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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 DANA GRAY,  
12 Plaintiff,  
13 vs.  
14 ROMERO, et al.,  
15 Defendants.  
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1:13cv-01473-DAD-GSA-PC

FINDINGS AND RECOMMENDATION TO  
DISMISS DUE PROCESS CLAIM  
WITHOUT LEAVE TO AMEND,  
CONSISTENT WITH MAGISTRATE  
JUDGE'S PRIOR ORDER IN LIGHT OF  
WILLIAMS DECISION

(ECF NO. 47.)

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

22 **I. BACKGROUND**

23 Dana Gray ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* with  
24 this civil rights action pursuant to 42 U.S.C. § 1983. This case was filed on September 12,  
25 2013. (ECF No. 1.)

26 Plaintiff and Defendant Rebel have consented to magistrate judge jurisdiction. (ECF  
27 Nos. 6, 71.) The remaining Defendants declined to consent to magistrate judge jurisdiction.  
28 (ECF No. 117.)

1 The magistrate judge previously screened Plaintiff's complaint before any defendants  
2 appeared.<sup>1</sup> (ECF No. 47.) On February 4, 2016, the magistrate judge found that Plaintiff stated  
3 cognizable Eighth Amendment and negligence claims in the Fourth Amended Complaint  
4 against Defendants Mundunuri, Ziomek, Rebel, Romero, Comelli and Loadholt. (Id.) The  
5 magistrate judge dismissed Plaintiff's due process claim without leave to amend. (Id.)<sup>2</sup>

6 As described below, in light of Ninth Circuit authority, this court is recommending that  
7 the assigned district judge dismiss Plaintiff's due process claim without leave to amend,  
8 consistent with the February 4, 2016, screening order by the magistrate judge.

9 **II. WILLIAMS V. KING**

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

18 Here, Defendants were not served at the time the court issued its order dismissing the  
19 due process claim, and therefore had not appeared or consented to magistrate judge jurisdiction.

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22 <sup>1</sup> Magistrate Judge Dennis L. Beck was the assigned magistrate judge until September 8, 2016. (ECF No.  
23 127.)

24 <sup>2</sup> Subsequently, Defendants were served with process. On April 29, 2016, Defendant Rebel filed a  
25 motion to dismiss. (ECF No. 57.) On August 12, 2016, District Judge Dale A. Drozd was assigned to this case.  
26 On August 31, 2016, Defendants Mundunuri and Ziomek filed a motion for judgment on the pleadings. (ECF No.  
27 122.) On March 28, 2017, the court granted Defendant Rebel's motion to dismiss, with leave to amend; granted  
28 Defendant Mundunuri's motion for judgment on the pleadings; and granted Defendant Ziomek's motion for  
judgment on the pleadings, with leave to amend. (ECF No. 184.) On May 2, 2017, Plaintiff submitted a Fifth  
Amended Complaint, which was stricken from the record on May 4, 2017, for exceeding page limits. (ECF No.  
206.) On December 11, 2017, Plaintiff was granted leave to file a Sixth Amended Complaint within sixty days.  
(ECF No. 295.)

1 Accordingly, the magistrate judge lacked jurisdiction to dismiss Plaintiff's claims based solely  
2 on Plaintiff's consent.

3 In light of the holding in Williams, this court will recommend to the assigned district  
4 judge that he dismiss the due process claim previously dismissed by this court, for the reasons  
5 provided in the court's February 4, 2016, screening order.

### 6 **III. SCREENING REQUIREMENT**

7 The court is required to screen complaints brought by prisoners seeking relief against a  
8 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
9 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
10 legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or  
11 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §  
12 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been  
13 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
14 appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. §  
15 1915(e)(2)(B)(ii).

16 A complaint must contain "a short and plain statement of the claim showing that the  
17 pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
18 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere  
19 conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing  
20 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient  
21 factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Id. (quoting  
22 Twombly, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions  
23 are not. Id.

24 Section 1983 provides a cause of action for the violation of Plaintiff's constitutional or  
25 other federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d  
26 1087, 1092 (9th Cir. 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.  
27 2006); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff's allegations must link  
28 the actions or omissions of each named Defendant to a violation of his rights; there is no

1 *respondeat superior* liability under section 1983. Iqbal, 556 U.S. at 676-77; Simmons v.  
2 Navajo County, Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588  
3 F.3d 1218, 1235 (9th Cir. 2009); Jones, 297 F.3d at 934. Plaintiff must present factual  
4 allegations sufficient to state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v.  
5 U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct  
6 falls short of meeting this plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

#### 7 **IV. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

8 Plaintiff is currently incarcerated at the Central California Women’s Facility (CCWF) in  
9 Chowchilla, California, in the custody of the California Department of Corrections and  
10 Rehabilitation (CDCR), where the events giving rise to this action occurred. In the Fourth  
11 Amended Complaint, Plaintiff named as Defendants V. Romero, M.D.; A. Comelli, M.D.; N.  
12 Loadholt, FNP; C. Rebel, M.D.; V. Mundunuri, M.D.; and J. Ziomek, DPM.

13 Plaintiff alleges as follows in the Fourth Amended Complaint.

14 Plaintiff contends that from 1995 to 1997, she was incarcerated at Robert Presley  
15 Detention Center. During that time, she had low back pain, bilateral foot pain and pain in both  
16 heels. She was given personal supportive shoes and a right shoe heel lift to correct a leg length  
17 discrepancy. These treatment notes were in her CCWF medical chart.

18 Upon incarceration at CCWF in January 1998, an orthopedic problem was noted on  
19 Plaintiff’s Activity Chrono.

20 From 1998 through 2006, Plaintiff was seen by numerous primary care physicians  
21 (“PCPs”) and specialists for complaints of chronic low back pain and a leg length discrepancy.  
22 She was also seen for renewal of the right heel lift and various accommodations. The  
23 specialists documented Plaintiff’s conditions (leg length discrepancy and the beginning of  
24 lumber spine scoliosis), and suggested preventative care, pain management and physical  
25 therapy.

26 In 2004, an orthopedic specialist discussed the need for a spine specialist and  
27 preventative care for the beginning of the deterioration of lumbar spine scoliosis and chronic  
28 pain management of low back pain.

1 Plaintiff was seen by Defendant Ziomek, who maintained her right heel lift from April  
2 2004 to April 2005, when he discontinued it.

3 In 2006, a spine specialist discussed continued use of the right heel insert and ordered  
4 symptomatic treatment for pain management, physical therapy, Neurontin for pain and anti-  
5 inflammatory medications.

6 From 2006 through 2010, Plaintiff was under the care of Defendants Romero, Rebel  
7 and Ziomek. Plaintiff alleges that her established spine care was systematically discontinued  
8 “one medical need at a time by failing to maintain established care by first three specialists.”  
9 ECF No. 45, at 12.

10 Plaintiff was seen by Defendant Rebel for an orthopedic consultation on October 19,  
11 2006. She complained of chronic pain problems, low back pain, leg length discrepancy and  
12 lumbar scoliosis. Plaintiff was in substantial pain, but Defendant failed to conduct appropriate  
13 tests and did not review prior tests. Plaintiff told him about her problems, but he did not  
14 recommend a heel lift because he did not find a leg length discrepancy. Plaintiff alleges that  
15 Defendant Rebel knew about the recommendations of a specialist, but failed to carry them out.  
16 He was also dismissive and did not take her complaints of pain seriously. Defendant Rebel  
17 persisted in a course of treatment that was ineffective despite knowing of Plaintiff’s diagnoses  
18 and problems.

19 Plaintiff returned to Defendant Ziomek on June 10, 2008, in an attempt to get more  
20 supportive shoes. He determined that Plaintiff did not have a leg-length discrepancy and  
21 denied the chrono. Plaintiff contends that he disregarded her prior history and her complaints  
22 of pain. He failed to send her to a spine specialist, which delayed adequate medical treatment.

23 From 2006 through 2010, Plaintiff was under the care of PCP Defendant Romero. She  
24 diagnosed Plaintiff with osteoarthritis in her hips, sciatica and degenerative disc disease.  
25 Defendant did not test for, or acknowledge, Plaintiff’s lumbar scoliosis or leg length  
26 discrepancy diagnosis. Defendant ordered pain medications and appliances to assist mobility.  
27 She maintained these chronos until she “systematically began to discontinue them in a punitive  
28 manner.” ECF No. 45, at 16.

1 Plaintiff's scoliosis, pain and mobility restrictions progressively worsened from 2007 to  
2 2010, and Defendant Romero dismissed Plaintiff's complaints. Defendant's attitude and  
3 willingness to help became "undermined" every time she filed a health care appeal against her.  
4 ECF No. 45, at 16. Plaintiff contends that Defendant Romero failed to act on the  
5 recommendation of a spine specialist, in disregard of the impact on Plaintiff.

6 Defendant told Plaintiff that it was her responsibility to prove her medications and  
7 chronos were necessary, despite previous documentation since 1997. Plaintiff had to argue  
8 with Defendant Romero over treatment because she refused to acknowledge or carry out the  
9 care from prior specialists. Defendant Romero discontinued Plaintiff's mobility restrictions,  
10 without examination, on April 29, 2010. She then suddenly and completely discontinued all  
11 pain medications on May 3, 2010, and accused Plaintiff of being a malingerer and manipulating  
12 medications. Plaintiff filed several health care appeals asking to see a spine specialist, and  
13 Defendant Romero referred Plaintiff to Defendant Rebel, an orthopedist, instead. The  
14 discontinuation of Plaintiff's medication left her in severe pain.

15 Plaintiff also contends that Defendant Romero directed staff LVNs to document  
16 Plaintiff's pain level as "pain free," and note that she had unrestricted mobility.

17 Plaintiff filed several health care appeals against Defendant Romero because she  
18 refused to maintain spine specialist care and pain management. All medications, mobility  
19 restrictions and appliances were discontinued without an examination or evaluation by a spine  
20 specialist. Defendant Romero also refused to order the appropriate testing for Plaintiff's  
21 symptoms, such as an MRI.

22 Plaintiff believed that Defendant Romero was retaliating against her for filing appeals.

23 Plaintiff was evaluated by Defendant Comelli on June 16, 2010, in connection with her  
24 health care appeal against Defendant Romero. Defendant had Plaintiff fill out a pain  
25 assessment form, but did not review it because he did not ask Plaintiff any questions about it.  
26 Defendant also ignored Plaintiff when she tried to tell him about prior recommendations and  
27 her diagnoses. Defendant examined Plaintiff while she was fully-clothed and only asked her to  
28 walk a very small distance. He never examined Plaintiff for lumbar scoliosis, a leg length

1 discrepancy or pelvic asymmetry. He also failed to order testing and chose to rely on an old  
2 MRI. Defendant Comelli told Plaintiff that she did not have medical needs that required pain  
3 management, or any other medication other than Tylenol. He also told her that her pain wasn't  
4 bad enough. Plaintiff alleges that she was denied adequate pain management and lumbar spine  
5 monitoring and care. Plaintiff believes that Defendant Comelli knew of Plaintiff's conditions  
6 but purposely avoided available documentation.

7 Plaintiff was also evaluated by Defendant Loadholt on August 2, 2010, in connection  
8 with another health care appeal. Plaintiff asked for pain medications, etc., but her requests  
9 were denied. Defendant insinuated that Plaintiff was "cheeking" her medications and  
10 suggested that this was the reason her medications were discontinued. Defendant failed to take  
11 Plaintiff's history, failed to conduct an adequate physical exam, failed to carry out the  
12 recommendations of the spine specialists, and failed to order testing to validate her claims.  
13 Defendant Loadholt did not take Plaintiff's complaints of pain seriously and left her with  
14 inadequate pain relief for approximately three months.

15 On April 19, 2011, Plaintiff's neurosurgeon examined her, noting that she was in  
16 obvious pain and had no conservative pain management. He issued mobility restrictions on a  
17 permanent basis, Neurontin and a pain medication regime to possibly include narcotics.  
18 Defendant Mundunuri was Plaintiff's PCP from 2011 through 2015. She was "fairly  
19 compliant" in maintaining Plaintiff's lumbar spine care until 2015, when she broke away from  
20 working treatment modalities by refusing to fill out required paperwork to approve pain  
21 medications (Neurontin). Plaintiff had to file appeals and was left in unrelieved pain for up to  
22 41 days. ECF No. 45, at 13. Plaintiff also believes that as a punitive measure, Defendant  
23 Mundunuri began to chart improvement when, in fact, Plaintiff was deteriorating.

24 On February 3, 2015, Plaintiff was still not receiving her Neurontin because Defendant  
25 Mundunuri refused to write a new non-formulatory request, or to examine Plaintiff's spine.  
26 Plaintiff rated her pain at an eight out of ten. Defendant told Plaintiff that she had to try  
27 Plaintiff on at least three different types of psych medications before she could reorder

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1 Neurontin. Defendant did not contact Plaintiff's mental health doctor and ignored Plaintiff's  
2 complaints about the psych medications.

3 On February 23, 2015, Plaintiff's psychiatrist agreed that the risk of violence with the  
4 psych medication contradicted its use for pain management. He noted that Plaintiff had  
5 effective pain relief with Neurontin.

6 On March 10, 2015, Plaintiff's pain was an eight out of ten, and she was still not on  
7 Neurontin. Defendant Mundunuri wrote a non-formulatory request for Neurontin on March 12,  
8 2015, but it was denied on March 26, 2015, in favor of another psych medication. Defendant  
9 failed to check interactions or consult with Plaintiff's psychiatrist.

10 Defendant Mundunuri changed Plaintiff's medication on April 2, 2015, without an  
11 exam. This left her severely under medicated. Defendant denied additional medication on  
12 April 16, 2015. On April 23, 2015, Defendant Mundunuri told Plaintiff that she had done all  
13 that she could, and that Plaintiff had to deal with it.

14 On May 7, 2015, Defendant Mundunuri refused to address the status of Plaintiff's  
15 epidural, which Plaintiff learned had been denied on April 28, 2015.

16 Plaintiff's condition quickly worsened after a fall on an uneven surface on May 21,  
17 2015. The next day, Plaintiff noticed clicking in her lumbar spine. On May 28, 2015, Plaintiff  
18 told Defendant Mundunuri that she wanted to proceed with spinal fusion. Defendant told her  
19 that she did not meet the criteria for spinal surgery and refused a wheelchair. On June 4, 2015,  
20 Defendant refused to send Plaintiff back to the neurosurgeon for evaluation for spinal fusion.

21 Plaintiff filed several appeals to return to the neurosurgeon. Defendant Mundunuri  
22 accused Plaintiff of changing her mind constantly about having lumbar spinal fusion, but  
23 Plaintiff was only following the recommended conservative treatment since surgery was a risk.  
24 Plaintiff believes that Defendant Mundunuri is attempting to undermine care by writing  
25 deceptive progress notes.

26 Plaintiff's Neurontin was restarted on June 19, 2015.

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1 On August 10, 2015, Plaintiff alleges that Defendant Mundunuri performed an  
2 inappropriate unclothed exam. Plaintiff asked for a lower lumber spine exam, but Defendant  
3 refused.

4 On August 13, 2015, Defendant Mundunuri threatened to disrupt her pain medication,  
5 insinuating that Plaintiff was drug-seeking.

