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6 **UNITED STATES DISTRICT COURT**
7 **EASTERN DISTRICT OF CALIFORNIA**
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9 GARY W. VANDERBUSCH,

10 Plaintiff,

11 v.

12 DR. ENENMOH, et al.,

13 Defendants.

1:13-cv-01422-LJO-EPG-PC

**FINDINGS AND RECOMMENDATIONS
TO DISMISS CLAIMS CONSISTENT
WITH MAGISTRATE JUDGE'S PRIOR
ORDER IN LIGHT OF WILLIAMS
DECISION**

(ECF Nos.16, 18)

**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS**

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19 Gary W. Vanderbusch ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma*
20 *pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff consented to
21 magistrate judge jurisdiction. (ECF No. 12.) Defendants declined to consent to magistrate
22 judge jurisdiction. (ECF No. 26.)

23 Plaintiff filed the Complaint commencing this action on September 5, 2013. (ECF No.
24 1.) The Court¹ screened the Complaint, and, finding no cognizable claims, granted Plaintiff
25 leave to amend. (ECF No. 15.) On April 6, 2015, Plaintiff filed a First Amended Complaint
26 ("FAC"). (ECF No. 16.) The Court screened the First Amended Complaint, and found a
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¹ This case was initially assigned to Magistrate Judge Gary Austin.

1 cognizable claim under the Eighth Amendment for deliberate indifference to serious medical
2 needs against Defendant Dr. J. Chokatos, but dismissed all other claims and Defendants. (ECF
3 No. 18.)

4 As described below, in light of Ninth Circuit authority, this Court is recommending that
5 the assigned district judge dismiss claims and Defendants consistent with the order by the
6 magistrate judge at the screening stage.

7 **I. WILLIAMS v. KING**

8 On November 9, 2017, the United States Court of Appeals for the Ninth Circuit held
9 that a magistrate judge lacked jurisdiction to dismiss a prisoner’s case for failure to state a
10 claim at the screening stage where the Plaintiff had consented to magistrate judge jurisdiction
11 and defendants had not yet been served. *Williams v. King*, 875 F.3d 500 (9th Cir. 2017).
12 Specifically, the Ninth Circuit held that “28 U.S.C. § 636(c)(1) requires the consent of all
13 plaintiffs and defendants named in the complaint—irrespective of service of process—before
14 jurisdiction may vest in a magistrate judge to hear and decide a civil case that a district court
15 would otherwise hear.” *Id.* at 501.

16 Here, the defendants were not served at the time the Court issued its order dismissing
17 claims and defendants, and therefore had not appeared or consented to magistrate judge
18 jurisdiction. Accordingly, the magistrate judge lacked jurisdiction to dismiss claims and
19 defendants based solely on Plaintiff’s consent.

20 In light of the holding in *Williams*, this Court will recommend to the assigned district
21 judge that he dismiss the claims and Defendants previously dismissed by this Court, for the
22 reasons provided in the Court’s screening order.

23 **II. SCREENING REQUIREMENT**

24 The Court is required to screen complaints brought by prisoners seeking relief against a
25 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
26 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
27 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
28 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §

1 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
2 paid, the court shall dismiss the case at any time if the court determines that . . . the action or
3 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. §
4 1915(e)(2)(B)(ii).

5 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
6 exceptions,” none of which applies to section 1983 actions. *Swierkiewicz v. Sorema N. A.*, 534
7 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain “a
8 short and plain statement of the claim showing that the pleader is entitled to relief” Fed. R.
9 Civ. P. 8(a). “Such a statement must simply give the defendant fair notice of what the plaintiff’s
10 claim is and the grounds upon which it rests.” *Swierkiewicz*, 534 U.S. at 512. However, “the
11 liberal pleading standard . . . applies only to a plaintiff’s factual allegations.” *Neitze v.*
12 *Williams*, 490 U.S. 319, 330 n.9 (1989). “[A] liberal interpretation of a civil rights complaint
13 may not supply essential elements of the claim that were not initially pled.” *Bruns v. Nat’l*
14 *Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting *Ivey v. Bd. of Regents*, 673
15 F.2d 266, 268 (9th Cir. 1982)).

16 **III. PLAINTIFF’S ALLEGATIONS**

17 Plaintiff alleged claims against three defendants: Dr. Enenmoh, Chief Medical Officer
18 at Corcoran State Prison; Dr. M. Rashidi, neurosurgeon at Mercy Hospital; and Dr. J. Chokatos,
19 Primary Care Physician at Coalinga. Plaintiff’s allegations generally relate to him not
20 receiving sufficient medical attention for his spinal conditions.

21 Plaintiff was in pain for cervical issues on or before January 2008. On January 29,
22 2008, while housed at SATF State Prison, Defendant Enenmoh generated a physician request
23 for services for a EMG and nerve condition study of Plaintiff’s upper right extremities. These
24 tests were performed shortly thereafter and revealed Chronic Motor Radiculopathy at the C5
25 and C6 nerve complex and carpal tunnel syndrome. A doctor recommended cervical spinal
26 surgery, but Defendant Enenmoh wrote over the request and replaced it with a request for an
27 EMG and nerve study, even though Defendant Enenmoh had already requested those tests and
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1 reviewed the results of the tests. This change in the recommendation unnecessarily prolonged
2 Plaintiff's surgery, resulting in pain.

