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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOE L. McKENNEY, JR.,)	Civil No. 07cv1735-L(POR)
)	
Plaintiff,)	ORDER ADOPTING REPORT AND
)	RECOMMENDATION AND
v.)	GRANTING IN PART
)	DEFENDANTS' MOTION TO
R. HERNANDEZ <i>et al.</i> ,)	DISMISS FIRST AMENDED
)	COMPLAINT
Defendants.)	
_____)	

Plaintiff Joe L. McKenney, Jr., a state prisoner proceeding *pro se* and *in forma pauperis*, filed this action under 42 U.S.C. § 1983 alleging numerous constitutional violations under the Eighth Amendment, First Amendment and the Due Process Clause. The case was referred to United States Louisa S. Porter for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B) and Civil Local Rule 72.3.

On September 9, 2008 the court granted in part and denied in part Defendants' motion to dismiss with leave to amend. Subsequently, Plaintiff filed a first amended complaint alleging an Eighth Amendment claims based on excessive force, deliberate indifference to safety and deprivation of outdoor recreation and a First Amendment claim for denial of meaningful access to the courts. Defendants moved to dismiss these claims as to Defendant Robert J. Hernandez pursuant to Federal Rule of Civil Procedure 12(b)(6). The Magistrate Judge issued a Report and

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1 Recommendation, recommending Defendants' motion to dismiss be denied in part and granted
2 in part with leave to amend. Plaintiff filed no objections.

3 A district judge may accept, reject, or modify the recommended decision on a dispositive
4 matter prepared by a magistrate judge proceeding without the consent of the parties for all
5 purposes. Fed. R. Civ. P. 72(b); *see* 28 U.S.C. § 636(b)(1). "The court shall make a *de novo*
6 determination of those portions of the [report and recommendation] to which objection is
7 made." 28 U.S.C. § 636(b)(1). Section 636(b)(1) does not require some lesser review by the
8 district court when no objections are filed. *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985). The
9 "statute makes it clear that the district judge must review the magistrate judge's findings and
10 recommendations *de novo if objection is made, but not otherwise.*" *United States v.*
11 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (*en banc*) (emphasis in the original); *see*
12 *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1225-26 & n.5 (D. Ariz. 2003).

13 In the absence of any objections, the court **ADOPTS** the Report and Recommendation.
14 Defendants' motion to dismiss is hereby **GRANTED IN PART AND DENIED IN PART** as
15 follows:

16 1. Defendants' motion to dismiss Plaintiff's Eighth Amendment claim for excessive force
17 is granted and the claim is **DISMISSED WITHOUT LEAVE TO AMEND** as to Defendant
18 Hernandez only;

19 2. Defendants' motion to dismiss Plaintiff's Eighth Amendment claim for deliberate
20 indifference to safety is granted and the claim is **DISMISSED WITHOUT LEAVE TO**
21 **AMEND** as to Defendant Hernandez only;

22 3. Defendants' motion to dismiss Plaintiff's Eighth Amendment claim for deprivation of
23 outdoor recreation is **DENIED**; and

24 4. Defendants' motion to dismiss Plaintiff's First Amendment claim for denial of
25 meaningful access to the courts is granted and the claim is **DISMISSED WITH LEAVE TO**
26 **AMEND** as to Defendant Hernandez only.

27 If Plaintiff chooses to amend the complaint, he must, no later than forty-five (45) days
28 from the date this Order is "Filed," file a Second Amended Complaint which cures the

1 deficiencies of pleading as stated in the Report and Recommendation. Plaintiff's Second
2 Amended Complaint must be complete in itself without reference to the any complaint filed in
3 this action. *See* Civil Local Rule 15.1. Defendants not named and all claims not re-alleged in
4 the Second Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814
5 F.2d 565, 567 (9th Cir. 1987). Defendants shall file a response as provided in Federal Rule of
6 Civil Procedure 15(a)(3).

7 **IT IS SO ORDERED.**

8
9 DATED: July 7, 2009

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11 
M. James Lorenz
United States District Court Judge

12 COPY TO:

13 HON. LOUISA S. PORTER
UNITED STATES MAGISTRATE JUDGE

14 ALL PARTIES/COUNSEL
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