6 Plaintiff's current mobility affects her daily living. She was using a walker, but  
7 received a wheelchair on August 28, 2015.

## 8 **V. ANALYSIS**

### 9 **1. Eighth Amendment- Deliberate Indifference**

10 While the Eighth Amendment of the United States Constitution entitles Plaintiff to  
11 medical care, the Eighth Amendment is violated only when a prison official acts with deliberate  
12 indifference to an inmate's serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th  
13 Cir. 2012); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d  
14 1091, 1096 (9th Cir. 2006). Plaintiff "must show (1) a serious medical need by demonstrating  
15 that failure to treat [his] condition could result in further significant injury or the unnecessary  
16 and wanton infliction of pain," and (2) that "the defendant's response to the need was  
17 deliberately indifferent." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d 1091, 1096 (9th Cir.  
18 2006)). Deliberate indifference is shown by "(a) a purposeful act or failure to respond to a  
19 prisoner's pain or possible medical need, and (b) harm caused by the indifference." Wilhelm,  
20 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective  
21 recklessness, which entails more than ordinary lack of due care. Snow, 681 F.3d at 985  
22 (citation and quotation marks omitted); Wilhelm, 680 F.3d at 1122.

23 As the Court found in the prior screening order, Plaintiff's allegations are sufficient in  
24 the Fourth Amended Complaint, at the pleading stage, to state an Eighth Amendment claim  
25 against Defendants Ziomek, Rebel, Romero, Comelli, Mundunuri and Loadholt.

### 26 **2. State Law Claims**

27 To the extent that Plaintiff seeks to pursue a negligence claim under California law, the  
28 California Tort Claims Act requires exhaustion of those claims with the state Victim

1 Compensation and Government Claims Board, and Plaintiff is required to specifically allege  
2 compliance in her complaint. Cal. Gov't Code §§ 905, 911.2(a), 945.4 & 950.2; Mangold v.  
3 California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir.1995). Failure to demonstrate  
4 such compliance constitutes a failure to state a cause of action and will result in the dismissal of  
5 state law claims. State of California v. Superior Court (Bodde), 32 Cal.4th 1234, 1240 (2004).

6 Plaintiff's Fourth Amended Complaint alleges proper compliance with administrative  
7 remedies. Plaintiff therefore states a negligence claim in the Fourth Amended Complaint  
8 against Defendants Ziomek, Rebel, Romero, Comelli, Mundunuri and Loadholt.

9 **3. Due Process**

10 If a constitutional claim is covered by a specific constitutional provision, the claim must  
11 be analyzed under the standard appropriate to that specific provision, not under the rubric of  
12 substantive due process. County of Sacramento v. Lewis, 523 U.S. 833, 843, 118 S.Ct. 1708  
13 (1998) (quotation marks and citation omitted).

14 Plaintiff's medical claims are properly analyzed under the Eighth Amendment and she  
15 does not state a due process claim. This cannot be cured by amendment.

16 **VI. CONCLUSION AND RECOMMENDATION**

17 For the foregoing reasons, IT IS HEREBY RECOMMENDED that Plaintiff's due  
18 process claim in the Fourth Amended Complaint be dismissed without leave to amend.

19 These findings and recommendation are submitted to the United States District Judge  
20 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen  
21 (14) days of the date of service of these findings and recommendations, any party may file  
22 written objections with the court. Such a document should be captioned "Objections to  
23 Magistrate Judge's Findings and Recommendation." Any reply to the objections shall be

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1 served and filed within seven (7) days after service of the objections. The parties are advised  
2 that failure to file objections within the specified time may result in the waiver of rights on  
3 appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan,  
4 923 F.2d 1391, 1394 (9th Cir. 1991)).

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6 IT IS SO ORDERED.

7 Dated: December 13, 2017

/s/ Gary S. Austin  
8 UNITED STATES MAGISTRATE JUDGE

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