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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 HUBERT DYMITR HARASZEWSKI,
12 Plaintiff,
13 vs.
14
15 LISA BRANNAN, et al.,
16 Defendants.
17

CASE NO. 10cv0546-LAB (PCL)

**ORDER ADOPTING REPORT
AND RECOMMENDATION; AND**

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

[Docket number 29.]

18 On March 12, 2010, Plaintiff Hubert Haraszewski, a prisoner in state custody, filed his
19 complaint seeking relief pursuant to 42 U.S.C. § 1983 for alleged violations of his
20 constitutional rights. He brought claims based on his detention in administrative segregation
21 both while as a pretrial detainee and later, following his conviction and sentencing. He also
22 brought claims for allegedly unlawful searches of his cell while he was a pretrial detainee,
23 and for interference with his right of access to courts. Defendants moved to dismiss.

24 This matter was referred to Magistrate Judge Peter Lewis for report and
25 recommendation. On August 11, 2011, Judge Lewis issued his report and recommendation
26 (the "R&R") which recommended denying Defendants' motion only as to his Due Process
27 claims arising from detention in administrative segregation while a pretrial detainee. The
28 R&R recommended dismissing all other claims.

1 Haraszewski submitted a sur-reply in connection with the motion to dismiss, after the
2 R&R had already been issued. Rather than reject it, the Court accepted it as his objections.
3 He then submitted a separate set of objections which the Court accepted for filing as
4 supplemental objections. The Court will consider both together as constituting his objections
5 to the R&R. Defendants filed no objections.

6 A district court has jurisdiction to review a Magistrate Judge's report and
7 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must
8 determine de novo any part of the magistrate judge's disposition that has been properly
9 objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the
10 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The
11 Court reviews de novo those portions of the R&R to which specific written objection is made.
12 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). "The statute
13 makes it clear that the district judge must review the magistrate judge's findings and
14 recommendations de novo *if objection is made*, but not otherwise." *Id.* When no objections
15 are filed, the Court need not review de novo the Report and Recommendation. *Wang v.*
16 *Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005).

17 Haraszewski's objections concede that he has no claim for post-trial detention in
18 administrative segregation,¹ or for interference with his communication with his counsel. He
19 offered extensive commentary on his pretrial detention in administrative segregation, but
20 since the R&R recommended denying the motion to dismiss this claim, the objections are
21 moot.

22 Haraszewski's only substantive objections to adverse recommendations concern the
23 search of his cell while he was a pretrial detainee. Although in his complaint he says
24 prosecutors ordered the search (First Amended Complaint ("FAC") (Docket no. 15) at 7), his
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26 ¹ His objections mention January 29, 2010, the date he was sentenced, as being the
27 date he ceased being a pretrial detainee for this purpose. (Docket no. 45 at 2.) But the
28 relevant date is the date of his conviction, not the date he was sentenced. *See Resnick v.*
Hayes, 213 F.3d 443, 448 (9th Cir. 2000) (convicted inmate who had not yet been sentenced
was not entitled to same rights as pretrial detainees). It is not clear whether this makes any
difference to his claims, however.

1 objections concede that on one occasion officials searched his cell pursuant to a judge's
2 order directing them to do so. In his objections, he argues that the order was illegal and
3 void, that the Defendants must have conspired with the judge, or that the Defendants must
4 have deceived the judge into issuing it. He also objected to some wording in the R&R
5 concerning the purpose of the search of his cell, the R&R's conclusion that as a pretrial
6 detainee he had no reasonable expectation of privacy in his cell, and its recommendation
7 that his claim arising from the search be dismissed.

8 Haraszewski attempts to distinguish several powerful adverse precedents, such as
9 *Bell v. Wolfish*, 441 U.S. 520, 556–57 (1979). That decision makes clear that a pretrial
10 detainee has no more than a “diminished expectation of privacy.” *Id.* at 557. Inmates,
11 including pretrial detainees ordinarily have no reasonable expectation that their cells will not
12 be subject to search by officials. *Mitchell v. Dupnik*, 75 F.3d 517, 522–23 (9th Cir. 1996).
13 Even though the FAC suggests that the searches were conducted out of vengeance or as
14 an effort to obtain evidence, Haraszewski, even as a pretrial detainee, could not reasonably
15 have expected his cell and its contents to remain private. See *United States v. Van Poyck*,
16 77 F.3d 285, 290 (9th Cir. 1996) (holding that only a state intrusion into an area where there
17 is a “constitutionally protected reasonable expectation of privacy” triggers the Fourth
18 Amendment) (citation omitted). This was not an intrusive search of his person, such as that
19 considered in *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993), where prison policy required
20 male guards to conduct random clothed body searches on female prisoners. Rather, it was
21 a search of his cell, which is contemplated in *Bell*.

