



1 employees of California State Prison – Corcoran, but Defendant Gutierrez could not be identified.  
2 (Doc. Nos. 23, 24). On May 5, 2023, the United States Marshal returned the summons on  
3 Defendant Gutierrez as unexecuted. (Doc. No. 25). The U.S. Marshal was unable to identify  
4 Defendant Gutierrez for service of process. (*Id.*).

5 Following an order to show cause, Plaintiff filed a response providing additional  
6 information to identify Defendant Gutierrez, and the Court ordered a second attempt at electronic  
7 service. (Doc. Nos. 31, 33-36). The E-Service order included the following information  
8 regarding Defendant Gutierrez: “Officer Gutierrez; Correctional Officer at CSP-Corcoran, who  
9 worked 3rd watch (5) five days a week on 3A03 2021 Jan-Feb. He was Officer Dustin White’s  
10 partner.” (Doc. No. 35 at 2.)

11 On August 3, 2023, the Court again received information from CDCR that Defendant  
12 Gutierrez could not be identified, and service documents were forwarded to the United States  
13 Marshals Service for personal service on Defendant Gutierrez. (Doc. No. 39). On October 2,  
14 2023, the United States Marshals Service filed a return of service unexecuted as to Defendant  
15 Gutierrez, indicating that the U.S. Marshal contacted the Litigation Coordinator at Corcoran to  
16 identify Gutierrez without success. (Doc. No. 40). The U.S. Marshall indicated that “more  
17 information is needed to identify CO Gutierrez.” (*Id.*).

18 Therefore, on October 5, 2023, the Court issued a second order requiring Plaintiff to show  
19 cause why Defendant Gutierrez should not be dismissed from this action. (Doc. No. 45). In that  
20 order, Plaintiff was warned that the failure to respond or failure to show cause would result in the  
21 dismissal of Defendant Gutierrez from this action due to Plaintiff’s failure to serve process  
22 pursuant to Federal Rule of Civil Procedure 4(m). (*Id.* at 3).

23 Plaintiff filed a response to the order to show cause on October 16, 2023, providing  
24 additional identifying information for Defendant Gutierrez. (ECF No. 46). The Court ordered a  
25 third attempt at electronic service. (Doc. Nos. 47-48). The E-Service order included the  
26 following information regarding Defendant Gutierrez: “Officer Gutierrez; Latino/Hispanic male,  
27 between 30 and 38 years old, 5’7”-5’9” feet tall, worked 2-10 pm from 1/28/21-2/2/21 in 3ao3 at  
28 Corcoran State Prison with Correctional Officers De La Torre, Contreras, and Trejullo;

1 identifying marks – front hairline big Moe removal scar above left upper forehead hairline. In  
2 late January 2021 or early February 2021 Gutierrez ‘put out [Plaintiff’s] fire with sergeant’ and  
3 sent Plaintiff to suicide watch after outside ER for broken finger.” (Doc. No. 47 at 3). On  
4 December 8, 2023, the Court again received notice that Defendant Gutierrez could not be  
5 identified. (Doc. No. 57).

## 6 **II. Legal Standard**

7 Federal Rule of Civil Procedure 4(m) provides as follows:

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

12 Fed. R. Civ. P. 4(m).

13 In cases involving a plaintiff proceeding *in forma pauperis*, the Marshal, upon order of the  
14 court, shall serve the summons and the complaint. Fed. R. Civ. P. 4(c)(3). “[A]n incarcerated pro  
15 se plaintiff proceeding in forma pauperis is entitled to rely on the U.S. Marshal for service of the  
16 summons and complaint, and . . . should not be penalized by having his or her action dismissed  
17 for failure to effect service where the U.S. Marshal or the court clerk has failed to perform the  
18 duties required of each of them . . .” *Puett v. Blandford*, 912 F.2d 270, 275 (9th Cir. 1990). “So  
19 long as the prisoner has furnished the information necessary to identify the defendant, the  
20 marshal’s failure to effect service is ‘automatically good cause . . . .’” *Walker v. Sumner*, 14 F.3d  
21 1415, 1422 (9th Cir. 1994), abrogated on other grounds by *Sandin v. Connor*, 515 U.S. 472, 115  
22 (1995). However, where a *pro se* plaintiff fails to provide the Marshal with accurate and  
23 sufficient information to effect service of the summons and complaint, the Court’s *sua sponte*  
24 dismissal of the unserved defendant is appropriate. *Walker*, 14 F.3d at 1421–22.

## 25 **III. Discussion**

26 The Marshal attempted multiple times to serve Defendant Gutierrez with the information  
27 that Plaintiff provided. (*See* Doc. Nos. 39, 40). However, the information provided was not  
28 sufficient to identify Defendant Gutierrez for service of process. (*Id.*). Plaintiff was afforded a

1 second opportunity to provide further information to locate Defendant Gutierrez, and he filed a  
2 response on October 16, 2023. (Doc. No. 46). However, the CDCR was still unable to identify  
3 Defendant Gutierrez with the information Plaintiff provided. (Doc. No. 57).

4 As the Marshal has already twice attempted to serve Defendant Gutierrez with the  
5 identifying information that Plaintiff provided, the Court finds that Plaintiff has not provided  
6 sufficient information to identify and locate Defendant Gutierrez for service of process.

7 Accordingly, it is hereby **ORDERED**:

8 The Clerk of Court is directed to assign a district judge to this case.

9 It is further **RECOMMENDED**:

10 Defendant Gutierrez be dismissed from this action, without prejudice, for failure to serve  
11 process pursuant to Federal Rule of Civil Procedure 4(m).

12 NOTICE TO PARTIES

13 These findings and recommendations will be submitted to the United States district judge  
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)**  
15 **days** after being served with these findings and recommendations, a party may file written  
16 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s  
17 Findings and Recommendations.” Parties are advised that failure to file objections within the  
18 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,  
19 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

20  
21 Dated: December 22, 2023

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23 HELENA M. BARCH-KUCHTA  
24 UNITED STATES MAGISTRATE JUDGE  
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