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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JONATHAN KIRKELIE,)	Case No.: 1:15-cv-00735-DAD-SAB (PC)
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	RECOMMENDING DISMISSAL OF CERTAIN
v.)	CLAIMS AND DEFENDANTS
)	
C.O. THISSELL, et al.,)	[ECF Nos. 17, 20]
)	
Defendant.)	
)	

Plaintiff Jonathan Kirkelie is a prisoner in the custody of the Federal Bureau of Prisons (“BOP”).

Plaintiff consented to United States Magistrate Judge jurisdiction on May 28, 2015. Defendants have not consented or declined to United State Magistrate Judge jurisdiction.

On January 25, 2016, the Court found that Plaintiff’s second amended complaint stated a cognizable Fourth and Eighth Amendment claim against Defendant Thissell and a cognizable Eighth Amendment claim for failure to protect against Defendants Smith, Madttavi, Masterson, Knoll, and Does 1 and 2. (ECF No. 20.) The Court dismissed all other claims and Defendants from the action for failure to state a cognizable claim for relief. (Id.) The Court indicated that jurisdiction existed under 28 U.S.C. § 636(c) based on the fact that Plaintiff had consented to Magistrate Judge jurisdiction and no other parties had yet appeared. (Id.)

1 On November 9, 2017, the Ninth Circuit Court of Appeals ruled that 28 U.S.C. § 636(c)(1)
2 requires the consent of all named plaintiffs and defendants, even those not served with process, before
3 jurisdiction may vest in a Magistrate Judge to dispose of a civil case. Williams v. King, __ F.3d __,
4 Case No. 15-15259, 2017 WL 5180205, *3 (9th Cir. Nov. 9, 2017). Accordingly, the Court did not
5 have jurisdiction to dismiss the claims and Defendants in its January 25, 2016 order.

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

9 **I.**

10 **SCREENING REQUIREMENT**

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

16 A complaint must contain “a short and plain statement of the claim showing that the pleader is
17 entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
18 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
19 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
20 550 U.S. 544, 555 (2007)). Plaintiff must demonstrate that each named defendant personally
21 participated in the deprivation of his rights. Iqbal, 556 U.S. at 676-677; Simmons v. Navajo County,
22 Ariz., 609 F.3d 1011, 1020-1021 (9th Cir. 2010).

23 Prisoners proceeding pro se in civil rights actions are still entitled to have their pleadings
24 liberally construed and to have any doubt resolved in their favor, but the pleading standard is now
25 higher, Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted), and to survive
26 screening, Plaintiff’s claims must be facially plausible, which requires sufficient factual detail to allow
27 the Court to reasonably infer that each named defendant is liable for the misconduct alleged. Iqbal,
28 556 U.S. at 678-79; Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). The “sheer

1 possibility that a defendant has acted unlawfully” is not sufficient, and “facts that are ‘merely
2 consistent with’ a defendant’s liability” falls short of satisfying the plausibility standard. Iqbal, 556
3 U.S. at 678; Moss, 572 F.3d at 969.

4 II.

5 COMPLAINT ALLEGATIONS

6 On September 14, 2014, during dinner at the Federal Correctional Institution of Mendota,
7 California, Plaintiff was exiting his assigned job in the chow hall on the “A” side at sometime between
8 5:00 and 6:00 p.m. Correctional officer Thissell pulled Plaintiff to the side to conduct a pat-down
9 search of Plaintiff’s person.

10 Thissell’s pat-down began from the back, roaming his hands all over Plaintiff’s upper body.
11 Thissell then grabbed and cupped Plaintiff’s genitals in an aggressive manner. Thissell then
12 whispered in Plaintiff’s ear, “You don’t feel like a Mexican.” Thissell then searched up and down
13 each leg of Plaintiff and then stepped back. Plaintiff took a step forward, believing the search was
14 concluded, at which time and without warning Thissell from behind aggressively grabbed Plaintiff’s
15 genitals again causing another surge of excruciating pain to Plaintiff.

16 The sexual assault was witnessed by several inmates and officer Alvarez. Alvarez was
17 standing directly to Thissell’s right and witnessed the sexual assault. Thissell’s conduct was so
18 outrageous that the Plaintiff and others watching saw Alvarez’s jaw fall open.

19 After the assault, Plaintiff was in excruciating pain, embarrassed and in shock and walked back
20 to his housing unit with inmate Owens, who also witnessed the sexual assault by Thissell. Upon
21 arrival at his housing unit and with word of the assault by Thissell being spread by other inmates and
22 staff who were witnesses, Plaintiff was informed of his right to file a complaint under the Prison Rape
23 Elimination Act (“PREA”). Plaintiff filed the complaint and waited to be contacted by prison
24 officials.

25 On or about September 16, 2014, Plaintiff sought help from the prison’s psychological services
26 department. Unfortunately, Plaintiff was turned away unseen because no one was available.
27 Approximately one week later, and with no response from Plaintiff’s PREA complaint and no action
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1 by prison officials, Plaintiff used the prison's e-mail system to report the Thissell sexual assault to
2 Defendant Warden Gill.

3 On or about September 25, 2014, Plaintiff was called to the Lieutenant's office and was
4 interviewed by Lieutenant Smith and another unknown Lieutenant regarding the sexual assault by
5 Thissell. During the interview, Plaintiff was asked to give an account of the sexual assault. Plaintiff
6 explained in detail what occurred and that officer Alvarez witnessed the entire incident, along with
7 several inmates. Smith concluded the interview by stating that Thissell was new and improperly
8 trained and that the incident was "no big deal."

9 Smith then sent Plaintiff to the prison's medical facility to be examined. Upon arrival, Plaintiff
10 was met by two nurse staff members (a female and a male). Plaintiff, while in the exam room, was
11 asked to pull down his pants for his genitals to be examined. Plaintiff requested twice for the female
12 to leave the room. Each time, the female nurse refused. After the third request, the female nurse
13 refused to leave but turned her back while the examination was conducted.

14 From approximately September 26, 2014 to October 6, 2014, Plaintiff met with Defendant
15 Psychologist Madttavi on four separate visits.

16 During the first session, Plaintiff was asked by Madttavi after explaining the sexual assault by
17 Thissell to write down the "pros" and "cons" of reporting the sexual assault within five minutes.
18 Plaintiff complied with the request by Madttavi who read the list and threw it in the trash in front of
19 Plaintiff.

20 During the second session, Plaintiff explained he was having trouble sleeping and was anxious,
21 among other things, which was interfering with his relationship with his girlfriend. Plaintiff discussed
22 his feelings toward Thissell and the sexual assault. Madttavi concluded the session and gave Plaintiff
23 a pamphlet entitled "Steps to Progressive Muscle Relaxation," and Madttavi told Plaintiff that his
24 feelings were normal and to read the pamphlet.

25 During the third session, Plaintiff discussed his relationship with his girlfriend and family.
26 There was no discussion regarding the sexual assault by Thissell.

27 During the fourth session, Plaintiff inquired about any action taken by the prison regarding the
28 sexual assault by Thissell. Plaintiff expressed more concern as to Thissell working in the Plaintiff's

1 housing unit. Plaintiff further explained how the verbal sexual harassment and pat-down searches
2 were becoming everyday events by Thissell. Plaintiff explained that he felt Thissell was retaliating
3 against him and felt uncomfortable with Thissella assigned to his housing unit. Madttavi concluded
4 the session by telling Plaintiff there was nothing he could do to help him, and Plaintiff's only option
5 was to proceed through the administrative remedy process.

6 On or about October 12, 2014, Plaintiff returned to the housing unit, at which time he was
7 shocked to see Thissell working in the unit. Upon entering the unit, Plaintiff was singled out of
8 several other inmates for a pat-down search of Plaintiff's person by Thissell. While Thissell
9 conducted the pat-down of Plaintiff, Thissell was laughing at Plaintiff after noticing that Plaintiff was
10 trembling and obviously afraid of Thissell.

11 Thissell's hand movements were odd, as the pat-down was more along the lines of being
12 rubbed down than a search. Thissell made several sexual comments to the Plaintiff that he had a nice
13 body and that his skin was soft. Throughout Thissell's shift, he stared at Plaintiff and made
14 inappropriate comments.

15 On October 15, 2015, Plaintiff while working his assigned prison job spoke to Defendant
16 Captain (last name unknown) and the same unknown Lieutenant who was in the September 25, 2014,
17 interview. Plaintiff explained the sexual assault to the Captain and also stated that Thissell was
18 continuing to make sexual remarks and single him out for pat-down searches in retaliation. The
19 unknown Lieutenant, in front of the Captain, told Plaintiff that he would make sure that Thissell was
20 put in a different housing unit.

