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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Jay Lynn Pember,

10 Plaintiff,

11 v.

12 Charles L. Ryan, et al.,

13 Defendants.  
14

No. CV 11-2332-PHX-SMM (JFM)

**ORDER**

15 Plaintiff Jay Lynn Pember, who is a prisoner in the custody of the Arizona State  
16 Prison Complex-Florence (“ASPC-Florence”), brought this civil rights case pursuant to  
17 42 U.S.C. § 1983. (Doc. 18.) Defendants Baird, Crabtree, Daniels, Ford, Freeland, Heet,  
18 Ramos and Woods move for summary judgment, and Plaintiff opposes.<sup>1</sup> (Docs. 73, 81.)

19 The Court will grant Defendants’ Motion.

20 **I. Background**

21 On February 13, 2013, Plaintiff filed his First Amended Complaint, asserting that  
22 he was denied constitutionally adequate medical care in Count I and that he was denied  
23 due process regarding his classification in Count II. (Doc. 18.)

24 Plaintiff seeks injunctive and declaratory relief, as well as damages.  
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27 <sup>1</sup> The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d  
28 952, 962 (9th Cir. 1998) (*en banc*), regarding the requirements of a response. (Doc. 75.)

1 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff  
2 stated a claim in Counts I and II and directed Defendants Baird, Doe and Crabtree to  
3 answer Count I and Defendants Payne, Ford, Danels, Wood, Ramos, Freeland, Heet, and  
4 Crabtree to answer Count II of the First Amended Complaint. (Doc. 19.)<sup>2</sup>

5 On June 30, 2014, Defendants Baird, Crabtree, Daniels, Ford, Freeland, Heet,  
6 Ramos and Woods filed their Motion for Summary Judgment (Doc. 73), and Plaintiff  
7 filed his Response on September 19, 2014 (Doc. 81.)<sup>3</sup> Defendants filed their Reply on  
8 October 8, 2014. (Doc. 83.)

## 9 **II. Summary Judgment Standard**

10 A court “shall grant summary judgment if the movant shows that there is no  
11 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
12 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23  
13 (1986). Under summary judgment practice, the moving party bears the initial  
14 responsibility of presenting the basis for its motion and identifying those portions of the  
15 record, together with affidavits, if any, which it believes demonstrate the absence of a  
16 genuine issue of material fact. *Id.* at 323. If the moving party meets its initial  
17 responsibility, the burden then shifts to the opposing party who must demonstrate the  
18 existence of a factual dispute and that the fact in contention is material, i.e., a fact that  
19 might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby,*  
20 *Inc.*, 477 U.S. 242, 248 (1986), and that the dispute is genuine, i.e., the evidence is such  
21 that a reasonable jury could return a verdict for the non-moving party. *Id.* at 250;

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24 <sup>2</sup> The Court subsequently ordered the substitution of Matthew Musson for  
25 Defendant Doe and ordered Musson to answer Count I of the First Amended Complaint.  
26 (Doc. 29.) In a later Order, the Court dismissed Defendants Payne and Musson without  
27 prejudice. (Doc. 76.)

28 <sup>3</sup> In support of their Motion, Defendants submitted a Statement of Facts. (Doc. 74  
29 (“DSOF”).) Plaintiff’s Brief in Opposition contains a Statement of Facts (Doc. 81  
30 (“PSOF”)) and Plaintiff submitted a separate Statement of Disputed Factual Issues (Doc.  
31 82).

1 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).  
2 The opposing party need not establish a material issue of fact conclusively in its favor; it  
3 is sufficient that “the claimed factual dispute be shown to require a jury or judge to  
4 resolve the parties’ differing versions of the truth at trial.” *First Nat’l Bank of Arizona v.*  
5 *Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968).

6 When considering a summary judgment motion, the court examines the pleadings,  
7 depositions, answers to interrogatories, and admissions on file, together with the  
8 affidavits or declarations, if any. *See* Fed. R. Civ. P. 56(c). At summary judgment, the  
9 judge’s function is not to weigh the evidence and determine the truth but to determine  
10 whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The evidence of  
11 the non-movant is “to be believed, and all justifiable inferences are to be drawn in his  
12 favor.” *Id.* at 255. But, if the evidence of the non-moving party is merely colorable or is  
13 not significantly probative, summary judgment may be granted. *Id.* at 248-49.  
14 Conclusory allegations, unsupported by factual material, are insufficient to defeat a  
15 motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). *See*  
16 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) (“[c]onclusory,  
17 speculative testimony in affidavits and moving papers is insufficient to raise genuine  
18 issues of fact and defeat summary judgment”).

### 19 **III. Count I (Medical Care)**

#### 20 **A. Plaintiff’s Facts**

21 On October 15, 2009, Plaintiff had a consultation with neurosurgeon Dr. Abhay  
22 Sanan in which Sanan diagnosed a “C5-C6 disk herniation on the right side,” a “clear-cut  
23 atrophy of the right deltoid,” and “fasciculations in the right biceps.” (Doc. 81 ¶ 34 and  
24 Ex. 19(B) at 2 (indicating that Dr. Sanan reviewed a July 27, 2009 cervical MRI scan).)  
25 Dr. Sanan recommended a “C5-C6 anterior cervical discectomy and arthrodesis.” (*Id.*  
26 ¶ 35 and Ex. 19(B) at 2.)

27 After the consultation with Dr. Sanan, Plaintiff only received Tylenol  
28 (acetaminophen) for the “unbearable pain,” despite submitting numerous HNRs regarding

1 his pain between 2009 through 2011 and asking in his HNRs about the recommended  
2 surgery. (Doc. 81 ¶¶ 36, 37, 42.) Plaintiff spoke to many nurses during their medication  
3 rounds about his pain, but “no one knew what to do.” (*Id.* ¶ 39.) Plaintiff did receive a  
4 “communique” dated March 26, 2011, from Nurse Ripley, who wrote: “Consult was  
5 written October 2009 for neurosurgery at present Dr. Baird has scheduled you for Appt.  
6 (Approved Oct 2010 per notes).” (*Id.* ¶ 39 and Ex. 22.) Plaintiff also asserts that many  
7 inmates attempted to assist in getting him to medical after witnessing the pain he was in.  
8 (*Id.* ¶ 37 and Ex. 21.)

9 In a Declaration, Plaintiff asserted that “medical staff were aware of [his] medical  
10 needs and pain and suffering, purposely ignoring [him],” that “Defendants denied [him]  
11 treatment for a ‘serious medical need’ by leaving [him] to endure the pain and not  
12 providing [him] with adequate pain medication and not providing medical treatment to  
13 prevent the pain,” and that “Defendants were deliberate[ly] indifferent to [his] ‘serious  
14 medical need’ by not providing [him] the recommended surgery after it was diagnosed  
15 and recommend[ed] on October 15, 2009.” (Doc. 82 at 5-9 ¶¶ 6, 13, 14, 15.)

#### 16 **B. Defendants’ Facts**

17 On September 29, 2011, Plaintiff was taken to see Dr. Marco Marsella, a staff  
18 neurosurgeon at the Chandler Regional Medical Center. (Doc. 74 ¶ 29.)<sup>4</sup> After  
19 examining Plaintiff, Dr. Marsella concluded that “there is no focal abnormality that  
20 requires surgical correction,” but that surgical decompression “may be recommended” if  
21 further testing found that Plaintiff suffered from nerve entrapment syndrome. (*Id.* ¶¶ 30,  
22 31 and Ex. 4.) On January 11, 2012, a neurologist, Dr. Jacek Sobczak, evaluated the  
23 results of Plaintiff’s nerve conduction testing and concluded that there was  
24 “electrophysiologic evidence of very mild, bilateral median neuropathy at the wrist and  
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26 <sup>4</sup> Plaintiff disputes all of Defendants’ statements of fact regarding his medical care  
27 and argues that “Defendants are defending themselves after the fact” when Plaintiff’s  
28 issues began in 2009 after Plaintiff “was diagnosed with a[n] injury and recommended  
surgery.” (Doc. 82 ¶¶ 29-39.) Other than saying the facts are disputed, however,  
Plaintiff does not say what specifically in DSOF paragraphs 29-39 he disputes.

1 no electrical evidence of radiculopathy, plexopathy, peripheral polyneuropathy or  
2 myopathy.” (*Id.* ¶ 32 and Ex. 5.)

