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

MAURICE DAVIS, Jr.,

Plaintiff,

No. CIV S-07-1472 FCD GGH P

vs.

CDCR, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

& ORDER

_____ /

Plaintiff, a state prisoner proceeding pro se, died in custody during the pendency of this action, on 3/28/08. See docket # 18. By Order, filed on 1/16/09, this court directed defendants' counsel to inform the court within fifteen days whether or not personal service of the suggestion of death had been effected upon the representative of plaintiff's estate, pursuant to Fed. R. Civ. P. 4 and 25. Counsel for defendants, on 1/29/09, filed a declaration regarding proof of service of statement noting plaintiff's death upon plaintiff's successor or representative, indicating a previous declaration to that effect had been filed on 7/29/08, in response to the court prior orders. Proof of service upon plaintiff's designated representative, his sister, Marita Tetter, is signed by the process server and dated 7/15/08, and indicates personal service upon her was effected on 7/12/08. See Ex. A in docket # 23 and # 27.

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2 Pursuant to Fed. R. Civ. P. 25(a)(1), a motion for substitution of a proper party
3 must be made no later than ninety days after the death is suggested upon the record. Counsel for
4 defendants has submitted proof of service as of 7/12/08 upon plaintiff's representative of a
5 statement noting plaintiff's death; however, there has been no motion for substitution of a proper
6 party filed, and the period of time for doing so has long expired.

7 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed.

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

16 In addition, IT IS ORDERED that the Clerk of the Court serve a copy of these
17 findings and recommendations by mail upon Marita Tetter / 266 N. Evergreen / Kankakee, IL
18 60901. The Clerk is further ordered not to serve a copy of this document upon plaintiff's address
19 of record as he is deceased.

20 DATED: February 6, 2009

/s/ Gregory G. Hollows

21 _____
22 GREGORY G. HOLLOWS
23 UNITED STATES MAGISTRATE JUDGE