21 On October 16, 2015, Plaintiff went to see Madttavi about Thissell working the housing unit.
22 Plaintiff explained that he was intimidated by Thissell and he was uncomfortable by the sexual
23 remarks being made to him by Thissell. Plaintiff pleaded that Madttavi do something to help.
24 Madttavi told Plaintiff that he could not help him and he had to go through the administrative remedy
25 process.

26 On or about October 19 through 25, 2014, Thissell was assigned to work the Plaintiff's
27 housing unit. Every day that Thissell worked the Plaintiff's housing unit, he was singled out for a pat-
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1 down search and Thissell told Plaintiff “You’re looking good!” During the pat-down searches,
2 Thissell ran his hands in a creepy masochistic manner while making sexual comments to Plaintiff.

3 On one occasion, Thissell whispered in Plaintiff’s ear while rubbing Plaintiff’s shoulders
4 “You’re losing weight and you look good, Mr. Kirkelie!” While performing a pat-down search of
5 Plaintiff, Thissell would often move both hands up and down each leg pushing to the Plaintiff’s
6 genitals and commented “You’re no happy to see me, Mr. Kirkelie?”

7 On October 25, 2014, Thissell, while working in Plaintiff’s housing unit, singled out Plaintiff
8 for a pat-down search. Thissell made sexual comments to the Plaintiff while he roamed his hands over
9 his chest, cupping and kneading Plaintiff’s body. Thissell noticed that Plaintiff was extremely upset
10 and proceeded to search Plaintiff’s locker tossing things around while laughing at Plaintiff.

11 Plaintiff called his father, Jeff Kirkelia and explained the situation. Plaintiff’s father informed
12 Plaintiff he would call the prison to address the sexual assaults by Thissell. Plaintiff’s father called
13 Lieutenant Masterson.

14 On November 10 and 14, 2014, Thissell, while assigned to Plaintiff’s housing unit, singled out
15 Plaintiff for a pat-down search. During the pat-down, Thissell’s hands roamed Plaintiff’s body in an
16 inappropriate manner, and Thissell made more sexual comments about Plaintiff’s body and asked why
17 he was so tense. Thissell’s hands went up and down each leg, pausing while pressing the Plaintiff’s
18 genitals.

19 On November 16, 2014, Plaintiff was notified by his counselor that the initial request for an
20 administrative remedy against Thissell was “lost.” Plaintiff then began the process all over again by
21 submitting a new administrative remedy.

22 In early to mid-January 2015, Plaintiff through the prison e-mail system, contacted the
23 Associate Warden of Operations and inquired about the status of his complaint against Thissell. The
24 Associate Warden informed Plaintiff that there was no record of Plaintiff’s complaint.

25 On January 23, 2015, Plaintiff met with a prison staff member who presented him with his BP-
26 9 (administrative remedy request) one month late. The unknown prison official requested that
27 Plaintiff back-date the log book in order to make the late BP-9 look as if it were in compliance and
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1 timely. Plaintiff refused and demanded the prison official put the correct date in the log book
2 reflecting the actual date the Plaintiff received the untimely BP-9 response from the Warden.

3 On March 5, 2015, Plaintiff met with A. Riofrio, who presented Plaintiff with a late BP-10
4 response. A. Riofrio told Plaintiff, "it was not her fault that the BP-10 was late. It must have been
5 misplaced in another unit."

6 Sometime in late March or early April 2015, Thissell was back working in Plaintiff's housing
7 unit. During all of the times that Thissell worked in Plaintiff's housing unit, he singled out Plaintiff for
8 a pat-down search and then shook down his locker. During the pat-downs, Thissell moved his hands
9 in an unprofessional manner and made sexual comments about Plaintiff's body.

10 On or about April 4, 2015, Plaintiff sent through the prison e-mail system to the new Warden,
11 Zuniga, and asked why Thissell is constantly put back in the Plaintiff's housing unit with knowledge
12 that Plaintiff had filed a sexual assault claim against him.

13 On or about April 7, 2015, Plaintiff was summoned to see Lieutenant Knoll. Knoll told
14 Plaintiff that their investigation was over and "Knoll will put Thissell anywhere on this compound he
15 wants."

