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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ELONZA JESSE TYLER,

CASE NO. 1:06-cv-00092-AWI-SMS PC

Plaintiff,

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING PLAINTIFF’S CROSS-  
MOTION FOR SUMMARY JUDGMENT  
BE DISREGARDED, AND DEFENDANT  
DAVIS’S MOTION FOR SUMMARY  
JUDGMENT BE GRANTED

v.

R. DAVIS, M.D., et al.,

Defendants.

(Docs. 59, 60 and 61)

OBJECTIONS DUE WITHIN THIRTY DAYS

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**Findings and Recommendations on Cross-Motions for Summary Judgment**

**I. Procedural History**

Plaintiff Elonza Jesse Tyler, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on January 27, 2006. This action is proceeding on Plaintiff’s amended complaint, filed September 15, 2006. Following resolution of Defendants Smith, Jackman, Mendoza-Powers, and Madruga’s motion for summary judgment on March 12, 2009, this action is proceeding on Plaintiff’s remaining claims against Defendant Smith, a staff physician, and Defendant Davis, the former Chief Medical Officer, for acting with deliberate indifference to Plaintiff’s serious medical needs, in violation of the Eighth Amendment. The events left at issue in this action allegedly occurred at Avenal State Prison in 2005.

On March 20, 2009, Defendant Davis filed a motion for summary judgment. (Doc. 59.) Plaintiff filed a cross-motion for summary judgment and an opposition to Defendant’s motion on

1 April 3, 2009.<sup>1</sup> (Doc. 60.) On April 9, 2009, Plaintiff filed an amended cross-motion for summary  
2 judgment and opposition.<sup>2</sup> (Doc. 61.) Defendant file a reply and an opposition to Plaintiff’s cross-  
3 motion on May 12, 2009, and Plaintiff filed a reply on June 5, 2009. (Docs. 67, 68.)

4 **II. Plaintiff’s Cross-Motion for Summary Judgment**

5 Summary judgment is appropriate when it is demonstrated that there exists no genuine issue  
6 as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R.  
7 Civ. P. 56(c). On his cross-motion for summary judgment, Plaintiff bears the burden of  
8 demonstrating that “no reasonable trier of fact could find other than for [Plaintiff].” Calderone v.  
9 United States, 799 F.2d 254, 259 (6th Cir. 1986) (quoting from W. Schwarzer, Summary Judgment  
10 Under the Federal Rules: Defining Issues of Material Fact 99 F.R.D. 465, 487 (1984)). This requires  
11 Plaintiff to show that there are no triable issue as to the matters alleged in his amended complaint,  
12 id., by establishing beyond controversy every essential element of his Eighth Amendment claim  
13 against Davis, Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992); Fontenot v. Upjohn Co., 780  
14 F.2d 1190, 1194 (5th Cir. 1986). Plaintiff’s evidence is judged by the same standard of proof  
15 applicable at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

16 Although entitled as a cross-motion for summary judgment and an opposition, Plaintiff’s  
17 filing consists of his arguments in opposition to Defendant’s motion for summary judgment along  
18 with a bare request that summary judgment be entered in his favor. Plaintiff did not comply with  
19 Local Rule 56-260(a), which requires that “[e]ach motion for summary judgment or summary  
20 adjudication shall be accompanied by a ‘Statement of Undisputed Facts’ that shall enumerate  
21 discretely each of the specific material facts relied upon in support of the motion and cite the  
22 particular portions of any pleading, affidavit, deposition, interrogatory answer, admission or other  
23 document relied upon to establish that fact.”

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25 <sup>1</sup> Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by the  
26 Court in an order filed on April 25, 2007. Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988). (Doc. 14.)

27 <sup>2</sup> Plaintiff submitted an amended cross-motion and opposition due to typographical errors and misplaced  
28 exhibits. However, Plaintiff failed to sign the amended filing, and it cannot be considered by the Court. The Court  
is able to and will overlook Plaintiff’s typographical errors and misplaced exhibits in considering the original cross-  
motion and opposition.

1 Further, Plaintiff's arguments are couched entirely in terms of opposing Defendant's motion  
2 and raising triable issues of fact, and do not support a cross-motion for summary judgment, which  
3 would require Plaintiff to demonstrate that there are no triable issues of fact and he is entitled to  
4 judgment as a matter of law. Therefore, it is the recommendation of the Court that Plaintiff's cross-  
5 motion for summary judgment be disregarded, and the filing be treated solely as an opposition to  
6 Defendant's motion for summary judgment. Because of this recommendation, the Court will not  
7 consider Defendant's supplemental evidence, submitted in opposition to Plaintiff's purported cross-  
8 motion.

