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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 RODERICK BRYAN RUSSELL,

12 Plaintiff,

13 v.

14 DR. K. TOOR, et al.,

15 Defendants.

Case No. 1:15-cv-00255-SAB-PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSING CERTAIN
DEFENDANTS AND DIRECTING CLERK
OF COURT TO RANDOMLY ASSIGN
ACTION TO A DISTRICT JUDGE

(ECF No. 15, 16)

FOURTEEN DAY DEADLINE

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17
18 Plaintiff is a former state prisoner proceeding pro se and in forma pauperis pursuant to 42
19 U.S.C. § 1983. Plaintiff has consented to magistrate judge jurisdiction pursuant to 28 U.S.C. §
20 636(c) ON March 2, 2015. (ECF No. 4.) To date Defendants have not consented or declined to
21 United States Magistrate Judge jurisdiction.

22 On November 7, 2016, the Court screened Plaintiff's third amended complaint and found
23 that it stated a cognizable claim against Defendant K. Toor for deliberate indifference in
24 violation of the Eighth Amendment. (ECF No. 16.) The Court dismissed Plaintiff's Eighth
25 Amendment claims against Defendants N.P. Woodward, Dr. Shwe, and Dr. Malakkla failure to
26 state a claim. (Id.) The Court indicated that jurisdiction existed under 28 U.S.C. § 636(c) based
27 on the fact that Plaintiff had consented to Magistrate Judge jurisdiction and no other parties had
28 yet appeared. (Id.)

1 On November 9, 2017, the Ninth Circuit Court of Appeals ruled that 28 U.S.C. §
2 636(c)(1) requires the consent of all named plaintiffs and defendants, even those not served with
3 process, before jurisdiction may vest in a Magistrate Judge to dispose of a civil case. Williams v.
4 King, ___ F.3d ___, Case No. 15-15259, 2017 WL 5180205, *3 (9th Cir. Nov. 9, 2017).
5 Accordingly, the Court did not have jurisdiction to dismiss the above-described claims in its
6 November 7, 2016 order.

7 Based upon the foregoing, the undersigned will now recommend to the District Judge that
8 this case continue to proceed only on Plaintiff’s cognizable claims, and that the claims described
9 above be dismissed, for the reasons explained herein.

10 **I.**

11 **SCREENING REQUIREMENT**

12 The Court is required to screen complaints brought by prisoners seeking relief against a
13 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
14 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
15 legally “frivolous or malicious,” that “fail to state a claim on which relief may be granted,” or
16 that “seek monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
17 1915(e)(2)(B).

18 A complaint must contain “a short and plain statement of the claim showing that the
19 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
20 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
21 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(citing Bell
22 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate
23 that each defendant personally participated in the deprivation of Plaintiff’s rights. Jones v.
24 Williams, 297 F.3d 930, 934 (9th Cir.2002).

25 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
26 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d
27 1113, 1121 (9th Cir. 2012)(citations omitted). To survive screening, Plaintiff’s claims must be
28 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer

1 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss
2 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant
3 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s
4 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572
5 F.3d at 969.

6 II.

7 COMPLAINT ALLEGATIONS

8 Plaintiff alleges that his civil rights were violated by Defendant Dr. Toor on October 19,
9 2012. (Third Am. Compl. 3, ECF No. 15.) Plaintiff saw Dr. Toor for a routine medical slip
10 request and described pain and beginning stages of loss of mobility, restlessness due to aching
11 pain, quality of life issues, pain in his left collarbone, depression, and anxiety. (Id.) Dr. Toor
12 minimized and ignored his pain. (Id.) Plaintiff’s request for an MRI or CT scan was denied
13 because Dr. Toor found the tests to not be warranted. (Id.) Plaintiff showed Dr. Toor that his
14 collar bone was making an extremely painful popping and clicking sound. (Id. at 3-4.) The
15 noise from his left “sterno-clavicular” bone was audible and noticeable without physical contact
16 to the area. (Id. at 4.) Plaintiff was removed from his medication which dramatically increased
17 his pain. (Id.) Plaintiff received no further treatment. (Id.)

18 Plaintiff alleges that Nurse Practitioner (“N.P.”) B. Woodward violated his Eighth
19 Amendment rights by “failing to use practical judgment while preparing [his] treatment plan(s).”
20 (Id. at 4.) On every visit in response to a medical request, Plaintiff showed N.P. Woodward
21 where the pain in his collar bone was. (Id.) N.P. Woodward examined Plaintiff and rotated both
22 arms to see the difference between the sides and heard the clicking and popping sound. (Id.) N.P.
23 Woodward determined that no treatment could be done because it was not warranted. (Id.) N.P.
24 Woodward needed proof of Plaintiff’s pain to treat his injury. (Id.) Since Plaintiff did not have
25 an M.R.I or CT scan to show a positive treatment plan for his collar bone his work duties became
26 harder and more painful to perform. (Id.) His range of motion has decreased dramatically and it
27 is painful to even shower with his left arm. (Id.) He has pain in his elbow and is starting to have
28 pain in his shoulder. (Id.) Plaintiff can no longer sleep on his left side due to pain. (Id.)

1 Plaintiff alleges that Dr. Shwe violated his rights under the Eighth Amendment by failing
2 to provide the results of his C.T. to the orthopedic specialist he was authorized to see. (Id. at 5.)
3 Since the orthopedic specialist did not have a CT scan he was only able to do the same range of
4 motion tests that N.P. Woodward performed. (Id.) He reproduced the same clicking and
5 popping sound. (Id.) Dr. Shew did not order physical therapy after Plaintiff’s consultation with
6 the orthopedic specialist stating that there was not enough time before Plaintiff was paroled to
7 warrant further treatment or therapy. (Id.)

8 Plaintiff contends that Chief Physician N. Malakkla violated his Eighth Amendment
9 rights by disregarding an inmate appeal partially granted on November 28, 2015. (Id. at 6.) On
10 April 15, 2015, Plaintiff generated another appeal grieving not having received timely treatment
11 because the granted appeal was missing. (Id.) Plaintiff provided a copy of the partially approved
12 appeal. (Id.) On May 28, 2015, Plaintiff was seen by an orthopedic specialist. (Id.) Due to the
13 amount of time that elapsed his shoulder continued to worsen, he had more frequent headaches,
14 and his range of motion decreased with pain to his rotator cuff and he had complete freezing of
15 his shoulder with no mobility. (Id. at 6-7.)

16 Plaintiff is seeking compensatory and punitive damages against Defendants Toor,
17 Woodward, Malakkla, and Shwe.

18 **III.**
19 **DISCUSSION**

20 A prisoner’s claim of inadequate medical care does not constitute cruel and unusual
21 punishment in violation of the Eighth Amendment unless the mistreatment rises to the level of
22 “deliberate indifference to serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
23 2006)(quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two part test for deliberate
24 indifference requires Plaintiff to show (1) “a ‘serious medical need’ by demonstrating that failure
25 to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and
26 wanton infliction of pain,’” and (2) “the defendant’s response to the need was deliberately
27 indifferent.” Jett, 439 F.3d at 1096. A defendant does not act in a deliberately indifferent
28 manner unless the defendant “knows of and disregards an excessive risk to inmate health or

1 safety.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). “Deliberate indifference is a high legal
2 standard,” Simmons v. Navajo County Ariz., 609 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v.
3 Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and is shown where there was “a purposeful act or
4 failure to respond to a prisoner’s pain or possible medical need” and the indifference caused
5 harm. Jett, 439 F.3d at 1096.

6 In applying this standard, the Ninth Circuit has held that before it can be said that a
7 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
8 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
9 cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)(citing
10 Estelle, 429 U.S. at 105-106). “[A] complaint that a physician has been negligent in diagnosing
11 or treating a medical condition does not state a valid claim of medical mistreatment under the
12 Eighth Amendment. Medical malpractice does not become a constitutional violation merely
13 because the victim is a prisoner.” Estelle, 429 U.S. at 106; see also Anderson v. County of Kern,
14 45 F.3d 1310, 1316 (9th Cir. 1995). Even gross negligence is insufficient to establish deliberate
15 indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.
16 1990).

17 Liberally construed, Plaintiff’s allegations that he complained to Dr. Toor of his pain and
18 loss of mobility and his complaints were ignored, and that Dr. Toor removed his pain medication
19 are sufficient to state a cognizable claim for deliberate indifference.

20 However, Plaintiff fails to include sufficient factual detail to allow the Court to
21 reasonably infer that any other named defendant was aware that Plaintiff had a serious medical
22 need and failed to adequately respond. Iqbal, 556 U.S. at 678-79. While Plaintiff alleges that
23 N.P. Woodward conducted range of motion testing and could hear the clicking and popping
24 sounds, he does not allege any facts to indicate that he informed N.P. Woodward that he was
25 having significant pain or loss of mobility. Nor does the complaint contain any allegations that
26 the range of motion testing showed any decreased range of motion to place N.P. Woodward on
27 notice that he had a serious medical need. See Wilhelm, 680 F.3d at 1122 (quoting McGuckin v.
28 Smith, 974 F.2d 1050, 1059–60 (9th Cir.1992)) (“The existence of an injury that a reasonable

1 doctor or patient would find important and worthy of comment or treatment; the presence of a
2 medical condition that significantly affects an individual's daily activities; or the existence of
3 chronic and substantial pain are examples of indications that a prisoner has a 'serious' need for
4 medical treatment.”). Even if N.P. Woodward was aware that his shoulder was making clicking
5 and popping sounds that is insufficient to show she was aware that Plaintiff had a serious
6 medical need and failed to adequately respond. Plaintiff has failed to state a cognizable claim
7 against N.P. Woodward.

