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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRUCE PATRICK HANEY,

Plaintiff,

v.

SALDANA, et al.,

Defendants.

CASE NO. 1:04-cv-05935-AWI-SMS PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING MOTION FOR
SUMMARY JUDGMENT FILED BY
DEFENDANTS NELSON AND SALDANA
BE GRANTED AND DEFENDANTS'
OBJECTIONS AND MOTION FOR
RECONSIDERATION BE DISREGARDED AS
MOOT

(Docs. 57, 65)

OBJECTIONS DUE WITHIN THIRTY DAYS

_____ /

FINDINGS and RECOMMENDATIONS

I. Procedural History

Plaintiff Bruce Patrick Haney (hereinafter "Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the complaint commencing this action on July 6, 2004. (Doc. 1.) This action now proceeds under the Third Amended Complaint, filed on February 26, 2007, on Plaintiff's claims for deliberate indifference to serious medical needs under the Eighth Amendment against Defendants Correctional Officer R. Saldana and Correctional Sergeant A. L. Nelson (hereinafter "Defendants"). (Doc. 26.) On May 20, 2010, Defendants filed a motion for summary judgment as to Plaintiff's claims. (Doc. 57.) Plaintiff filed his opposition to the present motion on June

1 15, 2010. (Doc. 61.)¹ Defendants filed their reply on June 18, 2010. (Doc. 62.) The motion is
2 deemed submitted.

3 For the reasons discussed herein below, Defendants are entitled to summary judgment on
4 Plaintiff's claim(s) such that their motion should be granted in its entirety.

5 **II. Summary Judgment Standard**

6 Summary judgment is appropriate when it is demonstrated that there exists no genuine
7 issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.
8 Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

9 always bears the initial responsibility of informing the district court
10 of the basis for its motion, and identifying those portions of "the
11 pleadings, depositions, answers to interrogatories, and admissions
on file, together with the affidavits, if any," which it believes
demonstrate the absence of a genuine issue of material fact.

12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the
13 burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made
14 in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on
15 file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and
16 upon motion, against a party who fails to make a showing sufficient to establish the existence of
17 an element essential to that party's case, and on which that party will bear the burden of proof at
18 trial. *Id.* at 322. "[A] complete failure of proof concerning an essential element of the
19 nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a
20 circumstance, summary judgment should be granted, "so long as whatever is before the district
21 court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is
22 satisfied." *Id.* at 323.

23 If the moving party meets its initial responsibility, the burden then shifts to the opposing
24 party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec.*

26
27 ¹ Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by the
court in an order filed on January 7, 2009. *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

1 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the
2 existence of this factual dispute, the opposing party may not rely upon the denials of its
3 pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or
4 admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P.
5 56(e); *Matsushita*, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in
6 contention is material, i.e., a fact that might affect the outcome of the suit under the governing
7 law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific*
8 *Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e.,
9 the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Wool*
10 *v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

11 The parties bear the burden of supporting their motions and oppositions with the papers
12 they wish the Court to consider and/or by specifically referencing any other portions of the record
13 they wish the Court to consider. *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026,
14 1031 (9th Cir. 2001). The Court will not undertake to mine the record for triable issues of fact.
15 *Id.*

16 **III. Plaintiff's Allegations and Claims Under the Eighth Amendment²**

17 Plaintiff is currently a state prisoner at California State Prison in Corcoran, California.
18 Plaintiff was formerly imprisoned at Pleasant Valley State Prison (hereinafter "PVSP") in
19 Coalinga, California, where the acts he complains of occurred.

20 In the Third Amended Complaint (Doc. 26), Plaintiff alleges that, upon his arrival at
21 PVSP, on August 8, 2003, he was placed in administrative segregation/orientation. On August
22 11, 2003, Plaintiff asked the sick call nurse to see a dentist as he had a bad toothache. The nurse
23 told Plaintiff to contact the unit officer at breakfast if Plaintiff was in need of emergency dental
24 treatment. Plaintiff contacted Defendant Saldana that morning, requesting to go to medical

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26 ² This is a rendition of the factual allegations upon which Plaintiff's claims against Defendants were found
27 cognizable which are delineated herein for overview purposes only. Undisputed and disputed material facts are
28 discussed in the immediately following section.

