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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BILLY PAUL BIRDWELL, II,

Plaintiff,

No. 2:10-cv-0719 KJM GGH P

VS.

M. CATES, et al.,

ORDER

Defendants.

Plaintiff is state prisoner proceeding pro se with a civil rights action pursuant to

42 U.S.C. § 1983. Service was effectuated on approximately 17 defendants in April and May of

2011. One defendant remains unserved, Petersen, and on August 23, 2011, the undersigned

recommended that Petersen be dismissed as plaintiff did not return the service forms. Discovery

commenced and finished and the remaining defendants filed a motion for summary judgment.

On May 9, 2012, the undersigned recommended that the motion for summary judgment be

granted and this case closed. The undersigned also looked to the merits of the claims against

Petersen and recommended that Petersen be dismissed, despite being unserved. On June 1, 2012,

the district judge assigned to this case declined to adopt the August 23, 2011, findings and

recommendations that Petersen be dismissed for failure to return the service forms and provided

plaintiff another opportunity to return the service forms. Plaintiff has returned the completed

service forms for defendant Petersen.

At this time, it would be inefficient to require the United States Marshal to serve defendant and counsel be obtained to answer the complaint to litigate this case while findings and recommendations are pending that Petersen be dismissed from this action on the merits and the case closed. If Peterson is dismissed on the merits, the need to serve becomes moot.

Therefore, the undersigned will take no action on serving Petersen until the pending findings and recommendation are adopted or declined.

IT IS SO ORDERED.

DATED: July 2, 2012

/s/ Gregory G. Hollows UNITED STATES MAGISTRATE JUDGE

GGH: AB bird0719.ord