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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

JAY G. KIMPEL,

Plaintiff,

vs.

DR. R. WALKER;  
P. JAYASUNDARA, N.P.,

Defendants.

Civil No. 08cv1734 LAB (JMA)

**ORDER:**

**(1) GRANTING DEFENDANTS’  
MOTION FOR SUMMARY  
JUDGMENT PURSUANT TO  
FED.R.CIV.P. 56(c)  
[ECF No. 123]; and**

**(2) DENYING MOTION TO  
APPOINT EXPERT WITNESSES  
AND MOTION TO USE ALL  
MEDICAL AND MENTAL  
RECORDS IN TRIAL [ECF Nos. 119,  
121] AS MOOT**

**I.**

**PROCEDURAL BACKGROUND**

Jay Kimpel (“Plaintiff”), a former state prisoner, proceeding pro se and *in forma pauperis*, has filed this civil rights action pursuant to 42 U.S.C. § 1983. Defendants have filed a filed a Motion for Summary Judgment pursuant to FED.R.CIV.P. 56 [ECF No. 123]. The Court notified Plaintiff of the requirements for opposing summary judgment pursuant to *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988) and *Rand v. Rowland*, 154 F.3d 952 (9th

1 Cir. 1998) (en banc) [ECF No. 125]. Plaintiff has not filed an Opposition. On April 9, 2013,  
2 Plaintiff filed a notice of change of address and he was re-served with Defendants moving  
3 papers and the Court's *Klinge/Rand* notice. [ECF Nos. 126, 127.] The Court has determined  
4 that Defendants' Motion is suitable for disposition upon the papers without oral argument and  
5 that no Report and Recommendation from Magistrate Judge Jan M. Adler is necessary. *See*  
6 S.D. CAL. CIVLR 7.1(d)(1), 72.3(e).

## 7 II.

### 8 PLAINTIFF'S FACTUAL BACKGROUND<sup>1</sup>

9 On December 15, 2007, while incarcerated at the Richard J. Donovan Correctional  
10 Facility ("RJDCF") Plaintiff sought medical treatment for "unbearable pain." (*See* SAC at 1,  
11 3.) Plaintiff claims that he was examined by Defendants Walker and Jayasundara who refused  
12 to renew pain medication that had been prescribed for him by a different doctor. (*Id.*) Plaintiff  
13 claims that Defendants told him he was "faking it" and denied him any treatment. (*Id.*)

14 Several months later, Plaintiff was being examined by Dr. Hunt<sup>2</sup> on June 24, 2008. (*Id.*  
15 at 4.) Plaintiff claims that Defendant Jayasundara interrupted this examination and told Dr.  
16 Hunt that Plaintiff was a "big faker." (*Id.*) On July 7, 2008, Plaintiff alleges that Defendant  
17 Jayasundara refused to provide a wrist brace for Plaintiff that was ordered by Dr. Hunt. (*Id.* at  
18 5.)

## 19 III.

### 20 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

#### 21 A. Standard of Review

22 Summary judgment is properly granted when "there is no genuine issue as to any  
23 material fact and ... the moving party is entitled to judgment as a matter of law." FED.R.CIV.P.  
24 56(c). Entry of summary judgment is appropriate "against a party who fails to make a showing  
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26 <sup>1</sup> These allegations are taken from Plaintiff's Second Amended Complaint ("SAC"). [ECF No.  
27 41.]

28 <sup>2</sup> Dr. Hunt is not a named Defendant in this matter.

1 sufficient to establish the existence of an element essential to that party's case, and on which  
2 that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322  
3 (1986). The court shall consider all admissible affidavits and supplemental documents  
4 submitted on a motion for summary judgment. *See Connick v. Teachers Ins. & Annuity Ass'n*,  
5 784 F.2d 1018, 1020 (9th Cir. 1986).

6 The moving party has the initial burden of demonstrating that summary judgment is  
7 proper. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970). However, to avoid summary  
8 judgment, the nonmovant cannot rest solely on conclusory allegations. *Berg v. Kincheloe*, 794  
9 F.2d 457, 459 (9th Cir. 1986). Rather, he must present "specific facts showing there is a  
10 genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The Court  
11 may not weigh evidence or make credibility determinations on a motion for summary judgment.  
12 Quite the opposite, the inferences to be drawn from the underlying facts must be viewed in the  
13 light most favorable to the nonmoving party. *Id.* at 255; *United States v. Diebold, Inc.*, 369 U.S.  
14 654, 655 (1962). The nonmovant's evidence need only be such that a "fair minded jury could  
15 return a verdict for [him] on the evidence presented." *Anderson*, 477 U.S. at 255. However,  
16 in determining whether the nonmovant has met his burden, the Court must consider the  
17 evidentiary burden imposed upon him by the applicable substantive law. *Id.*

18 A verified complaint or motion may be used as an opposing affidavit under  
19 FED.R.CIV.P. 56 to the extent it is based on personal knowledge and sets forth specific facts  
20 admissible in evidence. *McElyea v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir. 1987) (per curiam)  
21 (complaint); *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir. 1998) (motion). To  
22 "verify" a complaint, the plaintiff must swear or affirm that the facts in the complaint are true  
23 "under the pains and penalties of perjury." *Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th  
24 Cir. 1995). In this matter, Plaintiff's Second Amended Complaint is not verified.

25 **B. 42 U.S.C. § 1983**

26 Section 1983 authorizes a "suit in equity, or other proper proceeding for redress" against  
27 any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the  
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1 United States ... to the deprivation of any rights, privileges, or immunities secured by the  
2 Constitution.” *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122 (2004).

3 **C. Eighth Amendment Medical Treatment Claims**

4 Defendants argue that no genuine issue of material fact exists to show that either  
5 Defendant acted with deliberate indifference required to support an Eighth Amendment  
6 violation.

7 **1. Standard of Review**

8 The Eighth Amendment prohibits punishment that involves the “unnecessary and wanton  
9 infliction of pain.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (quoting *Gregg v. Georgia*, 428  
10 U.S. 153, 173 (1976)). The Eighth Amendment’s cruel and unusual punishments clause is  
11 violated when prison officials are deliberately indifferent to a prisoner’s serious medical needs.  
12 *Estelle*, 429 U.S. at 105. “Medical” needs include a prisoner’s “physical, dental, and mental  
13 health.” *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

14 To show “cruel and unusual” punishment under the Eighth Amendment, the prisoner  
15 must point to evidence in the record from which a trier of fact might reasonably conclude that  
16 Defendants’ medical treatment placed Plaintiff at risk of “objectively, sufficiently serious” harm  
17 and that Defendants had a “sufficiently culpable state of mind” when they either provided or  
18 denied him medical care. *Wallis v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir. 1995) (internal  
19 quotations omitted). Thus, there is both an objective and a subjective component to an  
20 actionable Eighth Amendment violation. *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir.  
21 2002);.

22 Although the “routine discomfort inherent in the prison setting” is inadequate to satisfy  
23 the objective prong of an Eighth Amendment inquiry, *see Johnson v. Lewis*, 217 F.3d 726, 731  
24 (9th Cir. 1999), the objective component is generally satisfied so long as the prisoner alleges  
25 facts to show that his medical need is sufficiently “serious” such that the “failure to treat [that]  
26 condition could result in further significant injury or the unnecessary and wanton infliction of  
27 pain.” *Clement*, 298 F.3d at 904 (quotations omitted).

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1 pain or the need to provide him constitutionally adequate care. *See McGuckin*, 974 F.2d  
2 at1060. This “subjective approach” focuses only “on what a defendant’s mental attitude  
3 actually was.” *Farmer*, 511 U.S. at 839.

4 Defendant Walker has provided a declaration, which includes portions of Plaintiff’s  
5 medical records while incarcerated, to show that Plaintiff was provided with adequate medical  
6 care for his serious medical needs. (*See* Declaration of Robert Walker, M.D., ECF No. 123-2.)  
7 In this declaration, Defendant Walker states that he examined Plaintiff on three occasions,  
8 January 16, 2008, January 28, 2008 and March 26, 2008. (*Id.* at ¶ 6.) On January 16, 2008,  
9 Defendant Walker examined Plaintiff for his complaint of “bilateral elbow pain and right  
10 shoulder pain.” (*Id.* at ¶ 7.) It was Dr. Walker’s opinion, after examining Plaintiff, that these  
11 conditions were “benign” but he continued Plaintiff’s prescription for Motrin and Effexor. (*Id.*)  
12 In addition, Dr. Walker ordered an x-ray of Plaintiff’s back that was “negative” and he ordered  
13 physical therapy, along with additional x-rays of Plaintiff’s right shoulder and elbows. (*Id.*, Ex.  
14 A, Outpatient Interdisciplinary Progress Notes dated January 16, 2008.)

15 On January 28, 2008, Defendant Walker again examined Plaintiff “regarding continued  
16 complaint of his right shoulder and low back pain.” (*Id.* at ¶ 8.) The x-ray of Plaintiff’s  
17 shoulder and elbow indicated “mild degenerative joint disease.” (*Id.*) Defendant Walker  
18 ordered an MRI and continued Plaintiff with the same pain medications. (*Id.*) The final time  
19 Plaintiff was examined by Defendant Walker was on March 26, 2008 for complaints of “fourth  
20 trigger finger condition and right shoulder pain.” (*Id.* at ¶ 10.) Defendant Walker noted that  
21 an MRI and orthopedic referral remained pending and continued Plaintiff’s pain medications.  
22 (*Id.*) On May 19, 2008, Defendant Walker prescribed “Naproxen, an anti-inflammatory and  
23 pain reliever” for Plaintiff based in a “report from plaintiff made to me by a registered nurse.”  
24 (*Id.* at ¶ 11, Ex. C. Outpatient Interdisciplinary Progress Notes, dated March 26, 2008.)

25 Plaintiff’s sole claim against Defendant Walker is his claim that on December 15, 2007,  
26 Defendant Walker refused to renew his medication and found it “funny” to deny Plaintiff  
27 treatment. (*See* SAC at 3.) First, there are no documents attached to Plaintiff’s Second  
28 Amended Complaint or to Defendants’ Motion that shows any record of Defendant Walker

1 examining Plaintiff on December 15, 2007. However, the records provided by both Plaintiff  
2 and Defendant Walker do demonstrate that Defendant Walker examined Plaintiff on three  
3 occasions and provided him with pain medication for his medical conditions.

4 The records supplied by the parties in this action do show that Plaintiff was examined  
5 by Defendant Jayasundara, a nurse practitioner, on December 28, 2007. (*See* Declaration of P.  
6 Jayasundara, ¶ 3, Ex. E, Interdisciplinary Progress Notes dated December 28, 2007) Neither the  
7 documents attached to Plaintiff’s Second Amended Complaint nor the documents attached in  
8 support of Defendants’ Motion show any evidence that Plaintiff was examined by any RJDCF  
9 prison medical official on December 15, 2007. During this examination on December 28, 2007,  
10 Defendant Jayasundara declares that he “examined [Plaintiff] in connection with right leg pain  
11 and lower back pain; Hep C; asthma; and abdominal pain.” (*Id.* at ¶ 3.) There was no pain  
12 medication discontinued at this examination. (*Id.*) On February 22, 2008, Defendant  
13 Jayasundara examined Plaintiff again and ordered an orthopedic consultation and prescribed  
14 a stronger anti-inflammatory medication in replacement of the prescription for Motrin. (*Id.* at  
15 ¶ 4.) Again, no other pain medication was discontinued. (*Id.*) Finally, Plaintiff was examined  
16 by Defendant Jayasundara on July 16, 2008 regarding complaints of shoulder pain and  
17 Jayasundara ordered “that his current medications be continued as his chart indicates and that  
18 he be prescribed Naproxen as well.” (*Id.* at ¶ 5, Ex. G., Outpatient Interdisciplinary Progress  
19 Notes dated July 16, 2008.)

20 Plaintiff has not supplied any evidence or pointed to any evidence in the Court’s record  
21 that would contradict Defendants’ assertion that they provided him with adequate medical care.  
22 There is no evidence in the record to support Plaintiff’s unsubstantiated claim that either  
23 Defendant refused to provide him with pain medication. Plaintiff’s claims that Defendant  
24 Jayasundara “refused to order a wrist brace” for Plaintiff is also completely unsubstantiated in  
25 the record. Plaintiff provides documents with his Second Amended Complaint that suggests  
26 he was prescribed a wrist brace in 2005. (*See* SAC, Ex., Home Health Certification and Plan  
27 Care dated February 11, 2005.) However, there is no evidence in the record that support claims  
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1 that either Defendant knew of Plaintiff's alleged need for a wrist brace or took any action to  
2 deny Plaintiff a wrist brace.

3 Even if Plaintiff could show that these Defendants told Plaintiff that he was "faking" his  
4 medical condition, the record before the Court demonstrates that Plaintiff was given medical  
5 examinations, tests and provided pain medication. Because this evidence is not contradicted  
6 anywhere in the record, the Court finds no genuine issues of material fact exists as to whether  
7 Defendants acted with deliberate indifference to Plaintiff's serious medical needs. *Estelle*, 429  
8 U.S. at 105. Accordingly, the Court GRANTS Defendants' Motion for Summary Judgment  
9 pursuant to FED.R.CIV.P. 56.

10 **IV.**

11 **CONCLUSION AND ORDER**

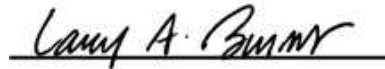
12 For all the reasons set forth above, the Court hereby:

- 13 1) GRANTS Defendants' Motion for Summary Judgment pursuant to FED.R.CIV.P.  
14 56(c) [ECF No. 123] and  
15 2) DENIES Plaintiff's Motions to Appoint Experts and to "Use all Medical and  
16 Mental Records in Trial" [ECF Nos. 119, 121] as moot.

17 The Clerk of Court shall enter judgment for the Defendants and close the file.

18 **IT IS SO ORDERED.**

19  
20 DATED: July 10, 2013

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22 **HONORABLE LARRY ALAN BURNS**  
23 United States District Judge