9 **III. Summary Judgment Standard**

10 Summary judgment must be entered, "after adequate time for discovery and upon motion,  
11 against a party who fails to make a showing sufficient to establish the existence of an element  
12 essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex  
13 Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986). The "party seeking summary judgment  
14 bears the initial responsibility of informing the district court of the basis for its motion, and  
15 identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions  
16 on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine  
17 issue of material fact." Celotex, 477 U.S. at 323 (quoting Rule 56(c) of the Federal Rules of Civil  
18 Procedure).

19 If the moving party meets its initial responsibility, the burden then shifts to the opposing  
20 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.  
21 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). In attempting to  
22 establish the existence of this factual dispute, the opposing party may not rely upon the denials of  
23 its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or  
24 admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P.  
25 56(e); Matsushita, 475 U.S. at 586 n.11.

26 A verified complaint in a pro se civil rights action may constitute an opposing affidavit for  
27 purposes of the summary judgment rule, where the complaint is based on an inmate's personal  
28 knowledge of admissible evidence, and not merely on the inmate's belief. McElyea v. Babbitt, 833

1 F.2d 196, 197-98 (9th Cir. 1987) (per curium); Lew v. Kona Hosp., 754 F.2d 1420, 1423 (9th Cir.  
2 1985); Fed. R. Civ. P. 56(e). Plaintiff's amended complaint is verified and will be considered by the  
3 Court in resolving Defendant's motion to the extent that it sets forth admissible facts. The parties  
4 bear the burden of supporting their motions and oppositions with the papers they wish the Court to  
5 consider and/or by specifically referencing any other portions of the record they wish the Court to  
6 consider. Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001). The  
7 Court will not undertake to mine the record for triable issues of fact. Id.

8 **IV. Defendant's Motion**

9 **A. Summary of Claim**<sup>3</sup>

10 On September 4, 2003, while working at his prison job, Plaintiff slipped and injured his left  
11 knee, causing severe pain and swelling. Plaintiff was provided with pain medication, a knee brace,  
12 and a cane, and at the time of his transfer to Avenal State Prison (ASP) on March 24, 2004, was  
13 barely able to walk. In May 2004, Plaintiff was designated as mobility impaired and provided with  
14 a wheelchair. Plaintiff underwent knee surgery on March 17, 2005.

15 Plaintiff alleges that Defendant Davis, who was the Chief Medical Officer (CMO) at ASP  
16 at that time, interfered with the course of treatment prescribed for Plaintiff, and rescinded the  
17 medical order directing that Plaintiff be transferred to a medical facility. Plaintiff further alleges that  
18 although Defendant partially granted a referral to send Plaintiff to an orthopedic specialist, he failed  
19 to follow through with the referral, leaving Plaintiff unable to walk and in severe pain. Plaintiff  
20 alleges that as CMO, Defendant was responsible for the system-wide deficiencies which led to the  
21 violation of Plaintiff's constitutional rights.

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28 <sup>3</sup> Court document 10.

