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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

10 BRIAN DEVERICK LEWIS,

CASE NO. 14cv2264-WQH-BGS

11 Plaintiff,

12 v.

13 M. WAGNER,

14 Defendant.

15 HAYES, Judge:

16 The matters before the Court are the Motion for New Trial and Motion for  
17 Reconsideration (ECF No. 42); Motion Requesting a Bad Faith Finding of Defendant's  
18 Motion for Summary Judgment Supporting Declaration (ECF No. 44); Objections to  
19 the Report and Recommendation (ECF No. 46); and the Ex Parte Application  
20 Requesting to Know the Status of Plaintiff's Motion for Reconsideration (ECF No. 49)  
21 filed by Plaintiff.

22 **I. Background**

23 On September 23, 2014, Plaintiff Brian Deverick Lewis, a state prisoner  
24 proceeding pro se, initiated this action by filing a Complaint pursuant to 42 U.S.C. §  
25 1983 against Defendant M. Wagner. (ECF No. 1). Plaintiff alleges that Defendant  
26 violated his First Amendment, Eighth Amendment, and Fourteenth Amendment rights.  
27 Plaintiff alleges that Defendant violated Plaintiff's right to be free from retaliatory  
28 punishment for engaging in conduct protected by the First Amendment. Plaintiff

1 alleges that Defendant disciplined Plaintiff in a retaliatory manner by searching his cell  
2 and confiscating his personal property for exercising his First Amendment right of  
3 submitting a CDCR 602 against Defendant. *Id.* at 4-5. On January 5, 2015, Defendant  
4 filed an Answer. (ECF No. 5).

5 On October 13, 2015, Defendant filed a motion for summary judgment. (ECF  
6 No. 15). On February 17, 2016, Plaintiff filed an opposition and cross motion for  
7 summary judgment. (ECF No. 28). On March 16, 2016, Defendant filed a reply in  
8 support of Defendant's motion for summary judgment. (ECF No. 29).

9 On June 7, 2016, the Magistrate Judge issued the Report and Recommendation,  
10 recommending that the Court grant the motion for summary judgment filed by  
11 Defendant. (ECF No. 30). With regard to Plaintiff's First Amendment claim, the  
12 Report and Recommendation states, "Plaintiff has not submitted evidence of opposition  
13 to his protected speech," and "Defendant has presented evidence that . . . Defendant  
14 Wagner had a legitimate correctional purpose for searching Plaintiff's cell." *Id.* at 15.  
15 The Report and Recommendation states, "[I]t does not appear that Plaintiff's exercise  
16 of his First Amendment rights were chilled by the threat of the search or the search  
17 itself." *Id.* With regard to Plaintiff's Eighth Amendment claim, the Report and  
18 Recommendation states, "Defendant's actions do not demonstrate knowledge and  
19 disregard of excessive medical risk" and "[n]o triable issue of material fact exists as to  
20 the objective or subjective components of Plaintiff's claim." *Id.* at 18. With regard to  
21 Plaintiff's Fourteenth Amendment claim, the Report and Recommendation states,  
22 "There is no evidence that Plaintiff pursued the state law remedy available to him under  
23 California Government Code §§ 810 et. seq. before asserting his constitutional claim.  
24 Therefore, as a matter of law, Defendant is entitled to summary judgment on Plaintiff's  
25 Fourteenth Amendment Claim." *Id.* at 20. Further, the Report and Recommendation  
26 states, "Plaintiff has not provided evidence that the deprivation he experiences was of  
27 such constitutional magnitude that a material issue of fact exists." *Id.*

28 The Court granted Plaintiff two extensions of time to file objections to the

1 Report and Recommendation. (ECF Nos. 33, 36). The docket reflects that no timely  
2 objections were filed.

3 On September 14, 2016, this Court issued an order adopting the Report and  
4 Recommendation in its entirety. On September 20, 2016, Plaintiff filed a Notice of  
5 Late Filing of Plaintiff's Objections to the Report and Recommendation stating that due  
6 to the "closure and dysfunction" of the RJD Facility A Library, Plaintiff was unable to  
7 timely file Objections to the Report and Recommendation. (ECF No. 40).

8 On March 16, 2017, Plaintiff filed Motion for New Trial and Motion for  
9 Reconsideration, Motion Requesting a Bad Faith Finding of Defendant's Motion for  
10 Summary Judgment Supporting Declaration, and Objections to the Report and  
11 Recommendation. (ECF Nos. 42, 44, 46). On October 10, 2017, Plaintiff filed an Ex  
12 Parte Application Requesting to Know the Status of Plaintiff's Motion for  
13 Reconsideration. (ECF No. 49). The record reflects that Defendant has not filed a  
14 response to any of Plaintiff's recent filings.

## 15 **II. Motion for New Trial or in the alternative Motion for Reconsideration**

16 Plaintiff moves the Court for an order granting him a new trial pursuant to Rule  
17 59(a) or in the alternative, requests that the Court vacate the judgment entered in this  
18 case pursuant to Rule 60(b) and consider Plaintiff's objections to the Report and  
19 Recommendation. (ECF No. 42). There has been no trial in this case. Accordingly,  
20 the Court construes Plaintiff's motion as a Motion to Vacate Judgment pursuant to Rule  
21 60(b).

22 Plaintiff contends that he could not timely file his objections to the Report and  
23 Recommendation due to circumstances beyond his control and that his objections were  
24 not considered in the Order adopting the Report and Recommendation. Plaintiff asserts  
25 that he attempted to make a copy of his objections and file on August 26, 2016 to meet  
26 the September 1, 2016 deadline, but was unsuccessful because the copy machine in the  
27 library was out of order. Plaintiff asserts that the copy machine was out of order until  
28 September 16, 2016, and due to a large volume of backlog of copying services for other

1 inmates, Plaintiff could not copy his objections until September 19, 2016.

2 **A. Applicable Law**

3 Federal Rule of Civil Procedure 60(b) provides in relevant part:

4 On motion and upon such terms as are just, the court may relieve a party  
5 . . . from a final judgment, order, or proceeding for the following reasons:  
6 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly  
7 discovered evidence that, with reasonable diligence, could not have been  
8 discovered in time to move for a new trial under Rule 59(b); (3) fraud . .  
9 . . , misrepresentation, or misconduct by an opposing party; (4) the  
10 judgment is void; (5) the judgment has been satisfied, released or  
11 discharged; it is based on an earlier judgment that has been reversed or  
12 vacated; or applying it prospectively is no longer equitable; or (6) any  
13 other reason that justifies relief.

14 Fed. R. Civ. P. (60)(b); *see also Gonzalez v. Crosby*, 545 U.S. 524, 529–32 (2005)  
15 (Rule 60(b) applies to habeas proceedings under 28 U.S.C. § 2254). The burden of  
16 proof is on the party bringing the Rule 60(b) motion. *See Rufo v. Inmates of Suffolk*  
17 *Cty. Jail*, 502 U.S. 367, 383 (1992); *see also Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d  
18 1255, 1262 (9th Cir. 1993) (citations omitted).

19 To justify relief under Rule 60(b)(1), a party must show “excusable neglect.”  
20 Fed. R. Civ. P. 60(b)(1). “To determine when neglect is excusable, we conduct the  
21 equitable analysis . . . by examining . . . (1) the danger of prejudice to the opposing  
22 party; (2) the length of the delay and its potential impact on the proceedings; (3) the  
23 reason for the delay; and (4) whether the movant acted in good faith.” *Lemoge v.*  
24 *United States*, 587 F.3d 1188, 1192 (9th Cir. 2009) (quotations omitted).

25 “To justify relief under subsection (6) [of Rule 60], a party must show  
26 ‘extraordinary circumstances’ suggesting that the party is faultless in the delay.”  
27 *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 393 (1993).  
28 Courts “use Rule 60(b)(6) sparingly as an equitable remedy to prevent manifest  
injustice.” *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010) (quoting *United States*  
*v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)) (quotations  
omitted). “To receive relief under Rule 60(b)(6), a party must demonstrate  
‘extraordinary circumstances which prevented or rendered him unable to prosecute his  
case.’” *Id.* (quoting *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002)).

1 “Relief under Rule 60(b)(6) will not be granted unless the moving party is able to show  
2 both injury and circumstances beyond its control prevented timely action to protect its  
3 interest.” *Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009).

#### 4 **B. Ruling of Court**

5 Upon a review of the record, the Court finds that Plaintiff has demonstrated  
6 injury because he lacked sufficient opportunity to timely file objections to the Report  
7 and Recommendation. The Court finds that Plaintiff has demonstrated an inability to  
8 timely file objections to the Report and Recommendation due to circumstances beyond  
9 his control. The Court concludes that Plaintiff has demonstrated “extraordinary  
10 circumstances which prevented or rendered him unable to prosecute his case” sufficient  
11 to warrant relief from judgment. *See Lal*, 610 F.3d at 524.

12 The Motion to Vacate the Court’s Order on September 14, 2016 (ECF No. 37)  
13 is granted. (ECF No. 42).

#### 14 **III. Objections to the Report and Recommendation**

15 The duties of the district court in connection with a Report and Recommendation  
16 of a Magistrate Judge are set forth in Rule 72(b) of the Federal Rules of Civil  
17 Procedure and 28 U.S.C. § 636(b)(1). When a party objects to a Report and  
18 Recommendation, “[a] judge of the [district] court shall make a de novo determination  
19 of those portions of the [Report and Recommendation] to which objection is made.”  
20 28 U.S.C. § 636(b)(1); *see Thomas v. Arn*, 474 U.S. 140, 149–50 (1985). When no  
21 objections are filed, the district court need not review the Report and Recommendation  
22 de novo. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *United States*  
23 *v. Reyna-Tapia*, 328 F.3d 1114, 1121–22 (9th Cir. 2003) (en banc). A district court  
24 may “accept, reject, or modify, in whole or in part, the findings or recommendations  
25 made by the magistrate.” Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

#### 26 **A. First Amendment Retaliation Claim**

27 The Magistrate Judge concluded that Plaintiff failed state a claim for retaliation  
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1 because Plaintiff did not demonstrate that Defendant's actions did not reasonably  
2 advance a legitimate correctional goal and did not demonstrate causation between the  
3 alleged retaliation and the exercise of Plaintiff's First Amendment Right. The Report  
4 and Recommendation states "Plaintiff alleges that on February 22, 2014, . . . he told  
5 Defendant Wagner that he would write a complaint against him for his disrespect to  
6 which Defendant allegedly responded 'and then you're going to be my next cell search,  
7 what cell are you in?'" (ECF No. 30 at 2). The Magistrate Judge found that the  
8 encounter on February 22nd was not the cause of the alleged retaliatory search because  
9 Defendant submitted evidence that the cell search was "part of Defendant's required  
10 duty." *Id.* at 13. The Magistrate Judge found that "Defendant would have had to  
11 engage in a cell search even in the absence of the Plaintiff's CDCR 602 complaint" and  
12 concluded that "Plaintiff has failed to submit evidence that the actions taken by  
13 Defendant lacked a legitimate correctional goal." *Id.*

14 Plaintiff objects to the Magistrate Judge's conclusion that Plaintiff failed to  
15 prove the elements of a retaliation claim. Plaintiff contends that the Magistrate Judge  
16 relied on material facts that are false and misleading. (ECF No. 46).

17 A viable claim of First Amendment retaliation contains five basic elements: (1)  
18 an assertion that a state actor took some adverse action against an inmate, (2) because  
19 of, (3) that inmate's protected conduct, and that action (4) chilled the inmate's exercise  
20 of his First Amendment Rights, and (5) the action did not reasonably advance a  
21 legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir.  
22 2005). The plaintiff must submit evidence that links the alleged retaliation with the  
23 exercise of a First Amendment right. *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir.  
24 1995). The plaintiff must show the exercise of the First Amendment right was the  
25 substantial or motivating factor behind the defendant's conduct. *Soranno's Gasco, Inc.*  
26 *v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). Raising a genuine issue of material  
27 fact as to retaliatory motive requires that the plaintiff produce, "in addition to evidence  
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1 that the defendant knew of the protected speech, at least (1) evidence of proximity in  
2 time between the protected speech and the allegedly retaliatory decision, (2) evidence  
3 that the defendant expressed opposition to the speech or (3) evidence that the  
4 defendant's proffered reason for the adverse action was false or pretextual." *Pinard*  
5 *v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 771 n.21 (9th Cir. 2006).

### 6 **1. Number of cell searches**

7 Plaintiff objects to the factual finding in the Report and Recommendation that  
8 Plaintiff's cell was searched twice in March 2014. Plaintiff contends that Defendant's  
9 March 29, 2014 search was the sixth time Plaintiff's cell was searched that month.  
10 Plaintiff does not contend that Defendant conducted any of the five searches prior to  
11 the March 29th search. Plaintiff contends the March 29th search was not part of  
12 Defendant's required job duty and was not an "infrequent and unscheduled" search  
13 pursuant to CAL. CODE REGS. tit. 15 § 3287(a)(1) (2017). Plaintiff objects to the  
14 factual finding in the Report and Recommendation that most cells in the housing unit  
15 were searched between one and four times in February and March 2014. *See* ECF No.  
16 30 at 13. Plaintiff contends the Cell Search Log and Housing Unit Log Book indicate  
17 that no cell was searched more than three times per month, that most cells were  
18 searched one time, and that five cells were not searched at all in March 2014. Plaintiff  
19 asserts that these facts show that Defendant did not have a legitimate correctional goal  
20 in searching his cell on March 29, 2014.

21 The Magistrate Judge noted that "cell search frequency is an average – not a  
22 limit." (ECF No. 30 at 13). The Magistrate Judge found that any dispute regarding the  
23 number of times Plaintiff's cell was searched in March 2014 was not material. The  
24 Magistrate Judge correctly concluded "Defendant would have had to engage in a cell  
25 search even in the absence of Plaintiff's CDCR 602 complaint" and that "a part of  
26 Defendant's required duty [is] to conduct mandatory routine cell searches." *Id.* at 13.  
27 Evidence in the record supports the Magistrate Judge's finding that the March 29th  
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1 search by Defendant reasonably advanced a legitimate correctional goal.

2 **2. Proximity between retaliatory threat and search**

3 Plaintiff contends the search by Defendant on March 29, 2014 was the first  
4 search conducted by Defendant since the alleged retaliatory threat on February 22,  
5 2014. Plaintiff contends the Magistrate Judge erred in finding that “Plaintiff has not  
6 submitted sufficient evidence of proximity in time between the incident or submission  
7 of the CDCR 602 in February and the alleged retaliatory cell search, which occurred  
8 a little more than a month later on March 29, 2014.” (ECF No. 30 at 14).

9 Causation is met if the Plaintiff’s speech is the motivating factor behind the  
10 retaliatory conduct. *Pratt*, 65 F. 3d at 807. In this case, the record reflects that  
11 Defendant was “required” to conduct mandatory routine cell searches. (ECF No. 30  
12 at 13). “Defendant would have had to engage in a cell search even in the absence of  
13 Plaintiff’s CDCR 602 complaint.” *Id.* The Magistrate Judge correctly concluded that  
14 the evidence does not demonstrate that Plaintiff’s speech was the motivating factor of  
15 Defendant’s cell search.

16 As to the fourth element, the Magistrate Judge correctly concluded that “it does  
17 not appear that Plaintiff’s exercise of his First Amendment rights were chilled by the  
18 threat of a search or the search itself.” (ECF No. 30 at 15).

19 **B. Eighth and Fourteenth Amendment claims**

20 Plaintiff objects to the Magistrate Judge’s finding that the confiscation by  
21 Defendant of Plaintiff’s fan and pillow “do[es] not demonstrate knowledge and  
22 disregard of excessive medical risk.” (ECF No. 30 at 18). Plaintiff contends merely  
23 possessing items in cells that do not appear on an approved list or for which inmates  
24 cannot prove permissibility did not violate prison rules and did not warrant  
25 confiscation. Plaintiff contends Defendant had no legitimate basis to confiscate  
26 Plaintiff’s items and Defendant violated Plaintiff’s Eighth and Fourteenth Amendment  
27 rights.

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1                                   **1. Applicable Law**

2           The Eighth Amendment prohibits cruel and unusual punishment and “embodies  
3 broad and idealistic concepts of dignity, civilized standards, humanity and decency.”  
4 *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing *Jackson v. Bishop*, 404 F.2d 571  
5 (8th Cir. 1968)). In the context of incarceration, although “[t]he Constitution ‘does not  
6 mandate comfortable prisons,” the Supreme Court has stated that malicious cell  
7 searches and “calculated harassment unrelated to prison needs” may implicate the  
8 Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Rhodes*  
9 *v. Chapman*, 452 U.S. 337, 349 (1981)); *Hudson v. Palmer*, 468 U.S. 517, 528–30  
10 (1984). However, after incarceration, “only the ‘unnecessary and wanton infliction of  
11 pain’ . . . constitutes cruel and unusual punishment forbidden by the Eighth  
12 Amendment.” *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (quoting *Estelle*, 429  
13 U.S. at 103).

14           A viable Eighth Amendment claim that a prison official has deprived an inmate  
15 of humane conditions must meet both an objective requirement and a subjective  
16 requirement. *Lopez v. Smith*, 203 F.3d 1122, 1132–33 (9th Cir. 1995) (citing *Allen v.*  
17 *Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1995)). “Under the objective requirement, the  
18 prison official’s acts or omissions must deprive an inmate of the minimal civilized  
19 measures of life’s necessities. The subjective requirement, relating to the defendant’s  
20 state of mind, requires deliberate indifference. *Id.* (citing *Allen*, 48 F.3d at 1087). In  
21 the context of a prisoner’s medical needs, the “determination of deliberate indifference  
22 requires an examination of two elements: the seriousness of the prisoner’s medical  
23 needs and the nature of the defendant’s response to that need.” *McGuckin v. Smith*, 974  
24 F.2d 1050, 1059 (9th Cir. 1992) (overruled on other grounds by *WMX Techs., Inc. v*  
25 *Miller*, 104 F.3d 1133 (9th Cir. 1997)).

26           The Due Process Clause of the Fourteenth Amendment protects individuals from  
27 arbitrary government action by prohibiting states from depriving people of “life,  
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1 liberty, or property without due process of law.” U.S. Const. amend. XIV. To prevail  
2 on a claim of deprivation of liberty or property without due process of law, a plaintiff  
3 must first establish the existence of a protected liberty or property interest. After  
4 meeting this threshold requirement, the plaintiff must then demonstrate that the  
5 defendants failed to provide due process. *See Wolff v. McDonnell*, 418 U.S. 539,  
6 556–57 (1974); *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003). A temporary  
7 deprivation of personal property does not constitute a violation of a prisoner’s due  
8 process rights unless Plaintiff can show the deprivation imposed “atypical and  
9 significant hardship on the inmate in relation to the ordinary incidents of prison life,”  
10 causing actual harm to the inmate. *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995).

## 11 **2. Ruling of the Court**

12 The Magistrate Judge found that Defendant’s alleged illegitimate basis for  
13 confiscating Plaintiff’s items was insufficient to establish Defendant’s deliberate  
14 indifference. The Magistrate Judge correctly concluded that “Defendant’s actions do  
15 not demonstrate knowledge and disregard of excessive medical risk because Defendant  
16 did not know whether Plaintiff was allowed to possess the medical devices, he believed  
17 the property was in violation of prison rules, and only temporarily took the property  
18 while determining its permissibility.” (ECF No. 30 at 18).

19 As to the Fourteenth Amendment claim, the Magistrate Judge correctly  
20 concluded “[t]here is no evidence that Plaintiff pursued the state law remedy available  
21 to him under California Government Code §§ 810 et seq. before asserting his  
22 constitutional claim. Therefore, as a matter of law, Defendant is entitled to summary  
23 judgment on Plaintiff’s Fourteenth Amendment Claim.” (ECF No. 30 at 20). The  
24 Magistrate Judge correctly concluded Defendant did not violate Plaintiff’s Eighth or  
25 Fourteenth Amendment rights.

## 26 **III. Motion Requesting a Bad Faith Finding of Defendant’s Motion for Summary** 27 **Judgment Supporting Declaration**

1 The Motion Requesting a Bad Faith Finding of Defendant's Motion for  
2 Summary Judgment Supporting Declaration is denied. (ECF No. 44).

3 **IV. Ex Parte Application Requesting to Know the Status of Plaintiff's Motion for**  
4 **Reconsideration**

5 Plaintiff's ex parte application "respectfully request[s] the Court to inform him  
6 of the status of his [motion for reconsideration.]" (ECF No. 49). This Order rules on  
7 the motion for reconsideration. The ex parte application is granted. (ECF No. 49).

8 **V. Conclusion**

9 IT IS HEREBY ORDERED that the Motion for Reconsideration is GRANTED.  
10 (ECF No. 42). The Order filed on September 14, 2016 and the Judgment filed on  
11 September 14, 2016 are VACATED. (ECF Nos. 37, 38).

12 IT IS HEREBY ORDERED that the Motion Requesting a Bad Faith Finding of  
13 Defendant's Motion for Summary Judgment Supporting Declaration is DENIED. (ECF  
14 No. 44).

15 IT IS HEREBY ORDERED that the Ex Parte Application Requesting to Know  
16 the Status of Plaintiff's Motion for Reconsideration (or New Trial) of the Court's  
17 September 14, 2016 Order Adopting the R&R Granting Defendant's Motion for  
18 Summary Judgment is GRANTED. (ECF No. 49).

19 IT IS FURTHER ORDERED that the Objections to the Report and  
20 Recommendation are OVERRULED. (ECF No. 46). The Report and Recommendation  
21 (ECF No. 30) is ADOPTED in its entirety. Defendant's motion for summary judgment  
22 (ECF No. 15) is GRANTED and Plaintiff's cross motion for summary judgment (ECF  
23 No. 28) is DENIED. The Clerk shall enter judgment in favor of Defendant and against  
24 Plaintiff.

25 DATED:

26 11/28/17

27   
28 WILLIAM Q. HAYES

United States District Judge