1 services. Defendant Saldana asked Plaintiff why he wanted to see the dentist to which Plaintiff
2 responded by telling her of his toothache. Defendant Saldana stated that she would call medical
3 services to see if they wanted to see him, but she never returned. Defendant Saldana took four
4 other inmates to medical services that morning.

5 Plaintiff filed a grievance with the orientation housing unit sergeant regarding Defendant
6 Saldana's refusal to take him to a dentist. Plaintiff talked to Defendant Sergeant Nelson the next
7 day regarding the grievance, which Defendant Nelson said he had not received. Plaintiff told
8 Defendant Nelson of his urgent need to see a dentist because of the severe pain Plaintiff was
9 suffering at the time. Defendant Nelson left Plaintiff and never returned. Plaintiff filed a second
10 grievance, which was never processed. Plaintiff was held in orientation for three weeks without
11 dental treatment. Because of the pain from his tooth, Plaintiff could not eat or drink water.
12 Plaintiff would wake up in pain every morning. Upon Plaintiff's release from orientation into the
13 main-line, Plaintiff went to see a dentist. X-rays revealed a hole in Plaintiff's second molar. The
14 dentist informed Plaintiff that the tooth would need to be removed and that the tooth might have
15 been saved if he had seen Plaintiff sooner.

16 **IV. Undisputed and Disputed Facts**³

17 At all times relevant to this action, Plaintiff was an inmate in the custody of the State
18 of California. On August 8, 2003, Plaintiff transferred from North Kern State Prison (hereinafter
19 "NKSP") to PVSP. (Doc. 59, Def. Stmt of Undisp. Fact ("UF"), No. 1.) Plaintiff is no longer
20 incarcerated at PVSP. (*Id.* at UF No. 2.) At all times relevant to this action, Defendant Saldana
21 was employed as a Correctional Floor Officer at PVSP. (*Id.* at UF No. 3.) At all times relevant
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23 ³ Plaintiff neither admitted or denied the facts set forth by Defendant as undisputed. Local Rule 260(b).
24 While his opposition contains a section entitled "Statement of Facts" (Doc. 61, Plntf. Opp., 2:17-5:2), it is deficient
25 since it only makes reference to the supporting evidence for one fact in over two pages of writing and was not
26 verified. (*Id.* at 3:9-12.) Further, while Plaintiff submitted a document identified as his declaration in opposition to
27 the current motion, it is also deficient as it was not signed under penalty of perjury. (*Id.* at pp. 51-53.) Therefore,
28 the Court compiled the statement of undisputed facts from Defendant's statement of undisputed facts and Plaintiff's
verified Complaint, but not from his unverified opposition. *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir.
1998). Because Plaintiff neither submitted his own statement of disputed facts nor addressed Defendant's statement
of undisputed facts, the Court accepts Defendant's version of the facts except where contradicted by Plaintiff's
verified complaint.

1 to this action, Defendant Nelson was employed as a Correctional Sergeant at PVSP. (*Id.* at UF
2 No. 4.)

3 Prior to his arrival at PVSP, on July 29, 2003, Plaintiff was examined and treated by Dr.
4 Wilford at NKSP in regards to his second molar (#2 tooth). (*Id.* at UF No. 5.) Plaintiff's dental
5 records indicate that his #2 tooth had deep decay, and was "non-restorable" at that time. (*Id.* at
6 UF No. 6.) The only treatment provided by CDCR for a tooth designated as "non-restorable" is
7 the extraction (removal) of that tooth. (*Id.* at UF No. 7.) An inmate may elect to refuse the
8 extraction for a period of time, but a "non-restorable" tooth cannot be saved and will continue to
9 deteriorate until immediate extraction becomes necessary. (*Id.* at UF No. 8.) Plaintiff's dental
10 records indicate that he could have had the tooth removed at NKSP, but refused the extraction.
11 (*Id.* at UF No. 9; Doc. 26, Compl., Ex C, p. 25.)