1           **B.     Undisputed Facts**<sup>4</sup>

- 2   1.     In September 2003, Plaintiff, an inmate incarcerated at Folsom State Prison, hurt his left knee  
3         while working in the kitchen.
- 4   2.     On March 15, 2005, while housed at ASP, Plaintiff received surgery on his knee.
- 5   3.     Medical staff at ASP provided post-operative care.
- 6   4.     Plaintiff submitted an inmate appeal claiming that R. Jackman, his physical therapist, lacked  
7         the necessary equipment to provide Plaintiff with meaningful physical therapy.
- 8   5.     Plaintiff requested that Mr. Jackman be provided with any and all necessary aids to promote  
9         physical therapy, or in the alternative, that Plaintiff be transferred to the California Medical  
10        Facility.
- 11 6.     At the first level of review, Plaintiff was evaluated by Dr. Douglass, a staff physician at ASP.
- 12 7.     Dr. Douglass reviewed the physical therapy notes in Plaintiff’s medical file, including Mr.  
13         Jackman’s notes.
- 14 8.     Mr. Jackman’s notes conveyed his impression that the equipment at ASP was adequate to  
15         provide Plaintiff with the care he needed and that Plaintiff may benefit from a second opinion  
16         from another physical therapist if Plaintiff felt dissatisfied with his progress.
- 17 9.     Plaintiff’s appeal was partially granted at the first level of review to the extent that a request  
18         was submitted for a second opinion by a physical therapist, pending approval by the Medical  
19         Authorization Review Committee.
- 20 10.    Defendant Davis, who was the CMO at ASP, reviewed Plaintiff’s appeal at the second level  
21         of review.
- 22 11.    Defendant reviewed Plaintiff’s medical record and the previous review by Dr. Douglass, and  
23         determined that Mr. Jackman was providing Plaintiff with adequate medical treatment.
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25           <sup>4</sup> In addressing Defendant’s proposed undisputed facts, Plaintiff cites to Defendant’s Memorandum of  
26 Points and Authorities rather than the Statement of Undisputed Facts. However, in comparing the two along with  
27 Plaintiff’s statement, the Court has determined that Plaintiff does not dispute the any of the facts set forth by  
28 Defendant as undisputed, and therefore, Defendant’s statement of undisputed facts is adopted. (Doc. 60, 3:3-15.)  
Plaintiff does dispute Defendant’s characterization of Plaintiff’s claim as solely premised on Defendant’s role as a  
decision maker in the appeals process. (Id., 3:14-15.) However, that statement is argument and was not proffered as  
an undisputed fact.

1 12. With respect to Plaintiff's request for a transfer to another institution, Defendant noted that  
2 the Health Care Manager at ASP had already determined that transferring Plaintiff was not  
3 a medical necessity, and the request was denied.

4 13. Defendant partially granted Plaintiff's appeal, noting that Plaintiff was to be referred back  
5 to an orthopedist to further evaluate Plaintiff's progress.

6 **C. Discussion**

7 **1. Defendant's Position**

8 Defendant argues that he is entitled to judgment as a matter of law because Plaintiff's sole  
9 claim against him arises from his role in considering and resolving Plaintiff's inmate appeal at the  
10 second level of review, which provides no basis for the imposition of liability under section 1983.  
11 On June 22, 2005, Plaintiff submitted a "Reasonable Accommodation or Modification Request"  
12 form (CDC 1824) in which he claimed he was not benefitting from physical therapy because his  
13 therapist, Mr. Jackman, was restricted in his ability to provide Plaintiff with meaningful physical  
14 therapy. (Motion, Doc. 59-3, Attachment A, court record p. 9.) Plaintiff requested that Mr. Jackman  
15 be provided with the necessary aids, equipment, and facility to provide Plaintiff with the level of  
16 treatment that would best promote his recovery. (Id.) In the alternative, Plaintiff requested that he  
17 be transferred to a prison with a physical therapy program, and identified the California Institution  
18 for Men and the California Medical Facility as two such prisons. (Id.)

19 At the first level of review, Plaintiff's appeal was evaluated by Dr. Douglass, a staff  
20 physician, who reviewed the physical therapy notes in Plaintiffs's medical file, including Mr.  
21 Jackman's notes. (Undisputed Facts 6, 7; Attach. A, c.r. pp. 7-8.) In the appeal decision, dated  
22 August 12, 2005, Dr. Douglass stated that it appeared Mr. Jackman felt the resources at ASP were  
23 adequate for Plaintiff's needs, but recommended a second opinion by another physical therapist,  
24 partly due to Plaintiff's dissatisfaction with his progress. (U.F. 8; Attach. A, c.r. p. 8.) Dr. Douglass  
25 partially granted Plaintiff's appeal to the extent that a request for a second opinion by a physical  
26 therapist was submitted and was pending approval by the Medical Authorization Review Committee.  
27 (U.F. 9; Attach. A, c.r. p. 8.) Further, a follow-up with an orthopedic surgeon was requested and  
28 pending scheduling by the surgeon. (Attach. A, c.r. p. 8.)

1 On August 18, 2005, Plaintiff filed an inmate appeal form (CDC 602) seeking a second-level  
2 review.<sup>5</sup> (Id., c.r. pp. 5-6.) Plaintiff stated that he had not progressed with his physical therapy, and  
3 some of Mr. Jackman’s exercises were starting to cause him pain and aggravate his injuries. (Id.)  
4 As relief, Plaintiff requested to know what date he was scheduled for a consultation with an  
5 orthopedic surgeon. (Id.)

