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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 WILLIAM WASHINGTON,

9 Plaintiff,

10 v.

11 WASHINGTON DEPARTMENT OF
12 CORRECTIONS, et al.,

Defendants.

CASE NO. C17-5728 BHS-TLF

ORDER ADOPTING IN PART
AND MODIFYING REPORT AND
RECOMMENDATION,
APPOINTING COUNSEL, AND
DENYING PLAINTIFF'S MOTION
FOR EXTENSION

13 This matter comes before the Court on the Report and Recommendation ("R&R")
14 of the Honorable Theresa L. Fricke, United States Magistrate Judge (Dkt. 52), Plaintiff's
15 objections to the R&R (Dkt. 53), Defendants' objections to the R&R (Dkt. 54), and
16 Plaintiff's motion requesting the appointment of counsel and an extension to file a
17 response to Defendants' objections (Dkt. 56).

18 Plaintiff brought claims against Defendants under 42 U.S.C. § 1983 for violations
19 of the Eighth and First Amendments as well as state law claims pursuant to RCW
20 7.70.030 for medical negligence and lack of informed consent. *See* Dkt. 5. Regarding
21 Plaintiff's medical negligence and Eighth Amendment claims, Plaintiff alleged that
22 Defendants diagnosed him with cirrhosis stemming from hepatitis C virus ("HCV") when

1 he entered Washington Department of Corrections (“WDOC”) custody in August 2015,
2 yet deliberately delayed any treatment of his condition for nearly two years, until after he
3 developed cancer, before performing any follow-up care or imaging. *Id.* Regarding his
4 First Amendment claim, Plaintiff alleged that several defendants attempted to discourage
5 him from pursuing grievances regarding his healthcare. *Id.*

6 On February 2, 2018, Judge Fricke entered the R&R. Dkt. 52. The R&R concludes
7 that Plaintiff’s claims against Defendants WDOC, Van Ogle Rogers, Gordon, and
8 twenty-nine unnamed “Does” should be dismissed for failure to state a claim. *Id.* at 30.
9 The R&R also recommends that the Court should grant summary judgment in favor of
10 Defendants Evans and Wright in light of Plaintiff’s failure to exhaust administrative
11 remedies in regards to his First Amendment claims against them. *Id.* Otherwise, the R&R
12 recommends that the Court deny Defendants’ motion to dismiss and motion for summary
13 judgment. *Id.*

14 On February 16, 2018, Plaintiff and Defendants objected. Dkts. 53, 54. On
15 February 23, 2018, Plaintiff requested an extension of time to respond to Defendants’
16 objections and moved to appoint counsel. Dkt. 56. On March 1, 2018, Defendants
17 responded to Plaintiff’s objections. Dkt. 57. On March 8, 2018, Defendants responded to
18 Plaintiff’s motion to appoint counsel. Dkt. 59. The Court has also received notice from
19 the Law Librarian at Stafford Creek Correction Center (“SCCC”), where Plaintiff was
20 incarcerated, informing the Court that Plaintiff was being treated medically outside of the
21 facility and would receive documents filed on or after March 1, 2018 upon his return.
22 Dkts. 58, 60.

1 On April 17, 2018, Defendants filed notice that Plaintiff had died on April 4, 2018
2 in Aberdeen, Grays Harbor County, Washington. Dkt. 61 at 2. Defendants have
3 dispatched a process server to serve notice of Plaintiff's death and this action on Leann
4 Washington, Plaintiff's Sister, who Defendants believe to be Plaintiff's successor and
5 representative. *Id.* at 2.

6 The district judge must determine de novo any part of the magistrate judge's
7 disposition that has been properly objected to. The district judge may accept, reject, or
8 modify the recommended disposition; receive further evidence; or return the matter to the
9 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

10 **A. Defendants' Objections**

11 Defendants have raised numerous objections. First, Defendants object to the
12 R&R's refusal to dismiss all of Plaintiff's federal claims predicated on events occurring
13 prior to November 1, 2016. To support their objection, Defendants cite *Woodford v. Ngo*,
14 548 U.S. 81 (2006), to argue that Plaintiff's claims predicated on such events are barred
15 by his failure to file administrative grievances regarding his lack of HCV treatment until
16 November 20, 2016, within twenty days of the alleged misconduct as required under
17 WDOC's Offender Grievance Program. Dkt. 54 at 2–5.

