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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

AUBREY GAYLE PADGETT,  
Plaintiff,  
vs.  
ARIZONA DEPARTMENT OF  
CORRECTIONS; et al.,  
Defendants.

No. CV 08-0617-PHX-MHM (MEA)

**ORDER**

Plaintiff filed his Complaint pursuant to 42 U.S.C. § 1983 on March 31, 2008, alleging that Defendants were liable to him for violation of his constitutional rights during his incarceration. (Dkt. #1). The matter was assigned to this Court and referred to Magistrate Judge Mark E. Aspey. (Dkt. #2). On May 9, 2008, the Magistrate Judge dismissed Counts II and III of Plaintiff’s Complaint for failure to adequately state a claim for violation of Plaintiff’s Eight Amendment rights. (Dkt. #4). As a result, the Arizona Department of Corrections, Dora Schriro, and Deputy Warden Freeland were dismissed as defendants in this matter. (Id.). Defendants Walker, Kirkland, and Krumpelman were ordered to answer Count I of the Complaint, which alleged retaliation against Plaintiff for asking to file a grievance. (Id.; Dkt. #1, p.3). However, Plaintiff filed an Amended Complaint on May 27, 2008, prior to the date the remaining Defendants were served with the original Complaint. (Dkt. #6). Defendants filed a motion asking the Court to screen

1 the Amended Complaint, which was granted (Dkt. #28), and on August 19, 2008, the  
2 Magistrate Judge issued a Report and Recommendation that the Court dismiss Counts II  
3 and III of the Amended Complaint and the respective defendants, and order Defendants  
4 Kirkland, Walker, and Krumpelman to answer Court I of the Amended Complaint. (Dkt.  
5 #38).

6 On August 27, 2009, Plaintiff filed the pending Motion for Leave to File an  
7 Amended Complaint. (Dkt. #39). Nevertheless, on November 26, 2008, the Court  
8 adopted the Report and Recommendation of the Magistrate Judge in its entirety and  
9 dismissed Counts II and III of the Amended Complaint and all defendants except  
10 Defendants Kirkland, Walker, and Krumpelman. (Dkt. #52). The remaining defendants  
11 filed an answer to the Amended Complaint on December 22, 2009 (Dkt. #54), and the  
12 Magistrate Judge subsequently issued a Scheduling Order governing litigation of Count I  
13 of the Amended Complaint. (Dkt. #56). Plaintiff then filed a Motion to Strike  
14 Defendants' Answer, which was denied by the Magistrate Judge on January 21, 2009.  
15 (Dkt. #61). Magistrate Judge Aspey filed the instant Report and Recommendation to  
16 deny Plaintiff's Motion for Leave to File a Second Amended Complaint on January 26,  
17 2009. (Dkt. #63).

18 In his Report and Recommendation the Magistrate Judge advised the parties that  
19 they had 10 days from the date of service of a copy of the Report and Recommendation  
20 within which to file specific written objections with the Court. The time to file such  
21 objections has long since expired and no objections to the Report and Recommendation  
22 have been filed. Failure to timely file objections to any factual or legal determination of  
23 the Magistrate Judge may be considered a waiver of a party's right to *de novo*  
24 consideration of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th  
25 Cir. 2003) (en banc) ("The district judge must review the magistrate judge's findings and  
26 recommendations *de novo* if objection is made, but not otherwise."); see 28 U.S.C. §  
27 636(b)(1)(C) ("A judge of the court shall make a *de novo* determination of those portions  
28 of the report or specified proposed findings or recommendations to which objection is

1 made.”); Jones v. Wood, 207 F.3d 557, 562 n.2 (9th Cir. 2000) (“Failure to object to a  
2 magistrate judge's recommendation waives all objections to the judge's findings of fact.”).

3 After a complete and independent review of the issues presented, the Court finds  
4 itself in agreement with the Report and Recommendation of the Magistrate Judge.  
5 Plaintiff has already filed an Amended Complaint; he is not entitled to the current  
6 proposed amendment of his First Amended Complaint as of right. In addition, Plaintiff’s  
7 proposed amended complaint would be futile as the it merely seeks to add the same  
8 Counts II and III, and the Court has already dismissed substantially similar claims in its  
9 previous order adopting the earlier Report and Recommendation of the Magistrate Judge.

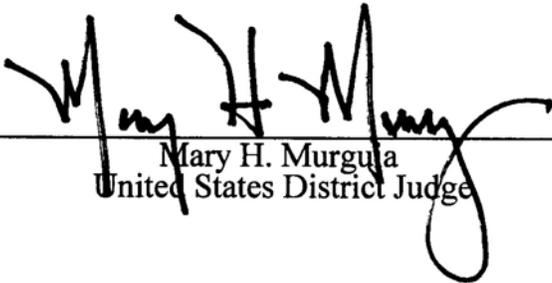
10 **Accordingly,**

11 **IT IS HEREBY ORDERED** adopting the Report and Recommendation of the  
12 Magistrate Judge (Dkt. #63) as the order of this Court.

13 **IT IS FURTHER ORDERED** denying Petitioner’s Motion for Leave to File a  
14 Second Amended Complaint. (Dkt. #39).

15 DATED this 24th day of March, 2009.

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Mary H. Murgula  
United States District Judge