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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERNEST KELLY HOLESTINE,
Plaintiff,
v.
R.J. DONOVAN CORRECTIONAL
FACILITY et al.,
Defendants.

Case No.: 18-CV-2094-AJB(WVG)

**ORDER GRANTING PLAINTIFF’S
MOTION FOR RELIEF FROM
COURT’S ORDER ADOPTING THE
REPORT AND RECOMMENDATION**

(Doc. No. 58)

Currently pending before this Court is Ernest Kelly Holestine’s (“Plaintiff”) motion for relief from the Court’s order adopting the Report and Recommendation (“R&R”). (Doc. No. 58.) Defendants have not objected to Plaintiff’s motion. For the reasons set forth below, the Court **GRANTS** Plaintiff’s motion for relief. (Doc. No. 58.)

I. BACKGROUND

Plaintiff, a prisoner proceeding pro se, filed a 42 U.S.C. § 1983 action on September 6, 2018. (Doc. No. 1.) On October 3, 2019, Plaintiff filed a Second Amended Complaint. (Doc. No. 46.) United States Magistrate Judge William V. Gallo issued a R&R recommending that this Court: (1) grant Defendants’ motion to dismiss with regard to Plaintiff’s Equal Protection claim; (2) deny in part as moot Defendant’s motion to strike; (3) grant Plaintiff’s motion for leave to file Third Amended Complaint; and (4) grant

1 Plaintiff's motion for leave to increase page limit. (Doc. No. 55.) Finding that there were
2 no objections to the R&R, and that the R&R did not contain clear error, the Court issued
3 an Order adopting the R&R in its entirety. (Doc. No. 56.) On October 2, 2020, Plaintiff
4 filed a motion for relief from the Court's order adopting the R&R pursuant to Rule 60(b)
5 of the Federal Rules of Civil Procedure. (Doc. No. 58.) Plaintiff alleges that he was never
6 served with a copy of the Magistrate Judge's R&R and that this extraordinary circumstance
7 entitles him to Rule 60(b) relief. Defendants have not opposed Plaintiff's motion.

8 **II. DISCUSSION**

9 Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, a district court may
10 grant a motion for relief from an order when there is any reason not previously considered
11 that justifies granting relief from operation of the order. *See* Fed. R. Civ. P. 60(b). A party
12 merits relief under Rule 60(b) if he demonstrates "extraordinary circumstances" prevented
13 him from taking timely action to prevent or correct an erroneous order. *See Cmty. Dental*
14 *Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002). Relief under Rule 60(b) normally will
15 not be granted unless the moving party is able to show both injury and that circumstances
16 beyond his control prevented timely action to protect his interests. *Id.*

17 With his motion, Plaintiff files a declaration stating that he never received Judge
18 Gallo's R&R. However, Plaintiff explains that on September 15, 2020, Plaintiff received
19 the Court's order adopting the R&R. (Doc. No. 58 at 6.) That same date, on September 15,
20 2020, Plaintiff sent a request for interview form to the prison's mailroom, and requested a
21 copy of Plaintiff's incoming legal mail log. (*Id.*) The next day, Plaintiff received the mail
22 log, which shows that between the time the R&R was issued, and when Plaintiff received
23 the Court's order adopting the R&R, Plaintiff only received two pieces of legal mail,
24 neither of which was the R&R. (*Id.*) Plaintiff contends that he did not become aware of the
25 R&R until he received the Court's order adopting the R&R. He further maintains that he
26 did not file objections to the R&R because he never received a copy of the R&R.
27 Defendants have not filed an opposition to dispute Plaintiff's motion.
28


1 After reviewing the record, the Court finds that Plaintiff has demonstrated injury
2 because he had no opportunity to file objections to the R&R, and that his inability to file
3 objections resulted from circumstances beyond his control. The Court concludes that
4 Plaintiff has demonstrated extraordinary circumstances sufficient to warrant relief from the
5 order because he never received a copy of the R&R and was therefore unable to file
6 objections.

7 **III. CONCLUSION**

8 In light of the above, the Court **GRANTS** Plaintiff's motion for relief from the
9 Court's August 28, 2020 order adopting the R&R. (Doc. No. 58). The Court **VACATES**
10 the August 28, 2020 order adopting the R&R. (Doc. No. 56) Plaintiff may file objections
11 to the R&R no later than **December 28, 2020**. Any party may file a reply to the objections
12 to the R&R no later than **January 11, 2021**.

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14 **IT IS SO ORDERED.**

15 Dated: November 13, 2020

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17 Hon. Anthony J. Battaglia
18 United States District Judge
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