3 On July 17, 2012, Plaintiff again saw Dr. Marsella, who “noted Plaintiff’s belief  
4 that a neurosurgeon had recommended surgery in 2009,” but Dr. Marsella found that  
5 Plaintiff’s cervical spine MRI “documented no significant changes as well as no  
6 abnormality including no evidence of C5-C6 disk herniation.” (*Id.* ¶¶ 33, 34 and Ex. 6.)  
7 Dr. Marsella noted “very mild bilateral median neuropathy” but “no radiculopathy,  
8 plexopathy or peripheral neuropathy.” (*Id.* ¶ 35 and Ex. 6.) “Given these ‘normal  
9 findings,’” Dr. Marsella “discouraged the patient of [sic] about an operation, which has  
10 no reason to be completed at this point.” (*Id.* ¶ 36 and Ex. 6.) Dr. Marsella wrote that  
11 “the lack of substantial findings at this point” led him to “advise against any operation,”  
12 and he discharged Plaintiff from surgical care. (*Id.* ¶ 37 and Ex. 6.)

13 According to Defendants, “Dr. Baird or other prison health staff authorized  
14 Plaintiff’s medications including acetaminophen, unithroid, carbamazepine, and others on  
15 June 3, 2010, July 27, 2010, September 2, 2010, September 10, 2010, May 2, 2011, June  
16 15, 2011, and October 17, 2011.” (*Id.* ¶ 38.)

17 Defendant Crabtree, ADC’s Administrator of the Offender Services Bureau, “had  
18 no role in Plaintiff’s medical treatment at all.” (*Id.* ¶ 39 and Ex. 3.)

### 19 **C. Governing Standard**

20 To succeed on a medical-care claim under the Eighth Amendment, a prisoner must  
21 demonstrate “deliberate indifference to serious medical needs.” *Jett v. Penner*, 439 F.3d  
22 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are  
23 two prongs to the deliberate-indifference analysis: an objective standard and a subjective  
24 standard. First, a prisoner must show a “serious medical need.” *Jett*, 439 F.3d at 1096  
25 (citations omitted). A “‘serious’ medical need exists if the failure to treat a prisoner’s  
26 condition could result in further significant injury or the ‘unnecessary and wanton  
27 infliction of pain.’” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled*  
28 *on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en

1 banc) (internal citation omitted). Examples of indications that a prisoner has a serious  
2 medical need include “[t]he existence of an injury that a reasonable doctor or patient  
3 would find important and worthy of comment or treatment; the presence of a medical  
4 condition that significantly affects an individual’s daily activities; or the existence of  
5 chronic and substantial pain.” *McGuckin*, 974 F.2d at 1059-60.

6 Second, a prisoner must show that the defendant’s response to that need was  
7 deliberately indifferent. *Jett*, 439 F.3d at 1096. The state of mind required for deliberate  
8 indifference is subjective recklessness; however, “the standard is ‘less stringent in cases  
9 involving a prisoner’s medical needs . . . because the State’s responsibility to provide  
10 inmates with medical care ordinarily does not conflict with competing administrative  
11 concerns.’” *McGuckin*, 974 F.2d at 1060. Whether a defendant had requisite knowledge  
12 of a substantial risk of harm is a question of fact, and a fact finder may conclude that a  
13 defendant knew of a substantial risk based on the fact that the risk was obvious. *Farmer*  
14 *v. Brennan*, 511 U.S. 825, 842 (1994).

15 “Prison officials are deliberately indifferent to a prisoner’s serious medical needs  
16 when they deny, delay, or intentionally interfere with medical treatment.” *Hallett v.*  
17 *Morgan*, 296 F.3d 732, 744 (9th Cir.2002) (internal citations and quotation marks  
18 omitted). Deliberate indifference may also be shown by the way in which prison officials  
19 provide medical care, *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988), or  
20 “by circumstantial evidence when the facts are sufficient to demonstrate that a defendant  
21 actually knew of a risk of harm.” *Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir.  
22 2003). And deliberate indifference may be shown by a purposeful act or failure to  
23 respond to a prisoner’s pain or possible medical need. *Jett*, 439 F.3d at 1096. But the  
24 deliberate-indifference doctrine is limited; an inadvertent failure to provide adequate  
25 medical care or negligence in diagnosing or treating a medical condition does not support  
26 an Eighth Amendment claim. *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012)  
27 (citations omitted). Further, a mere difference in medical opinion does not establish  
28 deliberate indifference. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

1 Finally, even if deliberate indifference is shown, to support an Eighth Amendment  
2 claim, the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at  
3 1096; *see Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (delay in providing  
4 medical treatment does not constitute Eighth Amendment violation unless delay was  
5 harmful).

## 6 **D. Analysis**

### 7 **1. Serious Medical Need**

8 The parties do not appear to dispute that Plaintiff had a serious medical need and  
9 Defendants make no argument in this regard. The evidence reflects that doctors found  
10 Plaintiff's condition both worthy of comment and treatment. (Doc. 81 ¶ 34; Doc. 74 ¶¶  
11 29-38.) In addition, Plaintiff submitted numerous HNRs over a two-year period reporting  
12 that he was in pain and inquiring about his surgery. (Doc. 81-2, Ex. 20.)

13 On this record, a jury could find that Plaintiff's condition constituted a serious  
14 medical need. *See McGuckin*, 974 F.2d at 1059. The Court, therefore, turns to the  
15 subjective prong of the deliberate-indifference analysis.

### 16 **2. Deliberate Indifference**

17 In his First Amended Complaint, Plaintiff alleged that Defendant Crabtree  
18 "authorizes final approval for surgery and communicates-coordinates scheduling with  
19 [D]efendant F.H.A.-Florence," but that "[a]fter 8 years, the [P]laintiff has still not had  
20 surgery nor pain medication relief from the medical department." (Doc. 18 at 14-15.)  
21 Defendants argue in their Motion for Summary Judgment that Crabtree, ADC's  
22 Administrator of the Offender Services Bureau, "had no involvement in Plaintiff's  
23 medical treatment whatsoever." (Doc. 73 at 10.) Plaintiff offers no argument or  
24 evidence in response to Defendants' contention that Crabtree had no involvement in his  
25 medical treatment. Nor does Plaintiff offer any evidence demonstrating that Crabtree  
26 was aware of a substantial risk of harm to Plaintiff or that he disregarded that risk of  
27 harm. On this record then, no jury could find that Defendant Crabtree was deliberately  
28 indifferent to Plaintiff's serious medical need.

1           Thus, the Court must now determine whether the remaining Defendant in Count I,  
2 Dr. Baird, was deliberately indifferent to Plaintiff’s serious medical need. This inquiry  
3 analyzes whether Baird had the requisite knowledge of a substantial risk of harm; that is,  
4 did Baird know of and disregard a substantial risk to Plaintiff’s health. *Farmer*, 511 U.S.  
5 at 837. “If a person should have been aware of the risk, but was not, then the person has  
6 not violated the Eighth Amendment, no matter how severe the risk.” *Gibson v. County of*  
7 *Washoe, Nev.*, 290 F.3d 1175, 1188 (9th Cir. 2002) (citing *Jeffers v. Gomez*, 267 F.3d  
8 895, 914 (9th Cir. 2001)).

9           Defendants argue that Plaintiff “was repeatedly sent to highly-qualified and  
10 respected medical specialists to look after his concerns about nerve damage.” (Doc. 73 at  
11 10.) Defendants also argue that, even assuming Dr. Sanan did recommend surgery in  
12 2009, “Plaintiff can present no evidence to contradict Dr. Marsella’s more recent, and  
13 amply supported with lab results, assessment that surgery was not indicated.” (*Id.*)  
14 Defendants conclude that “even if [Plaintiff] could produce a medical expert to disagree  
15 with Dr. Marsella, mere disagreement with a doctor’s medical opinions is insufficient as  
16 a matter of law when alleging violations of the Eighth Amendment.” (*Id.* (citing *Toguchi*  
17 *v. Chung*, 391 F.3d 1051 (9th Cir. 2004)).)