22 Furthermore, though the R&R does not emphasize this point, Haraszewski's
23 objections to the R&R concede the officers conducting one of the searches were acting out
24 of obedience to a state judge's order. (See Reply to Opp'n to Mot. to Dismiss (Docket no.
25 37-1), Ex. C.) At a hearing at which he was not present but was represented, the state judge
26 issued an order:

27 It is hereby ordered by this Court that: The San Diego Sheriff's Department
28 conduct search of [Haraszewski's] cell and seize all document, writings,
photographs, and all documents whether marked legal mail or not.

1 (*Id.*) While he disagrees that the order's true purpose was legitimate, he agrees the order
2 was issued by a judge and ordered officials to search his cell.

3 Even if the order were to turn out to be invalid, the officials who carried it out are
4 entitled to quasi-judicial immunity. See *Coverdell v. Dept. of Social and Health Services*, 834
5 F.2d 758, 764–65 (9th Cir. 1987). Because Haraszewski is a prisoner and because he is
6 proceeding *in forma pauperis*, the Court is required to dismiss his petition to the extent it
7 seeks monetary relief from defendants who are immune. 28 U.S.C. §§ 1915(e)(2)(B)(iii),
8 1915A(b)(2).

9 Although the Defendants haven't yet raised this point, the defense of qualified
10 immunity would be available to them on this claim, because precedent such as *Bell v.*
11 *Wolfish* and *Mitchell* show that the Fourth Amendment right of pretrial detainees against
12 warrantless searches of their cells is far from "clearly established." See *A.D. v. Markgraf*,
13 636 F.3d 555, 559 (9th Cir. 2011) (setting forth test for qualified immunity). Although the
14 Court is not ruling on the issue at this point, the availability of this defense makes it even
15 clearer that Haraszewski cannot successfully amend this claim.

16 To the extent Haraszewski merely seeks recompense for materials lost or taken
17 during the search, the California Tort Claims Act provided an adequate remedy, and he may
18 not bring such a claim in this Court. See *Dejesus v. Cabales*, 2011 WL 3204345, slip op.
19 at *2 (S.D.Cal., July 25, 2011) (dismissing claim for deprivation of property, because such
20 a claim was not cognizable in a § 1983 action).

21 The Court's only disagreement with the R&R concerns the standard for ruling on
22 motions to dismiss. The R&R cited *Graehling v. Village of Lombard, Ill.* 58 F.3d 295, 297
23 (7th Cir. 1995) for the principle that "the court may hypothesize facts, 'consistent with the
24 complaint, that would make out a claim.'" (R&R at 3:16–18.) Even though the Court
25 construes *pro se* pleadings liberally, *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), the
26 Court will not supply facts a plaintiff has not pleaded. See *Ivey v. Board of Regents of the*
27 *Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). In addition, the Supreme Court's
28 decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) repudiated the old standard,

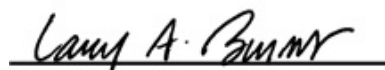
1 set forth in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), under which a complaint should
2 be dismissed only if the plaintiff could not prove any set of facts that would entitle him to
3 relief. To the extent it is applicable to motions to dismiss, *Graehling* is a relic of the *Conley*
4 era. To the extent it is applicable to decisions regarding whether a complaint can be
5 successfully amended, however, it may still be a useful standard. The R&R is therefore
6 modified to exclude the *Graehling* citation. This modification does not affect the validity of
7 the rest of the R&R, or of the outcome of the Court’s ruling.

8 For these reasons, Haraszewski’s objections to the R&R are **OVERRULED**. The
9 Court **ADOPTS** the R&R, as modified. Defendants’ motion to dismiss the complaint is
10 **GRANTED IN PART** and **DENIED IN PART**. Defendants’ request to dismiss the Due
11 Process claim regarding pretrial detention is **DENIED**. Defendants’ request to dismiss the
12 Due Process and Eighth Amendment claims regarding postconviction detention are
13 **GRANTED**. Defendants’ request to dismiss Haraszewski’s claim of denial of access to
14 courts is **GRANTED**. Defendants’ request to dismiss the Fourth Amendment and Due
15 Process claims regarding searches and unlawful property losses is **GRANTED**.

16 The only claims now pending before this Court, therefore, are Plaintiff’s Due Process
17 claim regarding pretrial detention. Haraszewski need not file an amended complaint, but if
18 he chooses to do so, he must do so no later than October 21, 2011, and it may not include
19 dismissed claims

20 **IT IS SO ORDERED.**

21 DATED: September 30, 2011

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23 **HONORABLE LARRY ALAN BURNS**
24 United States District Judge