

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TROY MAGARRELL,

Plaintiff,

No. CIV S-04-2634-LKK-DAD P

vs.

P. MANGIS, M.D., et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding through counsel with a civil rights action seeking relief under 42 U.S.C. § 1983. This matter is before the court on defendant Roche’s motion for summary judgment brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff has filed an opposition to the motion, and defendant has filed a reply. On July 31, 2009, the undersigned heard oral arguments in this matter.

BACKGROUND

Plaintiff is proceeding on his original complaint against defendants Drs. Roche and Mangis.¹ Therein, he alleges as follows. On October 29, 2003, after three days of

¹ Defendant Dr. Roche is represented by Stanzler Funderburk and Castellon, LLP. Defendant Dr. Mangis is represented by the Office of the Attorney General. Counsel on behalf of defendant Dr. Mangis has also filed a motion for summary judgment, which the court addresses in separate findings and recommendations.

1 complaining of pain due to kidney stones, plaintiff received a shot containing a pain killer at
2 High Desert State Prison's ("HDSP") Correctional Treatment Center. Plaintiff went to the yard
3 clinic the next morning for a follow-up visit with Dr. Mangis. Plaintiff overheard the defendant
4 comment that all inmates are drug addicts and that plaintiff merely wanted a shot of dope.
5 (Compl. at 3.)

6 At the clinic, plaintiff submitted a urine sample, which contained trace amounts of
7 blood. He also underwent a blood-sugar test. Plaintiff then met with Dr. Mangis who asked him
8 a series of questions, which allegedly had nothing to do with kidney stones. Plaintiff told the
9 doctor to look at his medical file to understand his history with kidney stones, but Dr. Mangis
10 responded by suggesting that plaintiff was only interested in drugs. Dr. Mangis also accused
11 plaintiff of adding blood to his urine sample. (Compl. at 3-4 & Ex. C.)

12 Dr. Mangis told plaintiff to lay down on the examining table and bring his knees
13 up and then squeezed plaintiff's left kidney area. Plaintiff tried to get away and yelled for him to
14 stop, but Dr. Mangis then squeezed his right kidney area. When plaintiff broke away, Dr. Mangis
15 said "See you don't have kidney stones" and ordered correctional officers to take plaintiff back to
16 his cell. Plaintiff alleges that he had difficulty urinating thereafter and began submitting sick-call
17 slips. (Compl. at 4.)

18 On November 10, 2003, when plaintiff saw him a second time, Dr. Mangis
19 refused to open plaintiff's medical file and instead touched plaintiff's back with his finger and
20 proclaimed him stone-free. According to plaintiff, his medical file contained 198 pages
21 documenting his history with kidney stones, dating as far back as 1992, when he was incarcerated
22 at the California Youth Authority. (Compl. at 4 & Ex. D.)

23 Plaintiff submitted an inmate appeal and explained that he had a kidney stone that
24 was stuck and was causing him pain and hindering his urine flow. He asked for a diagnostic test,
25 such as an x-ray or an ultrasound. He also asked to see Dr. Lajeunesse, a urologist familiar with
26 his case, to remove the kidney stone. Plaintiff did not receive a reply, so he re-submitted the

1 appeal on November 25, 2003. Again, he did not receive a reply, so he re-submitted the appeal
2 on December 10, 2003, and labeled it an “emergency appeal.” Defendant Dr. Roche, however,
3 refused to treat it as an emergency appeal. (Compl. at 5 & Ex. F.)

4 On January 16, 2004, plaintiff met with Dr. James regarding his inmate appeal.
5 Dr. James denied the appeal with defendant Roche’s approval. Plaintiff then submitted
6 additional sick-call slips and sent his appeal to the next level. Subsequently, plaintiff showed Dr.
7 James his medical file, including a 2002 operative report by Dr. Lajeunesse stating that he would
8 need to be followed closely and that he had a significant risk for recurrence of his stricture. Dr.
9 James then agreed to send plaintiff to see Dr. Lajeunesse. (Compl. at 5 & Exs. F, G.)

10 In early May 2004, plaintiff passed a kidney stone. On May 10, 2004, he saw Dr.
11 Lajeunesse and provided her with the stone for analysis. He also told her about his seven
12 consecutive months of suffering pain. Dr. Lajeunesse told correctional officers to take plaintiff
13 across town to the emergency room to have an emergency CT scan. The scan showed that he had
14 four additional kidney stones, so Dr. Lajeunesse scheduled him for surgery. (Compl. at 6 & Exs.
15 H, I, J.)

16 On June 16, 2004, plaintiff was in extreme pain and could not urinate. He could
17 only drip blood from his penis. Correctional officers emergency transported him to Northern
18 Nevada Medical Center where he passed another kidney stone. On July 22, 2004, plaintiff saw
19 Dr. Lajeunesse, and she requested an “urgent” operation for him. (Compl. at 6-7 & Exs. K, L.)

20 On July 23, 2004, plaintiff was in extreme pain again and went to HDSP’s
21 Correctional Treatment Center. Plaintiff alleges that defendant Dr. Roche refused to treat him
22 and told the nurse to send him back to administrative segregation. Dr. Roche said “We already
23 know you have kidney stones. Your [sic] scheduled for surgery soon.” On August 3, 2004,
24 plaintiff underwent surgery. During the procedure, the doctor removed or treated eight kidney
25 stones. (Compl. at 7-8 & Ex. L.)

26 ////

1 Plaintiff claims that defendants Dr. Mangis and Dr. Roche have been deliberately
2 indifferent to his medical needs in violation of the Eighth Amendment. Plaintiff requests
3 declaratory relief, injunctive relief, and damages. (Compl. at 11-12.)

4 **SUMMARY JUDGMENT STANDARDS UNDER RULE 56**

5 Summary judgment is appropriate when it is demonstrated that there exists “no
6 genuine issue as to any material fact and that the moving party is entitled to a judgment as a
7 matter of law.” Fed. R. Civ. P. 56(c).

8 Under summary judgment practice, the moving party
9 always bears the initial responsibility of informing the district court
10 of the basis for its motion, and identifying those portions of “the
11 pleadings, depositions, answers to interrogatories, and admissions
12 on file, together with the affidavits, if any,” which it believes
13 demonstrate the absence of a genuine issue of material fact.

14 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). “[W]here the
15 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary
16 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers
17 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,
18 after adequate time for discovery and upon motion, against a party who fails to make a showing
19 sufficient to establish the existence of an element essential to that party’s case, and on which that
20 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof
21 concerning an essential element of the nonmoving party’s case necessarily renders all other facts
22 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as
23 whatever is before the district court demonstrates that the standard for entry of summary
24 judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

25 If the moving party meets its initial responsibility, the burden then shifts to the
26 opposing party to establish that a genuine issue as to any material fact actually does exist. See
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to
establish the existence of this factual dispute, the opposing party may not rely upon the

1 allegations or denials of its pleadings but is required to tender evidence of specific facts in the
2 form of affidavits, and/or admissible discovery material, in support of its contention that the
3 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party
4 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome
5 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
6 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.
7 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could
8 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,
9 1436 (9th Cir. 1987).

10 In the endeavor to establish the existence of a factual dispute, the opposing party
11 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
12 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
13 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
14 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
15 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory
16 committee’s note on 1963 amendments).

17 In resolving the summary judgment motion, the court examines the pleadings,
18 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
19 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,
20 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the
21 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.
22 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
23 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
24 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.
25 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
26 show that there is some metaphysical doubt as to the material facts Where the record taken

1 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
2 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

3 **OTHER APPLICABLE LEGAL STANDARDS**

4 I. Civil Rights Act Pursuant to 42 U.S.C. § 1983

5 The Civil Rights Act under which this action was filed provides as follows:

6 Every person who, under color of [state law] . . . subjects, or causes
7 to be subjected, any citizen of the United States . . . to the
8 deprivation of any rights, privileges, or immunities secured by the
9 Constitution . . . shall be liable to the party injured in an action at
10 law, suit in equity, or other proper proceeding for redress.

11 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the
12 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See
13 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362
14 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the
15 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
16 omits to perform an act which he is legally required to do that causes the deprivation of which
17 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

18 Moreover, supervisory personnel are generally not liable under § 1983 for the
19 actions of their employees under a theory of respondeat superior and, therefore, when a named
20 defendant holds a supervisory position, the causal link between him and the claimed
21 constitutional violation must be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862
22 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory
23 allegations concerning the involvement of official personnel in civil rights violations are not
24 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

25 II. The Eighth Amendment and Inadequate Medical Care

26 The unnecessary and wanton infliction of pain constitutes cruel and unusual
punishment prohibited by the Eighth Amendment. Whitley v. Albers, 475 U.S. 312, 319 (1986);
Ingraham v. Wright, 430 U.S. 651, 670 (1977); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

1 In order to prevail on a claim of cruel and unusual punishment, a prisoner must allege and prove
2 that objectively he suffered a sufficiently serious deprivation and that subjectively prison officials
3 acted with deliberate indifference in allowing or causing the deprivation to occur. Wilson v.
4 Seiter, 501 U.S. 294, 298-99 (1991).

5 Where a prisoner’s Eighth Amendment claims arise in the context of medical
6 care, the prisoner must allege and prove “acts or omissions sufficiently harmful to evidence
7 deliberate indifference to serious medical needs.” Estelle, 429 U.S. at 106. An Eighth
8 Amendment medical claim has two elements: “the seriousness of the prisoner’s medical need
9 and the nature of the defendant’s response to that need.” McGuckin v. Smith, 974 F.2d 1050,
10 1059 (9th Cir. 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133
11 (9th Cir. 1997) (en banc).

12 A medical need is serious “if the failure to treat the prisoner’s condition could
13 result in further significant injury or the ‘unnecessary and wanton infliction of pain.’”
14 McGuckin, 974 F.2d at 1059 (quoting Estelle v. Gamble, 429 U.S. at 104). Indications of a
15 serious medical need include “the presence of a medical condition that significantly affects an
16 individual’s daily activities.” Id. at 1059-60. By establishing the existence of a serious medical
17 need, a prisoner satisfies the objective requirement for proving an Eighth Amendment violation.
18 Farmer v. Brennan, 511 U.S. 825, 834 (1994).

19 If a prisoner establishes the existence of a serious medical need, he must then
20 show that prison officials responded to the serious medical need with deliberate indifference.
21 Farmer, 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials
22 deny, delay, or intentionally interfere with medical treatment, or may be shown by the way in
23 which prison officials provide medical care. Hutchinson v. United States, 838 F.2d 390, 393-94
24 (9th Cir. 1988). Before it can be said that a prisoner’s civil rights have been abridged with regard
25 to medical care, however, “the indifference to his medical needs must be substantial. Mere
26 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”

1 Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at
2 105-06). See also Toguchi v. Soon Hwang Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (“Mere
3 negligence in diagnosing or treating a medical condition, without more, does not violate a
4 prisoner’s Eighth Amendment rights.”); McGuckin, 974 F.2d at 1059 (same). Deliberate
5 indifference is “a state of mind more blameworthy than negligence” and “requires ‘more than
6 ordinary lack of due care for the prisoner’s interests or safety.’” Farmer, 511 U.S. at 835
7 (quoting Whitley, 475 U.S. at 319).

8 Delays in providing medical care may manifest deliberate indifference. Estelle,
9 429 U.S. at 104-05. To establish a claim of deliberate indifference arising from delay in
10 providing care, a plaintiff must show that the delay was harmful. See Berry v. Bunnell, 39 F.3d
11 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059; Wood v. Housewright, 900 F.2d 1332,
12 1335 (9th Cir. 1990); Hunt v. Dental Dep’t, 865 F.2d 198, 200 (9th Cir. 1989); Shapley v.
13 Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985). In this regard, “[a]
14 prisoner need not show his harm was substantial; however, such would provide additional
15 support for the inmate’s claim that the defendant was deliberately indifferent to his needs.” Jett
16 v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). See also McGuckin, 974 F.2d at 1060.

17 Finally, mere differences of opinion between a prisoner and prison medical staff
18 as to the proper course of treatment for a medical condition do not give rise to a § 1983 claim.
19 Toguchi, 391 F.3d at 1058; Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); Sanchez v.
20 Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.
21 1981).

22 III. Qualified Immunity

23 “Government officials enjoy qualified immunity from civil damages unless their
24 conduct violates ‘clearly established statutory or constitutional rights of which a reasonable
25 person would have known.’” Jeffers v. Gomez, 267 F.3d 895, 910 (9th Cir. 2001) (quoting
26 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). When a court is presented with a qualified

1 immunity defense, the central questions for the court are (1) whether the facts alleged, taken in
2 the light most favorable to the plaintiff, demonstrate that the defendant’s conduct violated a
3 statutory or constitutional right and (2) whether the right at issue was “clearly established.”
4 Saucier v. Katz, 533 U.S. 194, 201 (2001).

5 Although the court was once required to answer these questions in order, the
6 United States Supreme Court has recently held that “while the sequence set forth there is often
7 appropriate, it should no longer be regarded as mandatory.” Pearson v. Callahan, ___ U.S. ___,
8 ___, 129 S. Ct. 808, 818 (2009). In this regard, if a court decides that plaintiff’s allegations do
9 not make out a statutory or constitutional violation, “there is no necessity for further inquiries
10 concerning qualified immunity.” Saucier, 533 U.S. at 201. Likewise, if a court determines that
11 the right at issue was not clearly established at the time of the defendant’s alleged misconduct,
12 the court may end further inquiries concerning qualified immunity at that point without
13 determining whether the allegations in fact make out a statutory or constitutional violation.
14 Pearson, 129 S. Ct. at 818-21.

15 In deciding whether the plaintiff’s rights were clearly established, “[t]he proper
16 inquiry focuses on whether ‘it would be clear to a reasonable officer that his conduct was
17 unlawful in the situation he confronted’ . . . or whether the state of the law [at the relevant time]
18 gave ‘fair warning’ to the officials that their conduct was unconstitutional.” Clement v. Gomez,
19 298 F.3d 898, 906 (9th Cir. 2002) (quoting Saucier, 533 U.S. at 202). The inquiry must be
20 undertaken in light of the specific context of the case. Saucier, 533 U.S. at 201. Because
21 qualified immunity is an affirmative defense, the burden of proof initially lies with the official
22 asserting the defense. Harlow, 457 U.S. at 812; Houghton v. South, 965 F.2d 1532, 1536 (9th
23 Cir. 1992); Benigni v. City of Hemet, 879 F.2d 473, 479 (9th Cir. 1989).

24 ////

25 ////

26 ////

1 **DEFENDANT ROCHE’S MOTION FOR SUMMARY JUDGMENT**

2 I. Defendant Roche’s Statement of Undisputed Facts and Evidence

3 Defendant Roche’s statement of undisputed facts is supported by citations to
4 plaintiff’s complaint, plaintiff’s deposition transcript, and plaintiff’s medical records. It is also
5 supported by citations to the deposition testimony of defendant Drs. Roche and Mangis.

6 The evidence submitted to the court by defendant Roche establishes the following.
7 On October 29, 2003, correctional officers brought plaintiff to HDSP’s Correctional Treatment
8 Center after he complained about kidney stones. On October 30, 2003, correctional officers
9 brought plaintiff to the yard clinic for a follow-up examination with Dr Mangis who ordered
10 Medical Technical Assistant (“MTA”) Barton to perform a preliminary screening. MTA Barton
11 took a urine sample from plaintiff and performed a blood-sugar test. Dr. Mangis then asked
12 plaintiff which hospitals he had been admitted to for kidney stones and to describe his current
13 pain. Plaintiff told him some of the hospitals he had been to but referred Dr. Mangis to his
14 medical file. Plaintiff also described his pain. (Def.’s SUDF 4-9 & Ex. B.)

15 Dr. Mangis conducted a physical examination of plaintiff by squeezing his lower-
16 back region on the left and right sides, determined that plaintiff did not have kidney stones and
17 asked correctional officers to escort plaintiff out of the facility. Plaintiff claims that Dr. Mangis
18 did not review his medical file in his presence, but he is unsure whether Dr. Mangis reviewed the
19 file at some other time. Plaintiff alleges that when he asked Dr. Mangis if he was refusing to
20 treat him, Dr. Mangis accused him of putting blood in his urine sample. (Def.’s SUDF 10-12 &
21 Ex. B.)

22 In Dr. Mangis’ progress note, he wrote that plaintiff complained of pain radiating
23 down into his left leg. Dr. Mangis also wrote that “[plaintiff] is long on the descriptions of pain
24 and discomfort which do not fit the classical picture.” When asked about plaintiff’s visit at his
25 deposition, Dr. Mangis testified as follows:

26 /////

1 On the date I was seeing him, all the objective findings that I could
2 marshal and that would be available to me as a practicing
3 physician, as my state of knowledge then and now and for any
other reasonable practicing physician, is that there were no kidney
stones causing him excessive pain at that time and date.

4 (Def.'s SUDF 13-14 & Exs. D, E.)

5 Defendant Dr. Roche agreed with Dr. Mangis' determination that plaintiff's
6 symptoms did not suggest problematic kidney stones. Dr. Roche testified at his deposition:

7 It's not where you would have pain because of a stone in your
8 urethra. I mean it is an area where you could have pain because of
a back sprain, for instance. He was tender there where Dr. Mangis
9 touched him, that's not consistent – that area is not consistent with
[a] kidney stone. It's not where pain radiates because of a kidney
stone in the ureter.

10
11 (Def.'s SUDF 15 & Ex. C.)

12 Between October 30, 2003, and November 10, 2003, plaintiff alleges that he was
13 in pain. On November 10, 2003, Dr. Mangis examined plaintiff for the second time. Prior to the
14 examination, a nurse took plaintiff's vital signs, including his blood pressure, temperature, and
15 weight. Dr. Mangis then conducted a physical examination by touching plaintiff's left side. Dr.
16 Mangis told plaintiff that he did not have a kidney stone and instructed correctional officers to
17 escort plaintiff out of the treatment area. Plaintiff claims that Dr. Mangis did not review his
18 medical file in his presence, but he does not know whether he consulted it before the visit. In Dr.
19 Mangis' progress note, he wrote that plaintiff had “[n]o sign of actively passing a kidney stone by
20 observation of patient.” (Def.'s SUDF 16-17, 19-23 & Exs. B, C, F, G.)

21 Dissatisfied, plaintiff filed an inmate appeal and requested “either I.V.P., x-rays,
22 or ultra sound done to prove I'm telling the truth. Then sent to the urologist who is familiar with
23 me, Dr. Lejunesse to remove the stone.” On January 16, 2004, Dr. James interviewed plaintiff as
24 part of the formal level of review of plaintiff's appeal. Prior to this, nurse Clark performed a
25 urinalysis, which was negative for trace amounts of blood. Plaintiff discussed his symptoms with
26 Dr. James and noted that he had been extreme pain, had trouble urinating, and wanted to see his

1 outside urologist, Dr. Lajeunesse. According to plaintiff, Dr. James recommended denying
2 plaintiff's appeal because there was no blood in his urine. He also recommended that plaintiff
3 drink a lot of water. On January 28, 2004, Dr. Roche issued a written response to plaintiff's
4 appeal, adopting Dr. James' recommendation to deny the appeal at the formal level of review. In
5 pertinent part, Dr. Roche's response to plaintiff stated:

6 there is no current evidence that [plaintiff] has kidney stones or a
7 bladder infection. Based on this there is no urgent need for further
8 investigation. You will be ducated back to the clinic in one month
9 to monitor your condition.

9 (Def.'s SUDF 17, 30-35 & Exs. B, G.)

10 In denying plaintiff's appeal, Dr. Roche considered plaintiff's entire medical file
11 available at the prison. At his deposition, Dr. Roche testified that the mere fact that plaintiff may
12 have had blood in his urine did not mean that he had problematic kidney stones and that
13 plaintiff's description of his pain did not correspond with pain from kidney stones. Dr. Roche
14 determined that there was no medically justifiable reason to order the tests plaintiff requested and
15 concluded that an attempt by an inmate to prove the truth of his allegations of pain through tests
16 is not an appropriate basis on which to grant an appeal.² (Def.'s SUDF 24-28 & Exs. C, G.)

17 On March 3, 2004, plaintiff saw Dr. James again. Dr. James asked plaintiff about
18 his pain, performed a urinalysis, and read some of plaintiff's medical file. Dr. James then
19 recommended that plaintiff see his outside urologist Dr. Lajeunesse. The Medical Authorization

20
21 ² Dr. Roche reviewed plaintiff's inmate appeal on two occasions. In December 2003, Dr.
22 Roche received plaintiff's appeal and wrote a brief note at the bottom. The court's copies of the
23 note are illegible and appear to have been cut-off during the copying process. However, during
24 plaintiff's deposition, defense counsel asked plaintiff about the same appeal. Plaintiff read
25 defendant Roche's note as stating: "Received patient's charts PM's and history including
26 numerous x-rays and procedures, there is insufficient documentation to treat as an emergency or
to treat with emergency intervention at this time." (Pl.'s Dep. at 123.) Contrary to the indication
in defendant's separate statement of undisputed material facts, it appears that Dr. Roche reviewed
plaintiff's inmate appeal in December 2003 only to determine whether it should be processed as
an emergency appeal. Dr. Roche did not reach the merits of the appeal. In January 2004, Dr.
Roche decided the merits of the appeal. He issued the written response described above denying
the appeal at the formal level of review.

1 Review Committee approved Dr. James' recommendation and forwarded the matter to the
2 Specialty Clinic for scheduling to occur within 60-90 days. (Def.'s SUDF 37-39 & Ex. B.)

3 On May 1 or 2, 2004, plaintiff passed a kidney stone. He submitted a sick-call
4 slip to notify prison officials of the incident. A nurse responded to the sick-call slip and told
5 plaintiff to hold onto the stone because he was already scheduled to see his outside urologist. On
6 May 10, 2004, plaintiff saw Dr. Lajeunesse and provided her the stone for analysis. (Def.'s
7 SUDF 40-41 & Ex. B.)

8 On June 15, 2004, plaintiff had his first physical contact with defendant Roche.
9 Plaintiff alleges that at that time he was laying on his cell floor curled in a ball in pain with blood
10 dripping from his penis. Correctional officers escorted him to the Correctional Treatment
11 Center. Once there, a nurse took his vital signs and gave him a shot of Toradol. Dr. Roche
12 informed plaintiff that he would be transported to see Dr. Lajuenesse for treatment. On the
13 following day, Dr. Lajuenesse dilated plaintiff's urethra, enabling him to pass another kidney
14 stone. When plaintiff returned to HDSP and informed Dr. Roche of the procedure that he had
15 undergone, Dr. Roche merely responded by stating that the procedure could have been performed
16 in-house. Plaintiff never came into physical contact with Dr. Roche again after June 16, 2004.
17 (Def.'s SUDF 42-47, 49 & Ex. B.)

18 On July 22, 2004, Dr. Roche approved Dr. Lajeunesse's recommendation for
19 surgery. On the following day, plaintiff was in his cell curled in a ball in pain again.
20 Correctional officers escorted him to the Correctional Treatment Center, and Nurse Kincaid took
21 his vital signs. Plaintiff discussed his symptoms with Nurse Kincaid and requested a shot to
22 alleviate his pain. Dr. Roche denied plaintiff's request over the telephone, asserting that he was
23 aware plaintiff had kidney stones but that plaintiff was scheduled for surgery soon and should
24 drink water instead. The next day, plaintiff's pain abated somewhat and stayed that way until his
25 surgery on August 3, 2004. On August 19, 2004, after plaintiff's stints were removed following

26 ////

1 his surgery, he no longer had pain associated with his kidneys or ureter, or during urination.
2 Plaintiff eventually made a complete recovery. (Def.'s SUDF 50-58 & Exs. B, I, J.)

3 II. Defendant Roche's Arguments

4 Defense counsel argues that Dr. Roche is entitled to summary judgment in his
5 favor on plaintiff's Eighth Amendment claims. Specifically, counsel argues that, from October
6 2003, through February 2004, Dr. Roche was not aware that plaintiff's medical condition was
7 objectively serious, and in fact, plaintiff's medical condition was not objectively serious. (Def.'s
8 Mem. of P. & A. at 9.)

9 On January 24, 2004, Dr. Roche issued a written response denying plaintiff's
10 inmate appeal, explaining that he reviewed plaintiff's medical history. On December 15, 2003,
11 plaintiff's urinalysis showed a specific gravity within normal range. In addition, plaintiff's urine
12 dip test showed no blood or white blood cells present. Dr. Roche concluded that there was no
13 urgent need for further investigation, but he left open the possibility that plaintiff would need
14 future medical care and informed him that he would be ducated back to the clinic in one month to
15 monitor his condition. Counsel argues that, as of January 24, 2003, there was insufficient
16 evidence to indicate that plaintiff needed urgent medical care. (Def.'s Mem. of P. & A. at 9-10.)

17 In March 2003, plaintiff visited Dr. James and presented symptoms indicative of
18 problematic kidney stones. Dr. James recommended that plaintiff see an outside specialist, and
19 the medical review committee approved the referral. In mid-June, Dr. Roche briefly saw plaintiff
20 before he went to see the specialist. Then, in late July, the day after Dr. Roche approved plaintiff
21 for surgery in early August, plaintiff wanted something for pain, and Dr. Roche prescribed water.
22 Plaintiff admits that his pain subsided somewhat the following day. (Def.'s Mem. of P. & A. at
23 10.)

24 Defense counsel argues that there is no evidence that Dr. Roche caused any delays
25 in plaintiff's treatment. Moreover, counsel argues that a mere difference of opinion between a
26 prisoner and doctors regarding the appropriate course of treatment is an insufficient basis on

1 which to state an Eighth Amendment claim. Here, Dr. Roche reviewed plaintiff's medical
2 history and found that the treatment he requested was not medically justified. Several other
3 doctors concurred with him. The fact that later in time, under different circumstances, treatment
4 was recommended does not undermine Dr. Roche's initial position. According to defense
5 counsel, Dr. Roche's behavior was deliberate and justified, as evidenced by the fact that he
6 concurred with Drs. Mangis and James' opinions. In this regard, counsel maintains that Dr.
7 Roche did not possess the requisite state of mind to violate plaintiff's rights under the Eighth
8 Amendment. (Def.'s Mem. of P. & A. at 10-11.)

9 Defense counsel also argues that there is no respondeat superior liability under
10 § 1983, so to the extent that defendant Mangis may have violated plaintiff's rights, defendant
11 Roche should not be held responsible. Counsel further argues that Dr. Roche's review and denial
12 of plaintiff's inmate appeal cannot serve as a basis for liability. In fact, counsel notes that in
13 denying plaintiff's appeal, Dr. Roche actually called for continued monitoring of plaintiff's
14 condition. (Def.'s Mem. of P. & A. at 11-12.)

15 Finally, defense counsel argues that Dr. Roche is entitled to qualified immunity
16 because a reasonable official in the defendant's position would have believed his conduct was
17 lawful. Specifically, counsel argues, Dr. Roche followed the well-reasoned opinions of Drs.
18 Mangis and James in denying plaintiff's requests for relief. (Def.'s Mem. of P. & A. at 12-13.)

19 III. Plaintiff's Opposition

20 Plaintiff's opposition to defendant Roche's motion for summary judgment is
21 supported by a response to the statement of undisputed facts submitted on behalf of defendant
22 Roche and plaintiff's separate statement of disputed facts. It is also supported by citations to
23 plaintiff's deposition testimony, plaintiff's medical records, and defendant Roche's deposition
24 testimony.

25 Counsel for plaintiff argues that there is a genuine issue of material fact as to
26 whether defendant Roche was deliberately indifferent to plaintiff's serious medical needs. By

1 way of background, counsel explains that plaintiff has had a long history of kidney stones
2 involving approximately 40 kidney and urinary tract stones since 1991. Plaintiff has been
3 hospitalized and has undergone surgery for the stones on several occasions. On October 29,
4 2003, plaintiff went to HDSP's emergency room complaining of left flank pain that radiated to
5 the left side of his abdomen. Plaintiff received pain medication and subsequently a ducat to go to
6 the yard clinic the next day. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 2-4, 6 & Pl.'s Dep. at
7 10-25, 43-45.)

8 On October 30, 2003, plaintiff went to the yard clinic and submitted a urine
9 sample to the nurse that contained trace amounts of blood. He also completed a blood sugar
10 finger-stick test. When plaintiff saw Dr. Mangis, the doctor refused to open plaintiff's medical
11 file and accused him of drug-seeking. Dr. Mangis squeezed plaintiff's left side so hard that it
12 caused plaintiff excruciating pain and the doctor then proclaimed plaintiff stone free without
13 further testing. Plaintiff was unable to urinate for 18 hours after this visit. (Pl.'s Opp'n to Def.'s
14 Mot. for Summ. J. at 4-5 & Pl.'s Dep. at 54-67.)

15 Between October 30, 2003, and November 10, 2003, plaintiff submitted an
16 estimated five or six sick-call slips. On November 10, 2003, he saw Dr. Mangis a second time.
17 Again, Dr. Mangis labeled plaintiff a drug-seeker and did not conduct any tests or diagnose
18 plaintiff's recurrence of kidney stones. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 6 & Pl.'s
19 Dep. at 71, 73-84.)

20 On November 10, 2003, plaintiff began filing inmate appeals regarding his kidney
21 stones and Dr. Mangis' alleged conduct. Defendant Roche, in his capacity as the Chief Physician
22 and Surgeon, denied plaintiff's appeal. Plaintiff's counsel contends, however, that Carol Leo, the
23 Appeals Coordinator at HDSP, actually prepared Dr. Roche's response. Defendant Roche did
24 not review plaintiff's medical record nor did he know anything about Ms. Leo or her
25 qualifications to review a medical record. Moreover, Dr. Roche made no effort to speak with
26 plaintiff to assess his pain even though Dr. Roche conceded that it was possible that a kidney

1 stone was the cause of plaintiff's pain. Instead, Dr. Roche mis-characterized plaintiff's request
2 for diagnostic tests, claiming that plaintiff wanted an ultrasound or x-ray simply to prove that he
3 was telling the truth about his kidney stones. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 5-8 &
4 Def.'s Dep. at 62-65.)

5 On March 3, 2004, Dr. James recommended that plaintiff see Dr. Lajeunesse for a
6 consultation for possible urethral stricture. On May 10, 2004, plaintiff saw Dr. Lajeunesse who
7 ordered a CT scan on the same day, revealing that plaintiff had three kidney stones in his right
8 kidney and one kidney stone in his left kidney. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 8 &
9 Exs. F, K.)

10 On July 23, 2004, plaintiff was in extreme pain and was unable to urinate. He
11 went to HDSP's emergency room and saw Nurse Kincaid. He discussed his symptoms with her
12 and told her that he had just returned from an outside hospital after having a KUB X-ray and
13 seeing Dr. Lajeunesse. Plaintiff requested pain medication, and Nurse Kincaid telephoned Dr.
14 Roche to get an order. Dr. Roche, however, refused to order the pain medication and instead,
15 indicated that plaintiff should drink more water since he was scheduled for surgery soon. On
16 August 3, 2004, plaintiff underwent surgery to remove or treat the kidney stones thereby
17 relieving him of his pain. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 8 & Pl.'s Dep. at 139-42.)

18 Counsel for plaintiff argues that Dr. Roche is responsible for the seven-month
19 delay plaintiff experienced before seeing Dr. Lajeunesse for actual treatment. Counsel contends
20 that Dr. Roche reviewed plaintiff's inmate appeal requesting diagnostic tests, but he failed to
21 review plaintiff's medical chart or see plaintiff to speak with him about his pain. Instead, Dr.
22 Roche relied on the Appeals Coordinator without knowing whether she had any medical
23 background whatsoever. Dr. Roche knew that Dr. Mangis had not completed an informal level
24 of review of plaintiff's appeal as he was supposed to do. In this regard, plaintiff's counsel
25 contends that Dr. Roche had a heightened obligation to conduct a thorough review of the appeal

26 ////

1 and potentially meet with plaintiff given this knowledge. (Pl.'s Opp'n to Def.'s Mot. for Summ.
2 J. at 11-12 & Def.'s Dep. at 35-36.)

3 Plaintiff's counsel also argues that Dr. Roche knew that kidney stone pain could
4 be severe at the time he reviewed plaintiff's inmate appeal. In addition, he knew or strongly
5 suspected plaintiff had a recurrence of kidney stones. Plaintiff's counsel argues that, by failing to
6 authorize diagnostic tests to determine whether plaintiff was suffering from a recurrence of
7 kidney stones, Dr. Roche knew of and disregarded the risks to plaintiff's health and knew that
8 plaintiff would continue to suffer severe pain. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 12-13
9 & Def.'s Dep. at 39.)

10 Finally, plaintiff's counsel argues that Dr. Roche is not entitled to qualified
11 immunity. Counsel points out that a prisoner's right to adequate medical care is well established.
12 Here, he contends, plaintiff did not receive necessary diagnostic tests for seven months. He did
13 not receive a referral to his urologist, and he only received Tylenol for his extreme pain. Counsel
14 argues that Dr. Roche acted unreasonably by not promptly authorizing necessary diagnostic tests
15 for plaintiff and by not promptly providing him with a referral to see Dr. Lajeunesse. Counsel
16 also argues that Dr. Roche acted unreasonably when he processed plaintiff's appeal without
17 speaking to him or examining him or his medical record. Finally, counsel argues that Dr. Roche
18 acted unreasonably on July 23, 2004, when he denied plaintiff pain medication and instead told
19 him to drink water without speaking to him or examining him. (Pl.'s Opp'n to Def.'s Mot. for
20 Summ. J. at 13-15.)

21 IV. Defendant Roche's Reply

22 In reply, defense counsel argues that plaintiff's opposition fails to distinguish
23 between the mere existence of kidney stones and problematic kidney stones. Problematic kidney
24 stones warrant treatment, but inactive kidney stones are often innocuous and not readily
25 susceptible to treatment. Defense counsel contends that in October 2003, Dr. Roche was aware
26 of plaintiff's lengthy history with kidney stones. However, plaintiff's history in and of itself did

1 not justify the diagnostic tests he requested. Plaintiff's presenting symptoms did not correspond
2 with problematic kidney stones, so Dr. Roche reasonably concluded that there was no medically
3 justifiable reason to order diagnostic x-rays or an ultrasound. (Def.'s Reply at 1-2.)

4 Moreover, defense counsel contends that Dr. Roche reviewed plaintiff's entire
5 medical chart, including notes from plaintiff's treating physician before he denied plaintiff's
6 inmate appeal. In this regard, counsel contends that Dr. Roche made an informed decision to
7 deny plaintiff's requested relief and also scheduled plaintiff for further monitoring of his
8 condition. According to defense counsel, Dr. Roche's conduct shows that he cared about
9 plaintiff's health and was open to the possibility that plaintiff may require further examination or
10 treatment in the future. (Def.'s Reply at 2.)

11 Defense counsel also argues that plaintiff's opposition attempts but fails to raise
12 six triable issues of fact. First, plaintiff argues that Dr. Roche mis-characterized his motive for
13 requesting diagnostic tests as a truth-telling exercise. However, plaintiff's inmate appeal literally
14 requested diagnostic tests so that plaintiff could prove he was "telling the truth." In addition,
15 although Dr. Roche determined that plaintiff's requests for relief were inappropriate because
16 diagnostic tests are not performed on inmates to prove that they are telling the truth, he also
17 determined that plaintiff's presenting symptoms did not correspond with the diagnostic tests he
18 requested. (Def.'s Reply at 3.)

19 Second, plaintiff argues that Dr. Roche did not review his medical file before
20 denying his request for diagnostic tests. However, this contention is false because, as defendant
21 Roche testified at his deposition:

22 Well, as I - my note says, I reviewed the entire chart which
23 includes nursing notes, progress notes which also include nursing
24 notes. It's not just Dr. Mangis's notes, it would have been other
25 doctors and nurses who have seen him or would have reviewed
26 myself his x-rays, his blood work, whatever kind of procedures he
had had beforehand.

(Def.'s Reply at 3-4.)

1 Third, plaintiff argues that Dr. Roche made no effort to speak with him before
2 denying his requests for relief. However, Dr. Roche had sufficient information to respond to
3 plaintiff's appeal. Plaintiff presents no authority that requires Dr. Roche to interview inmates
4 pursuing appeals. Moreover, Dr. Roche ordered future monitoring of plaintiff's condition to
5 ensure he received any necessary treatment. (Def.'s Reply at 4.)

6 Fourth, plaintiff argues that Dr. Roche did not prepare his response to plaintiff's
7 appeal; instead Carol Leo, an Appeals Coordinator, prepared it. However, Ms. Leo performed
8 the administrative function of drafting Dr. Roche's response. Defendant Roche approved its
9 content based on his opinions. (Def.'s Reply at 4.)

10 Fifth, plaintiff argues that Dr. Roche denied plaintiff medication on July 23, 2004,
11 even though plaintiff presented with pain associated with problematic kidney stones. However,
12 based on the information that Dr. Roche received, he concluded that a shot was not warranted.
13 Moreover, plaintiff's pain subsided the following day. (Def.'s Reply at 4.)

14 Sixth, plaintiff argues that Dr. Mangis did not complete the informal level of
15 review of plaintiff's inmate appeal. However, Dr. Mangis' failure to do so is irrelevant as to
16 whether Dr. Roche acted with deliberate indifference. In denying plaintiff's inmate appeal, Dr.
17 Roche relied on plaintiff's medical file and the written memorandum by Dr. Mangis regarding
18 his examination of plaintiff. (Def.'s Reply at 4-5.)

19 Finally, defense counsel argues that plaintiff misstates the qualified immunity
20 standard. Plaintiff argues that the qualified immunity analysis comes down to whether Dr. Roche
21 acted reasonably. Qualified immunity, however, is a two-part inquiry: (1) was the law governing
22 the state official's conduct clearly established, and (2) under that law, could a reasonable state
23 official have believed his conduct was lawful. The second prong does not involve an analysis of
24 whether the defendant's conduct was reasonable. Rather, it asks whether a reasonable state
25 official could have believed defendant Roche's conduct was lawful. Again, for the reasons

26 ////

1 discussed above, defense counsel argues that a reasonable official would have believed Dr.
2 Roche's conduct was lawful. (Def.'s Reply at 5.)

3 ANALYSIS

4 I. Plaintiff's Serious Medical Needs

5 The undersigned concludes that based upon the evidence presented by the parties
6 in connection with the pending motion a reasonable juror could conclude that plaintiff's recurring
7 kidney stones and related pain constitute objective, serious medical needs. See McGuckin, 974
8 F.2d at 1059-60 ("The existence of an injury that a reasonable doctor or patient would find
9 important and worthy of comment or treatment; the presence of a medical condition that
10 significantly affects an individual's daily activities; or the existence of chronic and substantial
11 pain are examples of indications that a prisoner has a 'serious' need for medical treatment."); see
12 also Canell v. Bradshaw, 840 F. Supp. 1382, 1393 (D. Or. 1993) (the Eighth Amendment duty to
13 provide medical care applies "to medical conditions that may result in pain and suffering which
14 serve no legitimate penological purpose."). Specifically, plaintiff's long and largely undisputed
15 medical history demonstrates that a failure to treat him could result in "further significant injury"
16 and the "unnecessary and wanton infliction of pain." See, e.g., McGuckin, 974 F.2d at 1059.
17 Accordingly, defendant Roche's motion for summary judgment hinges on whether, based upon
18 the evidence before the court, a rationale jury could conclude that defendant Roche responded to
19 plaintiff's serious medical needs with deliberate indifference. Farmer, 511 U.S. at 834; Estelle,
20 429 U.S. at 106.

21 II. Defendant Roche's Response to Plaintiff's Serious Medical Needs

22 The court finds that defendant Roche has borne his initial responsibility of
23 demonstrating that there is no genuine issue of material fact with respect to the adequacy of the
24 medical care provided to plaintiff. Defendant's evidence demonstrates that, on January 28, 2004,
25 he issued a written response denying plaintiff's inmate appeal. Therein, defendant Roche
26 adopted Dr. James' findings and recommendations, which were based on an interview he had

1 with plaintiff. Specifically, Dr. James stated that there was no current evidence that plaintiff had
2 kidney stones. Plaintiff's urinalysis and urine dip test were normal. Dr. Roche concluded that
3 "there is no urgent need for further investigation" and informed plaintiff that he would be
4 ducated back to the clinic in one month to monitor his condition. (Def.'s Ex. G.)

5 In denying plaintiff's appeal, Dr. Roche considered plaintiff's entire medical file
6 available at the prison, including defendant Mangis' notes, other doctors' and nurses' notes,
7 progress notes, and diagnostic and medical tests plaintiff previously underwent. Defendant
8 Roche agreed with the determination by Dr. Mangis that plaintiff's symptoms did not suggest
9 problematic kidney stones. (Def.'s Ex. C.)

10 On June 15, 2004, Dr. Roche had his first physical contact with plaintiff. He
11 informed plaintiff that he would be transported to see his Dr. Lajuensee for treatment. On the
12 following day, Dr. Lajuensee dilated plaintiff's urethra, enabling him to pass a kidney stone.
13 When plaintiff returned to HDSP, he informed Dr. Roche of the procedure that was performed.
14 After June 16, 2004, plaintiff never came into physical contact again with Dr. Roche. (Def.'s Ex.
15 B.)

16 On July 22, 2004, Dr. Roche approved Dr. Lajeunesse's recommendation for
17 surgery for plaintiff. On July 23, 2004, plaintiff requested a shot to alleviate kidney stone related
18 pain, but Dr. Roche denied the request over the telephone and told him to drink water instead.
19 The next day, plaintiff's pain abated somewhat and stayed that way until his surgery on August 3,
20 2004. (Def.'s Exs. B, I, J.) Given this evidence, the burden shifts to plaintiff to establish the
21 existence of a genuine issue of material fact with respect to his deliberate indifference claim.

22 The court finds that a reasonable juror could conclude that defendant Roche
23 responded to plaintiff's serious medical needs with deliberate indifference. Farmer, 511 U.S. at
24 834; Estelle, 429 U.S. at 106. In so concluding, the court has considered plaintiff's opposition to
25 the pending motion for summary judgement, his sworn deposition testimony, and his verified
26 complaint. In considering defendant Roche's motion for summary judgment, the court is

1 required to believe plaintiff's evidence and draw all reasonable inferences from the facts before
2 the court in plaintiff's favor. Drawing all reasonable inferences from the evidence submitted in
3 plaintiff's favor, the court finds that plaintiff has submitted sufficient evidence to create a
4 genuine issue of material fact precluding summary judgment in favor of defendant Roche.

5 Defense counsel argues that Dr. Roche did not act or fail to act with the requisite
6 state of mind to violate plaintiff's rights under the Eighth Amendment. However, this court
7 cannot grant defendant's motion for summary judgment simply based on his assertion as to his
8 own state of mind. As the Ninth Circuit recently has explained:

9 Proof of "subjective awareness" is not limited to the purported
10 recollections of the individuals involved. "Whether an official had
11 the requisite knowledge of a substantial risk is a question of fact
12 subject to demonstration in the usual ways, including inference
13 from circumstantial evidence." Indeed, in certain circumstances,
14 "a factfinder may conclude that [an] official knew of a substantial
15 risk from the very fact that the risk was obvious. . . ."

16 * * *

17 "[Q]uestions involving a person's state of mind are generally
18 factual issues inappropriate for resolution by summary judgment."
19 We, of course, "may not make credibility determinations or weigh
20 conflicting evidence." (internal citations omitted)

21 Conn v. City of Reno, __ F.3d __, __, 2009 WL 2195338 at *7 & *9 (9th Cir. July 24, 2009).

22 In this case, plaintiff has a long and largely undisputed medical history of
23 recurring kidney stones. Plaintiff's evidence establishes that, as early as June 1991, he was
24 hospitalized overnight for kidney stone related pain. In the two years that followed, plaintiff was
25 hospitalized on several other occasions for the same reason. At times, plaintiff experienced
26 bleeding, blood in his urine and pain. In February 1993, plaintiff underwent his first surgery for
kidney stones. In the ensuing years through 1998, plaintiff was hospitalized on several more
occasions and passed at least two kidney stones. From 1998 through early 2002, plaintiff did not
have any active kidney stones. However, in May 2002, plaintiff underwent his second surgery
for kidney stones. Dr. Lajeunesse performed the surgery and explained in her operative report

1 that “[plaintiff] is at significant risk for recurrence of his stricture and will need to be followed
2 closely and may require intermittent dilatations.” In December of 2002, Dr. Weaver at HDSP
3 treated plaintiff for kidney stones again. Up to that point, each time plaintiff received medical
4 care for kidney stones and kidney stone related pain, he received pain medication, including
5 Toradol or Morphine. (Pl.’s Dep. at 11-17, 21, 24 & Compl. Ex. G.)

6 Dr. Roche acknowledges that he was aware of plaintiff’s medical history with
7 respect to his kidney stones. Dr. Roche also acknowledges that, before he issued his written
8 response denying plaintiff’s inmate appeal, he reviewed plaintiff’s entire medical record,
9 including defendant Mangis’ notes, other doctors’ and nurses’ notes, progress notes, and
10 diagnostic and medical tests plaintiff previously underwent. Finally, Dr. Roche acknowledges
11 that plaintiff complained about kidney stones and kidney stone related pain in his inmate appeal
12 and on July 23, 2004, in HDSP’s Correctional Treatment Center. (Def.’s Dep. at 41, 67 & Def.’s
13 Exs. G, J.) Given this evidence, a reasonable juror could conclude that plaintiff’s medical needs
14 were so obvious that defendant Roche should have been aware of the substantial risk of injury or
15 harm to him.

16 Defense counsel also argues that a mere difference of opinion between a prisoner
17 and medical staff about the appropriate treatment is an insufficient basis on which to state an
18 Eighth Amendment claim. Defense counsel is correct that a mere difference of opinion between
19 a prisoner and prison medical staff does not give rise to a § 1983 claim. Toguchi, 391 F.3d at
20 1058; Jackson, 90 F.3d at 332; see also Fleming v. Lefevere, 423 F. Supp. 2d 1064, 1070 (C.D.
21 Cal. 2006) (“Plaintiff’s own opinion as to the appropriate course of care does not create a triable
22 issue of fact because he has not shown that he has any medical training or expertise upon which
23 to base such an opinion.”). Likewise, a difference of medical opinion between doctors does not
24 give rise to a constitutional violation. See, e.g., Toguchi, 391 F.3d at 1059-60 (“Dr. Tackett’s
25 contrary view was a difference of medical opinion, which cannot support a claim of deliberate
26 indifference.”); Sanchez, 891 F.2d at 242 (difference of opinion between medical personnel

1 regarding the need for surgery does not amount to deliberate indifference to a prisoner's serious
2 medical needs). However, the evidence before the court indicates that this case may involve
3 more than a mere difference of opinion over the appropriate course of treatment.

4 In the undersigned's view, the instant case is akin to cases where prison officials
5 and doctors deliberately ignore the express orders of a prisoner's prior physician. See Jett, 439
6 F.3d at 1097-98 (finding a triable issue of fact as to whether a prison doctor was deliberately
7 indifferent to a prisoner's medical needs when he decided not to request an orthopedic
8 consultation as the prisoner's emergency room doctor had previously ordered); Hamilton v.
9 Endell, 981 F.2d 1062, 1067 (9th Cir. 1992) (finding a triable issue of fact as to whether prison
10 officials were deliberately indifferent to prisoner's serious medical needs when they relied on the
11 opinion of a prison doctor instead of the opinion of the prisoner's treating physician and
12 surgeon), abrogated in part on other grounds by Estate of Ford v. Ramirez-Palmer, 301 F.3d
13 1043, 1045 (9th Cir. 2002); see also Estelle, 429 U.S. at 104-05 (holding that deliberate
14 indifference may manifest "by prison doctors in their response to the prisoner's needs or by
15 prison guards in intentionally denying or delaying access to medical care or intentionally
16 interfering with the treatment once prescribed"); Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir.
17 2000) (holding that a prisoner may establish deliberate indifference by showing that a prison
18 official intentionally interfered with his medical treatment); Wakefield v. Thompson, 177 F.3d
19 1160, 1165 & n.6 (9th Cir. 1999) (holding that "a prison official acts with deliberate indifference
20 when he ignores the instructions of the prisoner's treating physician or surgeon.").

21 On November 10, 2003, November 25, 2003, and December 10, 2003, plaintiff
22 submitted the same inmate appeal to prison officials because they had failed to respond to it on
23 previous occasions. Therein, plaintiff explained that he saw defendant Dr. Mangis twice
24 regarding a kidney stone that was stuck and causing him pain and hindering his ability to urinate.
25 He further explained that his medical records showed that he had a long history of kidney stones
26 and that the year before Dr. Lajeunesse surgically-removed kidney stones. Plaintiff requested

1 specific diagnostic tests and a referral to see Dr. Lajeunesse. As noted above, Dr. Lajeunesse had
2 previously treated plaintiff for kidney stones and performed surgery on him. She explained in
3 her operative report that “[plaintiff] is at significant risk for recurrence of his stricture and will
4 need to be followed closely and may require intermittent dilatations.” (Compl. Ex. G.)

5 Defendant Roche reviewed plaintiff’s inmate appeal and requests for medical care
6 on two occasions. On December 12, 2003, defendant Dr. Roche rejected plaintiff’s request to
7 treat his inmate appeal as an emergency appeal. On January 28, 2004, Dr. Roche issued a written
8 response to plaintiff’s inmate appeal denying his requests for relief. In so doing, defendant
9 Roche adopted the findings of Drs. Mangis and James and concluded that “there is no urgent
10 need for further investigation.” (Def.’s Ex. G.)

11 Dr. Roche testified at his deposition that he reviewed plaintiff’s entire medical
12 chart before he denied the appeal. (Def.’s Dep. at 41.) Thus, Dr. Roche was aware of the
13 opinions of Drs. Mangis and James that plaintiff did not need further diagnostic tests or treatment
14 as well as Dr. Lajeunesse’s opinion that plaintiff was at significant risk for recurrence of his
15 stricture, would need to be followed closely, and might require intermittent dilatations. Where,
16 as here, Dr. Roche had conflicting medical opinions to consider, the relevant inquiry is whether
17 the defendant was entitled to rely on the opinions of Drs. Mangis and James knowing what he
18 knew about plaintiff’s medical condition and the merits of the various medical opinions.

19 Hamilton, 981 F.2d at 1067.

20 On the one hand, Dr. Lajeunesse is plaintiff’s urologist and surgeon. She treated
21 plaintiff on previous occasions for kidney stones and performed surgery on him. (Def.’s Ex. H,
22 Compl. Ex. G.) On the other hand, Dr. Mangis was a contract physician for HDSP. He had not
23 seen or treated plaintiff until October 30, 2003, and November 10, 2003. Moreover, plaintiff
24 repeatedly complained that Dr. Mangis refused to examine him or adequately treat him for
25 kidney stones and submitted five or six sick-call slips seeking additional treatment. Dr. James’
26 interaction with plaintiff was similarly limited. He saw plaintiff on January 16, 2004, in response

1 to plaintiff's inmate appeal. Dr. James did not examine plaintiff or touch him at all. He only
2 asked plaintiff for a urine sample, which contained no trace amounts of blood. (Def.'s Exs. E, F,
3 G & Pl.'s Dep. at 86-88.)

4 By adopting the findings of Drs. Mangis and James, defendant Roche relied on the
5 arguably inferior medical opinions. See Hamilton, 981 F.2d at 1067 ("By choosing to rely upon
6 a medical opinion which a reasonable person would likely determine to be inferior, the prison
7 officials took actions which may have amounted to the denial of medical treatment, and the
8 'unnecessary and wanton infliction of pain.'"). Dr. Roche had the authority and multiple
9 opportunities to procure the medical treatment plaintiff sought and appears to have needed under
10 one view of the evidence. However, a rationale juror could find based upon the evidence
11 submitted to the court that defendant Roche ignored plaintiff's repeated complaints about kidney
12 stones and kidney stone related pain as well as plaintiff's lengthy history of kidney stones and his
13 urologist's medical opinion. See Jett, 439 F.3d at 1098 ("prison administrators . . . are liable for
14 deliberate indifference when they knowingly fail to respond to an inmate's requests for help.");
15 see also See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A supervisor is only liable for
16 constitutional violations of his subordinates if the supervisor participated in or directed the
17 violations, or knew of the violations and failed to act to prevent them."). Given the evidence
18 before the court on summary judgment, a reasonable juror could conclude that defendant Roche
19 responded to plaintiff's serious medical needs with deliberate indifference.³

21 ³ The court also notes that Dr. Roche denied plaintiff's requests for medical treatment
22 based, in part, on Dr. James' observation that plaintiff's urinalysis and urine dip test were
23 normal. However, Dr. Roche himself now appears to dismiss the presence of or lack of blood in
24 urine as evidence of a kidney stone. In this regard, at his deposition, Dr. Roche testified that:

24 a number of people walk around with kidney stones that are totally
25 asymptomatic, and so having – having blood in your urine is not a
26 diagnosis of a kidney stone. Not having blood in your urine is not
a diagnosis of a kidney stone.

(Def. Roche Dep. at 46.)

1 Finally, defense counsel argues that Dr. Roche’s decision to deny plaintiff
2 treatment is not undermined by the fact that plaintiff ultimately received medical treatment for a
3 recurrence of kidney stones. Defense counsel contends that prison officials later recommended
4 plaintiff for treatment “under different circumstances.” However, it is not at all clear from
5 defense counsel’s argument or the evidence before the court that prison officials made their
6 subsequent recommendation under different circumstances at all. On January 16, 2004, Dr.
7 James indicated that plaintiff did not require additional diagnostic tests or medical treatment
8 because his urinalysis was normal and his urine dip test showed no blood or white blood cells
9 present. (Def.’s Ex. G.) Less than two months later, however, Dr. James recommended that
10 plaintiff see Dr. Lajeunesse. Dr. James did not appear to base his subsequent recommendation
11 on a new urinalysis or a diagnostic test. In fact, plaintiff’s urinalysis at the time of Dr. James’
12 subsequent referral was also negative for trace amounts of blood. Rather, Dr. James appears to
13 have based his subsequent recommendation on a review of plaintiff’s existing medical records,
14 specifically, Dr. Lajeunesse’s opinion that plaintiff was at significant risk for recurrence of his
15 stricture, would need to be followed closely, and might require intermittent dilatations. (Pl.’s
16 Dep. at 90-92 & Compl. Ex. G.)

17 Moreover, even after Dr. James recommended that plaintiff see Dr. Lajeunesse,
18 defendant Roche still denied plaintiff medical treatment in the form of pain management even
19 though he acknowledged that kidney stone related pain can be severe. (Def.’s Dep. at 39.)
20 Specifically, there is evidence before the court that on July 23, 2004, plaintiff was in his cell
21 curled in a ball in pain. Correctional officers escorted him to the Correctional Treatment Center,
22 and Nurse Kincaid took his vital signs. Plaintiff discussed his symptoms with Nurse Kincaid and
23 requested a shot to alleviate his pain. As noted above, Dr. Roche denied plaintiff’s request over
24 the telephone, asserting that he was aware plaintiff had kidney stones but that plaintiff was
25 scheduled for surgery soon and should drink water instead. (Pl.’s Dep. at 101-102.)

26 //

1 It is undisputed that at the time Dr. Roche denied plaintiff's request he was aware
2 that plaintiff was experiencing a recurrence of kidney stones. In May 2004, plaintiff had passed a
3 kidney stone. On May 10, 2004, plaintiff saw Dr. Lajeunesse, and on the same day she ordered a
4 CT-scan. The scan revealed that plaintiff had three kidney stones in his right kidney and one
5 kidney stone in his left kidney. Subsequently, on June 15, 2004, plaintiff was laying on his cell
6 floor curled in a ball in pain with blood dripping from his penis. Correctional officers escorted
7 him to the Correctional Treatment Center. Plaintiff was sweating profusely, and his eyes were
8 closed. His head was buried in his knees, and he was yelling for a shot. Correctional officers
9 picked up plaintiff out of his wheelchair and put him on the examining table. A nurse took his
10 vital signs and gave him a shot of Toradol. Dr. Roche then entered the room and informed
11 plaintiff that he would be emergency transported to see Dr. Lajuensee for treatment. Dr. Roche
12 did not examine plaintiff or touch him at all. The next day, Dr. Lajuensee dilated plaintiff's
13 urethra, enabling him to pass another kidney stone. When plaintiff returned to HDSP, he
14 informed Dr. Roche of the procedure that had been performed and Dr. Roche merely responded
15 by stating that it could have been performed in-house. Finally, on July 22, 2004, the day before
16 denying plaintiff's request for pain management, Dr. Roche had approved Dr. Lajeunesse's
17 recommendation for surgery. Plaintiff was not scheduled for surgery, however, until August 3,
18 2004. (Pl.'s Dep. at 92-93, 101-115, Compl. Ex. I.)

19 Thus, notwithstanding plaintiff's long and largely undisputed medical history of
20 suffering with recurring kidney stones, as well as defendant Roche's own awareness that plaintiff
21 was experiencing a recurrence of kidney stones, Dr. Roche denied plaintiff pain medication and
22 instead told him to drink water. Dr. Roche concluded that a shot for pain was not warranted
23 based on the information he received. However, defendant Roche did not examine plaintiff or
24 ask him about his pain and did not speak with Dr. Lajeunesse about plaintiff's medical needs or
25 pain management. Finally, Dr. Roche has not explained how or why he determined plaintiff did
26 not have a medical need for pain medication or how or why drinking water is a medically-

1 acceptable course of treatment for plaintiff's recurrence of kidney stones. Again, under these
2 circumstances, a reasonable juror could conclude that Dr. Roche responded to plaintiff's serious
3 medical needs with deliberate indifference.

4 Accordingly, the court concludes that defendant Roche is not entitled to summary
5 judgment in his favor on plaintiff's Eighth Amendment inadequate medical care claims.

6 III. Qualified Immunity

7 For the reasons discussed above, the facts alleged in this case taken in the light
8 most favorable to plaintiff are sufficient if proven to demonstrate that defendant Roche violated
9 plaintiff's rights under the Eighth Amendment. Moreover, the state of the law in 2004 clearly
10 would have given Dr. Roche fair warning that his failure to provide plaintiff with adequate
11 medical care was unconstitutional. As the United States Supreme Court has recognized:

12 [G]eneral statements of the law are not inherently incapable of
13 giving fair and clear warning, and in other instances a general
14 constitutional rule already identified in the decisional law may
15 apply with obvious clarity to the specific conduct in question, even
16 though "the very action in question has [not] previously been held
17 unlawful."

18 United States v. Lanier, 520 U.S. 259, 271 (1997) (quoting Anderson v. Creighton, 483 U.S. 635,
19 640 (1987)). By 2004, it was well established that prison officials could not be deliberately
20 indifferent to a prisoner's serious medical needs or deny, delay, or intentionally interfere with
21 medical treatment for a prisoner's serious medical needs. See Estelle, 429 U.S. at 104-06;
22 Hamilton, 981 F.2d 1066-68 (defendants not entitled to qualified immunity when they ignored
23 orders of prisoner's prior physician). Here, defendant Roche was on notice that he could not
24 ignore Dr. Lajeunesse's order that plaintiff was at significant risk for recurrence of his stricture,
25 would need to be followed closely, and might require intermittent dilatations. Nor could he
26 ignore plaintiff's recurrence of kidney stones and kidney stone related pain.

27 Accordingly, the court concludes that defendant Roche is not entitled to summary
28 judgment in his favor with respect to the affirmative defense of qualified immunity.

1 **CONCLUSION**

2 IT IS HEREBY RECOMMENDED that defendant Roche's June 4, 2009 amended
3 motion for summary judgment (Doc. No. 72) be denied.

4 These findings and recommendations are submitted to the United States District
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
6 days after being served with these findings and recommendations, any party may file written
7 objections with the court and serve a copy on all parties. Such a document should be captioned
8 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
9 shall be served and filed within ten days after service of the objections. The parties are advised
10 that failure to file objections within the specified time may waive the right to appeal the District
11 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: August 19, 2009.

13 
14 _____
15 DALE A. DROZD
16 UNITED STATES MAGISTRATE JUDGE

16 DAD:9
17 maga2634.57Roche