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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MANUEL JOE PADILLA,	)	Case No. CV 09-5651VAP (Ex)
	)	
Plaintiff,	)	<b>FINDINGS OF FACT AND</b>
	)	<b>CONCLUSIONS OF LAW</b>
v.	)	
	)	
UNITED STATES OF	)	
AMERICA,	)	
	)	
Defendant .	)	

This case was tried to the Court without a jury on August 28, 29, and 30, 2013, and the Court took the matter under submission at the conclusion of trial. The Court, having considered all the evidence presented by the parties, the written submissions from both sides, and the argument of counsel, issues the following Findings of Fact and Conclusions of Law.

1 **FINDINGS OF FACT**

- 2 1. Tony Richard Padilla ("Padilla") was the son of  
3 Plaintiffs Manuel Joe Padilla and Clara Fernandez.<sup>1</sup>  
4 Padilla had been incarcerated at the United States  
5 Penitentiary in Victorville, California ("USP  
6 Victorville") since April 11, 2006, and as of May 27,  
7 2006, he was housed in the penitentiary's Special  
8 Housing Unit ("SHU"). He had been transferred to the  
9 SHU to be placed in protective custody after he had  
10 been attacked by other inmates affiliated with a  
11 different prison gang. Ex. 24J.
- 12 2. Mario Peña Llanas ("Peña Llanas") had been  
13 incarcerated at USP Victorville since January 27,  
14 2006, after his conviction for violation of 8 U.S.C.  
15 § 1326, illegal reentry into the United States after  
16 deportation. He was transferred to the SHU on May  
17 27, 2006, because he had been fighting with other  
18 inmates while housed in general population. Ex. 23F.
- 19 3. Upon his transfer to the SHU on May 27, 2006, Peña  
20 Llanas was assigned to share Cell 206 with Padilla.  
21 On July 9, 2006, Padilla and Peña Llanas were moved  
22 to Cell 215.
- 23 4. USP Victorville is one facility in the Victorville  
24 Federal Correctional Complex, and is located within  
25 the Central District of California.

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<sup>1</sup>Clara Fernandez died during the pendency of the case  
and has been dismissed.

1                   **Conditions and Procedures at USP Victorville's**  
2                                   **Special Housing Unit**

- 3 5. Inmates housed in the SHU at USP Victorville are  
4 confined to their cells for 23 hours each day, taking  
5 their meals and showers inside the cell. They are  
6 released for one hour per day to exercise in a  
7 confined exercise area. The dimensions of both cells  
8 shared by Padilla and Peña Llanas, Cells 206 and 215,  
9 were eight feet by twelve feet.
- 10 6. SHU staff conducts checks on the inmates every 30  
11 minutes during daytime and evening hours. During  
12 these checks, the correctional officers look into  
13 every cell through the window in the cell door.  
14 Inmate safety is the primary purpose of these checks.
- 15 7. Five times per day, SHU staff does an inmate count.  
16 These are conducted at midnight, 3:00 a.m., 5:00  
17 a.m., 4:00 p.m., and 10:00 p.m. on weekdays; the  
18 primary purpose of the inmate count is ensuring that  
19 all inmates are present and accounted for.
- 20 8. Approximately three times per week, the lieutenant in  
21 charge of the SHU conducts rounds, during which he or  
22 she addresses such issues as medical and dental care  
23 needs, counseling, and law library access with the  
24 inmates. The lieutenant looks into each cell during  
25 these rounds, and spends between 15 seconds and 15

1 minutes talking to each inmate. The warden conducts  
2 rounds of the SHU once per week, accompanied by other  
3 Bureau of Prisons ("BOP") staff.  
4

5 **Policies in Force at the USP Victorville SHU Regarding**  
6 **Violence Between Inmates**

7 9. The evidence presented at trial revealed (1) a policy  
8 existed requiring BOP staff to investigate reports or  
9 witnessed incidents of fighting between cellmates;  
10 and (2) no policy, written or otherwise, existed  
11 mandating reassignment of cellmates following a  
12 physical altercation.

13 a. All of the BOP staff members who testified were  
14 careful to state (in nearly identical language)  
15 that there were no mandatory written BOP  
16 policies regarding the reassignment of cellmates  
17 who engaged in physical fighting.

18 b. Jermaine Diaz worked as a correctional officer  
19 in the USP Victorville SHU from May 2006 through  
20 August 2006. He investigated any reports made  
21 to him of inmate fights, and would notify the  
22 Officer in Charge and the lieutenant in his  
23 chain of command of any such reports or  
24 incidents. He could not recall any situation  
25 where two cellmates were found fighting and were  
26 not separated, i.e., not reassigned to share a  
27 cell with a different inmate.  
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1 c. Tony Quale, employed by BOP at the Victorville  
2 Federal Correctional Complex since 2000, first  
3 assigned to the SHU in 2005, and now holding the  
4 title of "Safety and Compliance Specialist" at  
5 USP Victorville, testified no mandatory policy  
6 exists mandating separation of inmates following  
7 a report of violence between them. He would  
8 report any inmate fights he observed to the SHU  
9 lieutenant, and would investigate any reports of  
10 violence. Pedro Barajas, a correctional officer  
11 working in the SHU in August 2006, testified he  
12 too investigated when he observed or got reports  
13 of inmate fights, and would pass along the  
14 information to his superior officer.  
15 Correctional Officer Joseph Martinez testified  
16 to the same effect: he would investigate and  
17 report to his superior officer any reports or  
18 observations of inmate fights. Both Quale and  
19 Barajas testified that no BOP policy exists  
20 regarding procedures that staff must follow when  
21 an inmate reports a fight.

22 d. Jesus Sanchez, another corrections officer  
23 working at the SHU in USP Victorville in August  
24 2006, testified that when he saw inmates  
25 fighting, he would separate the inmates in order  
26 to investigate. He could not recall any  
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1 instances where inmates who fought in the SHU  
2 were not reassigned to different cells.

3 e. Eduardo Madrid, another correctional officer  
4 working at the USP Victorville SHU in August  
5 2006, testified that fighting between inmates  
6 was "not tolerated" by the staff, i.e., both  
7 inmates would be disciplined if found fighting.

8 f. Scott Williams served as the lieutenant in  
9 charge of the SHU at USP Victorville in August  
10 2006. He testified that the SHU was filled to  
11 capacity at that time; if an inmate requested a  
12 move, he would have to swap cells with another  
13 inmate. He too testified that inmate fighting  
14 "was not tolerated."

15 g. Like the other BOP employees who testified,  
16 Williams emphasized the lack of a written  
17 institutional policy mandating separation of  
18 cellmates who had fought.

19 h. According to Williams's trial testimony, if an  
20 inmate submitted a written complaint, the  
21 complaint would be sent to Williams, who would  
22 read it, and if it referred to a fight or  
23 assault, he first would investigate by talking  
24 to both inmates. If the inmates were housed  
25 together, Williams would reassign them to  
26 different cells only if he thought the fighting  
27 would continue. Williams also testified that a  
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1 written complaint about inmate fighting would  
2 not be retained in an inmate's file or BOP files  
3 unless, after investigation, the complaint was  
4 found to be "legitimate."

- 5 i. Captain Robert Hodak, who was a Special  
6 Investigation Services ("SIS") agent at USP  
7 Victorville in August, 2006, testified that  
8 although it was "always a problem" to reassign  
9 inmates, it was done whenever necessary.  
10 Although at trial, Hodak testified that the only  
11 factors BOP staff consider in making cell  
12 assignments for SHU inmates were "race,  
13 religion, gang affiliation, basis for transfer  
14 to the SHU, and geography," during his  
15 deposition, Hodak stated he would reassign two  
16 cellmates who requested it "to avoid problems."  
17 j. Hodak also testified that all complaints were  
18 passed on to him because the staff had the  
19 obligation to do so, and it was his practice to  
20 investigate any complaint of fighting and err on  
21 the side of caution by separating the cellmates.  
22 Finally, Hodak testified during his deposition  
23 that if inmates celled together posed a threat  
24 to one another, the "general understanding" or  
25 unwritten policy was to separate them.  
26 k. The BOP officials testified that serious  
27 incidents of violence between inmates must be  
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1 reported to the lieutenant in charge of the SHU.  
2 Williams and Hodak testified that they would  
3 receive reports of any violent conflicts between  
4 inmates; Hodak testified that he knew would be  
5 notified of such because corrections officers  
6 were required to make such reports.

7 1. Upon receiving such a report of violence or  
8 threatened future violence, the BOP staff would  
9 conduct an investigation and attempt informally  
10 to determine if the cellmates were seeking  
11 separate quarters or if there was a danger of  
12 future violence.

13 10. In sum, the evidence was insufficient to demonstrate  
14 the existence of a mandatory, nondiscretionary policy  
15 of separating cellmates housed in the SHU. The  
16 testimony taken as a whole revealed a policy and  
17 practice of investigating reported or observed inmate  
18 fighting or violence, but the outcome of such  
19 investigations, i.e., whether the cellmates would be  
20 reassigned, depended heavily on a number of factors.  
21 Even the evidence most favorable to Plaintiff on this  
22 issue, the testimony by correctional officers Diaz  
23 and Sanchez that they could not recall any instances  
24 when cellmates who fought were not reassigned, and by  
25 Hodak that his usual practice or protocol would be to  
26 reassign cellmates after a fight in order to avoid  
27 future problems, does not amount to evidence of a  
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1 nondiscretionary policy mandating such reassignments  
2 in all circumstances where fighting occurred.

3  
4 **Altercations Between Padilla and Peña Llanas**

- 5 11. Peña Llanas's BOP records showed he was disciplined  
6 numerous times for fighting before 2006. See Exs.  
7 10-B, 10-C, 10-D, 10-F, 10-G. Peña Llanas admitted  
8 during his trial testimony that by May 27, 2006, when  
9 he was transferred to the USP Victorville SHU, he had  
10 been in fights with other inmates about 20 times.
- 11 12. Nevertheless, SHU staff considered Peña Llanas one of  
12 the "less dangerous" inmates on the unit, and in  
13 approximately July 2006, Williams assigned him an  
14 orderly position on his tier. Williams testified he  
15 would not have given Peña Llanas this assignment if  
16 he had known that Peña Llanas had ever assaulted his  
17 cellmate in the SHU. Serving as an orderly was a  
18 privilege for SHU inmates, because rather than being  
19 confined to one's cell for 23 hours per day, an  
20 orderly was allowed outside while performing his  
21 duties and often had access to extra food.
- 22 13. Peña Llanas testified he began fighting with Padilla  
23 within 15 minutes of meeting him in the cell they  
24 were assigned to share on May 27, 2006. The fight  
25 began when Peña Llanas observed Padilla exposing his  
26 genitals to an inmate housed across the hall.  
27 Although Padilla stopped this behavior when Peña  
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1 Llanas protested, he soon resumed. Peña Llanas began  
2 to fight with Padilla, and hit or punched him  
3 repeatedly. Peña Llanas called out to a correctional  
4 officer he heard in the corridor, and told the  
5 officer he and Padilla were fighting because Padilla  
6 repeatedly exposed his genitals. Peña Llanas also  
7 told this correctional officer that things between  
8 the two cellmates "were getting out of hand," and  
9 showed his injured hand. The correctional officer  
10 responded by telling Peña Llanas to "do what he had  
11 to do" and that there should be "no blood." Peña  
12 Llanas told the correctional officer he was worried  
13 about his safety because Padilla was much larger and  
14 heavier, and that he wanted to be moved to a  
15 different cell. The correctional officer told him  
16 there were no cells available.