12 Upon his transfer to PVSP on August 8, 2003, Plaintiff was housed in the administrative
13 segregation/orientation unit (hereinafter "Ad-Seg"). (*Id.* at UF No. 10.) While he was housed in
14 Ad-Seg, Plaintiff could have requested and received pain management medication from the nurse
15 who passed through his housing unit each morning. (*Id.* at UF No. 11.) In the Third Amended
16 Complaint, Plaintiff states that, on August 11, 2003, he "made a request to the Ad-
17 Seg/Orientation sick call nurse to see a dentist complaining of a bad toothache" and was "told
18 that on Thursday morning [he] was to tell the unit officer at breakfast that [he] was in need of
19 emergency dental treatment and wished to go with the medical line that morning to the medical
20 services office for emergency dental treatment." (Doc. 26, 3rd Amd. Comp., § IV, p. 3.)
21 Inmates housed in Ad-Seg must be escorted to the medical/dental unit. (Doc. 59, at UF No. 12.)
22 Correctional staff did not have authority to: (1) escort inmates to the dental unit without
23 pre-authorization from medical or dental staff; (2) schedule dental appointments for inmates; or
24 (3) provide dental diagnoses or treatment. (*Id.* at UF No. 13.)

25 As a Correctional Sergeant, Defendant Nelson did not have authority to process sick call
26 slips, schedule medical/dental appointments, provide diagnoses or treatment for inmates, or
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1 transport them to the medical unit without pre-authorization. (*Id.* at UF No. 14.) As a Floor
2 Officer, Defendant Saldana did not have authority to process sick call slips, schedule
3 medical/dental appointments or transport inmates to the medical unit without pre-authorization.
4 (*Id.* at UF No. 15.) Custody staff members have no authority over medical/dental staff. (*Id.* at
5 UF No. 16.) If an inmate brings a health concern to the attention of custody staff, that officer
6 apprises medical/dental staff of the situation, and defers to the directions received from medical
7 staff. (*Id.* at UF No. 17.) Medical/dental staff determines whether treatment is necessary. (*Id.* at
8 UF No. 18.) Medical/dental staff inform custody staff which inmates they want to see and when.
9 (*Id.* at UF No. 19.) Medical/dental staff schedule all appointments and direct custody staff to
10 provide escorts. (*Id.* at UF No. 20.) Plaintiff did not have a pre-scheduled dental appointment.
11 (*Id.* at UF No. 21.)

12 On Thursday, August 14, 2003, Plaintiff told Defendant Saldana that he had a toothache
13 and wanted to see the dentist immediately. (*Id.* at UF No. 22; Doc. 26, 3rd Amd. Comp., § IV.)
14 Defendant Saldana notified dental staff of Plaintiff's complaint that same day and was directed to
15 ask Plaintiff some medical questions. (*Id.* at UF No. 23.) In the Third Amended Complaint,
16 Plaintiff alleges that "even though Officer R. Saldana was aware that [he] was in pain, she
17 ignored this fact." (Doc. 26, 3rd Amd. Comp., 4:16-17.) Yet Defendants submit evidence
18 (including Plaintiff's deposition testimony) to show that Defendant Saldana asked Plaintiff
19 questions about his toothache, as directed, then reported Plaintiff's answers to dental staff. (*Id.* at
20 UF No. 24; Doc. 26, 3rd Amd. Comp., § IV.) Dental staff informed Defendant Saldana that the
21 clinic would not see Plaintiff at that time. (*Id.* at UF No. 25.) Medical/dental staff never
22 informed Defendant Saldana that Plaintiff required an escort for treatment. (*Id.* at UF No. 26.)

23 On August 16, 2003, Plaintiff informed Defendant Nelson that he had a toothache. (*Id.* at
24 UF No. 27; Doc. 26, Compl. at 5:19-24, Ex. B, pg. 21.) Defendant Nelson informed
25 medical/dental staff of Plaintiff's toothache so that they could schedule him for an appointment if
26 one was necessary. (*Id.* at UF No. 28.) Medical/dental staff never informed Defendant Nelson
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1 that Plaintiff required an escort for treatment. (*Id.* at UF No. 29.) In the Third Amended
2 Complaint, Plaintiff alleges that he asked Defendant Nelson if he had received Plaintiff's
3 complaint form 602, and that when Defendant Nelson responded in the negative, Plaintiff
4 advised him of Plaintiff's urgent need to see a dentist and explaining the severe pain that Plaintiff
5 was suffering at the time. (Doc. 26, 3rd Amd. Comp., 5:19-24.) Plaintiff further alleges that
6 Defendant Nelson left his cell door, never returned, and that Plaintiff was never escorted to
7 medical services. (*Id.* at 5:25-26.)

8 On September 9, 2003, after Plaintiff was released from orientation, he was examined and
9 treated by Dr. Alexander regarding his #2 tooth. (*Id.* at UF No. 30; Doc. 26, 3rd Amd. Comp.,
10 6:24-26.) Plaintiff's dental records indicate that the #2 tooth had irreversible pulpitis, an
11 infection of the nerve inside the tooth which kills the nerve, necessitating extraction. (*Id.* at UF
12 No. 31.) Plaintiff agreed to have the tooth extracted. (*Id.* at UF No. 32.) On September 10,
13 2003, the dental records indicate Plaintiff's #2 tooth was extracted and Plaintiff was prescribed
14 Motrin. (*Id.* at UF No. 33; Doc. 26, 3rd Amd. Comp., Ex. C, p. 26.) Because Plaintiff's #2 tooth
15 already had deep decay and was determined to be non-restorable as of July 29, 2003, no
16 treatment Plaintiff could have received, from July 29, 2003 to September 9, 2003, could have
17 saved the tooth. (*Id.* at UF No. 34.) In the Third Amended Complaint, Plaintiff alleges that Dr.
18 Alexander told him that if Plaintiff had "come to him sooner, the tooth may have been able to be
19 saved, but now it would have to come out." (Doc. 26, 3rd Amd. Comp., Ex. C, 6:24-7:3.)

20 **V. Eighth Amendment – Deliberate Indifference to Serious Medical Need**

21 Plaintiff claims that Defendants acted with deliberate indifference when they failed to
22 escort him for emergency dental treatment and that the resulting three-week delay in receipt of
23 dental treatment caused the loss of his tooth and unnecessary pain. (Doc. 26, Compl.; Doc. 26,
24 Screen Ord.)

25 Where a prisoner's Eighth Amendment claim is one of inadequate medical care, the
26 prisoner must allege and prove "acts or omissions sufficiently harmful to evidence deliberate
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1 indifference to serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Such a
2 claim has two elements: “the seriousness of the prisoner’s medical need and the nature of the
3 defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.1991). A
4 medical need is serious “if the failure to treat the prisoner’s condition could result in further
5 significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin*, 974 F.2d at
6 1059 (*quoting Estelle*, 429 U.S. at 104). Indications of a serious medical need include “the
7 presence of a medical condition that significantly affects an individual’s daily activities.” *Id.* at
8 1059-60. By establishing the existence of a serious medical need, a prisoner satisfies the
9 objective requirement for proving an Eighth Amendment violation. *Farmer v. Brennan*, 511
10 U.S. 825, 834 (1994).

11 If a prisoner establishes the existence of a serious medical need, he must then show that
12 prison officials responded to the serious medical need with deliberate indifference. *Farmer*, 511
13 U.S. at 834. “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d
14 1051, 1060 (9th Cir.2004). “Under this standard, the prison official must not only ‘be aware of
15 the facts from which the inference could be drawn that a substantial risk of serious harm exists,’
16 but that person ‘must also draw the inference.’” *Id.* at 1057 (*quoting Farmer*, 511 U.S. at 837).
17 “‘If a prison official should have been aware of the risk, but was not, then the official has not
18 violated the Eighth Amendment, no matter how severe the risk.’” *Id.* (*quoting Gibson v. County*
19 *of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002)).