8 Similarly, Plaintiff alleges that Dr. Shew failed to provide the results of his C.T. scan to
9 the orthopedic specialist and failed to order physical therapy stating there was not enough time to
10 warrant treatment because Plaintiff was due to be paroled. To the extent that the orthopedist did
11 not have C.T. results, Plaintiff has failed to allege any facts that Dr. Shwe was aware that
12 Plaintiff had a shoulder problem, had a CT scan, or was going to be seen by a specialist. Further,
13 while Plaintiff alleges that Dr. Shwe did not order physical therapy, he has not alleged any facts
14 by which the Court could conclude that Dr. Shwe was aware that Plaintiff had a need for
15 physical therapy. Plaintiff's mere disagreement with diagnosis or treatment does not support a
16 claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Plaintiff
17 fails to include sufficient factual detail to allow the Court to reasonably infer that Dr. Shwe was
18 aware that Plaintiff had a serious medical need and failed to adequately respond. Iqbal, 556 U.S.
19 at 678-79.

20 Finally, Plaintiff alleges that Dr. Malakkla who is a Chief Physician disregarded his
21 partially granted inmate appeal. However, government officials may not be held liable for the
22 actions of their subordinates under a theory of respondeat superior. Iqbal, 556 U.S. at 676.
23 Since a government official cannot be held liable under a theory of vicarious liability for section
24 1983 actions, Plaintiff must plead that the official has violated the Constitution through his own
25 individual actions. Iqbal, 556 U.S. at 677; OSU Student Alliance v. Ray, 699 F.3d 1053, 1069
26 (9th Cir. 2012). Plaintiff appears to be alleging that Dr. Malakkla is liable due to his position as
27 Chief Physician. However, Plaintiff alleges no facts by which the Court can infer that Dr.
28 Malakkla was aware that Plaintiff's appeal was granted and failed to adequately respond.

1 Plaintiff alleges that on April 15, 2015, he generated another appeal because his granted appeal
2 was not on file. To the extent that the Court could assume that Dr. Malakkla was responsible for
3 ensuring that Plaintiff was seen by a specialist, Plaintiff was seen by an orthopedic specialist
4 approximately six weeks after he grieved the missing appeal. Therefore, it appears that Plaintiff
5 was provided with an appointment to see a specialist shortly after bringing the missing appeal to
6 the attention of prison officials. Plaintiff fails to state a cognizable claim against Dr. Malakkla.

7 Under Rule 15(a) of the Federal Rules of Civil Procedure, as relevant here, Plaintiff may
8 amend only by leave of the court or by written consent of the adverse party, and leave shall be
9 freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). In determining whether to grant
10 leave to amend, the court considers five factors: “(1) bad faith; (2) undue delay; (3) prejudice to
11 the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously
12 amended his complaint.” Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004).

13 In this instance, Plaintiff has been granted leave to file two amended complaints to
14 correct the deficiencies in his prior complaints. In each instance, the Court provided Plaintiff
15 with guidance on the necessary corrections to be made to state a cognizable claim. Plaintiff has
16 now filed two amended complaints against these same defendants and has been unable to cure
17 the deficiencies in his claims against N.P. Woodward, Dr. Shwe, and Dr. Malakkla. The Court
18 finds that Plaintiff is unable to cure the deficiencies in the claims against these defendants and it
19 would therefore be futile to afford Plaintiff further opportunity to file an amended complaint.
20 Accordingly, the Court recommends that Plaintiff’s claims against N.P. Woodward, Dr. Shwe,
21 and Dr. Malakkla be dismissed without leave to amend.

22 IV.

23 CONCLUSION AND RECOMMENDATION

24 The Court finds that Plaintiff has stated a cognizable claim against Defendant Toor but
25 has not stated a claim against any other named defendant. Plaintiff has previously been provided
26 with the opportunity to file an amended complaint, with guidance from the Court, to correct the
27 pleading deficiencies. In light of the fact that the Court previously notified Plaintiff of the
28 deficiencies and granted leave to amend (see ECF Nos. 10, 14), further amendment is not

1 warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d
2 1446, 1448-1449 (9th Cir. 1987).

3 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 4 1. This action proceed against Defendant K. Toor for deliberate indifference in
5 violation of the Eighth Amendment;
- 6 2. Plaintiff's Eighth Amendment claims against Defendants N.P. Woodward, Dr.
7 Shwe, and Dr. Malakkla be dismissed without leave to amend for failure to state a
8 claim;
- 9 3. Defendants N.P. Woodward, Dr. Shwe, and Dr. Malakkla be dismissed from this
10 action; and
- 11 4. The Clerk of the Court is directed to randomly assign this action to a district
12 judge.

13 This Findings and Recommendations will be submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen**
15 **(14) days** after being served with this Findings and Recommendations, the parties may file
16 written objections with the Court. The document should be captioned "Objections to Magistrate
17 Judge's Findings and Recommendations." The parties are advised that failure to file objections
18 within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler,
19 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.
20 1991)).

21 IT IS SO ORDERED.

22 Dated: November 30, 2017

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24 _____
25 UNITED STATES MAGISTRATE JUDGE
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