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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

PHILLIP TOTHEROW,	)	
	)	
Plaintiff,	)	
	)	CIV 07-02218 PHX PGR (MEA)
v.	)	
	)	REPORT AND RECOMMENDATION
DORA SCHRIRO, et al.,	)	
	)	
Defendants.	)	
_____	)	

TO THE HONORABLE PAUL G. ROSENBLATT:

This matter is before the Magistrate Judge on referral from the District Judge, and the determination of the Magistrate Judge is dispositive of some of Plaintiff's claims. Accordingly, the following proposed findings of fact, report, and recommendation are made pursuant to Rule 72(b), Federal Rules of Civil Procedure, and 28 U.S.C. § 636(b)(1)(B) and (C). Before the Court is Plaintiff's motion to add/join parties at Docket No. 31.

Plaintiff is incarcerated by the Arizona Department of Corrections. Plaintiff filed a civil rights complaint on November 14, 2007, naming Dora Schriro, the Arizona Department of Corrections ("ADOC"), and members of the ADOC Board of Institutional Protectional Committee as defendants. On January 18, 2008, the Court granted Plaintiff's motion to

1 proceed *in forma pauperis* and dismissed the complaint with  
2 leave to amend.

3           On February 5, 2008, Plaintiff filed an amended  
4 complaint naming Herb Haley and Benny Rollins as defendants  
5 and alleging these defendants failed to protect him from  
6 attacks by other inmates in 2001 and 2006. At that time  
7 Plaintiff was housed in the Special Management Unit of the  
8 ADOC Eyman Complex in Florence, Arizona. The amended  
9 complaint sought only injunctive relief. Plaintiff also filed  
10 a motion seeking a temporary restraining order on March 10,  
11 2008, asking to be placed in protective segregation. See  
12 Docket No. 9.

13           On March 31, 2008, Plaintiff filed a change of  
14 address with the Court, indicating he has been moved to the  
15 Stiner Unit of the ADOC Lewis facility in Buckeye, Arizona.  
16 On April 2, 2008, the Court ordered Defendants Haley and  
17 Rollins to answer Count I, the only count, of Plaintiff's  
18 amended complaint.

19           Defendants Haley and Rollins waived service and filed  
20 an answer to the amended complaint on June 30, 2008. See  
21 Docket No. 15. On July 2, 2008, the Court ordered any motion  
22 to add parties or to further amend the complaint be filed by  
23 September 5, 2008.

24           On September 4, 2008, Plaintiff filed a motion  
25 [Docket No. 19] for leave to file an amended complaint.  
26 Plaintiff did not lodge a proposed amended complaint.  
27 Plaintiff asked for leave to amend his complaint to add a "2nd  
28 count of failure to protect with deliberate [indifference] a

1 violation of Plaintiffs 8th Amendment Rights." Docket No. 19.  
2 Plaintiff also sought to amend his prayer for relief to  
3 include a monetary award, i.e., "any and all court fees and  
4 cost [incurred]." Id. Plaintiff also sought to amend his  
5 complaint to include a prayer for injunctive relief "in form  
6 of [permanent] protective [segregation]" to alleviate  
7 conditions "that pose any further risk now or in future." Id.  
8 In his motion Plaintiff stated the factual and legal predicate  
9 for "Count Two," an Eighth Amendment failure-to-protect claim  
10 against Defendant Rollins and Haley regarding events occurring  
11 on March 25, 2008. Id. Defendants opposed the motion to  
12 amend. See Docket No. 21.

13           The Court granted the motion to amend in an order  
14 filed October 3, 2008. See Docket No. 22. The Court  
15 concluded Plaintiff proposed to amend his complaint to allege  
16 causes of action based on an event occurring in 2008.  
17 Plaintiff alleged the event occurring in 2008 was the result  
18 of Defendants' acts in failing to place Plaintiff in  
19 protective segregation in 2007. The Court noted the time for  
20 completing discovery in this matter had not passed and that  
21 Defendants Haley and Rollins would not be substantially  
22 prejudiced by allowing Plaintiff to amend his complaint and  
23 that the proposed amendments were not clearly frivolous. The  
24 Court's order gave Plaintiff until October 31, 2008, to file a  
25 second amended complaint which did not incorporate by  
26 reference his prior complaints and which incorporated only  
27 those claims and facts included in Plaintiff's proposed  
28 amendments in the pleading at Docket No. 19.

1           Plaintiff filed a second amended complaint on October  
2 20, 2008, naming Herb Haley, Protective Segregation  
3 Administrator, Benny Rollins, Deputy Director of Prison  
4 Operations, and Dora Schriro, Director of the Arizona  
5 Department of Corrections, as Defendants. See Docket No. 27.  
6 The Second Amended Complaint alleged violations of Plaintiff's  
7 rights at the Lewis Complex-Stiner, and Florence Complex,  
8 Central. Plaintiff alleged that, *inter alia*, because  
9 Defendants denied his request for protective custody on March  
10 25, 2008, Plaintiff was threatened by other inmates on June 6,  
11 2008.

12           On October 27, 2008, Plaintiff filed a "motion to  
13 add/join parties." See Docket No. 31. Defendants Haley and  
14 Rollins filed a response in opposition to this motion on  
15 November 4, 2008. See Docket No. 33. Defendants also filed a  
16 substitution of defendants, pursuant to Rule 25(d), Federal  
17 Rules of Civil Procedure, through their counsel, on November  
18 3, 2008. Additionally, on October 28, 2008, Defendants Haley  
19 and Rollins filed a motion for a screening order with regard  
20 to the second amended complaint.

21           On November 25, 2008, the Court screened the Second  
22 Amended Complaint and ordered only Defendants Haley and  
23 Rollins to answer the claims stated in the Second Amended  
24 Complaint. These Defendants answered the Second Amended  
25 Complaint on December 24, 2008. Discovery in this matter was  
26 to be completed by December 8, 2008. See Docket No. 16.  
27 Dispositive motions are to be filed by February 13, 2009. Id.

28

1 Plaintiff's motion at Docket No. 31 seeks to add Ivan  
2 Bartos as a defendant because "Mr. Bartos is now decision  
3 maker in my current protection issues..." Plaintiff believes  
4 Mr. Bartos will deny him protective segregation as punishment  
5 for Plaintiff bringing this suit. Plaintiff states that Mr.  
6 Bartos is replacing Mr. Rollins as Director of Operations.

7 Defendants assert that Mr. Bartos is not Mr. Rollins'  
8 successor at this position, but that Mr. Rollins' successor is  
9 James Branch. Defendants also note that Plaintiff alleges Mr.  
10 Bartos may harm Plaintiff in the future, a frivolous claim.  
11 Because the claim alleged by Plaintiff as a basis for joining  
12 Mr. Bartos as a party to this matter is frivolous, i.e., the  
13 allegation of future harm, Plaintiff's motion to add Mr.  
14 Bartos as a Defendant should be denied.

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16 Accordingly,

17 **IT IS RECOMMENDED that** Plaintiff's motion at Docket  
18 No. 31 be **denied**.

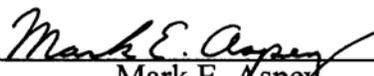
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20 This recommendation is not an order that is  
21 immediately appealable to the Ninth Circuit Court of Appeals.  
22 Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules  
23 of Appellate Procedure, should not be filed until entry of the  
24 district court's judgment.

25 Pursuant to Rule 72(b), Federal Rules of Civil  
26 Procedure, the parties shall have ten (10) days from the date  
27 of service of a copy of this recommendation within which to  
28 file specific written objections with the Court. Thereafter,

1 the parties have ten (10) days within which to file a response  
2 to the objections. Pursuant to Rule 7.2, Local Rules of  
3 Civil Procedure for the United States District Court for the  
4 District of Arizona, objections to the Report and  
5 Recommendation may not exceed seventeen (17) pages in length.

6 Failure to timely file objections to any factual or  
7 legal determinations of the Magistrate Judge will be  
8 considered a waiver of a party's right to de novo appellate  
9 consideration of the issues. See United States v. Reyna-  
10 Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). Failure  
11 to timely file objections to any factual or legal  
12 determinations of the Magistrate Judge will constitute a  
13 waiver of a party's right to appellate review of the findings  
14 of fact and conclusions of law in an order or judgment entered  
15 pursuant to the recommendation of the Magistrate Judge.

16 DATED this 6<sup>th</sup> day of February, 2009.

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21 Mark E. Aspey  
22 United States Magistrate Judge  
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