20 “Denial of medical attention to prisoners constitutes an [E]ighth [A]mendment violation
21 if the denial amounts to deliberate indifference to serious medical needs of the prisoners.”
22 *Toussaint v. McCarthy* 801 F.2d 1080, 1111 (9th Cir. 1986) *abrogated in part on other grounds*
23 *by Sandin v. Conner*, 515 U.S. 472 (1995) (*citing Estelle*, 429 U.S. at 104-05); *see also Jett v.*
24 *Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Clement v. Gomez*, 298 F.3d 898, 905 (9th Cir.
25 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Lopez v. Smith* 203 F.3d 1122,
26 1131 (9th Cir. 2000) (en banc); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) *McGuckin*

1 974 F.2d at 1059. Delay of, or interference with, medical treatment can also amount to deliberate
2 indifference. *See Jett*, 439 F.3d at 1096; *Clement*, 298 F.3d at 905; *Hallett*, 296 F.3d at 744;
3 *Lopez*, 203 F.3d at 1131; *Jackson*, 90 F.3d at 332; *McGuckin* 974 F.2d at 1059; *Hutchinson v.*
4 *Untied States*, 838 F.2d 390, 394 (9th Cir. 1988).

5 **A. Defendants' Have Met Their Burden**

6 **1. Defendant Saldana**

7 Defendants have submitted evidence to contradict Plaintiff's claim that Defendant
8 Saldana intentionally delayed his medical treatment, when she failed to escort him. (Doc. 59, UF
9 No. 35.) Defendants' evidence shows that, as a correctional officer, Defendant Saldana did not
10 have authority to: (1) provide treatment; (2) determine the course of treatment provided;
11 (3) schedule an appointment for Plaintiff; or (3) escort him for treatment without authorization
12 from dental staff. (*Id.* at UF Nos. 13, 15.) Defendants' evidence also shows that Defendant
13 Saldana immediately brought Plaintiff's complaint to the attention of dental staff in an effort to
14 secure him medical treatment. (*Id.* at UF Nos. 23, 24.) Defendant Saldana, was required to defer
15 to dental staff's instructions (*Id.* at UF Nos. 16, 17), and dental staff ultimately determined
16 Plaintiff would not be seen at that time. (*Id.* at UF Nos. 25, 26.) Defendant Saldana had no
17 authority over dental staff, and could not require them to treat Plaintiff. (*Id.* at UF Nos. 16, 18.)

18 Since Defendant Saldana deferred to the decisions of trained dental staff on matters
19 involving Plaintiff's dental care, she cannot reasonably be found to be the "moving force" behind
20 the alleged violation, or to have caused any injury resulting from the delay in care. *See Monell*,
21 436 U.S. at 694. Defendant's evidence shows that Defendant Saldana responded reasonably to
22 the risk of which she was aware and deferred to the directives of trained dental staff.

23 Accordingly, Defendant Saldana has met her burden of showing that she did not deny,
24 delay, or intentionally interfere with Plaintiff's medical treatment in deliberate indifference to his
25 serious medical need.

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1 **2. Defendant Nelson**

2 Defendants have submitted evidence to show that Defendant Nelson did not intentionally
3 delay Plaintiff’s medical treatment when he did not immediately escort Plaintiff for dental care
4 upon becoming aware of Plaintiff’s toothache. (Doc. 59, UF No. 35.) Like Defendant Saldana,
5 Defendant Nelson did not have authority to: (1) provide treatment, (2) determine the course of
6 treatment provided; (3) schedule an appointment for Plaintiff; or (3) escort him for treatment
7 without authorization from dental staff. (*Id.* at UF Nos. 13, 14.) Defendant Nelson immediately
8 relayed Plaintiff’s complaint regarding his toothache to medical/dental staff so that they could
9 schedule an appointment for Plaintiff if one was necessary. (*Id.* at UF No. 28.) Defendant Nelson
10 was never informed that Plaintiff required an escort for treatment. (*Id.* at UF No. 29.)

11 Defendant Nelson was required to defer to medical/dental staff’s instructions regarding
12 inmate appointments and treatment, and did so. (*Id.* at UF Nos. 16, 17.) Defendant Nelson,
13 therefore, cannot reasonably be found to be the “moving force” behind the alleged violation, or to
14 have caused any injury resulting from the delay in care. *See Monell*, 436 U.S. at 694.

15 Defendants’ evidence shows that Defendant Nelson responded reasonably to the risk of
16 which he was aware, and deferred to the directives of trained dental staff such that Defendant
17 Nelson did not deny, delay, or intentionally interfere with Plaintiff’s medical treatment in
18 deliberate indifference to Plaintiff’s serious medical need.

