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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JESSE J. MONTIEL,	)	1:11cv02145 LJO DLB PC
	)	
Plaintiff,	)	FINDINGS AND RECOMMENDATIONS
	)	REGARDING DISMISSAL OF
vs.	)	DEFENDANT WYNN
	)	
YATES, et al.,	)	FIFTEEN-DAY DEADLINE
	)	
Defendants.	)	

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Plaintiff Jesse J. Montiel, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on December 28, 2011. This action is proceeding against Defendants Green, Taher-Pour, Wilson, Das and Wynn for violation of the Eighth Amendment.

**PROCEDURAL HISTORY**

Defendants Taher-Pour and Wilson filed a motion for summary judgment on January 21, 2014. The motion is currently pending.

On March 28, 2014, the Court directed the United States Marshal to attempt service a second time on Defendants Green and Das.

The Marshal was not able to locate Defendant Wynn and service was returned unexecuted on January 16, 2014. Therefore, on March 28, 2014, the Court issued an order to

1 show cause to Plaintiff why Defendant Wynn should not be dismissed pursuant to Federal Rule  
2 of Civil Procedure 4(m). Plaintiff was instructed to respond to the order to show cause within  
3 thirty (30) days. Over thirty (30) days have passed and Plaintiff has not responded to the order  
4 or otherwise contacted the Court.

5 **DISCUSSION**

6  
7 Rule 4(m) of the Federal Rules of Civil Procedure provides:

8 If a defendant is not served within 120 days after the complaint is filed, the court -  
9 on motion or on its own after notice to the plaintiff - must dismiss the action  
10 without prejudice against that defendant or order that service be made within a  
11 specified time. But if the plaintiff shows good cause for the failure, the court  
12 must extend the time for service for an appropriate period.

13 In cases involving a plaintiff proceeding in forma pauperis, the Marshal, upon order of  
14 the Court, shall serve the summons and the complaint. 28 U.S.C. § 1915(d); Fed. R. Civ. P.  
15 4(c)(3). “[A]n incarcerated pro se plaintiff proceeding in forma pauperis is entitled to rely on the  
16 U.S. Marshal for service of the summons and complaint and [he] should not be penalized by  
17 having his action dismissed for failure to effect service where the U.S. Marshal or the court clerk  
18 has failed to perform his duties.” *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (internal  
19 quotations and citation omitted), *abrogated on other grounds by Sandin v. Connor*, 515 U.S. 472  
20 (1995). “So long as the prisoner has furnished the information necessary to identify the  
21 defendant, the marshal’s failure to effect service is automatically good cause. . . .” *Walker*, 14  
22 F.3d at 1422 (internal quotations and citation omitted). However, where a pro se plaintiff fails to  
23 provide the Marshal with accurate and sufficient information to effect service of the summons  
24 and complaint, the Court’s sua sponte dismissal of the unserved defendants is appropriate.  
25 *Walker*, 14 F.3d at 1421-22.

1 At this juncture, the Marshal's Office has exhausted the avenues available to it in  
2 attempting to locate and serve Defendant Wynn.<sup>1</sup> *Walker*, 14 F.3d at 1421-22. Plaintiff was  
3 provided with an opportunity to show cause why Defendant Wynn should not be dismissed, but  
4 he did not respond. Fed. R. Civ. P. 4(m).

5 **RECOMMENDATION**

6 Based on the foregoing, the Court RECOMMENDS that Defendant Wynn be  
7 DISMISSED from this action.

8 These Findings and Recommendations are submitted to the United States District Judge  
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen (15)  
10 days after being served with these Findings and Recommendations, the parties may file written  
11 objections with the court. Such a document should be captioned "Objections to Magistrate  
12 Judge's Findings and Recommendations." The parties are advised that failure to file objections  
13 within the specified time may waive the right to appeal the District Court's order. *Martinez v.*  
14 *Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).

15  
16 IT IS SO ORDERED.

17  
18 Dated: May 19, 2014

19 /s/ Dennis L. Beck  
20 UNITED STATES MAGISTRATE JUDGE

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<sup>1</sup> Assistance has been sought from the prison, the California Department of Corrections and Rehabilitation and the Attorney General's Office.