



1 indifference and dismissing all remaining Defendants and claims. Because the Court finds that  
2 Plaintiff's first amended complaint states a cognizable claim against Defendant Mason as well as the  
3 other Defendants, the Court will recommend this action proceed on Plaintiff's deliberate indifference  
4 claim only and dismiss all remaining claims and Defendants.

## 5 II.

### 6 SCREENING REQUIREMENT

7 The Court is required to screen Plaintiff's first amended complaint and dismiss the case, in  
8 whole or in part, if the Court determines it fails to state a claim upon which relief may be granted. 28  
9 U.S.C. § 1915(e)(2)(B)(ii). A complaint must contain "a short and plain statement of the claim  
10 showing that the pleader is entitled to relief..." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
11 are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere  
12 conclusory statements, do not suffice," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
13 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)), and courts "are not required to indulge  
14 unwarranted inferences," Doe I v. Walmart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal  
15 quotation marks and citation omitted). While factual allegations are accepted as true, legal  
16 conclusions are not. Iqbal, 556 U.S. at 678.

17 Pro se litigants are entitled to have their pleadings liberally construed and to have any doubt  
18 resolved in their favor, Wilhelm v. Rotman, 680 F.3d 1113, 1121-23 (9th Cir. 2012); Hebbe v. Pliler,  
19 627 F.3d 338, 342 (9th Cir. 2010), but Plaintiff's claims must be facially plausible to survive  
20 screening, which requires sufficient factual detail to allow the Court to reasonably infer that each  
21 named defendant is liable for the misconduct alleged, Iqbal, 556 U.S. at 678; Moss v. U.S. Secret  
22 Service, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully is  
23 not sufficient, and mere consistency with liability falls short of satisfying the plausibility standard.  
24 Iqbal, 556 U.S. at 678.

## 25 III.

### 26 COMPLAINT ALLEGATIONS

27 Plaintiff names Correctional Officer Mason, Nurse Practitioner Ruslan Lozovoy, Chief  
28 Medical Executive Sherry Lopez, Licensed Vocational Nurses E. Vitto and E. Ramirez, Registered

1 Nurses Orlando Regino and H. Ducusin, Supervising Nurse C. Triesch, and Does 1 through 10, as  
2 Defendants.

3 Prior to July 11, 2015, Defendants Lopez and Triesch instituted a practice and policy at Kern  
4 Valley State Prison (KVSP) that medical personnel, including the named Defendants, were to treat  
5 every inmate complaining of pain as faking his symptoms in order to gain pain medication to get high.  
6 Further, no inmate complaint of pain was to be treated unless and until the inmate was able to prove to  
7 medical personnel and the named Defendants that their symptoms were real and in need of medical  
8 attention.

9 On July 11, 2015, shortly after lunch, Plaintiff began to feel ill and began to experience  
10 abdominal pain. Plaintiff informed his cellmate that he was not feeling well and was going to lie  
11 down and rest. Plaintiff attempted to rest but the pain continued to increase. At approximately 3:00  
12 p.m., the pain had worsened and Plaintiff began to vomit.

13 As the evening progressed, Plaintiff continued to vomit and his abdominal pain had become  
14 severe. Plaintiff could do nothing but lie on his bunk in severe pain.

15 On July 12, 2015, at approximately 5:00 a.m., Plaintiff's cellmate flagged down Defendant  
16 officer Mason. He explained to Defendant Mason that Plaintiff was in medical distress and needed  
17 immediate medical attention. Defendant Mason asked Plaintiff what was wrong, and Plaintiff who  
18 was on his bunk, curled in a ball, holding his abdomen, stated "I have severe abdominal pain and have  
19 been vomiting since the afternoon. I need medical attention." Defendant Mason stated that Plaintiff  
20 would have to wait until 6:00 a.m. because there was nothing she could do until then, but she would  
21 notify the medical department. Plaintiff objected stating, "I'm in severe pain. I need medical help  
22 right now." Defendant Mason stated, "You'll have to wait until 6:00 a.m.," and walked away.

23 Defendant Mason deliberately delayed summoning medical assistance for Plaintiff because her  
24 shift was ending at 6:00 a.m. and she did not want to do the paperwork for a medical emergency.  
25 Defendant Mason failed to take steps to ensure that Plaintiff receive the needed medical treatment,  
26 despite her knowledge of Plaintiff's extreme medical distress.

27 On July 12, 2015, at approximately 6:10 a.m., Plaintiff still had not been called to the medical  
28 department, so Plaintiff's cellmate called the control booth officer and informed him that Plaintiff was

1 in extreme medical distress and that Defendant Mason was supposed to have informed second watch  
2 officers of Plaintiff's need for emergency medical attention. The control booth officer stated he was  
3 unaware of Plaintiff's medical emergency and would contact the medical department.

4 At approximately 6:30 a.m., when medical personnel still had not arrived, Plaintiff's cellmate  
5 again called to the control booth officer. At that time, he informed Plaintiff that Defendant Ramirez  
6 was aware of Plaintiff's complaint and would arrive shortly as he was "loading his cart" with that days  
7 medications.

8 Prior to arriving at Plaintiff's housing unit, Defendant Ramirez, operating under the practice  
9 and policy of Defendants Lopez and Triesch, had already formed the opinion that Plaintiff was faking  
10 his symptoms in order to receive pain medication, and not really experiencing a medical emergency,

11 At approximately 6:50 a.m., Defendant Ramirez arrived at Plaintiff's housing unit. Defendant  
12 Ramirez did not go to Plaintiff's cell, instead he required Plaintiff to go to him to be examined.  
13 Plaintiff's cell door was open, but he was unable to stand erect or walk without assistance due to  
14 severe abdominal pain. Plaintiff's cellmate helped Plaintiff walk down the stairs, across the dayroom  
15 and out to the rotunda, where Defendant Ramirez was sitting. Defendant Ramirez took Plaintiff's vital  
16 signs and asked Plaintiff to describe his symptoms. Plaintiff informed Defendant Ramirez that he had  
17 been experiencing severe abdominal pain since the previous day and that the pain had become worse  
18 overnight. In addition to the abdominal pain, Plaintiff had been vomiting a foul smelling substance.  
19 Defendant Ramirez asked Plaintiff if he could walk to the clinic, and Plaintiff told him that would not  
20 be possible.

21 Instead of altering additional medical personnel of Plaintiff's medical emergency, Defendant  
22 Ramirez sent Plaintiff's cellmate to the clinic to retrieve a wheelchair. Once Plaintiff's cellmate  
23 returned with the wheelchair, Defendant Ramirez informed Plaintiff's cellmate to dress Plaintiff and  
24 push him to the clinic, which Plaintiff's cellmate did. Defendant Ramirez abandoned his medical duty  
25 to Plaintiff, even after noting that Plaintiff appeared to be in extreme medical distress, because he  
26 believed Plaintiff was faking his symptoms.

27 Prior to arriving at the medical clinic, Defendants Ducusin, Lozovoy and Doe, operating under  
28 the practice and policy of Defendants Lopez and Triesch, had already formed the opinion that Plaintiff

1 was faking his symptoms in order to receive pain medication, and was not really experiencing a  
2 medical emergency.

3       Upon arrival at the clinic, Plaintiff was met by Defendant Ducusin, who proceeded to take  
4 Plaintiff's vitals and asked Plaintiff to describe his symptoms. Plaintiff explained that his symptoms  
5 began the previous day and had become severe overnight. Plaintiff informed Defendant Ducusin that  
6 he could not hold anything down, was vomiting a foul smelling substance, could not have a bowel  
7 movement, and the pain and cramps were severe and located in Plaintiff's lower abdomen. Defendant  
8 Ducusin made a telephone call to Defendant Lozovoy. Plaintiff could clearly hear Defendant Ducusin  
9 recite Plaintiff's vitals and symptoms to Defendant Lozovoy. Defendant Lozovoy, without ever  
10 examining or talking to Plaintiff, simply ordered Defendant Ducusin to give Plaintiff IV fluids and a  
11 25mg injection of Phenergen to combat Plaintiff's nausea and vomiting. Plaintiff continued to  
12 complain to Defendant Ducusin that his abdominal pain was becoming unbearable. Defendant  
13 Ducusin told Plaintiff, "Lozovoy said your vital signs are fine so there is nothing seriously wrong with  
14 you." Plaintiff continued to plead with Defendant Ducusin and begged for medical assistance. All of  
15 Plaintiff's pleas were ignored because Defendants Ducusin and Lozovoy believed Plaintiff was faking  
16 his symptoms to get pain medication.

17       Defendant Ducusin then ordered Plaintiff to return to his housing unit. Defendant Ducusin  
18 informed Plaintiff he would be "seen in the morning on RN line and doctor's line in approximately  
19 five (5) days." Plaintiff continued to complain to Defendant Ducusin that he was experiencing severe  
20 abdominal pain. Defendant Ducusin stated, "I don't believe you," and had Plaintiff escorted back to  
21 his housing unit.

22       Defendant Lozovoy failed to order tests that were suggested by the elemental and classic  
23 symptoms of a lower bowel blockage, i.e. persistent severe lower abdominal pain, vomiting, nausea  
24 and inability to have a bowel movement.

25       After being returned to his cell, Plaintiff could do nothing but lie in bed, in severe pain. At  
26 approximately 6:30 p.m., Plaintiff notified unit staff that he was in medical distress, with severe  
27 abdominal pain and required emergency medical assistance. Plaintiff's floor officer called medical  
28 and advised Defendant Vitto and Defendant Doe of Plaintiff's complaint and he was unable to walk.

1 Prior to arriving at Plaintiff's housing unit, Defendant Vitto and Defendant Doe, operating under the  
2 practice and policy of Defendants Lopez and Triesch, had already formed the opinion that Plaintiff  
3 was faking his symptoms in order to receive pain medication, and was not experiencing a medical  
4 emergency.

5 At approximately 6:35 p.m., Defendant Vitto and Defendant Doe arrived at Plaintiff's housing  
6 unit. Defendant Vitto and Defendant Doe refused to go to Plaintiff's cell and would only see Plaintiff  
7 if he could walk to them. Plaintiff, with the assistance of his cellmate, walked down the stairs to the  
8 wheelchair, and was wheeled out to the rotunda to be seen by Defendants. Plaintiff informed  
9 Defendants Vitto and Defendant Doe that he had been experiencing severe abdominal pain and  
10 vomiting since July 11, 2015, and that the pain and vomiting was continuing to get worse. Defendant  
11 Vitto took Plaintiff's vitals and made a telephone call to Defendant Doe. Defendant Vitto then  
12 informed Plaintiff that Defendant Regino said, "You've already been checked out today and there is  
13 nothing seriously wrong with you." Defendant Doe then stated to Plaintiff, "[t]he level of pain you  
14 claim to be experiencing is not reflected in your vitals." Plaintiff continued to explain to Defendants  
15 Vitto and Doe that the pain and vomiting were real and Defendant Vitto stated, "[y]ou are not getting  
16 any more pain medication." Plaintiff stated, "I'm not on ANY pain medication." Defendants Vitto  
17 and Doe both began to laugh and Defendant Doe stated, "[n]or will you be." After Plaintiff continued  
18 to request for assistance, Defendant Vitto stated, "You'll be seen by the doctor in the morning."

19 As Plaintiff arrived back at his cell, he realized he had left his ID card in the rotunda.  
20 Plaintiff's cellmate said he would go and get it. As Plaintiff's cellmate entered the rotunda he  
21 encountered Defendants Vitto and Doe, who were waiting to exit the building, Defendants Vitto and  
22 Doe were laughing and joking about Plaintiff and how he was not a "very good actor" and that he  
23 shouldn't look for any "acad[e]my awards" in the future.

24 Over the next approximate seventeen hours, Plaintiff could do nothing but lie in bed in extreme  
25 pain and suffering. Plaintiff could not sleep, eat or have a bowel movement. Plaintiff's severe  
26 abdominal pain continued to worsen with each passing hour and Plaintiff continued to vomit a foul  
27 smelling substance.

1           On July 13, 2015, at approximately 11:00 a.m., when Plaintiff had still not been called to  
2 medical, Plaintiff contacted his control booth officer and informed him that Plaintiff was in need of  
3 emergency medical care. Plaintiff was informed, by the control booth officer, that he had called  
4 medical and Plaintiff would be seen in medical, if he could walk to the clinic. As Plaintiff was in need  
5 of medical assistance, Plaintiff forced himself to walk over to the clinic to be seen by medical  
6 personnel.

7           Once in the clinic, Plaintiff was examined by Registered Nurse H. Tuhin, who took Plaintiff's  
8 vital signs, listened to his abdomen and asked Plaintiff to describe his symptoms. After Plaintiff  
9 described his symptoms to Tuhin, he telephoned Dr. Dileo, who immediately ordered an x-ray of  
10 Plaintiff. Following the x-ray, Plaintiff was diagnosed with a lower bowel blockage and immediately  
11 transported to the outside hospital for further medical treatment. Once at the hospital, it was  
12 determined that Plaintiff would require surgical intervention to correct the bowel blockage. Plaintiff  
13 underwent surgery and remained in the hospital for seven days until he returned to Kern Valley State  
14 Prison on July 20, 2015.

15           On October 1, 2015, Plaintiff was interviewed by Defendant Triesch pursuant to Plaintiff's  
16 grievance concerning Defendants failure to provide Plaintiff appropriate medical treatment.  
17 Defendant Triesch stated to Plaintiff that, her staff (Defendants) were not deliberately indifferent to  
18 Plaintiff's serious medical needs and responded appropriately to Plaintiff's medical complaint.[""]  
19 Plaintiff explained to Defendant Triesch that Defendants Ramirez, Vitto, Lozovoy, Ducusin, Regino,  
20 and Doe did not respond appropriately to Plaintiff's medical complaint because they believed Plaintiff  
21 was faking his symptoms in order to receive pain medication. Defendant Triesch stated, "When you  
22 complained of abdominal pain, they gave you Phenergan for the pain." Plaintiff stated, "That's not  
23 true, the Phenergan was not for pain, it was to keep me from vomiting." Defendant Triesch admitted  
24 the Phenergan was for vomiting, but then stated, "Keeping you from vomiting helps with the pain."  
25 Plaintiff responded, "Not in my case as I could not defecate and had been vomiting a greenish/brown  
26 foul smelling substance, so when I couldn't vomit, it caused my pain and suffering to worsen and my  
27 abdom[en] to swell."  
28

1 IV.

2 DISCUSSION

3 A. Deliberate Indifference to Serious Medical Need

4 While the Eighth Amendment of the United States Constitution entitles Plaintiff to medical  
5 care, the Eighth Amendment is violated only when a prison official acts with deliberate indifference to  
6 an inmate's serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), overruled  
7 in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir. 2014); Wilhelm v.  
8 Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).  
9 Plaintiff "must show (1) a serious medical need by demonstrating that failure to treat [his] condition  
10 could result in further significant injury or the unnecessary and wanton infliction of pain," and (2) that  
11 "the defendant's response to the need was deliberately indifferent." Wilhelm, 680 F.3d at 1122 (citing  
12 Jett, 439 F.3d at 1096). Deliberate indifference is shown by "(a) a purposeful act or failure to respond  
13 to a prisoner's pain or possible medical need, and (b) harm caused by the indifference." Wilhelm, 680  
14 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective  
15 recklessness, which entails more than ordinary lack of due care. Snow, 681 F.3d at 985 (citation and  
16 quotation marks omitted); Wilhelm, 680 F.3d at 1122.

17 "A difference of opinion between a physician and the prisoner – or between medical  
18 professionals – concerning what medical care is appropriate does not amount to deliberate  
19 indifference." Snow v. McDaniel, 681 F.3d at 987 (citing Sanchez v. Vild, 891 F.2d 240, 242 (9th  
20 Cir. 1989)), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir.  
21 2014); Wilhelm v. Rotman, 680 F.3d at 1122-23 (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th  
22 Cir. 1986)). Rather, Plaintiff "must show that the course of treatment the doctors chose was medically  
23 unacceptable under the circumstances and that the defendants chose this course in conscious disregard  
24 of an excessive risk to [his] health." Snow, 681 F.3d at 988 (citing Jackson, 90 F.3d at 332) (internal  
25 quotation marks omitted).

26 Based on Plaintiff's allegations in the first amended complaint, Plaintiff states a cognizable  
27 claim for deliberate indifference against Defendants R. Lozovoy, S. Lopez, E. Vitto, E. Ramirez, H.  
28 Ducusin, C. Triesch, Mason, and one Doe Defendant; however, Plaintiff fails to state a cognizable



1 claim against Defendant Regino and Does 2 through 9, and those Defendants should be dismissed  
2 from the action. As in Plaintiff’s original complaint, with regard to Defendant Regino Plaintiff alleges  
3 only that he stated, “You’ve already been checked out today and there is nothing seriously wrong with  
4 you.” In addition, with the exception of one Doe Defendant, Plaintiff fails to link any of the Doe  
5 Defendants to alleged actions or inactions that give rise to the alleged constitutional violation.  
6 Accordingly, Plaintiff fails to state a cognizable claim against Defendant Regino and Doe Defendants  
7 2 through 9.

8 **B. Denial of Inmate Appeal**

9 To the extent Plaintiff attempts to seek relief against Defendant C. Triesch for denial of his  
10 inmate appeal, such claim does not give rise to a claim for relief.

11 “The Fourteenth Amendment’s Due Process Clause protects persons against deprivations of  
12 life, liberty, or property; and those who seek to invoke its procedural protection must establish that one  
13 of these interests is at stake.” Wilkinson v. Austin, 545 U.S. 209, 221 (2005). Plaintiff does not a  
14 have protected liberty interest in the processing his appeals, and therefore, he cannot pursue a claim  
15 for denial of due process with respect to the handling or resolution of his appeals. Ramirez v. Galaza,  
16 334 F.3d 850, 860 (9th Cir. 2003) (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988)).

17 Generally, denying a prisoner’s administrative appeal does not cause or contribute to the  
18 underlying violation. George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007) (quotation marks omitted).  
19 However, because prison administrators cannot willfully turn a blind eye to constitutional violations  
20 being committed by subordinates, Jett v. Penner, 439 F.3d at 1098, there may be limited circumstances  
21 in which those involved in reviewing an inmate appeal can be held liable under section 1983. That  
22 circumstance has not been presented here.

23 In this instance, Defendant Triesch denied Plaintiff’s inmate appeal about a medical problem  
24 that already had occurred and been resolved, thus, there is no constitutional violation alleged.  
25 Accordingly, Plaintiff fails to state a cognizable claim against Defendant Triesch for denial of his  
26 inmate appeal.

27 ///

28 ///



1           3.       Plaintiff's request for declaratory judgment and transfer to Mule Creek State Prison be  
2 dismissed; and

3           4.       The matter be referred back to the undersigned for initiation of service of process.

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

11  
12 IT IS SO ORDERED.

13 Dated: April 4, 2017



UNITED STATES MAGISTRATE JUDGE