19 **3. Causation of Substantial Harm**

20 Where the prisoner is alleging that delay of medical treatment evinces deliberate
21 indifference, the prisoner must show that the delay led to further injury. *See Hallett*, 296 F.3d at
22 745-46; *McGuckin* 974 F.2d at 1060; *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d
23 404, 407 (9th Cir.1985) (*per curiam*). Mere delay which did not cause harm is insufficient to
24 state a claim of deliberate medical indifference, and Plaintiff will “have no claim for deliberate
25 medical indifference unless the denial was harmful.” *Id.*, citing *Estelle v. Gamble*, 429 U.S. 97,
26 106 (1976). Only delays that cause substantial harm violate the Eighth Amendment. *Berry v.*

1 *Bunnell* 39 F.3d 1056, 1057 (9th Cir. 1994) citing *Wood v. Housewright*, 900 F.2d 1332, 1335
2 (9th Cir.1990). Substantial harm is not present when the inmate’s condition does not require
3 emergency attention. *Wood v. Housewright* 900 F.2d 1332, 1335 (9th Cir. 1990) citing
4 *Broughton v. Cutter Laboratories* 622 F.2d 458, 460 (9th Cir. 1980).

5 The evidence submitted by Defendants shows that, on July 29, 2003, before his transfer to
6 PVSP, Plaintiff’s tooth was determined to be “non-restorable” such that their actions did not
7 cause the loss of Plaintiff’s tooth. (Doc. 59, UF Nos. 5, 6.) The tooth could not have been saved.
8 (*Id.* at UF Nos. 7, 8, 34.) Thus, Defendants have met their burden of proving that nothing they
9 did, or failed to do, caused the loss of Plaintiff’s tooth.

10 Defendants’ evidence also shows that they are not liable for any pain Plaintiff
11 experienced regarding his toothache for the time they were involved in his custody and even until
12 the offending tooth was removed as they reported Plaintiff’s concerns regarding his toothache to
13 dental staff (*id.* at UF Nos. 23-25, 28-29) and Plaintiff could have received pain management
14 medication directly from the nurse who passed through his housing unit each morning (*id.* at UF
15 No. 11).

16 Defendants have met their initial burden of informing the Court of the basis for their
17 motion and identifying admissible evidence to demonstrate the absence of a genuine issue of
18 material fact as to Plaintiff’s claim that Defendants Saldana and Nelson were deliberately
19 indifferent to his serious medical needs. The burden therefore shifts to Plaintiff to establish that
20 a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v.*
21 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). As stated above, in attempting to establish the
22 existence of this factual dispute, Plaintiff may not rely upon the mere allegations or denials of his
23 pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or
24 admissible discovery material, in support of his contention that the dispute exists. Fed. R. Civ. P.
25 56(e); *Matsushita*, 475 U.S. at 586 n.11; *First Nat’l Bank*, 391 U.S. at 289; *Strong v. France*, 474
26 F.2d 747, 749 (9th Cir. 1973).

1 **B. Plaintiff Did Not Meet His Burden**

2 **1. Defendant Saldana**

3 Plaintiff did not submit any evidence to show that, once made aware, Defendant Saldana
4 did not immediately inform medical/dental staff of his complaints and/or had any ability to make
5 medical/dental staff see Plaintiff. The closest Plaintiff came to addressing this issue is when he
6 alleged that: (1) on August 11, 2003, he “made a request to the Ad-Seg/Orientation sick call
7 nurse to see a dentist complaining of a bad toothache” and was “told that on Thursday morning
8 [he] was to tell the unit officer at breakfast that [he] was in need of emergency dental treatment
9 and wished to go with the medical line that morning to the medical services office for emergency
10 dental treatment” (Doc. 26, 3rd Amd. Comp., § IV, p. 3); (2) on Thursday, August 14, 2003,
11 Plaintiff told Defendant Saldana that he had a toothache and wanted to see the dentist
12 immediately (*id.*); (3) Defendant Saldana questioned Plaintiff as to why he wanted to see the
13 dentist, what was wrong with his tooth, which tooth, indicated that she was going to have to call
14 medical/dental staff to see if they wanted to see Plaintiff, left, and then did not return (*id.* at 4:1-
15 5); and (4) “even though Officer R. Saldana was aware that [Plaintiff] was in pain, she ignored
16 this fact” (*id.* at 4:16-17.)