17 14. Later the same day, after a shift change, Peña Llanas  
18 told another officer he was worried about his safety,  
19 showed the officer his injured hand, and asked to be  
20 transferred. This officer also told Peña Llanas  
21 there were no available cells to which he could be  
22 transferred.

23 15. Several BOP employees, including Quale, Martinez,  
24 Diaz, Williams, Sanchez, and Hodak, testified that  
25 Peña Llanas and Padilla appeared to get along well as  
26 cellmates; at least one of these witnesses described  
27 the two as a "happy little couple." Hodak, for  
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1 example, testified he was not aware of any problems  
2 or discord between the two cellmates before August 8,  
3 2006. Other officers testified that they never  
4 witnessed or heard of any discord between Peña Llanas  
5 and Padilla.

6 16. Peña Llanas testified that after his initial requests  
7 for transfer were denied, he told Padilla he did not  
8 want to continue fighting and began to try to get to  
9 know and help his cellmate. Padilla showed Peña  
10 Llanas pictures of his family, and Peña Llanas helped  
11 Padilla by writing letters for him. This confirms  
12 the testimony from the BOP staff that there appeared  
13 to be no friction between these cellmates.

14 17. Nevertheless, Padilla's chronic, open masturbation in  
15 the shared cell was a constant cause for arguments  
16 and fights between the two cellmates, and Peña Llanas  
17 testified that he continued to complain about it to  
18 correctional officers. He complained both orally and  
19 by sending "cop outs," or written complaints,  
20 requesting to speak to the lieutenant in charge of  
21 the SHU about a transfer. The absence of any record  
22 of these written complaints does not undercut Peña  
23 Llanas's credibility on this issue; as noted above,  
24 the BOP employee witnesses testified that such  
25 records were not retained unless an investigation had  
26 been done and any complaint had been "sustained."  
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1 18. Peña Llanas testified that he and Padilla physically  
2 fought about ten times before August 7, 2006, and  
3 some of these fights were witnessed by correctional  
4 officers, including Officers Madrid and Diaz. Peña  
5 Llanas brought these fights to the attention of other  
6 correctional officers.

7 19. Peña Llanas also testified that although he  
8 repeatedly complained to corrections officers about  
9 Padilla's chronic masturbation, his fear of Padilla,  
10 and his fear of future violence between him and his  
11 cellmate, his complaints and warnings were never  
12 investigated.

13 20. The Court found credible Peña Llanas's testimony  
14 regarding (1) the pattern of violent conflict between  
15 Padilla and Peña Llanas, (2) his verbal and written  
16 complaints to BOP staff, and (3) the failure of the  
17 BOP staff to investigate or act in any manner on the  
18 complaints and warnings.

19 a. Peña Llanas's testimony that he assaulted Padilla  
20 approximately ten times before August 7, 2006,  
21 constituted admissions against his penal  
22 interest. Even if the statute of limitations, or  
23 the plea agreement<sup>2</sup> between Peña Llanas and the  
24 government, barred his future prosecution for  
25 this conduct, it still constitutes admission of  
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27 <sup>2</sup>Peña Llanas pled guilty to voluntary manslaughter  
28 and assault with a deadly weapon on February 13, 2009,  
pursuant to a plea agreement.

1 criminal conduct. Furthermore, Peña Llanas stood  
2 to gain nothing by testifying for Plaintiff;  
3 rather, as he faces a long period of  
4 incarceration in BOP custody, testifying against  
5 the interests of the Government, and the BOP  
6 officials in whose custody he is confined, is  
7 also against his interest.

8 b. Key points of Peña Llanas's testimony were  
9 corroborated by other witnesses. For example,  
10 corrections officer Barajas testified that when  
11 he arrived at Cell 215 on August 8, 2006, he  
12 observed that Padilla's face was swollen and  
13 puffy. The fatal blows that night, however, were  
14 two kicks to Padilla's temple. The swelling and  
15 puffiness on his face that officer Barajas  
16 observed was consistent, however, with a beating  
17 the night before, as Peña Llanas testified he had  
18 inflicted on his cellmate because of the latter's  
19 open masturbation.

20 c. Inmate Luiz Edsall testified he had witnessed  
21 injuries on Padilla on more than one occasion.

22 21. Williams and Hodak testified they were unaware of any  
23 violence between Padilla and Peña Llanas. They each  
24 testified they never received or heard any reports of  
25 past confrontations, written or oral, nor any  
26 warnings of future violence.

1 22. Their subordinates testified they knew it was their  
2 responsibility to forward any complaints by inmates  
3 to the lieutenant in charge, or to investigate these  
4 complaints themselves. Nevertheless, they all denied  
5 having received any complaint or warning from Peña  
6 Llanas, and denied any awareness of the assaults  
7 inflicted on Padilla by Peña Llanas.

8 23. Hence, having accepted the testimony of Peña Llanas  
9 that he made complaints and warned of future violent  
10 conflicts with his cellmate, the Court finds that  
11 either (1) those officials with supervisory  
12 responsibility in the SHU received the complaints and  
13 failed to act on them, or (2) those corrections  
14 officers to whom the complaints were made orally, or  
15 to whom the written complaints were handed, failed to  
16 forward them to their superiors.

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18 **The Fatal Assault on Padilla**

19 24. Both Padilla and Peña Llanas were in their cell on  
20 August 7, 2006, when Padilla began masturbating; Peña  
21 Llanas warned him to stop and when Padilla did not,  
22 Peña Llanas punched him in the face, bruising  
23 Padilla's eye.

24 25. Peña Llanas's account that he had inflicted visible  
25 injuries on Padilla on August 7, 2006, was supported  
26 by testimony from inmate Edsall. Edsall worked as  
27 the barber for the SHU inmates, and claimed he saw  
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1 Padilla with a black eye and bruises and notified  
2 Williams about it, who told him there was no other  
3 available cell for Peña Llanas.

4 26. The next day, August 8, 2006, Peña Llanas reported  
5 for work on his orderly shift. At the end of his  
6 shift at approximately 8:00 p.m., Madrid and Sanchez  
7 escorted Peña Llanas back to his cell. Then,  
8 according to Peña Llanas, Sanchez observed the  
9 obvious injury to Padilla's face from the blows Peña  
10 Llanas had inflicted the previous day. Sanchez asked  
11 Padilla if he had suffered an injury in the  
12 recreation room, and Padilla gestured toward Peña  
13 Llanas. Nevertheless, the officers placed Peña  
14 Llanas back in his cell with Padilla and uncuffed  
15 him.

16 27. Shortly after this, Peña Llanas observed Padilla once  
17 again masturbating, this time while looking at a  
18 letter written to Peña Llanas by his sister. This  
19 angered Peña Llanas so much that he grabbed the  
20 letter away from Padilla and kicked him twice,  
21 hitting Padilla in the temple with his foot.

22 28. Peña Llanas did not intend to kill Padilla when he  
23 kicked him, but was angry with his cellmate and  
24 wanted to make Padilla stop masturbating. He was  
25 afraid of Padilla, because of the latter's size  
26 advantage, and testified he previously had told  
27 correctional officers he was afraid he might "do  
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1 something stupid" if he was not transferred to  
2 another cell, as a result of Padilla's inappropriate  
3 behavior. And, Peña Llanas explained, when two  
4 inmates began fighting, "who knew what would happen?"  
5 29. Immediately after Peña Llanas kicked Padilla in the  
6 temple, Padilla fell to the floor, and began  
7 groaning, twitching, bleeding and foaming from his  
8 mouth. Peña Llanas tried to assist Padilla, brought  
9 him water and tried to comfort him, urging Padilla to  
10 think of his mother.  
11 30. Barajas was working in the USP Victorville SHU the  
12 night of August 8, 2006. At approximately 10:15 p.m.  
13 he was called to Cell 215. Peña Llanas told Barajas  
14 that Padilla was suffering a seizure. Barajas  
15 observed that Padilla's face was "puffy" and one eye  
16 was swollen up and closed.  
17 31. Dr. Frank Sheridan, the forensic pathologist who  
18 performed the autopsy on Padilla, testified that  
19 Padilla died on August 12, 2006, at the Arrowhead  
20 Regional Medical Center as a result of the injuries  
21 sustained in the assault.  
22 32. Peña Llanas pled guilty to one charge of voluntary  
23 manslaughter of Padilla, and one count of assault  
24 with a deadly weapon on him, on February 13, 2009.

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1 **CONCLUSIONS OF LAW**

2 1. The Court has jurisdiction over this negligence  
3 action pursuant to the Federal Tort Claims Act  
4 ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

5  
6 **Elements of a Negligence Claim**

7 2. The incident giving rise to this action, i.e., the  
8 killing of Tony Padilla, occurred within the  
9 jurisdiction of the Central District of California,  
10 and the Court applies the California substantive law  
11 of negligence. 28 U.S.C. §§ 1346(b), 2674.

12 3. To prove negligence, a plaintiff must show "that the  
13 defendant owed the plaintiff a legal duty, that the  
14 defendant breached the duty, and that the breach was  
15 a proximate or legal cause of injuries suffered by  
16 the plaintiff." Ann M. v. Pac. Plaza Shopping Ctr.,  
17 6 Cal. 4th 666, 673 (1993) (citing United States  
18 Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d  
19 586, 594 (1970)), and 6 Witkin, Summary of Cal. Law  
20 (9th ed. 1988) Torts, § 732, p. 60), disapproved on  
21 other grounds by Reid v. Google, Inc., 50 Cal. 4th  
22 512, 516 (2010).

23 4. California applies the substantial factor test of the  
24 Restatement Second of Torts to determine causation.  
25 "Under that standard, a cause in fact is something  
26 that is a substantial factor in bringing about the  
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1 injury." Rutherford v. Owens-Illinois, Inc., 16 Cal.  
2 4th 953, 968-69 (1997) (citations omitted).

3  
4 **The Discretionary Immunity Exception to the FTCA**

5 5. The FTCA embodies a limited waiver of sovereign  
6 immunity for specified tort actions arising out of  
7 the conduct of federal employees. 28 U.S.C. § 2674.

8 6. If the claim under the FTCA stems from a federal  
9 employee's exercise of a "discretionary function,"  
10 however, then liability is barred under 28 U.S.C.  
11 § 2860 (a), which provides:

12 [a]ny claim based upon an act or omission of an  
13 employee of the Government, exercising due care,  
14 in the execution of a statute or regulation,  
15 whether or not such statute or regulation be  
16 valid, or based upon the exercise or performance  
17 or the failure to exercise or perform a  
18 discretionary function or duty on the part of a  
19 federal agency or an employee of the Government,  
20 whether or not the discretion involved be abused.

21 7. The courts have developed a two-part test to  
22 determine whether the discretionary function  
23 exception bars a particular claim. "First we must  
24 decide whether the challenged conduct is  
25 discretionary, that is, whether it 'involv[es] an  
26 element of judgment or choice. . . . 'This element  
27 is not met "when a federal statute, regulation or  
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1 policy specifically prescribes a course of action for  
2 an employee to follow." . . . If the act is not  
3 discretionary, the government is not immune." Alfrey  
4 v. United States, 276 F.3d 557, 561 (9th Cir. 2002)  
5 (citing Fang v. United States, 140 F.3d 1238, 1241  
6 (9th Cir. 1998) and Berkovitz v. United States, 486  
7 U.S. 531, 536 (1988)).

8 8. If the challenged conduct is discretionary, then in  
9 the second step the Court determines "whether that  
10 judgment is of the kind that the discretionary  
11 function exception was designed to shield." Id.