6 Defendant reviewed Plaintiff’s medical record and the previous decision by Dr. Douglass.  
7 (U.F. 11; Attach. A, c.r. pp. 11-12.) Defendant stated in the written appeal decision, dated  
8 September 13, 2005, that Plaintiff’s request for a transfer had been taken under consideration by the  
9 Health Care Manager, who determined that the transfer was not a medical necessity, and the  
10 previously written transfer chrono had been therefore rescinded. (U.F. 12, Attach. A, c.r. p. 12.)  
11 Defendant partially granted Plaintiff’s appeal in that Plaintiff was referred back to an orthopedist  
12 to further evaluate his progress. (U.F. 13, Attach. A, c.r. p. 12.)

## 13 **2. Plaintiff’s Position**

14 In his opposition, Plaintiff argues that as CMO, Defendant was in charge of the entire health  
15 care operation at ASP and is responsible for the systematic deficiencies that caused Plaintiff to suffer  
16 unnecessary pain and injury. (Doc. 60, Opp., c.r. p. 5, ¶1.) Plaintiff argues that as CMO, Defendant  
17 was responsible for the interference with and discontinuation of Plaintiff’s prescribed medical  
18 treatment by other ASP medical staff members, the temporary discontinuation of Plaintiff’s physical  
19 therapy specifically.<sup>6</sup> (Id.) Plaintiff argues that Defendant failed to provide adequate medical care  
20 in the form of physical therapy once it was prescribed, and stopped Plaintiff’s physical therapy at a  
21 prison medical facility, choosing instead to have Plaintiff treated at ASP, which did not have any

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23 <sup>5</sup> Both the “Reasonable Accommodation or Modification Request” and the inmate appeal form parts of the  
same appeal, log number ASP 05-01654.

24 <sup>6</sup> For the purpose of clarification only, the Court takes judicial notice of the following facts offered in  
25 support of the previous motion for summary judgment, filed by Defendants Smith, Jackman, Mendoza-Powers, and  
26 Madruga. Because ASP did not have a physical therapy program, Defendant Smith, Plaintiff’s treating physician,  
27 recommended that Plaintiff be transferred to a medical facility with a physical therapy program, although Defendant  
28 Smith was not authorized to actually initiate transfers. (Doc. 55, F&R, 5:18-6:2.) Plaintiff was scheduled to be sent  
to California State Prison-Corcoran three times a week for physical therapy, but it was discontinued because ASP did  
not have the resources to send Plaintiff to another prison three times a week. (Id.) When Defendant Jackman was  
brought in to provide physical therapy at ASP in June 2005, Defendant Smith issued a medical chrono for Plaintiff to  
see Mr. Jackman. (Id.)

1 physical therapy equipment. (Id., ¶2.) Plaintiff also argues that Defendant failed ensure that he was  
2 seen by an orthopedic surgeon without unreasonable delay. (Id., ¶2.)

### 3 **3. Findings**

4 Plaintiff's claim against Defendant arises from the alleged violation of Plaintiff's rights under  
5 the Eighth Amendment of the United States Constitution. "[T]o maintain an Eighth Amendment  
6 claim based on prison medical treatment, an inmate must show 'deliberate indifference to serious  
7 medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble,  
8 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part test for deliberate indifference requires the  
9 plaintiff to show (1) "'a serious medical need' by demonstrating that 'failure to treat a prisoner's  
10 condition could result in further significant injury or the unnecessary and wanton infliction of pain,'"  
11 and (2) "the defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096  
12 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,  
13 WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations  
14 omitted)).

15 Deliberate indifference is shown by "a purposeful act or failure to respond to a prisoner's  
16 pain or possible medical need, and harm caused by the indifference." Id. (citing McGuckin, 974 F.2d  
17 at 1060). Deliberate indifference may be manifested "when prison officials deny, delay or  
18 intentionally interfere with medical treatment, or it may be shown by the way in which prison  
19 physicians provide medical care." Id. (citing McGuckin at 1060 (internal quotations omitted)).  
20 Where the claim involves a delay in the receipt of treatment or care, the claim is not cognizable  
21 unless the delay led to further harm. McGuckin at 1060 (citing Shapely v. Nevada Bd. of State  
22 Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985)).

23 Under section 1983, Plaintiff must show that Defendant acted under color of state law, and  
24 deprived him of rights secured by the Constitution or federal law. Long v. County of Los Angeles,  
25 442 F.3d 1178, 1185 (9th Cir. 2006). Plaintiff is required to prove that Defendant personally  
26 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).  
27 There is no *respondeat superior* liability under section 1983, and therefore, Defendant is only liable  
28 for his own misconduct. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948-49 (2009).



1 Generally, “[r]uling against a prisoner on an administrative complaint does not cause or  
2 contribute to the violation.” George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007). Further, the  
3 existence of an administrative remedy process does not create any substantive rights and therefore,  
4 mere dissatisfaction with the remedy process or its results cannot, without more, support a claim for  
5 relief for violation of a constitutional right. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003);  
6 Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988); Massey v. Helman, 259 F.3d 641, 647 (7th Cir.  
7 2001). However, a supervisor may be held liable for the constitutional violations of his or her  
8 subordinates *if* he or she “participated in or directed the violations, or knew of the violations and  
9 failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); also Corales v.  
10 Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of  
11 Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir.  
12 1997). If that participation, direction, or knowledge occurred within the context of handling an  
13 appeal, merely claiming that there exists no constitutional right to an appeals process is not  
14 necessarily a shield to liability. The critical inquiry is whether or not the supervisor directly  
15 participated in the violations complained of or had knowledge that violations were occurring but  
16 failed to intervene. Taylor, 880 F.2d at 1045; also Jett at 1098.

17 Here, Defendant presents evidence that his involvement in Plaintiff’s medical care was  
18 limited to addressing and resolving Plaintiff’s appeal at the second level of review, which included  
19 reviewing the first level decision. Defendant’s position is supported by a review of Plaintiff’s appeal  
20 and the responses to the appeal. Although Plaintiff disputes this characterization of the basis for his  
21 claim against Defendant, he has presented no evidence to the contrary.

22 Plaintiff seeks to extend liability to Defendant for all of the problems he encountered at ASP  
23 with respect to his knee injury, but Defendant simply cannot be held liable under section 1983 for  
24 all that Plaintiff believes was wrong with his medical treatment merely because of Defendant’s  
25 position as CMO or merely because Defendant reviewed and issued a decision on Plaintiff’s appeal.  
26 Iqbal, 129 S.Ct. at 1948-49. Plaintiff must submit evidence demonstrating that there was deliberate  
27 indifference to his serious medical needs, and that Defendant was either directly involved or was on  
28 notice of the violations but failed to intervene.

1           Although Plaintiff argues that his constitutional rights were violated as a result of the  
2 systematic medical care deficiencies at ASP, there is no evidence establishing that Plaintiff's rights  
3 were violated as a direct result of a deficiency in the medical care system, and that Defendant knew  
4 about or created that deficiency but failed to rectify it. General arguments or accusations are not  
5 sufficient to support Plaintiff's claim. Further, although Plaintiff argues that Defendant was involved  
6 in the discontinuation of his physical therapy at California State Prison-Corcoran and the subsequent  
7 initiation of substandard therapy at ASP, Plaintiff has presented no evidence linking Defendant to  
8 these decisions or demonstrating that the decisions constituted deliberate indifference to his medical  
9 needs. Plaintiff's disagreement with treatment decisions is not sufficient to support an Eighth  
10 Amendment claim. Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).

11           With respect to Plaintiff's allegation that Defendant interfered with the course of treatment  
12 prescribed for Plaintiff and cancelled Plaintiff's pending transfer to a medical facility, there is no  
13 evidence that Defendant interfered with a prescribed course of treatment, or that the alleged  
14 interference "was medically unacceptable under the circumstances" and chosen "in conscious  
15 disregard of an excessive risk to plaintiff's health," Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.  
16 1986) (internal citations omitted), which must be shown to support an Eighth Amendment claim.  
17 Further, the uncontroverted evidence demonstrates that the Acting Health Care Manager considered  
18 Plaintiff's request for a transfer, and determined it was not medically necessary. Defendant  
19 documented this information in his response to Plaintiff's appeal. Neither Plaintiff's disagreement  
20 with that determination nor Defendant's involvement in relaying that message via an inmate appeal  
21 provides a basis for the imposition of liability under section 1983.