17 While it shows that Defendant Saldana did not obtain the relief Plaintiff was hoping for,
18 none of this evidence shows that Defendant Saldana did not immediately take Plaintiff’s
19 complaints to medical/dental staff, nor does it show that Defendant Saldana had any control over
20 whether the medical/dental department would agree to see Plaintiff.

21 **2. Defendant Nelson**

22 Plaintiff also did not submit any evidence to show that, once made aware, Defendant
23 Nelson did not immediately inform medical/dental staff of his complaints and/or had any ability
24 to make medical/dental staff see Plaintiff. The closest Plaintiff came to addressing this issue is
25 when he alleged that: (1) on August 16, 2003, Plaintiff informed Defendant Nelson that he had a
26 toothache (Doc. 26, 3rd Amd. Comp. at 5:19-24, Ex. B, pg. 21); (2) he asked Defendant Nelson
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1 if he had received Plaintiff's complaint form 602 and when Defendant Nelson responded in the
2 negative, Plaintiff advised him of Plaintiff's urgent need to see a dentist and explaining the
3 severe pain that Plaintiff was suffering at the time (*Id.* at 5:19-24); and that Defendant Nelson left
4 his cell door, never returned, and that Plaintiff was never escorted to medical services (*Id.* at
5 5:25-26).

6 Here again, while Plaintiff's evidence shows that Defendant Nelson did not obtain the
7 relief Plaintiff was hoping for, none of this evidence shows that Defendant Nelson did not
8 immediately take Plaintiff's complaints to medical/dental staff, nor does it show that Defendant
9 Nelson had any control over whether the medical/dental department would agree to see Plaintiff.

10 Further, Defendant Nelson, as a supervisor is generally not liable under section 1983 for
11 the actions of his subordinates under a theory of *respondeat superior*; therefore, the causal link
12 between him and Plaintiff's claimed constitutional violation must be specific. *See Fayle v.*
13 *Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir.
14 1978), *cert. denied*, 442 U.S. 941 (1979). Plaintiff failed to submit evidence to support a claim
15 that Defendant Nelson either: personally participated in a deprivation of Plaintiff's constitutional
16 rights; knew of the violation(s) and failed to act to prevent them; or promulgated or
17 "implemented a policy so deficient that the policy 'itself is a repudiation of constitutional rights'
18 and is 'the moving force of the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642, 646
19 (9th Cir. 1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).
20 Under section 1983, liability may not be imposed on supervisory personnel for the actions of
21 their employees/subordinates under a theory of *respondeat superior*. *Ashcroft v. Iqbal*, ___ U.S.
22 ___, 129 S.Ct. 1937, 1949 (2009). "In a §1983 suit or a *Bivens* action - where masters do not
23 answer for the torts of their servants - the term 'supervisory liability' is a misnomer." *Id.*
24 Knowledge and acquiescence of a subordinate's misconduct is insufficient to establish liability;
25 each government official is only liable for his or her own misconduct. *Id.* Accordingly,
26 Defendant Nelson is not liable for the acts or inactions of his subordinates.

1 **3. Causation of Injury**

2 Plaintiff did not submit any admissible evidence to show that his tooth could have been
3 saved if he had seen Dr. Alexander at any time during his stay in Ad-Seg.

4 The only submissions by Plaintiff on this issue are again found in his pleading wherein he
5 alleges that when he was released to the main-line, he went to see the main-line dentist about his
6 tooth and x-rays revealed a hole in his second molar such that the tooth required extraction and
7 the main-line dentist told Plaintiff that the tooth “may have been able to be saved”if Plaintiff had
8 come in sooner, but “now it had to come out.” (Doc. 26, 3rd Amd. Comp., 6:24-7:3 and Ex. C,
9 p. 26.) On September 10, 2003, Plaintiff’s tooth was extracted and Plaintiff was prescribed
10 Motrin. (*Id.* at Ex. C, p. 26.)