18 In *Woodford*, an inmate filed a grievance regarding his placement in
19 administrative segregation for engaging in inappropriate activity in a prison chapel.
20 Subsequently, the prison began prohibiting him from "special programs" including a
21 number of religious activities. The grievance was filed approximately six months after
22 the prison began excluding the inmate from special programs. The Supreme Court

1 decided that 42 U.S.C. § 1997e(a) demanded the “proper” exhaustion of administrative
2 remedies, including compliance with administrative deadlines and timeliness
3 requirements. *Woodford*, 548 U.S. at 90. Therefore, the plaintiff’s claims were dismissed
4 because he failed to grieve the decision to place him under restriction within the
5 applicable fifteen-day administrative deadline. The claims were dismissed for failure to
6 timely grieve the decision to impose the restriction even though the denial of access to
7 “special programs” was ongoing.

8 However, since the Supreme Court rendered its decision in *Woodford*, the Ninth
9 Circuit has recognized that regardless of the “proper” exhaustion requirement, “when
10 prison officials address the merits of a prisoner’s grievance instead of enforcing a
11 procedural bar, the state’s interests in administrative exhaustion have been served.” *Reyes*
12 *v. Smith*, 810 F.3d 654, 657 (9th Cir. 2016). Accordingly, the Circuit has held that a
13 prisoner adequately exhausts administrative remedies for the purposes of 42 U.S.C. §
14 1997e(a), “despite failing to comply with a procedural rule[,] if prison officials ignore the
15 procedural problem and render a decision on the merits of the grievance at each available
16 step of the administrative process.” *Id.* at 658. Under this rule, the applicable
17 administrative remedies were exhausted in this case. Although Plaintiff did not file a
18 grievance regarding WDOC medical personnel’s alleged delay in providing HCV
19 treatment until November 20, 2016, that grievance specifically claimed that “WDOC and
20 Medical Dept. has [sic] delayed me [Direct Acting Antiviral (“DAA”)] treatment for over
21 a year or sience [sic] I entered WDOC Coustody [sic] while knowing of my condition.”
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1 Dkt. 40-1 at 52. In response, WDOC rendered decisions on the merits of Plaintiff's
2 grievance at each level of review. *See* Dkt. 40-1 at 49–68.

3 The Court agrees with Defendants' arguments that the R&R appears to improperly
4 apply an equitable tolling rule to Plaintiff's failure to timely file administrative
5 grievances for the actions of certain medical personnel in delaying his treatment.
6 Nonetheless, WDOC addressed Plaintiff's grievance on the merits at each available level
7 of administrative review. Therefore, notwithstanding the untimeliness of Plaintiff's
8 grievance as it relates to delays in DAA treatment since he entered the WDOC, the Court
9 finds that Plaintiff exhausted the applicable administrative remedies in regards to his
10 claims that WDOC acted with deliberate indifference in delaying DAA treatment for his
11 diagnosis of HCV from the time he entered WDOC custody until after he developed
12 cancer.¹

13 Second, Defendants "object" to the R&R's refusal to dismiss Plaintiff's claims
14 against WDOC personnel whose only alleged actions involve investigating or responding
15 to Plaintiff's grievances. Dkt. 54 at 5–11. The Court disagrees with this objection as it
16 pertains to Defendants McTarsney, Dahne, and Caldwell. Defendants failed to raise their
17 present arguments pertaining to each specific defendant in their underlying motion to
18 dismiss; instead, they simply offered the blanket argument that the Defendants were
19 entitled to rely on the opinions of medical professionals. Accordingly, Defendants'

21 ¹ The Court notes that WDOC should not be criticized for addressing Plaintiff's grievance on the
22 merits notwithstanding its untimeliness as to events occurring before November 4, 2016, particularly in
light of the stakes involved with Plaintiff's grievance and the alleged delay of HCV treatment.

1 present arguments pertaining to these individual defendants are less objections than they
2 are requests for further relief. The Court generally will not dismiss claims based on
3 arguments that are raised for the first time in response to an R&R. This is particularly so
4 where the record on its face suggests that there may be unresolved issues that preclude
5 summary judgment. For instance, while McTarsney was entitled to rely on the opinions
6 of the WDOC's medical professionals in denying Plaintiff's claims, McTarsney twice
7 returned Plaintiff's grievance No. 16622119 with the instruction "[i]f you're going to cite
8 law identify it, case law citations are not necessary as the Offender Grievance Program is
9 not a legal forum. Rewrite, resubmit." Dkt. 5-1 at 2, 3. She did so even though in his
10 original and first rewritten grievance Plaintiff clearly cited a case and wrote that the
11 denial of DAA treatment constituted "deliberate indifference to my serious medical
12 needs, and or [sic] Melpractice/Gross [sic] Negligence." Dkt. 5-1 at 2. Defendants have
13 failed to explain why it was appropriate for McTarsney to twice return Plaintiff's
14 grievance and delay a response by requiring him to rewrite it, particularly in light of the
15 allegations of serious and urgent medical needs.

16 Similarly, Defendant Dahne is implicated in the delayed response to the level II
17 appeal of Plaintiff's grievance no. 16622119, even if it is unclear what role he personally
18 may have played in the prolonged delay. *See* Dkt. 5-1 at 7–9. On the present record, it is
19 unclear what role a grievance coordinator plays in the grievance process, and how his or
20 her actions pertain to the timely processing of grievances. It would be inappropriate to
21 require an inmate to plead the specific conduct that an individual defendant took in
22 delaying a grievance without allowing discovery when the applicable grievance records

1 reveal that the process was prolonged and the individual defendant was somehow
2 involved in the delayed grievance process. To the extent Plaintiff claims that Dahne is
3 liable for failing to provide Plaintiff with notice of “time extensions” or documentation
4 regarding previous grievances in violation of WDOC policies, the Court recognizes that
5 these allegations do not state a viable claim. *See* Dkt. 5-1 at 19. Violations of a grievance
6 procedure do not by themselves give rise to claims under 42 U.S.C. § 1983. *See Flick v.*
7 *Alba*, 932 F.2d 728, 729 (8th Cir. 1991). Nonetheless, this does not mean that Dahne
8 cannot be liable for any personal conduct delaying responses to Plaintiff’s grievances if
9 such delays further prolonged Plaintiff’s medical care in deliberate indifference to his
10 serious medical need for timely HCV treatment.

11 Also, while it appears that Defendant Parris’s involvement was limited to an
12 investigation of Plaintiff’s grievance no. 16622119, it is unclear what role is played by
13 “Health Service Managers” such as Parris and how their participation in the grievance
14 process may result in prolonged delays or involve formulating medical conclusions that
15 might result in the denial of necessary medical treatment. If Parris reviewed Plaintiff’s
16 medical records and concluded that Plaintiff was properly treated, even though medical
17 records indicated an ongoing prolonged delay in providing adequate HCV treatment, the
18 Court is satisfied that the denial of Plaintiff’s request for allegedly necessary treatment
19 could constitute an unnecessary delay in treatment in deliberate indifference to a medical
20 necessity.

21 It may be that the “rewrite instructions” from McTarsney were appropriate, or
22 other delays in the grievance process may not have been the result of conduct by any

1 particular individual defendant or may not have resulted in a significant delay
2 constituting deliberate indifference. Nonetheless, the Court finds that these issues are
3 better left for summary judgment proceedings and resolution before Judge Fricke after
4 appropriate discovery while Plaintiff is represented by counsel.

5 The Court agrees with Defendants' argument as it pertains to Defendant Caldwell.
6 It appears that his only participation in Plaintiff's grievances was responding to grievance
7 no. 17630385. While the Court generally will not grant relief on an argument raised for
8 the first time in response to an R&R, it is clear that any claim against Caldwell must fail
9 because grievance no. 17630385 does not grieve any alleged delay of medical care and
10 there are no allegations that Caldwell participated in retaliating against Plaintiff or
11 chilling his First Amendment rights. *See* Dkt. 5-1 at 19–21. If anything, Caldwell's
12 response to the grievance encouraged Plaintiff's present lawsuit by stating as follows:

13 [I]t appears that your level II response does mention your concerns are
14 being addressed, and that local administration is aware of their tardy
15 administrative response. Corrective action against staff is not shared with
16 offenders; however in this case as stipulated corrections have been made to
17 ensure that this does not occur again. Your allegation regarding particular
18 grievance interviews are being conducted late at night is troublesome; this
19 office will ensure that if this alleged practice is being conducted, it
20 discontinues immediately.