18           In this case, the Court is presented with differing opinions from medical specialists  
19 about the need for surgery. Plaintiff has presented Dr. Sanan’s October 2009  
20 consultation report in which Dr. Sanan, a neurosurgeon, found “C5-C6 disk herniation on  
21 the right side” and recommended “C5-C6 anterior cervical discectomy and arthrodesis.”  
22 (Doc. 81-2, Ex. 19 at 2.) Defendants present the September 2011 opinion of Dr.  
23 Marsella, a neurosurgeon, who concluded there was no focal abnormality requiring  
24 surgical correction but that surgical decompression may be recommended if further  
25 testing found Plaintiff suffered from nerve entrapment syndrome. (Doc. 74-4, Ex. 4.) Dr.  
26 Sobczak, a neurologist, evaluated the results of Plaintiff’s nerve conduction testing and  
27 concluded there was very mild, bilateral median neuropathy at the wrist but found no  
28 “radiculopathy, plexopathy, peripheral polyneuropathy or myopathy.” (Doc. 74-5, Ex.

1 5.) When Plaintiff saw Dr. Marsella again in July 2012, Dr. Marsella found that  
2 Plaintiff's cervical spine MRI showed no evidence of C5-C6 disk herniation and found  
3 no reason for surgery, given these "normal findings." (Doc. 74-6 and Ex. 6.)

4 These diverse findings and recommendations from two neurosurgeons and a  
5 neurologist reflect nothing more than a difference of opinion on the necessity of surgery,  
6 and a difference of opinion does not establish deliberate indifference to a serious medical  
7 need. *Jackson*, 90 F.3d at 332. Therefore, the Court will grant Defendants summary  
8 judgment on Plaintiff's claim in Count I regarding surgery.

9 Defendants also argue that Plaintiff cannot prove a claim of deliberate indifference  
10 against Defendant Baird because Baird "regularly and routinely authorized Plaintiff for  
11 pain medication and others." (Doc. 73 at 10.) Plaintiff counters that through the years of  
12 complaining about "unbearable pain," he was only prescribed acetaminophen, "which is  
13 equal to a mild Tylenol which did not work." (Doc. 81 ¶ 42.) Plaintiff further argues the  
14 other medications Defendants say Plaintiff received for pain are actually for "thyroid  
15 disorder" (unithroid) and "seizure disorder for epilepsy" (carbamazepine). (*Id.* ¶ 36.)

16 Plaintiff, however, has presented no evidence that Defendant Baird was  
17 deliberately indifferent to his serious medical needs. In fact, the only mention of Baird in  
18 Plaintiff's Response is in the context of the communique from Nurse Ripley, who wrote  
19 that Baird had scheduled Plaintiff for an appointment. (*See* Doc. 81 ¶ 39 and Ex. 22.)  
20 Plaintiff presents no evidence that he ever spoke to or wrote to Baird about his pain or  
21 that Baird ever saw or responded to his HNRs.<sup>5</sup> In fact, all of Plaintiff's facts refer to

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23 <sup>5</sup> Plaintiff did state in his First Amended Complaint that Baird was present during  
24 the 2009 consultation with Dr. Sanan and that after the consultation Plaintiff asked Baird  
25 for pain medication and Baird said "he would look into it." (Doc. 18 at 13.) But Plaintiff  
26 provided no evidence in his Response to Defendant's Motion that Baird purposefully  
27 failed to respond to or was deliberately indifferent to his pain. Indeed, the evidence in the  
28 record reflects that Baird did respond to Plaintiff's pain by repeated prescriptions for  
acetaminophen, as well as prescriptions for ibuprofen, naproxen and gabapentin. (*See*,  
*e.g.*, Doc. 74-7, Ex. 7 at 1, 3 and 7.) In fact, one of the HNRs Plaintiff submitted on  
August 29, 2010 stated that he cannot take the naproxen because it "feels like it is  
burning a hole in [his] stom[ach]" and he asked to change his prescription back to

1 “Defendants” or “medical staff” or nurses, without ever mentioning Defendant Baird or  
2 how Baird specifically was deliberately indifferent to Plaintiff’s serious medical need.

3 Finally, other than Plaintiff’s subjective statements about his pain, he has  
4 presented no evidence that the pain medications he was prescribed were not appropriate  
5 or that he ever took the prescribed medications. Plaintiff’s arguments, at most, present a  
6 mere disagreement over the proper treatment his pain, and a disagreement about the  
7 course of medical care cannot support an Eighth Amendment claim of deliberate  
8 indifference. *See, e.g., Sanchez v. Vild*, 801 F.2d 240, 242 (9th Cir. 1989) (“A difference  
9 of opinion does not amount to a deliberate indifference to [plaintiff’s] serious medical  
10 needs.”) Therefore, the Court will grant Defendants summary judgment on Plaintiff’s  
11 claim in Count I regarding the treatment for his pain.

#### 12 **IV. Count II (Due Process)**

##### 13 **A. Background Facts**

14 ADC classifies inmates in one of four custodial levels: minimum, medium, close,  
15 and maximum. (Doc. 74 ¶ 14.) Minimum custody inmates are the lowest risk to public  
16 and staff, and maximum custody inmates represent the highest risk. (*Id.* ¶ 15.) Inmates  
17 are classified using factors that are “computed into a point system resulting in a final  
18 ‘score’ that is used to calculate the inmate’s classification.”<sup>6</sup> (*Id.* ¶ 16.) The factors  
19 include “indicators of institutional violence, public safety risk, escape risk, risk to staff  
20 and other inmates, current and prior criminal convictions, discipline history, gang  
21 affiliation, age, program completion, and length of sentence.” (*Id.*)

22 Plaintiff was first incarcerated by ADC in 1988 until 1993. (Doc. 74 ¶ 1.)  
23 Plaintiff was re-incarcerated from 1993 to 2000; he re-entered again in 2002 and has been  
24 incarcerated since then. (*Id.*) During his deposition, Plaintiff admitted to escaping from

25  
26 acetaminophen. (Doc. 81-2 at 27.)

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28 <sup>6</sup> Although Defendants provide this information on ADC’s classification system,  
they do not actually provide Plaintiff’s final score that was used to calculate his  
classification.

1 the Towers Jail in 1987 while awaiting sentencing, and to escaping from state prison in  
2 1994. (*Id.* ¶¶ 2-3.) In 2003, Plaintiff was convicted of aggravated assault for striking a  
3 police officer with his vehicle while fleeing. (*Id.* ¶ 4.) In 2004, Plaintiff was accused of  
4 being involved in a prison riot and assaulting two correctional officers, and he was  
5 subsequently convicted by a jury for those assaults. (*Id.* ¶ 5 and Ex. 1 (Pl. Dep.) at 42:23-  
6 43:3, Dec. 17, 2013.) Plaintiff was classified as maximum custody following his  
7 convictions for the assault of two correctional officers in 2004. (*Id.* ¶ 18.) On March 19,  
8 2008, Plaintiff’s classification was reduced to “close custody” because he was  
9 “discipline-free,” even though he continued to qualify for maximum custody. (*Id.* ¶ 19.)

10 In 2008, Plaintiff was suspected of involvement in the murder of inmate Timothy  
11 Lucero. (Doc. 74 ¶ 6 and Ex. 2 (an ADC Criminal Investigations Unit report stating that  
12 Plaintiff and another inmate initially blocked a corrections officer’s view of a picnic table  
13 under which Lucero was subsequently found slumped).) Because of Plaintiff’s suspected  
14 involvement in the murder of inmate Lucero on August 27, 2008, he was reclassified to  
15 maximum custody on September 4, 2008. (*Id.* ¶¶ 20-21.) Six-month reviews of  
16 Plaintiff’s classification status took place on November 28, 2008, June 12, 2009,  
17 December 28, 2009, July 8, 2010, February 18, 2011 and August 25, 2011. (*Id.* ¶ 23.) At  
18 his deposition, Plaintiff testified that beginning in 2009, there were hearings every six  
19 months to review his maximum custody classification. (*Id.* ¶ 22 and Ex. 1, Pl. Dep.  
20 29:22-50:01.)<sup>7</sup>

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23 <sup>7</sup> DSOF ¶ 22 states, in part, that “Plaintiff’s classification to maximum custody  
24 was individually reviewed in a hearing every six months, pursuant to [ADC] policy by  
25 prison staff.” Plaintiff disputes DSOF ¶ 22 and states that his classification was not  
26 “individually reviewed,” but Plaintiff does not explain what he means by his statement  
27 that his classification was not individually reviewed. (Doc. 82 ¶ 22.) Plaintiff cites to his  
28 own exhibits 15-17 in support of his contention that his classification was not  
individually reviewed; those exhibits, however, are merely ADC printouts showing  
Plaintiff’s classification and comments, apparently by classification officials. (*See* Doc.  
81-2, Exs. 15-17.) The exhibits do not necessarily indicate that Plaintiff’s classification  
was not individually reviewed.

1 According to Defendant Crabtree, Administrator of the ADC's Offender Services  
2 Bureau and previously the Classification Manager for ADC, Plaintiff's classification  
3 implicated the following considerations: "history of violent behavior, two known escape  
4 attempts, suspected gang membership in the Aryan Brotherhood, convictions of criminal  
5 violent acts, and disciplinary violations."<sup>8</sup> (Doc. 74 ¶ 17 and Ex. 3.)

6 Plaintiff filed this lawsuit on November 28, 2011. (Doc. 74 ¶ 24 (citing Doc. 1).)  
7 Plaintiff had more classification reviews on February 24 and August 29, 2012; after the  
8 August 2012 review, Plaintiff's classification was reduced to close custody. (*Id.* ¶¶ 25-  
9 26.) Plaintiff's classification was later reduced to medium custody "for about 10  
10 months," and at the time of the filing of Defendants' Motion for Summary Judgment,  
11 Plaintiff was again classified as close custody. (*Id.* ¶¶ 27-28.)

## 12 **B. Governing Standard**

13 It is well-settled that placement in maximum security segregation units implicates  
14 a liberty interest requiring due process protections. *Wilkinson v. Austin*, 545 U.S. 209,  
15 224 (2005). An inmate may be deprived of his liberty interest as long as he is accorded  
16 the proper procedural protections. For the initial decision to place an inmate in maximum  
17 custody, due process is generally satisfied by notice of the factual basis for the placement  
18 and an opportunity to be heard, as these procedural mechanisms serve to avoid the risk of  
19 erroneous deprivation. *Id.* at 224-26; *Hewitt v. Helms*, 459 U.S. 460, 476 (1983),  
20 *overruled in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995); *see also*  
21 *Cato v. Rushen*, 824 F.2d 703, 706 (9th Cir. 1987) (applying the "some evidence"  
22 standard of *Superintendent v. Hill*, 472 U.S. 445, 454 (1985).) In *Hill*, the Supreme Court  
23 stated that "the relevant question is whether there is any evidence in the record that could  
24 support the conclusion reached by the disciplinary board." 472 U.S. at 455-56. When  
25 examining the record, the court is not to make its own assessment of the credibility of  
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27  
28 <sup>8</sup> Plaintiff disputes that he was an "escape risk" in 2008 or later based only on an  
escape conviction 18 years earlier. (Doc. 82 ¶ 17.)

1 witnesses or reweigh the evidence. *Id.* at 455. But the evidence must have some indicia  
2 of reliability. *Cato*, 824 F.2d at 705.

3 After an inmate is placed in maximum security segregation, he is entitled to “some  
4 sort” of periodic review of his status. *See Hewitt*, 459 U.S. at 477, n.9 (“[A]dministrative  
5 segregation may not be used as a pretext for indefinite confinement of an inmate. Prison  
6 officials must engage in some sort of periodic review of the confinement of such  
7 inmates.”).

### 8 **C. Analysis**

9 Defendants argue that the “undisputed facts make it clear that Plaintiff was never  
10 harmed by any violation of due process.” (Doc. 73 at 6.) Alternatively, Defendants  
11 argue that they are entitled to qualified immunity.

12 Defendants rely on *Brown v. Oregon Dep’t of Corrections*, 751 F.3d 983 (9th Cir.  
13 2014), a case in which the court held that an inmate’s 27-month confinement in an  
14 intensive management unit deprived him of due process where the inmate received no  
15 “meaningful review” of his confinement because his confinement could not have lasted  
16 less than 106 weeks, and because he experienced atypical and significant hardship. 751  
17 F.3d at 987-88 (nevertheless finding that the defendants were entitled to qualified  
18 immunity). Defendants here argue that Plaintiff admitted under oath that he was given a  
19 hearing to review his classification every six months, in contrast to the inmate in *Brown*,  
20 and his six-month reviews “actually resulted in reductions from maximum custody.”  
21 (Doc. 73 at 6.)

