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

GUSTAVO FAJARDO,	)	No. CV-F-08-624 OWW/SMS P
	)	
	)	ORDER DENYING PLAINTIFF'S
Plaintiff,	)	MOTION FOR RECONSIDERATION
	)	(Doc. 11)
vs.	)	
	)	
P. MCGUINNESS, et al.,	)	
	)	
Defendants.	)	
	)	

On January 27, 2009, the United States Magistrate recommended that Plaintiff's Complaint be dismissed with leave to amend.

After obtaining an extension of time to respond to the January 27, 2009 Order, Plaintiff timely filed a Request for Reconsideration by District Court of Magistrate Judge's Ruling.

Pursuant to Rule 72-303, Local Rules of Practice, a District Judge upholds a Magistrate Judge's ruling on a referred matter unless it is "clearly erroneous or contrary to law." See Rule 72(a), Federal Rules of Civil Procedure; 28 U.S.C. §

1 636(b) (1) (A). The "clearly erroneous" standard applies to a  
2 Magistrate Judge's findings of fact. *Concrete Pipe & Prods. v.*  
3 *Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993). "A  
4 findings is 'clearly erroneous' when although there is evidence  
5 to support it, the reviewing [body] on the entire evidence is  
6 left with the definite and firm conviction that a mistake has  
7 been committed." *Id.* at 622. The "contrary to law" standard  
8 allows independent, plenary review of purely legal determinations  
9 by the Magistrate Judge. *FDIC v. Fidelity & Deposit Co. of Md.*,  
10 196 F.R.D. 375, 378 (S.D.Cal.2000); *Haines v. Liggett Group,*  
11 *Inc.*, 975 F.2d 81, 91 (3<sup>rd</sup> Cir.1992). "An order is contrary to  
12 law when it fails to apply or misapplies relevant statutes, case  
13 law, or rules of procedure." *DeFazio v. Wallis*, 459 F.Supp.2d  
14 159, 163 (E.D.N.Y.2006).

15 Plaintiff claims that the January 27, 2009 Order is  
16 erroneous because an MRI scan of Plaintiff's right knee performed  
17 on June 18, 2007 at a different penal institution indicated that  
18 "[a] deformity of the lateral tibial plateau is noted," which  
19 "may represent an old healed fracture." See *Ex. B* to Complaint.  
20 In addition, Plaintiff refers to allegations in the Complaint  
21 that Defendant Nguyen stated that he had reviewed an x-ray report  
22 of a scan of Plaintiff's knee on December 30, 2005 but that  
23 Plaintiff does not recall any such x-ray being taken, and that  
24 Defendants failed to request an MRI of Plaintiff's knee, thereby  
25 misdiagnosing Plaintiff's right knee fracture. Plaintiff argues  
26 that these allegations, among others, suffice to state a claim

1 for violation of the Eighth Amendment based on prison medical  
2 treatment.

3 Plaintiff's Request for Reconsideration is DENIED.

4 Plaintiff has not demonstrated that the Magistrate Judge's Order  
5 is contrary to law or clearly erroneous. The exhibits attached  
6 to Plaintiff's Complaint show that Defendant Nguyen ordered the  
7 x-ray on December 30, 2005 but that it was not taken until  
8 February, 2006 and showed an appearance "compatible with an old  
9 gunshot wound," that "[n]o radiographic evidence of acute  
10 fracture nor dislocation" was seen, and that "[n]o abnormal bone  
11 erosion nor destruction" was noted. Consequently, it is arguable  
12 that Plaintiff has not alleged the requisite deliberate  
13 indifference necessary to state an Eighth Amendment claim.

14 Further, Plaintiff has not been prejudiced by the Order because  
15 he has been granted leave to amend to correct the deficiencies of  
16 the Complaint.

17 IT IS SO ORDERED.

18 Dated: April 13, 2009

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE