Patrol agents that use the road to conduct border security operations.

In sum, Jones has failed to raise a genuine issue of material fact as to his allegations that he was pummeled or otherwise physically abused in any way.

Temperature in Agent Hernandez' Tahoe. Jones alleges no injury-in-fact in his TAC, and he does not dispute that he did not complain to Agent McFarlin about the temperature in the Tahoe. Furthermore, Jones does not address the case law cited by Defendants. *See also Little v. Gore*, 148 F. Supp. 3d at 950 ("Whereas an 'unnecessary exposure to heat' may cause a constitutional violation, being briefly confined in uncomfortable conditions, such as a hot patrol car, does not amount to a constitutional violation.") (citations omitted); *Dillman v. Vasquez*, No. 13-CV-00404 LJO, 2015 WL 881574, at *9 (E.D. Cal. Mar. 2, 2015) ("the case law suggests that a brief (e.g., 30-minute-long) confinement in a hot patrol car does not violate the Fourth Amendment"). Jones has therefore failed to state a claim or raise a genuine issue of material fact as to the temperature inside Agent Hernandez's Tahoe.

The ride in Agent Kulakowski's Tahoe. Jones now alleges that he suffered "acute anxiety" as a result of the ride as a whole in Agent Kulakowski's Tahoe [Jones Response at 12:21], but in his TAC, he alleges only that he experienced extreme or acute distress when he witnessed Agent Kulakowski putting on leather gloves while driving. [ECF Doc. 72, para. 54.] Regardless, he presents no evidence of injury-in-fact, even though he was seen by doctors immediately after the incident. He contends that he feared that Agent Kulakowski was preparing to beat him up, but he presents no evidence that Agent Kulakowski intended to cause such fear. Jones has therefore failed to state a claim or raise a genuine issue of material fact as to his ride in Agent Kulakowski's Tahoe.

<u>ASSAULT</u> (Claim 6)

Jones now contends that his allegations of a hot spell in Agent Hernandez's Tahoe and a rough ride in Agent Kulakowski's Tahoe support his assault claim, but the assault claim in his TAC states that one or more agents "*threatened* to touch [him] in a harmful or offensive manner." [ECF Doc. 72, para. 108 (emphasis added).] In addition, he presents no

evidence of intent to cause harmful or offensive contact. [Jones Response at 35-36.] The only threat that he alleges in the TAC concerns the restraint chair. Jones does not dispute that he never saw a restraint chair and that he did not know what the Border Patrol agent was talking about. [ECF Doc. 52-6 (Jones depo Tr. 237:6—238:1).] Jones has therefore failed to state a claim or raise a genuine issue of material fact as to his assault claim.[8]

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (Claim 8)

Jones has presented no evidence of intent to cause him emotional distress, which is an essential element of this tort, and the actions that he describes do not, in themselves, suggest any such intent. Jones also alleges for the first time that several other actions caused him emotional distress [Jones Response at 37-38], but as pointed out in Defendants' motion, he does not allege injury-in-fact with respect to those actions in his TAC, and he does not mention them in his causes of action against the United States. He does not address this inadequate pleading in his Response.

At any rate, as discussed above, he does not dispute that he did not complain to Agent McFarlin about the temperature inside Agent Hernandez's Tahoe, he does not cite any authority that he was entitled to a free lawyer at the time, and there is uncontroverted evidence that he was allowed to make phone calls from the station [ECF Doc. 52-6 (Jones depo Tr. 227:20—232:5)], that he declined medical attention [*id.* at 232:16—234:4, 307:1—308:24; ECF Doc. 98-5 (Johnson depo Tr. 190:14-24)], that he rejected offers to get his medication [*see, e.g.*, Jones interview at 5:01-6:19], and that he was examined by an emergency medical technician (EMT). [ECF Doc. 98-12 (Herrera depo Tr. 114:1-12, 115:3—116:4).] None of the actions that Jones describes would require a trier of fact to decide whether they amount to "outrageous conduct" or conduct "so extreme as to exceed all bounds of that usually tolerated in a civilized society," and Jones does not address any

[8] Jones misstates Defendants' argument regarding his assault claim by responding here to an argument that Defendants made concerning his Bane Act claim. [ECF Doc. 104 at 36:16-23.] Defendants are not arguing that agents may assault a detainee to cause him to stop banging on his cell door. Defendants are arguing that Jones has failed to state a claim for assault.

of the cases cited by the United States, *see Jackson v. City of Bremerton*, 268 F.3d 646, 650-52 (9th Cir. 2001), or cite any authority to the contrary.

NEGLIGENCE (Claim 7)

Jones' argument is unclear, but the law is clear, even in the case he cites, that the reasonableness standard applies to both his battery and negligence claims. *See Munoz v. City of Union City*, 120 Cal. App. 4th 1077, 1102 (2004) (in a case involving claims of battery and negligence, the court noted that, "[i]n order to prevail on a claim of battery against a police officer, the plaintiff bears the burden of proving the officer used unreasonable force."). Since Jones has not presented evidence of unreasonable force, both his battery and negligence claims may automatically be dismissed.

Jones also tries to expand upon the negligence claim in his TAC by claiming that "the Border Patrol agents acted negligently in escalating their encounter with Jones and in detaining him overnight without any legitimate purpose." [Jones Response at 37:6-7.] But his negligence claim concerns only "use of force." [ECF Doc. 72, paras. 113-17.] At any rate, since there was probable cause to arrest him, and there is insufficient evidence of unreasonable force, these new negligence claims would automatically fail as well.

BANE ACT (Claim 9)

Jones does not deny that he alleges no statutory or constitutional violation in the context of his Bane Act claim and, instead, attempts to revive the *Bivens* First Amendment claim that this Court dismissed. [ECF Doc. 71 at 15-22.] Apart from the failure to plead a First Amendment violation in the TAC, the claim should be dismissed because it is well-settled law that constitutional tort claims may not be brought against the United States. [*See* ECF Doc. 98-1 at 36:5-13.] Jones misapprehends this Court's recent decision in *Anonymous v. United States*, No. 16-cv-0725 W (BLM), 2017 WL 1479233 (S.D. Cal. Apr. 25, 2017), which relied on the Ninth Circuit's decision in *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010). The *Lu* decision concerned interference with a *statutory* right to asylum, not interference with a constitutional right, and this Court noted that the Supreme Court's decision in *F.D.I.C. v Meyer*, 510 U.S. 471 (1994), was distinguishable because it "involved

1 a federal constitutional violation (not a state statutory violation)." *Anonymous*, 2017 WL
2 1479233, at *5. *See also Delta Savings Bank v. United States*, 265 F.3d 1017, 1024-25 (9th
3 Cir. 2001) (discussing *Meyer*). This Court also distinguished *Munyua v. United States*, No.
4 C-03-04538 EDL, 2005 WL 43960 (N.D. Cal. Jan. 10, 2005), because "the court's dismissal
5 of the Bane Act claim was based on its concern 'of allowing Plaintiff to make what amounts
6 to a claim based on *federal constitutional violations* that cannot be a basis of liability under
7 the FTCA.'" *Anonymous*, 2017 WL 1479233, at *5 (emphasis in original) (quoting *Munyua*,
8 2005 WL 43960, at *12 (citing *Meyer*, 510 U.S. at 477-78)). Jones' Bane Act claim should
9 therefore he dismissed.
10 UNITED STATES' COUNTERCLAIM AS TO NEGLIGENCE
11 For the reasons set forth above, the first element of negligence per se is satisfied,
12 because Jones committed the crime of resisting, delaying, or obstructing a public officer.
13 Jones argues that the causation element is not satisfied, because there is no video evidence
14 of how Agent Johnson was injured, but he never addresses his own admissions that he knew
15 the agents were trying to surround him, that he ran around them, that he continued running
16 when he was surrounded, and that Agent Johnson was injured as a consequence of stepping
17 in front of him. [*See* Jones Response at 10:25-25 ("The agents' contemporaneous reports
18 differ in many respects, but they generally agree that Agent Johnson was injured as the four
19 agents worked together to take Jones to the ground.").] The third and fourth elements, which
20 Jones does not substantively address in his Response, may be decided as a matter of law,
21 and for reasons evident in the RVSS video, this Court should reject Jones' argument that he
22 "acted reasonably under the circumstances." [*Id*. at 40:25.]
23 CONCLUSION
24 This Court should therefore dismiss all of Jones' *Bivens* and FTCA claims and enter
25 partial judgment for the United States on its counterclaim as to its negligence claim.
26 ///
27 ///
28 ///

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Respectfully submitted,

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