21 Dkt. 5-1 at 21. Accordingly, the Court will grant Defendant's request for further relief in
22 part and dismiss Plaintiff's claims against Defendant Caldwell.

Finally, Defendants object to the R&R's refusal to dismiss Plaintiff's claims
against Dr. Donahue. Dkt. 54 at 11–12. The Court agrees. Plaintiff's complaint fails to
attribute any wrongful conduct to Dr. Donahue other than a purported "clandestine

1 meeting” with other defendants on April 7, 2017. Dr. Donahue’s participation in a
2 meeting is insufficient to support a claim for deliberate indifference when Plaintiff does
3 not allege that, as a result of the meeting, Dr. Donahue took any actions to delay Plaintiff
4 from receiving timely HCV treatment. Plaintiff does not even allege that Dr. Donahue
5 was responsible for providing him with treatment, deciding the prescribed course of
6 treatment, or otherwise personally participating in Plaintiff’s medical care. Accordingly,
7 the Court agrees with Defendants’ objection that Plaintiff’s claims against Defendant
8 Donahue should be dismissed.

9 **B. Plaintiff’s Objections**

10 Plaintiff first objects to the dismissal of Defendants Van Ogle, Rogers, and
11 Gordon. Dkt. 53 at 1. He argues that Van Ogle and Rogers “failed to act, while having a
12 duty to protect [Plaintiff] from further harm.” Dkt. 53 at 1. He further claims that they
13 “did have knowledge and personally [participated] in the violation of [Plaintiff’s]
14 constitutional rights while denying him treatment for his serious medical needs.” *Id.*
15 However, these conclusory allegations, like the claims against these defendants in
16 Plaintiff’s complaint, are devoid of any underlying explanation as to how these
17 defendants personally participated in any alleged deprivation of Plaintiff’s rights. Even if
18 Plaintiff could plead additional facts regarding these defendants’ personal participation in
19 delaying his medical treatment or instituting policies that resulted in an unconstitutional
20 delay of medical treatment, those allegations are not presently included in the complaint.
21 Similarly, Plaintiff argues that Gordon interfered with his communications to health care
22 providers, *id.* at 2, but the Court cannot locate any factual allegations from the complaint

1 to support this claim, nor has Plaintiff offered any citation. Accordingly, the Court will
2 adopt the R&R and dismiss these claims with leave to amend.

3 Plaintiff next objects to the R&R's entry of summary judgment in favor of 28
4 unnamed "Doe" defendants. Dkt. 53 at 2.² However, Plaintiff only attributes specific
5 conduct to two of the 30 unnamed "doe" defendants. *See* Dkt. 5. Because the remaining
6 28 unnamed defendants are merely placeholders without any describing details or alleged
7 conduct in the complaint, they were properly dismissed. Should Plaintiff discover the
8 identity of additional parties who allegedly wronged him through the course of litigation,
9 he may appropriately move to amend his pleadings and add allegations pertaining to
10 newly discovered parties at that time.

11 Plaintiff next objects to the R&R's entry of summary judgment on his retaliation
12 claims against Defendants Evans and Wright for failure to exhaust the applicable
13 administrative grievance procedures. Dkt. 53 at 3. The R&R correctly noted that Plaintiff
14 continued to file and pursue administrative grievances notwithstanding these defendants'
15 alleged attempts to discourage him, including his grievance claiming that Defendant
16 DeHaven was visiting his cell at late hours of the night to discourage any further
17 grievances. *See* Dkt. 5-1 at 21. Accordingly, Defendant has failed to show that these
18 defendants' alleged conduct "actually did deter [him] from lodging a grievance or
19 pursuing a particular part of the process." *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir.
20 2015) (quotation omitted). Moreover, the R&R properly concluded that Evans's single

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22 ² The Court notes that Plaintiff has not objected to the dismissal of Plaintiff's § 1983 claims
against the "Doe" defendant who purportedly "botched" his blood draws.

1 statement that Plaintiff “might ruffle the wrong feathers” by further pursuing his
2 grievances and Wright’s removal of Plaintiff from his prison job were not of a nature that
3 they would deter “a reasonable prisoner of ordinary firmness” from grieving Evan’s or
4 Wright’s conduct. The First Amendment claims against Evans and Wright were properly
5 dismissed.

6 **C. Appointment of Counsel**

7 The Court concludes that this case merits the appointment of counsel to represent
8 Plaintiff. To decide whether exceptional circumstances exist that warrant the appointment
9 of counsel, the Court must evaluate both “the likelihood of success on the merits [and]
10 the ability of the [plaintiff] to articulate his claims pro se in light of the complexity of the
11 legal issues involved.” *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)
12 (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). The Court finds that this
13 case involves complex issues that Plaintiff lacks the ability to properly address pro se,
14 particularly in light of the complex medical subject matter and potentially far-reaching
15 policy considerations this case presents involving prison administration and the
16 applicable standards of care for the treatment of HCV. Furthermore, this case has already
17 been affected by Plaintiff’s significant difficulty in prosecuting his claims while
18 undergoing treatment that is now being provided. While it remains unclear if Plaintiff
19 will succeed in establishing that he suffered a constitutional violation due to delays in his
20 medical treatment or that Defendants are not entitled to qualified immunity, Plaintiff has
21 shown that his likelihood of success is enough that it warrants the aid of capable counsel.
22 The Court is satisfied that there is a sufficient likelihood that a constitutional violation

1 occurred for the purpose of appointing counsel if adequate treatment of Plaintiff's HCV
2 was indeed prolonged for such a period that Plaintiff was allowed to develop cancer as
3 alleged in the complaint. Moreover, Plaintiff has died in the custody of WDOC.

4 **D. Substitution of Parties**

5 In light of Plaintiff's death, if the case is to proceed, the Court notes that it will be
6 necessary for appointed counsel to work with Plaintiff's personal representative to
7 substitute Plaintiff's estate and representative in accordance with Federal Rule of Civil
8 Procedure 25 within ninety days.

9 **E. Conclusion**

10 The Court having considered the R&R, Plaintiff's objections, and the remaining
11 record, it is hereby **ORDERED** that the R&R is **ADOPTED in part** and **MODIFIED in**
12 **part** as follows:

13 (1) Defendants' motion to dismiss (Dkt. 34) is **GRANTED in part** as to
14 Plaintiff's claims against the WDOC and Defendants Van Ogle, Rogers, Gordon,
15 Caldwell, Donahue, and 29 Doe defendants. Because Plaintiff's claims against the
16 WDOC are barred by the doctrine of sovereign immunity, those claims are **DISMISSED**
17 **without leave to amend**. Because it is not absolutely clear that Plaintiff's claims against
18 Defendants Van Ogle, Rogers, Gordon, Caldwell, Donahue, and 29 Doe defendants could
19 not be cured without amended pleadings, Plaintiff's claims against these defendants are
20 **DISMISSED with leave to amend**. Otherwise, Defendants' motion to dismiss is
21 **DENIED in part** as it pertains to Plaintiff's claims against the remaining defendants.
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1 (2) Defendants' motion for summary judgment (Dkt. 39) is **GRANTED in**
2 **part** as to Plaintiff's First Amendment claims against Defendants Evans and Wright.
3 Otherwise, Defendants' motion for summary judgment is **DENIED in part**.

4 Additionally, it is hereby **ORDERED** that:

5 (1) Plaintiff's motion to appoint counsel (Dkt. 56) is **GRANTED**. The Clerk
6 shall identify an attorney or law firm from the Court's Pro Bono Panel to represent
7 Plaintiff.

8 (2) Plaintiff's motion for an extension of his deadline to respond to
9 Defendant's objections is **DENIED**.

10 This matter is **RE-REFERRED** to Judge Fricke for further proceedings. After
11 counsel has been appointed for Plaintiff, Judge Fricke may issue a scheduling order with
12 deadlines for amended pleadings or discovery.

13 Dated this 18th day of April, 2018.

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16 BENJAMIN H. SETTLE
17 United States District Judge
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