UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT ROGERS,

Plaintiff,

v.

A. K. SCRIBNER, et al.,

Defendants.

/

CASE NO. 1:05-cv-00569-AWI-YNP-GSA (PC)

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on March 3, 2008. On June 16, 2009, the Court issued an order finding that Plaintiff's complaint states cognizable claims against Defendants Walker, Miller, Montgomery, Alvarez, Scribner, Stockman, Ortiz, Bravo, Yamamoto, Vella and Villareal for violation of the Fourteenth Amendment, but does not state a cognizable Eighth Amendment claim and does not state a claim for a violation of the California Penal Code. The Court ordered Plaintiff to either file an amended complaint or notify the Court of his willingness to proceed only on the claims found to be cognizable. On July 20, 2009, Plaintiff notified the Court that he does not wish to amend and is willing to proceed on the claims found cognizable. Based on Plaintiff's notice, this Findings and Recommendations now issues. See Noll v. Carlson, 809 F. 2d 1446, 1448 (9th Cir. 1987) (prisoner must be given notice of deficiencies and opportunity to amend prior to dismissing for failure to state a claim).

Accordingly, it is HEREBY RECOMMENDED that Plaintiff's Eighth Amendment claim

and claim for violation of the California Penal Code be dismissed.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within **thirty (30) days** after being served with these Findings and Recommendations, plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 28, 2009 **/s/ Gary S. Austin**
UNITED STATES MAGISTRATE JUDGE