3 In June 2009, after experiencing pain and weakness, Plaintiff was taken to Mercy
4 Hospital and a neurosurgeon recommended neck surgery between the C4 and C5 vertebral.
5 Defendant Rashidi performed surgery removing the disc between the C5-C6 and C6-C7
6 vertebral. The C4-C5 disc was not removed even though that is the area that caused the worst
7 pain. Dr. Rashidi wrote in his Post Op report that he had removed the disc between C4-C5 and
8 C6-C7, but then Dr. Rashidi wrote over the C4-C5 with what appeared to say C5-C6.

9 After returning to SATF State Prison, a neurosurgeon there noted that Plaintiff needed
10 extensive physical therapy and that the cervical spine had reversed its normal curvature.
11 Defendant Enenmoh received 3 urgent requests for physical therapy, but Defendant Enenmoh
12 refused to provide physical therapy.

13 Beginning in August 2011, Plaintiff began consulting Defendant Chokatos as his
14 primary care physician. Plaintiff's complaint provides a detailed account of Defendant
15 Chokatos repeatedly denying plaintiff treatment, accusing Plaintiff of lying, taking away
16 medical necessities, including those prescribed by a ten doctor panel to treat plaintiff's spinal
17 condition. Defendant Chokatos repeatedly wrote that Plaintiff did not require pain medication
18 and is in no pain, although Plaintiff contends this was incorrect. Defendant Chokatos told
19 Plaintiff to stop wasting his time, and that "there is nothing wrong with you."

20 When Plaintiff was eventually transferred to Lancaster State Prison in September 2013,
21 he was given a cane, lower bunk, mobility impaired accommodation, and ADA status again.

22 **IV. DELIBERATE INDIFFERENCE TO MEDICAL NEEDS**

23 The Eighth Amendment of the United States Constitution entitles prisoners to medical
24 care and is violated when a prison official acts with deliberate indifference to a prisoner's
25 serious medical needs. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012), *overruled in part*
26 *on other grounds*, *Peralta v. Dillard*, 744 F.3d 1076, 1082-83 (9th Cir. 2014); *Wilhelm v.*
27 *Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
28 2006). A prisoner alleging deliberate indifference to his serious medical needs "must show (1)

1 a serious medical need by demonstrating that failure to treat [his] condition could result in
2 further significant injury or the unnecessary and wanton infliction of pain,” and (2) that “the
3 defendant’s response to the need was deliberately indifferent.” *Wilhelm*, 680 F.3d at 1122
4 (citing *Jett*, 439 F.3d 1091, 1096 (9th Cir. 2006)). Deliberate indifference is shown by “(a) a
5 purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm
6 caused by the indifference.” *Wilhelm*, 680 F.3d at 1122 (citing *Jett*, 439 F.3d at 1096). The
7 requisite state of mind is one of subjective recklessness, which entails more than ordinary lack
8 of due care. *Snow*, 681 F.3d at 985 (citation and quotation marks omitted); *Wilhelm*, 680 F.3d
9 at 1122.

10 The Court finds that Plaintiff has stated a claim under the Eighth Amendment for
11 deliberate indifference to serious medical needs as to Defendant Chokatos. Plaintiff’s
12 allegations are detailed and generally allege a prolonged and deliberate effort to deprive
13 Plaintiff of medical care when Dr. Chokatos was Plaintiff’s primary care physician.

14 The Court finds that Plaintiff has failed to allege a claim against Defendants Enenmoh
15 and Rashidi. The Court notes the allegations that the actions of these defendants resulted in
16 lack of medical care for Plaintiff. But the Court finds that the allegations against them fail to
17 establish a mental state of deliberate indifference. Their actions appear consistent with an
18 unintentional mistake and not a deliberate attempt to thwart Plaintiff’s medical care. Unlike
19 Defendant Chokatos, Plaintiff alleges that Defendants Enenmoh and Rashidi did provide some
20 medical care to Plaintiff during their tenure and at least attempted to address Plaintiff’s spinal
21 issues.

22 V. CONCLUSION AND RECOMMENDATIONS

23 For the foregoing reasons, IT IS HEREBY RECOMMENDED that all claims and
24 defendants, except for Plaintiff’s claim against Defendant Chokatos for deliberate indifference
25 to serious medical needs in violation of the Eighth Amendment, be DISMISSED.

26 These findings and recommendations are submitted to the United States District Judge
27 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
28 (14) days after being served with these findings and recommendations, any party may file

1 written objections with the court. Such a document should be captioned “Objections to
2 Magistrate Judge's Findings and Recommendations.” Any reply to the objections shall be
3 served and filed within seven (7) days after service of the objections. The parties are advised
4 that failure to file objections within the specified time may result in the waiver of rights on
5 appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*,
6 923 F.2d 1391, 1394 (9th Cir. 1991)).

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8 IT IS SO ORDERED.

9 Dated: December 8, 2017

10 /s/ Eric P. Gray
11 UNITED STATES MAGISTRATE JUDGE
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