22           Finally, there is no evidence to support Plaintiff's claim that Defendant violated his rights  
23 under the Eighth Amendment by failing to ensure that he was seen by an orthopedic specialist.  
24 Defendant informed Plaintiff in the appeal decision that Defendant Dr. Smith's referral to an  
25 orthopedist was approved by the Medical Authorization Review Committee, and that Plaintiff would  
26 be scheduled in the near future. Plaintiff presents no evidence that Defendant was responsible for  
27 ensuring that the appointment was scheduled and that his failure to do so rose to the level of

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1 deliberate indifference, or that Defendant knew his subordinates were acting with deliberate  
2 indifference by failing to schedule the appointment but failed to intervene.

3 Although Plaintiff argues that Defendant was ordered in the Director's Level response to his  
4 appeal to provide Plaintiff with immediate orthopedic care and Defendant failed to comply with that  
5 order, the evidence shows an acknowledgment that medical staff were having some difficulty getting  
6 an appointment scheduled, and a directive to medical staff to schedule Plaintiff with an orthopedist  
7 as expeditiously as possible. (Doc. 60, Ex. F., c.r. pp. 81-82.) This evidence demonstrates that  
8 between the issuance of Defendant's second level decision on September 13, 2005, and the  
9 Director's Level decision on October 26, 2005, Plaintiff had not received an orthopedic consultation.  
10 However, it does not support Plaintiff's claim that Defendant disobeyed a direct order to him and  
11 in doing so, knowingly disregarded an excessive risk to Plaintiff's health. Farmer v. Brennan, 511  
12 U.S. 825, 837, 114 S.Ct. 1970 (1994).

13 Further, Plaintiff has submitted no admissible evidence that the delay in getting the  
14 orthopedic consultation caused further harm. On March 3, 2006, an x-ray of Plaintiff's knee showed  
15 significant worsening since the x-ray previously taken on September 10, 2003, a time period of  
16 approximately two and one-half years. (Doc. 60, Ex. G, c.r. p 85.) However, the record does not  
17 provide any insight into the reason for the worsening, or demonstrate that the delay in obtaining the  
18 orthopedic consultation at issue in the complaint, which occurred between 2005 and March 2006,  
19 caused further damage. Plaintiff is not a medical expert and may not offer his own opinion that the  
20 delay led to additional, severe injury to both of Plaintiff's knees and to a general deterioration in his  
21 health.

22 In conclusion, "[d]eliberate indifference is a high legal standard." Toguchi v. Chung, 391  
23 F.3d 1051, 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware  
24 of the facts from which the inference could be drawn that a substantial risk of serious harm exists,'  
25 but that person 'must also draw the inference.'" Id. at 1057 (quoting Farmer, 511 U.S. at 837). "'If  
26 a prison official should have been aware of the risk, but was not, then the official has not violated  
27 the Eighth Amendment, no matter how severe the risk.'" Id. (quoting Gibson v. County of Washoe,  
28 Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). Further, as a prison administrator, Defendant may

1 only be held liable for the violation of Plaintiff's constitutional rights if he personally "participated  
2 in or directed the violations, or knew of the violations [committed by subordinates] and failed to act  
3 to prevent them." Taylor at 1045. Plaintiff has not presented any admissible evidence showing that  
4 Defendant was directly involved in a violation of Plaintiff's rights or knew that his subordinates were  
5 violating Plaintiff's rights but failed to intervene. Because Plaintiff has not raised any triable issues  
6 of material fact as to his Eighth Amendment medical care claim against Defendant, Defendant is  
7 entitled to judgment as a matter of law.

8 **V. Conclusion and Recommendation**

9 The Court finds that Defendant is entitled to judgment as a matter of law on Plaintiff's Eighth  
10 Amendment claim against him. Accordingly, it is HEREBY RECOMMENDED that:

- 11 1. Plaintiff's cross-motion for summary judgment, filed April 3, 2009, be  
12 DISREGARDED;
- 13 2. Defendant Davis's motion for summary judgment, filed March 20, 2009, be  
14 GRANTED; and
- 15 3. This matter be referred back to the undersigned to set for jury trial on Plaintiff's  
16 remaining claim against Defendant Smith.

17 These Findings and Recommendations will be submitted to the United States District Judge  
18 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30)**  
19 **days** after being served with these Findings and Recommendations, the parties may file written  
20 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
21 Findings and Recommendations." The parties are advised that failure to file objections within the  
22 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d  
23 1153 (9th Cir. 1991).

24 IT IS SO ORDERED.

25 **Dated: November 19, 2009**

26 /s/ Sandra M. Snyder  
27 UNITED STATES MAGISTRATE JUDGE  
28