16 On May 15, 2015, Plaintiff filed a civil rights complaint with this Court.

17 Sometime thereafter, Plaintiff's locker was shaken down by an unknown correctional officer or
18 officers. The only items missing from Plaintiff's locker were Plaintiff's note and a calendar which
19 documented everything that took place involving the sexual assault by Thissell, including the BP-9,
20 Bp-10 and BP-11 inmate appeals.

21 On or about May 28, 2015, Plaintiff received a 300-series write up for having a clothesline in
22 his living area. The write up was made by A. Riofrio, a prison secretary who the Plaintiff named in
23 his various requests for administrative remedy and the same individual who requested that Plaintiff
24 falsify the uncorrected dated document.

25 On or about July 28, 2015, Plaintiff was transferred to the Federal Correctional Institution at
26 Terminal Island, California, where he is currently incarcerated.

27 Sometime between April and June 2015, Plaintiff spoke to inmate Jamie Hernandez-Samudio
28 (Fed. Reg. No. 11629-010), who told Plaintiff that he was also sexually assaulted by Thissell and

1 when he informed Lieutenants Smith and Knoll, he was locked in the staff bathroom for over one
2 hour. Smith and Knoll later threatened inmate Hernandez-Samudio with placement in the Special
3 Housing Unit to be “buried there.”

4 III.

5 DISCUSSION

6 A. Fourth Amendment

7 The Fourth Amendment to the United States Constitution guarantees freedom from
8 unreasonable search and seizure. U.S. Const. amend. IV. The touchstone for all issues under the
9 Fourth Amendment is reasonableness. “The test of reasonableness under the Fourth Amendment is
10 not capable of precise definition or mechanical application. Bell v. Wolfish, 441 U.S. 520, 559
11 (1979). Reasonableness is determined by examining the totality of the circumstances. Id.

12 The determination of reasonableness of a search “requires a balancing of the need for the
13 particular search against the invasion of personal rights that the search entails.” Id. at 559-560. The
14 scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it,
15 and the place in which it is conducted must all be considered. Id. at 559; Bull v. City and County of
16 San Francisco, 595 F.3d 964, 972 (9th Cir. 2010).

17 Based on the allegations in the complaints and viewed in the light most favorable to Plaintiff,
18 Plaintiff states a cognizable claim against Defendant officer Thissell under the Fourth Amendment.

19 B. Eighth Amendment

20 A prison official violates the Eighth Amendment’s proscription of cruel and unusual
21 punishment where he or she deprives a prisoner of the minimal civilized measure of life’s necessities
22 with a “sufficiently culpable state of mind.” Farmer v. Brennan, 511 U.S. 825, 834 (1994). “After
23 incarceration, only the unnecessary and wanton infliction of pain constitutes cruel and unusual
24 punishment forbidden by the Eighth Amendment.” Jordan v. Gardner, 986 F.2d 1521, 1525 (9th Cir.
25 1993) (en banc) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986) (internal quotation marks and
26 indications of alteration omitted).

27 Although inmates, have a “limited right to bodily privacy,” Michenfelder v. Sumner, 860 F.2d
28 328, 333 (9th Cir. 1988), the Eighth Amendment protects inmates from repetitive and harassing

1 searches, and from sexual abuse, Schwenk v. Hartford, 204 F.3d 1187, 1196-1197 (9th Cir. 2000).
2 The Ninth Circuit has recognized that digital rectal searches are highly intrusive and humiliating.
3 Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1998). Prisoners thus have a clearly established right
4 to be free from digital rectal searches conducted for purposes unrelated to legitimate penological
5 concerns. Tribble, 860 F.2d at 325-327. A digital rectal search may violate the Eighth Amendment if
6 it is not reasonably related to any legitimate penological concerns. Id. at 325 n. 6. The Ninth Circuit
7 has also held that, under limited circumstances, a bodily search involving intimate touching may inflict
8 psychological pain sufficient to implicate the Eighth Amendment even in the absence of sexual
9 assault. In Jordan v. Gardner, the Ninth Circuit held that a prison policy requiring male guards to
10 conduct frequent random clothed body searches of female inmates constituted cruel and unusual
11 punishment when the policy was adopted despite the warnings of prison psychologists that the
12 intrusive searches would severely traumatize inmates, many of whom had pre-incarceration histories
13 of sexual abuse by men. Jordan, 986 F.2d at 1523-1531. By contrast, the Ninth Circuit has also found
14 that “the exchange of verbal insults between inmates and guards is a constant, daily ritual observed in
15 this nation’s prisons” of which “we do not approve,” but which do not violate the Eighth Amendment.
16 Somers v. Thurman, 109 F.3d 614, 622 (9th Cir. 1997) (internal quotation marks omitted). Thus, not
17 “every malevolent touch by a prison guard gives rise to a federal cause of action.” Hudson, 503 U.S.
18 at 9; Calhoun v. DeTella, 319 F.3d 936, 939 (9th Cir. 2003).

19 Based on Plaintiff’s allegations in the second amended complaint, Plaintiff states a cognizable
20 claim under the Eighth Amendment for cruel and unusual punishment against Defendant Thissell.

21 **C. Failure to Protect**

22 The Eighth Amendment protects prisoners from inhumane methods of punishment and from
23 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006).
24 Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with
25 food, clothing, shelter, sanitation, medical care, and personal safety. Farmer v. Brennan, 511 U.S.
26 825, 832-33 (1994) (quotations omitted). However, prison officials are liable under the Eighth
27 Amendment only if they demonstrate deliberate indifference to conditions posing a substantial risk of
28 serious harm to an inmate; and it is well settled that deliberate indifference occurs when an official

1 acted or failed to act despite his knowledge of a substantial risk of serious harm. Farmer, 511 U.S. at
2 834, 841 (quotations omitted); Clem, 566 F.3d at 1181; Hearns, 413 F.3d at 1040.

3 Based on Plaintiff's allegations in the second amended complaint, Plaintiff states a cognizable
4 claim for failure to protect against Defendants Smith, Captain (unknown last name "Doe 1"),
5 Madttavi, Masterson, Knoll, and Lieutenant (unknown name "Doe 2"). However, Plaintiff fails to
6 state a cognizable claim against Defendants Gill, Roupe, and Connors as there are insufficient
7 allegations to link any of these individuals to affirmative actions or omissions for liability under
8 Bivens.

9 **D. Supervisory Liability**

10 As noted above, to state a claim under Bivens, Plaintiff must demonstrate that each defendant
11 personally participated in the deprivation of his rights. There is no respondeat superior liability, and
12 each defendant is only liable for his or her own misconduct. Iqbal, 566 U.S. at 676-677. A defendant
13 cannot be held liable solely on the basis of supervisory responsibility or position. See Terrell v.
14 Brewer, 935 F.2d 1015, 1018 (9th Cir. 1990) (respondeat superior theory of liability inapplicable to
15 Bivens actions).

16 Plaintiff's second amended complaint is devoid of any allegations supporting the existence of a
17 supervisory liability claim against Warden Gill or Zunich. The only basis for such a claim would be
18 respondeat superior, which is precluded under Bivens.

19 **E. Conspiracy**

20 An actionable Bivens conspiracy claim requires (1) the existence of an express or implied
21 agreement among the defendants to deprive the plaintiff of his constitutional rights, and (2) an actual
22 deprivation of those rights resulting from that agreement. Ting v. United States, 927 F.2d 1504, 1512
23 (9th Cir. 1991).

24 There are insufficient facts from which the Court can reasonable infer an agreement to violate
25 Plaintiff's constitutional rights under the Fourth and Eighth Amendments. The facts in Plaintiff's
26 second amended complaint demonstrate only that Defendant Thissell, himself, subjected Plaintiff to
27 sexual assaults while working in Plaintiff's housing unit.

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1 IV.

2 RECOMMENDATIONS

3 Plaintiff's complaint states a cognizable claim against Defendant Thissell for violations under
4 the Fourth and Eighth Amendments, and against Defendants Smith, Madttavi, Masterson, Knoll and
5 Does 1 and 2 for failure to protect in violation of the Eighth Amendment. However, Plaintiff fails to
6 state a cognizable claim against Defendants Gill, Roupe, Conners, Zurich and Does 3 through 10 or a
7 supervisory and conspiracy claim.

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

9 1. For screening purposes only, this action proceed against Defendant Thissell for
10 violations under the Fourth and Eighth Amendments, and against Defendants Smith, Madttavi,
11 Masterson, Knoll and Does 1 and 2 for failure to protect in violation of the Eighth Amendment; and

12 2. All other claims and Defendants be dismissed from the action for failure to state a
13 cognizable claim for relief.

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

21
22 IT IS SO ORDERED.

23 Dated: November 29, 2017

24 
25 _____
26 UNITED STATES MAGISTRATE JUDGE
27
28