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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MALIK JONES,
Plaintiff,

v.

J.L. BISHOP, et al.,
Defendants.

NO. CV-09-0150-JLQ

**ORDER RE: SERVICE OF
PROCESS**

**U.S. MARSHAL ACTION
REQUIRED**

I. Service of Process Issues

On April 30, 2010, the court ordered the Clerk of the Court to forward the Summons' and Complaint as well as other documents to the U.S. Marshal so that the Marshal could serve eighteen Defendants: Defendants Lipton, Bishop, Betti, Stovall, Chatham, Wisely, Montgomery, Probst, Swart, Stailey, Weston, Rigney, Whitlow, Kimbrell, Williams, David, Mitchell and Wright. Ct. Rec. 21. The court later directed service upon five additional Defendants: Defendants Robertson, Felker, the Director of Corrections, Thompson (*see* Ct. Rec. 24), and most recently, McGuire.

Fourteen of twenty-three Defendants have appeared. *See* Ct. Recs. 27, 34.

On August 5, 2010, Defendants Felker, Robertson, and Wright filed an Answer. Ct. Rec. 34. In a footnote, Defendants indicate that to their knowledge Defendants Chatham and Kimbrell are deceased, and that Defendants David, the Director of Corrections, McGuire,

1 Montgomery, Stailey, Thompson, and Wisely “have not been served, have not requested
2 representation by the Office of the Attorney General, and no appearance is made on their
3 behalf.” *Id.* at 1.

4 On August 18, 2008, summonses were returned unexecuted as to Defendants Chatman,
5 Kimbrell, David, Wisely, and Director of Corrections.

6 **Defendants Chatman and Kimbrell.** In the “remarks” section of the Process Receipt
7 and Return form, the Marshal has indicated that Chatman and Kimbrell are deceased.

8 **Defendant David.** The remarks section indicates Defendant David is “in Iraq.”
9 Plaintiff's Amended Complaint states Defendant David is or was a correctional physician's
10 assistant at High Desert (“HDSP”), and refers to David as a "she." Ct. Rec. 15 at 2. The court
11 has researched another district court case against a Defendant referred to as “Dr. David” who
12 worked at HDSP. *Kirk v. Felker*, 2010 WL 2025278 (E.D.Ca May 18, 2010). In that case,
13 the Marshals Service had provided information that Defendant David was no longer employed
14 at the facility and that David had *moved* to Iraq. The court then held that it did not have
15 jurisdiction over Defendant David and dismissed him from the case. The court believes it is
16 very likely that this case involves the same David as in *Kirk v. Felker*.

17 **Defendant Wisely.** As to Defendant Wisely, the summons remarks section indicates
18 prison staff was “unable to locate staff by this name” and the “CDC locator” indicated “more
19 than one in database.” Although the U.S. Marshal was ordered to effect service for Plaintiff,
20 it is ultimately Plaintiff's responsibility to provide a name and address for each defendant to
21 be served in order for the Court to direct the Marshal to serve process on a defendant.
22 Plaintiff only provided a last name and the prison's address. Plaintiff now has three choices;
23 he may provide additional information with which the Marshal may attempt to identify and
24 serve Wisely, or utilize discovery process to seek out information concerning his identity.

25 **Defendant Director.** As to defendant “Director of Corrections,” the remarks indicate
26 “unable to accept service of process per lt co.” Ct. Rec. 40. The court is not aware of any law

1 or regulation prohibiting the Director of Corrections from receiving service of process.
2 *Ortiz-Sandoval v. Gomez*, 81 F.3d 891 (9th Cir. 1996) indicates that both the warden of a
3 California prison and the Director of Corrections for California “may receive service of
4 process.” Defense counsel shall notify the court within **7 DAYS** from receipt of this Order
5 if he is aware of any authority to the contrary, the name and address of the Director of
6 Corrections during the times at issue herein, and whether the then Director of Corrections
7 continues to serve in that position. If the then Director of Corrections is no longer serving as
8 the Director of Corrections, counsel for the Defendants shall serve and file a statement as to
9 the last known address of the Director.

10 The docket does not reflect any attempt to effectuate service upon Montgomery,
11 Stailey, or Thompson.

12 **IN ACCORDANCE WITH THE ABOVE, IT IS HEREBY ORDERED:**

13 1. The United States Marshal for the Eastern District of California is hereby
14 directed to:

15 a. File an Affidavit of Service if such service has been effected on
16 Defendants **Montgomery, Stailey, and Thompson**. If service of process
17 was completed the court will consider the entry of an Order of Default
18 against them if the time for response has passed. If such service has not
19 been effected, the Marshal shall forthwith effect such service and file an
20 Affidavit of Service in this file;

21 b. Effectuate service upon the Director of Corrections as set forth above;

22 2. No later than **September 26, 2010**, Plaintiff shall:

23 a. advise the court in writing whether he intends to dismiss his claims
24 against Defendant Chatman and Kimbrell;

25 b. Either provide additional information with which the Marshal may
26 attempt to identify and serve Defendant Wisely, utilize the discovery

1 process to seek out information concerning Wisely's identity, or elect to
2 dismiss this action against Wisely.

- 3 3. Within **7 DAYS** of receipt of this Order, defense counsel shall file an affidavit:
- 4 a. informing the court of any authority, if known, which would prohibit
5 service of process upon the Director of Corrections;
- 6 b. informing the court, after verifying with the Department of Corrections,
7 whether Defendant David (a female HDSP medical staff) is no longer
8 employed at HDSP and has *moved* to Iraq.
- 9 c. Comply with the court's directions concerning the Director of
10 Corrections.

11 IT IS SO ORDERED. The Clerk shall enter this Order and furnish copies to the United
12 States Marshal for the Eastern District of California, to the Plaintiff, and to defense counsel.

13 **DATED** this 27th day of August 2010.

14 s/ Justin L. Quackenbush
15 JUSTIN L. QUACKENBUSH
16 SENIOR UNITED STATES DISTRICT JUDGE
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