12 9. The conduct challenged here is the failure by the BOP  
13 staff to separate Padilla and Peña Llanas, and assign  
14 them to different cells. The Government bears the  
15 burden of showing discretionary function immunity  
16 applies. Terbush v. United States, 516 F.3d 1125,  
17 1128 (9th Cir. 2008) (citing Prescott v. United  
18 States, 973 F.2d 696, 702 (9th Cir. 1992)). Hence,  
19 the Court first examines whether the Government has  
20 met its burden of showing the absence of any  
21 mandatory policy, regulation, or statute regarding  
22 the separation of inmates who repeatedly fought in  
23 the cell when confined in the SHU.

24 10. Plaintiff concedes there was no mandatory statute or  
25 regulation governing the separation or assignment of  
26 inmates in the SHU. He contends, instead, that the  
27 BOP "policy" or "protocol" is to separate inmates if  
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1 the prison staff receive a complaint or request to  
2 move an inmate to prevent future harm. [Pl.'s Mem.  
3 of Contentions of Fact & Law (Doc. No. 87) at 8.]  
4 11. No evidence of any written policy, statute or  
5 regulation was produced at trial. An unwritten  
6 policy may suffice under this first step of the  
7 analysis, but there must be evidence that such a  
8 policy imposed a mandatory duty on prison officials  
9 to reassign inmates or investigate threats to the  
10 safety of inmates. Alfrey, 276 F.3d at 562; see also  
11 Macharia v. United States, 334 F.3d 61, 66 (D.C. Cir.  
12 2003).  
13 12. The testimony from the witnesses employed by the BOP  
14 established the lack of an unwritten policy requiring  
15 that all cellmates who physically fought be separated  
16 and reassigned to different cells. The evidence  
17 adduced at trial as to separation of cellmates who  
18 physically fought revealed no policy requiring the  
19 prison officials to reassign such inmates to separate  
20 cells. At least two senior corrections officials  
21 testified that after talking to and counseling the  
22 inmates involved in a physical fight, the officers  
23 frequently determined that it was not necessary to  
24 reassign them, as the altercation was an isolated  
25 incident and unlikely to be repeated. The evidence  
26 from two officers that they were unaware of any  
27 instance when cellmates who fought had not been  
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1 separated, and from another that it was his usual  
2 practice to separate cellmates if future violence was  
3 feared was not sufficient; that evidence is not  
4 tantamount to a showing that a policy exists  
5 mandating the separation and reassignment of inmates.  
6 13. Although the trial testimony revealed the existence  
7 of a policy that BOP personnel investigate reports or  
8 complaints of violence between cellmates, Plaintiff  
9 did not rely upon a theory that violation of such a  
10 policy caused his damage here.<sup>3</sup> Neither in the  
11 Pretrial Conference Order [see Pretrial Conference  
12 Order (Doc. No. 92) Ex. A at 3, 5], nor in his  
13 Memorandum of Contentions of Fact and Law [see Pl.'s  
14 Mem. of Contentions of Fact & Law at 9-13], did  
15 Plaintiff specify any mandatory, nondiscretionary  
16 policy which would exempt this case from the bar of  
17 section 2860(a), other than an alleged policy  
18 mandating separation and reassignment of inmates who  
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21 <sup>3</sup>In any event, even if pled and relied upon by the  
22 Plaintiff, existence of a mandatory policy to investigate  
23 a report of inmate-on-inmate violence likely would not  
24 have supported a finding of liability, as Plaintiff did  
25 not produce evidence that the failure to conduct an  
26 investigation was a "substantial factor" causing his  
27 injury. As described above, the supervisory BOP  
28 personnel charged with investigating such complaints  
testified they did not automatically reassign inmates who  
fought; rather, they counseled and attempted to discern  
whether or not the violence would be repeated. Williams  
and Hodak both testified, moreover, they thought Padilla  
and Peña Llanas appeared compatible, based on their  
observations of them.

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fought. Accordingly, as the evidence presented at trial did not support a finding that the latter policy existed, Plaintiff's claim is barred.

Dated: October 31, 2013 \_\_\_\_\_

*Virginia A. Phillips*  
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VIRGINIA A. PHILLIPS  
United States District Judge