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

JOHN THOMAS,

1:07-cv-01165-AWI-GSA-PC

Plaintiff,

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS ACTION
PROCEED ONLY AGAINST DEFENDANT
SERGEANT R. COX ON PLAINTIFF’S CLAIM
FOR EXCESSIVE FORCE UNDER THE
EIGHTH AMENDMENT, AND ALL OTHER
CLAIMS AND DEFENDANTS BE DISMISSED

OBJECTIONS, IF ANY, DUE IN 30 DAYS

Plaintiff John Thomas (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The case now proceeds on the amended complaint filed by Plaintiff on November 19, 2007. (Doc. 11.) The amended complaint names the California Department of Corrections and Rehabilitation (“CDCR”), R. Cox (Sergeant), Carrillo (Correctional Officer), A. Hedgpeth (Warden), S. L. Kays (Assistant Warden), J.D. Soto (Captain), Donald Schroeder (Lieutenant), S. Simpson (Lieutenant), L. Garcia (Medical Technical Assistant), and A. Diza-Albarran (Correctional Officer) as defendants, and alleges claims for excessive force under the Eighth Amendment.

The Court screened Plaintiff’s amended complaint pursuant to 28 U.S.C. § 1915A and found that it states a cognizable claim for relief under section 1983 against defendant Sergeant R. Cox only, for excessive force under the Eighth Amendment. On July 23, 2009, Plaintiff was given leave to either file

1 a second amended complaint, or in the alternative, to notify the Court that he does not wish to file a
2 second amended complaint and instead wishes to proceed only on the claim identified by the Court as
3 viable/cognizable in the Court's order. (Doc. 17.) On August 13, 2009, Plaintiff filed written notice
4 to the Court that he does not wish to file a second amended complaint and only wishes to proceed on
5 the claim found cognizable by the Court. (Doc. 18.)

6 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 7 1. This action proceed only against Sergeant R. Cox, for excessive force under the Eighth
8 Amendment;
- 9 2. All remaining claims and defendants be dismissed from this action; and
- 10 3. Plaintiff's claims against defendants the California Department of Corrections and
11 Rehabilitation ("CDCR"), Carrillo (Correctional Officer), A. Hedgpath (Warden), S. L.
12 Kays (Assistant Warden), J.D. Soto (Captain), Donald Schroeder (Lieutenant), S.
13 Simpson (Lieutenant), L. Garcia (Medical Technical Assistant), and A. Diza-Albarran
14 (Correctional Officer) be dismissed from this action based on Plaintiff's failure to state
15 any claims upon which relief may be granted against them.

16 These Findings and Recommendations will be submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days
18 after being served with these Findings and Recommendations, Plaintiff may file written objections with
19 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
20 Recommendations." Plaintiff is advised that failure to file objections within the specified time may
21 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

22
23 IT IS SO ORDERED.

24 **Dated: August 17, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE