

1 Plaintiff could nonetheless allege additional facts in support of his claims. (See ECF Nos.
2 88, 94.) Accordingly, Defendant Sundaram’s motion to dismiss was granted, the
3 complaint was dismissed in its entirety, and Plaintiff again was given leave to amend.
4 (Id.) In the findings and recommendations granting the motion to dismiss, the Court
5 stated: “Plaintiff may not add new claims against either Defendant. He may only add the
6 facts presented in his opposition related to Defendant Sundaram, and any other facts
7 that may further explain his claim against Defendant Sundaram.” (ECF No. 88 at 5
8 (emphasis in original)).

9 Plaintiff filed a third amended complaint. (ECF No. 106.) The Court dismissed the
10 third amended complaint because it was not complete in itself. (ECF No. 110.)

11 Plaintiff’s fourth amended complaint (ECF No. 111) is before the Court for
12 screening.

13 **I. Screening Requirement**

14 The Court is required to screen complaints brought by prisoners seeking relief
15 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
16 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has
17 raised claims that are legally “frivolous, malicious,” or that fail to state a claim upon which
18 relief may be granted, or that seek monetary relief from a defendant who is immune from
19 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion
20 thereof, that may have been paid, the court shall dismiss the case at any time if the court
21 determines that . . . the action or appeal . . . fails to state a claim upon which relief may
22 be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

23 **II. Pleading Standard**

24 Section 1983 “provides a cause of action for the deprivation of any rights,
25 privileges, or immunities secured by the Constitution and laws of the United States.”
26 Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
27 Section 1983 is not itself a source of substantive rights, but merely provides a method for
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1 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94
2 (1989).

3 To state a claim under § 1983, a plaintiff must allege two essential elements:
4 (1) that a right secured by the Constitution or laws of the United States was violated and
5 (2) that the alleged violation was committed by a person acting under the color of state
6 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d
7 1243, 1245 (9th Cir. 1987).

8 A complaint must contain “a short and plain statement of the claim showing that
9 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
10 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
11 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
12 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
13 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to relief
14 that is plausible on its face.” Id. Facial plausibility demands more than the mere
15 possibility that a defendant committed misconduct and, while factual allegations are
16 accepted as true, legal conclusions are not. Id. at 677-78.

17 **III. Plaintiff's Allegations**

18 Plaintiff is incarcerated at the California Substance Abuse Treatment Facility, but
19 complains of acts that occurred at Corcoran State Prison (“CSP”). He names Winfred
20 Kokor, M.D., and Jawahar Sundaram, M.D., as defendants. Briefly stated, he alleges
21 that Defendants refused to provide him with adequate pain management (morphine and
22 gabapentin), despite knowing that other medications were ineffective.

23 His allegations may be summarized essentially as follows:

24 Plaintiff's medical history involves a gunshot wound to his chest and right hand,
25 two ineffective surgeries, right elbow surgery with nerve damage, and right leg nerve
26 damage that causes mobility issues and has strained his lower back “for years.” He also
27 is a diabetic and needs to exercise, but is unable to do so without proper medication.
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1 Plaintiff received adequate pain management, including morphine and gabapentin, at
2 other prisons. Plaintiff also received adequate medication when he was seen by
3 specialists or in the E.R.

4 However, Dr. Kokor cancelled a medication order from Plaintiff's prior physician.
5 Kokor stated that he didn't treat old injuries and that his decision was based on
6 "cutbacks." Plaintiff saw Dr. Kokor several times, but he refused to prescribe opioids and
7 only prescribed nonsteroidal anti-inflammatory drugs. Both Dr. Kokor and Dr. Sunduram
8 knew that Plaintiff continued to be in pain but nonetheless refused to follow guidelines
9 for the treatment of chronic pain. Plaintiff describes these guidelines as the WHO and
10 CPHCS¹ guidelines. Instead, they prescribed Plaintiff psychiatric medications and
11 NSAIDs. Plaintiff experienced side effects from these medications.

12 Plaintiff filed two complaints. As a result, Kokor briefly changed Plaintiff's
13 medications. At one point, Kokor gave Plaintiff morphine for one day; at another point,
14 he gave Plaintiff morphine for one week.

15 On one occasion, Plaintiff experienced problems with his hand and saw Dr.
16 Sunduram. Sunduram stated that, "if the orthopedic recommends pain medication then
17 we will talk." The orthopedic specialist did recommend pain medication and Sunduram
18 prescribed Tylenol with codeine. This medication gave Plaintiff stomach problems.

19 Both Defendants failed to follow "higher reports," stated that they don't follow
20 other reports, refused to send Plaintiff to specialists, and stated that they didn't care.

21 Plaintiff seeks monetary relief and the reinstatement of his previously prescribed
22 pain medication. He also seeks a declaration that his rights were violated.

23 **IV. Analysis**

24 **A. Eighth Amendment Medical Indifference**

25 The Eighth Amendment's Cruel and Unusual Punishments Clause prohibits
26 deliberate indifference to the serious medical needs of prisoners. McGuckin v. Smith,

27 ¹ Plaintiff may intend to refer to CCHCS, or California Correctional Health Care Services. The Court is
28 unfamiliar with the acronym CPHCS and it is not defined by Plaintiff.

1 974 F.2d 1050, 1059 (9th Cir. 1992). A claim of medical indifference requires (1) a
2 serious medical need, and (2) a deliberately indifferent response by defendant. Jett v.
3 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). The deliberate indifference standard is met
4 by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible
5 medical need and (b) harm caused by the indifference. Id. Where a prisoner alleges
6 deliberate indifference based on a delay in medical treatment, the prisoner must show
7 that the delay led to further injury. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th Cir.
8 2002); McGuckin, 974 F.2d at 1060a; Shapley v. Nevada Bd. Of State Prison Comm'rs,
9 766 F.2d 404, 407 (9th Cir. 1985) (per curiam). Delay which does not cause harm is
10 insufficient to state a claim of deliberate medical indifference. Shapley, 766 F.2d at 407
11 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

12 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d
13 1051, 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be
14 aware of the facts from which the inference could be drawn that a substantial risk of
15 serious harm exists,’ but that person ‘must also draw the inference.’” Id. at 1057 (quoting
16 Farmer v. Brennan, 511 U.S. 825, 837 (1994)). “‘If a prison official should have been
17 aware of the risk, but was not, then the official has not violated the Eighth Amendment,
18 no matter how severe the risk.’” Id. (brackets omitted) (quoting Gibson, 290 F.3d at
19 1188). Mere indifference, negligence, or medical malpractice is not sufficient to support
20 the claim. Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle v.
21 Gamble, 429 U.S. 87, 105-06 (1976)). A prisoner can establish deliberate indifference by
22 showing that officials intentionally interfered with his medical treatment for reasons
23 unrelated to the prisoner’s medical needs. See Hamilton v. Endell, 981 F.2d 1062, 1066
24 (9th Cir. 1992); Estelle, 429 U.S. at 105.

25 An allegation that prison officials deliberately ignored a prisoner’s complaint about
26 the ineffective nature of prescribed pain medication and the pain being suffered as a
27 result can, in some circumstances, give rise to a constitutional claim. See Chess v.
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1 Dovey, No. CIV S-07-1767 LKK DAD P., 2011 WL 567375, at *21 (E.D. Cal. Feb. 15,
2 2011) (denying summary judgment on Eighth Amendment claim where the doctor
3 “ignored plaintiff’s complaint about the ineffective nature of the Tylenol, aspirin and other
4 medications he was being given and the pain being suffered as a result”); Franklin v.
5 Dudley, No. 2:07-cv-2259 FCD KJN P., 2010 WL 5477693, at *6 (E.D. Cal. Dec. 29,
6 2010) (existence of triable issue of fact as to whether defendant violated Eighth
7 Amendment precluded the granting of summary judgment where plaintiff was previously
8 prescribed narcotic pain medication but now was given only Motrin, Naprosyn, and
9 Tylenol under prison’s no-narcotic policy). However, a prisoner does not have a
10 constitutional right to the medication of his choice, and a mere difference of opinion
11 regarding appropriate treatment and pain medication is insufficient to give rise to a
12 constitutional claim. Toguchi, 391 F.3d at 1058; Wilson v. Borg, No. 95-15720, 1995 WL
13 571481, at *2 (9th Cir. Sept. 27, 1995); Smith v. Norrish, No. 94-16906, 1995 WL
14 267126, at *1 (9th Cir. May 5, 1995); McMican v. Lewis, No. 94-16676, 1995 WL
15 247177, at *2 (9th Cir. Apr. 27, 1995).

16 Plaintiff’s allegation that Drs. Kokor and Sunduram continued to provide
17 ineffective pain medication, despite Plaintiff’s complaints of side effects and continued
18 pain, previously was found to state an Eighth Amendment claim. (See ECF Nos. 59, 61,
19 88, 94.) The Court concludes that this claim remains cognizable.

20 **B. Other Statutory Claims**

21 Plaintiff claims that Defendants’ conducted violated a number of other statutes:
22 “1997e(E); 18 U.S.C. 831(F)(5) 1365(g)(4) 1515(A)(5) and 1864(d)(2).” The majority of
23 these provisions are wholly inapplicable in this action and, in any event, do not provide a
24 basis for a separate cause of action on the facts presented here.

25 These claims should be dismissed without further leave to amend.
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1 **C. Declaratory Relief**

2 In addition to damages, Plaintiff seeks declaratory relief, but because his claims
3 for damages necessarily entail a determination whether his rights were violated, his
4 separate request for declaratory relief is subsumed by those claims. Rhodes v.
5 Robinson, 408 F.3d 559, 566 n.8 (9th Cir. 2005). Therefore, Plaintiff's claim for
6 declaratory relief should be dismissed.

7 **D. Injunctive Relief**

8 Plaintiff seeks reinstatement of his medications which is, in effect, a request for
9 injunctive relief.

10 Plaintiff has been transferred to another institution and apparently is no longer
11 under Defendants' care. Absent facts to suggest that Plaintiff will be transferred back to
12 the custody of Defendants, any requests for injunctive relief appear to be moot. See
13 Preiser v. Newkirk, 422 U.S. 395, 402-03 (1975); Johnson v. Moore, 948 F.2d 517, 519
14 (9th Cir. 1991); see also Andrews v. Cervantes, 493 F.3d 1047, 1053 n.5 (9th Cir. 2007).

15 The Court cannot order officials at Plaintiff's new institution, who are not parties to
16 this matter, to take action. Zepeda v. United States Immigration & Naturalization Serv.,
17 753 F.2d 719, 727 (9th Cir. 1985) ("A federal court may issue an injunction if it has
18 personal jurisdiction over the parties and subject matter jurisdiction over the claim; it may
19 not attempt to determine the rights of persons not before the court.").

20 **V. Conclusion and Recommendation**

21 Plaintiff's fourth amended complaint states a cognizable Eighth Amendment claim
22 for damages against Defendants Kokor and Sunduram. It states no other cognizable
23 claims. Further leave to amend appears futile and should be denied.

24 Accordingly, it is HEREBY RECOMMENDED that:

- 25 1. Plaintiff proceed on his Eighth Amendment claims for damages against
26 Defendants Kokor and Sunduram;
- 27 2. All other claims asserted in the fourth amended complaint be DISMISSED

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with prejudice, and

- 3. Defendants Kokor and Sunduram be required to file a responsive pleading or motion within fourteen days of the order adopting these findings and recommendations.

The findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with the findings and recommendations, the parties may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." A party may respond to another party's objections by filing a response within fourteen (14) days after being served with a copy of that party's objections. The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: February 10, 2017

1st Michael J. Seng
UNITED STATES MAGISTRATE JUDGE