22 In addition, Defendants point to Plaintiff’s history of escape attempts, which  
23 Plaintiff does not dispute, as well as “convictions for assaulting prison staff, and  
24 suspicion of being involved in the homicide of an inmate” as supporting Plaintiff’s  
25 classification. (Doc. 73 at 6-7.) While Plaintiff denies any involvement in the death of  
26 inmate Lucero, Defendants argue that “as long as ‘some evidence’ supports the factual  
27 determination made by prison officials, there was no violation of due process.” (*Id.* at 7  
28 (citing *Castro v. Terhune*, 712 F.3d 1304, 1307 (9th Cir. 2013) (citation omitted).)

1 Defendants contend that the “some evidence” standard is easily met here by the homicide  
2 investigation alone, where a correctional officer “personally witnessed Plaintiff acting as  
3 a screen to block his or her view of the murder of Timothy Lucero.” (Doc. 73 at 7.)

4 Plaintiff counters that his placement in maximum custody was not supported  
5 because he was never charged with the murder of Lucero in a criminal court or even in a  
6 disciplinary report; that he was labeled an escape risk “without any reason or evidence”;  
7 and he “only received one disciplinary in more than ten (10) years.” (Doc. 81 ¶¶ 20, 21,  
8 24.) Plaintiff argues that Defendants “completely disregarded the classification policy  
9 and procedures and denied [P]laintiff’s due process by first refer[r]ing to [D]efendant  
10 Stacey Crabtree to solely make her independent decision whether [P]laintiff was  
11 reclassified to a lower custody unit.” (Doc. 81 at ¶ 44 (citing Exs. 14, 15, 16, 17).)  
12 Plaintiff argues that “he was never charged or found guilty of a major disciplinary  
13 violation. No new evidence was ever provided to warrant his confinement in super-  
14 maximum custody which is a violation of due process of the classification policy, exhibit  
15 26.” (*Id.* ¶ 45.) In Exhibit 26, Plaintiff provided one page of Department Order 801-  
16 Inmate Classification (“DO 801”) and highlighted subsection 1.4.5, which states: “Other  
17 Major Reason-Substantial justification that the inmate is currently a risk to the public,  
18 staff, or other inmates and increased supervision is required. Justification may not  
19 duplicate any other override reason(s) or standard criteria.” Because Plaintiff only  
20 provided one page of DO 801, the court has no context for this one paragraph highlighted  
21 by Plaintiff; thus, it is not probative evidence.

22 In *Castro*, the Ninth Circuit Court of Appeals noted the “low hurdle” set by the  
23 “some evidence” standard, and that the court does not “examine the entire record,  
24 independently assess witness credibility, or reweigh the evidence,” as long as the  
25 evidence bears “some indicia of reliability[.]” 712 F.3d at 1314-15. In this case, the  
26 Court finds that Defendants have provided “some evidence” to support the classification  
27 of Plaintiff to maximum custody following the death of another inmate in which a  
28 correctional officer said she observed Plaintiff acting as a “screen,” as well as Plaintiff’s

1 history of escapes and assault. Plaintiff does not dispute that hearings were held every  
2 six months while he was in maximum custody. In addition, Plaintiff provided documents  
3 showing that he was notified of the rationale for his placement in maximum custody, his  
4 appeal rights, and that he submitted at least one appeal of his maximum custody  
5 placement. (See Doc. 81, Exs. 10, 12, 13, 14.) Plaintiff does appear to dispute the role of  
6 Defendant Crabtree in approving his custody level, but he does not explain how  
7 Crabtree's role violated his due process rights.

8 Based on this record, where there were periodic reviews of Plaintiff's  
9 classification and he was able to exercise his appeal rights, there is some evidence  
10 supporting Plaintiff's placement in maximum custody, and a reasonable jury could not  
11 find otherwise. Accordingly, the Court will grant Defendants summary judgment on  
12 Count II.

13 **IT IS ORDERED:**

14 (1) The reference to the Magistrate Judge is withdrawn as to Defendants'  
15 Motion for Summary Judgment (Doc. 73).

16 (2) Defendants' Motion for Summary Judgment (Doc. 73) is **granted** and the  
17 action is terminated with prejudice. The Clerk of Court must enter judgment accordingly.

18 DATED this 2nd day of March, 2015.

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22 Honorable Stephen M. McNamee  
23 Senior United States District Judge  
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