11 Plaintiff does not meet his burden of showing that, but for the delay in treatment he
12 received allegedly by the actions of Defendants Saldana and Nelson, his tooth would have been
13 able to be saved. First off, Plaintiff has not made any submission to show that his tooth could
14 have been saved upon his arrival at PVSP, and any arguments to that end in his opposition are
15 not persuasive as Plaintiff does not qualify as an expert under Rule 702 of the Federal Rules of
16 Evidence. Further, his allegation that the main-line dentist told him that the tooth “may have
17 been able to be saved”if Plaintiff had come in sooner, but “now it had to come out” (*id.*) does not
18 meet the preponderance of evidence standard⁴ – “may have been able to be saved” simply does
19 not make it more likely than not that the tooth would have been able to be saved during the time
20 frame in question in this action.

21 Thus, Plaintiff does not establish a triable issue of fact as he does not present any
22 admissible evidence to contradict Defendants’ evidence that, because Plaintiff’s #2 tooth already
23 had deep decay and was determined to be non-restorable as of July 29, 2003, no treatment
24 Plaintiff could have received, from July 29, 2003 to September 9, 2003, could have saved the
25 tooth. (*Id.* at UF No. 34.)

26 _____
27 ⁴ See 9th Circuit Model Civil Jury Instruction 1.3 (2007).
28

1 Further, Plaintiff does not submit any evidence to in any way suggest that he was not able
2 to obtain pain medication from his arrival at PVSP through the date that his tooth was extracted.

3 Accordingly, Plaintiff has not established that a genuine issue as to any material fact
4 exists such that Defendants' motion for summary judgment should be granted. Since Defendants
5 are entitled to summary judgment on the merits of Plaintiff's claims against them, the issue of
6 whether Defendant is entitled qualified immunity need not be reached.

7 Further, Plaintiff did not file a request for postponement of this motion under Rule 56(f),
8 or in any way argue/show⁵ that facts necessary to oppose this motion for summary judgment were
9 not available to him when he was required to file his opposition, despite having been provided
10 information on such requirements.⁶ Accordingly, in light of the finding that Defendants' motion
11 for summary judgment should be granted, their motion for reconsideration, filed July 26, 2010, is
12 properly disregarded as moot.

13 **VI. Conclusion and Recommendation**

14 Accordingly, this Court finds that the motion for summary judgment filed by Defendants
15 Saldana and Nelson should be granted in its entirety as they are entitled to summary judgment on
16 Plaintiff's claims for violations of his rights under the Eighth Amendment.

17 As set forth herein, the Court HEREBY RECOMMENDS:

- 18 (1) Defendants Saldana and Nelson are entitled to summary judgment on Plaintiff's
19 claims under the Eighth Amendment such that their motion for summary
20 judgment, filed on May 20, 2010 (Doc. 57), should be GRANTED;
21 (2) that the Clerk of the Court be directed to enter judgment for the Defendants

23 ⁵ Plaintiff did not make any such argument and/or showing in either his opposition to this present motion, or
24 in his opposition (Doc. 70) to the objections and request for reconsideration and clarification which Defendants filed
25 (Doc. 68) to this Court's order granting Plaintiff's motions to compel (Doc. 67). In Defendants' objection and
26 request for reconsideration, they specifically requested discovery be stayed pending a ruling on their motion for
summary judgment and raised the fact that Plaintiff did not seek an extension to filing his opposition to this motion
under Rule 56(f). (Doc. 68, Def. Obj. & Req for Recon, 2:6-9, 10:5-8.)

27 ⁶ Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by
the court in an order filed on January 7, 2009. *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

1 Saldana and Nelson and against Plaintiff;

2 (3) that in light of this finding, Defendants' Objection and Motion for
3 Reconsideration, filed on July 26, 2010 (Doc. 65) be disregarded as moot; and

4 (4) that the Clerk of the Court be directed to close the case.

5 These Findings and Recommendations will be submitted to the United States District
6 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
7 **thirty (30) days** after being served with these Findings and Recommendations, the parties may
8 file written objections with the Court. The document should be captioned "Objections to
9 Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file
10 objections within the specified time may waive the right to appeal the District Court's order.
11 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

12
13 IT IS SO ORDERED.

14 **Dated: January 18, 2011**

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE