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7 UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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10 JERRY CLOUD,

11 Plaintiff,

12 v.

13 CALIFORNIA DEPARTMENT OF  
14 CORRECTIONS, et al.,

15 Defendants.

No. 2:17-cv-00339-KJM-GGH

ORDER

16 Plaintiff, appearing pro se, filed a petition for a writ of habeas corpus on October  
17 21, 2016, which was transferred to this court as a civil right case on February 16, 2017. ECF Nos.  
18 1, 12. On April 3, 2017, the magistrate judge to whom this matter was assigned<sup>1</sup> issued an order  
19 granting in forma pauperis status to plaintiff and dismissing his pending complaint with leave to  
20 amend. ECF No. 17. Plaintiff filed an amended complaint on May 31, 2017, ECF No. 22, and the  
21 magistrate judge again dismissed with leave to amend clarifying that in any amendment plaintiff  
22 was required to identify specific individual defendants who he claimed had violated his federal  
23 constitutional rights, ECF No. 25. Plaintiff complied with the latter order on August 15, 2017 when  
24 he filed a second amended complaint, ECF No. 26; *see* ECF No. 27 (directing service of second  
25 amended complaint on defendants); ECF No. 35 (defendants' answer).

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27 <sup>1</sup> After Magistrate Judge Gregory G. Hollows issued the findings and recommendations  
28 considered here, this matter was reassigned to Magistrate Judge Edmund F. Brennan. ECF No.  
56 (Jan. 11, 2019 order reassigning case).

1 Defendants have since filed the motion for summary judgment at issue here, Mot.,  
2 ECF No. 38-2, plaintiff has opposed the motion, ECF No. 41, and defendants replied, ECF No. 43.  
3 Thereafter defendants moved to alter the scheduling order specifically to allow time for a deposition  
4 of plaintiff, ECF No. 42, and the magistrate judge granted that request extending the discovery  
5 cutoff to July 29, 2018 for the sole purpose of defendants' deposing plaintiff. ECF No. 45.

6 On October 15, 2018, the magistrate judge issued Findings and Recommendations,  
7 ECF No. 53, to which plaintiff filed objections on October 25, 2018, ECF No. 54. In accordance  
8 with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a de  
9 novo review of this case. Having reviewed the file, the court finds the findings and  
10 recommendations to be supported by the record and the proper analysis with the following  
11 clarification.

12 The court notes plaintiff underwent three required levels of internal review with  
13 respect to his prescription pain medication request, which the magistrate judge acknowledges but  
14 treats as immaterial. ECF No. 53 at 8 n.5 (finding plaintiff's exhausted claim regarding pain  
15 medication demonstrates his "knowledge[] of his right to appeal" but also finding, without further  
16 explanation, that claim "not relevant here"); *see* Gates Decl. Ex. A, ECF No. 38-5 at 7 (health care  
17 appeal history printout indicating plaintiff submitted appeals concerning his request for "the same  
18 pain medication (hydrocodone) the Veterans Administration [VA] was providing him since 2011,"  
19 on March 1, April 7 and April 19, 2016 and California Correctional Health Care Services denied  
20 those appeals on March 24, April 15, and July 13, 2016); *see also* Gates Decl. Ex. B, ECF No. 38-  
21 5 at 15 (denying plaintiff's first level appeal after interviewing plaintiff and finding, in part,  
22 "Hydrocodone is not on our formulary list" and plaintiff "agreed to try Tylenol #3 instead of  
23 Hydrocodone," also noting facility was waiting on health records ordered from the VA); *id.* at  
24 16-17 (denying appeal at second level following Dr. S. Wong's "comprehensive review of  
25 [plaintiff's] health record," though still without VA records, based on plaintiff's claim he had  
26 "'tried Tylenol #3 for a week but it was ineffective' and that it 'did nothing to alleviate' [plaintiff's]  
27 chronic pain"; concluding, in part, "You are trying Tylenol #3 and we will not provide  
28 Hydrocodone as you requested, it is a non-formulary prescription"); *id.* at 9-10 (third level denial,

1 exhausting plaintiff's claim, noting "historical orders for the medication acetaminophen with  
2 codeine as hydrocodone is not on the formulary" and records indicating plaintiff "appear[s] well  
3 [and] in no apparent distress or discomfort," concluding plaintiff was "receiving treatment deemed  
4 medically necessary").

5           Because plaintiff's operative complaint refers to his requests for pain medication as  
6 well as his requests for orthopedics, it appears plaintiff intended to pursue a deliberate indifference  
7 claim on both issues. *See* ECF No. 26 ¶ 16 ("On January 7th 2016 [sic] I was in pain due to no  
8 pain killer or prosthetic support support [sic] I filed a reasonable accommodation request. (C.D.C.R.  
9 1824)."); *id.* ¶ 25 ("As of yet have [sic] not received proper pain meds have been offered Tylenol  
10 3 with Codeine, refused, codeine is an analgesic and cough suppressant [sic] not a pain medicine.").  
11 Defendants appear to acknowledge this as a claim of plaintiff's in their motion. Mot. at 3  
12 (summarizing plaintiff's allegations as concerning defendants' "wrongfully depriv[ing] him the  
13 treatment he believed he needed for his foot . . . including orthopedic shoes and 'proper pain  
14 medication'") (quoting plaintiff's second amended complaint); *see also id.* at 9 (arguing plaintiff  
15 "was merely disagreeing with the type of medication he received, not complaining that staff were  
16 intentionally denying, or delaying, treatment for a serious medical condition"). It appears to this  
17 court, then, that plaintiff's exhausted claim as to pain medication is not irrelevant in resolving the  
18 motion for summary judgment.

19           Even assuming plaintiff's pain medication claim is before the court and relevant to  
20 the defense motion for summary judgment, on the record before the court, summary judgment in  
21 full is warranted. Plaintiff provides no evidence from which a reasonable juror could conclude that  
22 defendants' decision to provide plaintiff with Tylenol #3 rather than hydrocodone, which plaintiff  
23 asserts physicians had prescribed him in the past, constituted unconstitutional disregard for  
24 plaintiff's pain. *See Toguchi v. Chung*, 391 F.3d 1051, 1056–58 (9th Cir. 2004) (prison officials  
25 act with deliberate indifference only if they know of and disregard an excessive risk to inmate  
26 health, and negligence in treatment or a difference of opinion concerning the appropriate course of  
27 treatment do not amount to deliberate indifference).

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With the court's clarification above, IT IS HEREBY ORDERED:

1. Defendants' motion for summary judgment, ECF No. 38, is GRANTED,
2. Plaintiff's motion to stay, ECF No. 55, is DENIED, and
3. The Clerk of the Court shall close this case.

DATED: April 8, 2019.

  
UNITED STATES DISTRICT JUDGE