

FEB 20 2013

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH SCHULTZ,

Plaintiff - Appellant,

v.

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION; J. KIM, M.D.,

Defendants - Appellees.

No. 12-16182

D.C. No. 1:11-cv-00988-MJS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Michael J. Seng, Magistrate Judge, Presiding**

Submitted February 11, 2013***

Before: FERNANDEZ, TASHIMA, and WARDLAW, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** Schultz consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c)

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Kenneth Schultz, a California state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging deliberate indifference to his medical needs. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under 28 U.S.C. §§ 1915A and 1915(e)(2). *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). We reverse and remand.

Liberally construed, the allegations in Schultz's pro se complaint were sufficient to state a claim for deliberate indifference where Schultz alleged that defendant Dr. J. Kim was aware of Schultz's severe pain, but refused to treat it or investigate its underlying cause. *See Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (discussing objective and subjective elements of deliberate indifference claim). Accordingly, we reverse the district court's judgment and remand for further proceedings.

REVERSED and REMANDED.