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

ARMANDO HERRERA,

Plaintiff,

No. CIV S-10-1744 GEB EFB P

vs.

GARDNER, et al.,

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner without counsel in an action brought under 42 U.S.C. § 1983. On October 19, 2010, the court dismissed plaintiff’s complaint for failure to state a cognizable claim, and gave him leave to file an amended complaint within 30 days. Plaintiff did not do so. On January 4, 2011, the undersigned recommended that this case be dismissed for failure to state a claim.

On January 11, 2011 and February 2, 2011 plaintiff filed motions for extensions of time to file objections to the findings and recommendations, which the court granted. In these motions plaintiff stated that he was locked up in administrative segregation and became suicidal and was moved to the Department of Mental Health; and that CDCR took all of his legal property, and did not return it to him despite multiple requests.

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1 On February 7, 2011, plaintiff filed a “motion for property” stating that he had put in
2 three requests for his legal property but had not received it from the property officer, and asking
3 the court to order the property officer to return his legal property.

4 On February 15, 2011, plaintiff filed a document stating that gang investigators
5 Lieutenant T. Lee and S. Borsch classified him as an associate to the Mexican Mafia gang. He
6 states that in 1980-81, his family member dropped out of the Mexican Mafia gang in Old Folsom
7 Prison, and the CDC staff had him locked up for his own protection. He states that the
8 investigators know this, but have classified him as an associate to the gang so that they can house
9 him with gang members, who will kill him because of his family member. He states that he has
10 a chrono documenting that his family member was a drop out of the gang.

11 The court construes this document as an amended complaint. Pursuant to 28 U.S.C.
12 § 1915A, the court shall review “a complaint in a civil action in which a prisoner seeks redress
13 from a governmental entity or officer or employee of a governmental entity.” 28 U.S.C.
14 § 1915A(a). “On review, the court shall identify cognizable claims or dismiss the complaint, or
15 any portion of the complaint, if the complaint (1) is frivolous, malicious, or fails to state a claim
16 upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune
17 from such relief.” *Id.* § 1915A(b).

18 The court finds that, for the limited purposes of § 1915A screening, the amended
19 complaint states a cognizable claim against the new defendants, T. Lee and S. Borsch.

20 Accordingly, it is hereby ORDERED that:

- 21 1. The court’s January 4, 2011 findings and recommendations are vacated.
- 22 2. Service is appropriate for defendants T. Lee and S. Borsch.
- 23 3. The Clerk of the Court shall send plaintiff two USM-285 forms, one summons, an
24 instruction sheet and one copy of the February 15, 2011 amended complaint.

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1 4. Within 30 days from service of this order, plaintiff shall complete the attached Notice
2 of Submission of Documents and submit it to the court with the completed summons and USM-
3 285 forms and three copies of the endorsed February 15, 2011 amended complaint.

4 5. Upon receipt of the necessary materials, the court will direct the United States
5 Marshal to serve defendants T. Lee and S. Borsch pursuant to Federal Rule of Civil Procedure 4
6 without payment of costs. Failure to comply with this order will result in a recommendation that
7 this action be dismissed.

8 6. Plaintiff's motion for property is granted. Plaintiff is entitled to receive his legal
9 property and may show this court order to anyone who denies him access to it. If he is still
10 denied access to his legal property, he shall inform the court of the name of the person denying
11 him access to his property and the circumstances of the denial.

12 As plaintiff has not stated any claims against defendants Gardner and Stewart in his
13 amended complaint, it is hereby RECOMMENDED that they be dismissed from this action.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
19 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
20 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

21 Dated: March 16, 2011.

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23 EDMUND F. BRENNAN
24 UNITED STATES MAGISTRATE JUDGE
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