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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 MARTIN BIBBS,

11 Plaintiff,

12 vs.

13 JAMES TILTON, et al.,

14 Defendants.

1:11-cv-01012-GSA-PC

ORDER DISMISSING CASE, WITH  
PREJUDICE, FOR FAILURE TO STATE A  
CLAIM UPON WHICH RELIEF MAY BE  
GRANTED UNDER § 1983

ORDER THAT THIS DISMISSAL IS  
SUBJECT TO THE "THREE-STRIKES"  
PROVISION SET FORTH IN 28 U.S.C. §  
1915(g)

ORDER FOR CLERK TO CLOSE CASE

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18 **I. BACKGROUND**

19 Martin Bibbs ("Plaintiff") is a state prisoner proceeding pro se with this civil rights  
20 action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on  
21 September 7, 2010. (Doc. 1.)

22 On July 1, 2011, Plaintiff consented to the jurisdiction of a Magistrate Judge in this  
23 action, and no other parties have made an appearance. (Doc. 12.) Therefore, pursuant to  
24 Appendix A(k)(4) of the Local Rules of the Eastern District of California, the undersigned shall  
25 conduct any and all proceedings in the case until such time as reassignment to a District Judge  
26 is required. Local Rule Appendix A(k)(3).

27 The court screened the Complaint and entered an order on April 19, 2013, dismissing  
28 the Complaint for failure to state a claim, with leave to amend. (Doc. 21.) On May 6, 2013,

1 Plaintiff filed the First Amended Complaint, which is now before the court for screening.  
2 (Doc. 22.)

3 **II. SCREENING REQUIREMENT**

4 The court is required to screen complaints brought by prisoners seeking relief against a  
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
6 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
7 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or  
8 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
9 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been  
10 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
11 appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

12 A complaint is required to contain “a short and plain statement of the claim showing  
13 that the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
14 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by  
15 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct.  
16 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955  
17 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge  
18 unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)  
19 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual  
20 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal 556 U.S.  
21 at 678. While factual allegations are accepted as true, legal conclusions are not. Id. The mere  
22 possibility of misconduct falls short of meeting this plausibility standard. Id. at 678-79; Moss  
23 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

24 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

25 Plaintiff is presently incarcerated at Pelican Bay State Prison in Crescent City,  
26 California. The events at issue in the First Amended Complaint allegedly occurred at the  
27 California Correctional Institution (CCI) in Tehachapi, California, when Plaintiff was  
28 incarcerated there. Plaintiff names as defendants B. Kingston (Special Agent, Office of

1 Correctional Safety (“OCS”)), Lieutenant J. Gentry (Institutional Gang Investigator (“IGI”)),  
2 G. Adame (IGI), and J. Tyree (IGI) (collectively “Defendants”). Plaintiff’s factual allegations  
3 follow.

4 In January 1992, Plaintiff was validated as an associate of the Mexican Mafia prison  
5 gang (EME). That validation has never been rescinded.

6 From December 2005 to April 10, 2008, Plaintiff was housed on the General Population  
7 at CCI. On June 29, 2007, IGI J. Tyree identified Plaintiff as an “active” (involved in current  
8 gang activity) member and participant of an established Mesa (governing body of the EME) on  
9 the facility. Plaintiff and the other members of this established Mesa were conducting all their  
10 business on behalf of and for the benefit of the EME. This information was discovered, but IGI  
11 J. Tyree did not identify one instance in which Plaintiff did anything for the prison gang.  
12 Because no actual gang activity was cited, Plaintiff was not removed from the General  
13 Population.

14 On January 14, 2008, IGI G. Adame submitted false information as evidence for  
15 Plaintiff’s re-validation as an “active” associate, alleging that Plaintiff was identified as being  
16 responsible for activities being conducted in housing unit 2-A Section. However, Adame did  
17 not identify a single activity Plaintiff was responsible for. To warrant indefinite Ad-Seg  
18 placement, gang activity must be shown. So Plaintiff was not removed from the General  
19 Population at that time.

20 On March 4, 2008, IGI G. Adame knowingly submitted false information in the re-  
21 validation of Plaintiff. Adame stated that Plaintiff heard a phone conversation by another  
22 inmate, which was impossible according to Housing Movement records which showed that  
23 Plaintiff was in his cell on the opposite side of the building at the time of the alleged phone call.  
24 Adame denied Plaintiff any consideration in his rebuttal to the allegations and knowingly used  
25 false information, in collusion with IGI J. Tyree, resulting in Plaintiff being indefinitely  
26 segregated in Ad-Seg.

27 On April 3, 2008, OCS Special Agent B. Kingston launched an operation called “Swift  
28 Response” to investigate the activities of the EME at CCI’s IV-A Facility where Plaintiff was

1 housed. That investigation turned up confidential information that Plaintiff was engaged with  
2 the EME. The OCS investigation was concluded on April 3, 2008 and rubber-stamped again  
3 by OCS on May 6, 2008.

4 On April 9, 2008, Assistant IGI C. A. Eubanks (not a named defendant) completed his  
5 investigation into Plaintiff's continued association with the EME, which had been decided in  
6 1992 and had already been re-decided by OCS's investigation of April 3, 2008.

7 On April 10, 2008, Plaintiff was removed from the General Population and placed in  
8 Administrative Segregation (Ad-Seg), pending his re-validation as an "active" associate of a  
9 prison gang.

10 On April 18, 2008, IGI Lieutenant J. Gentry submitted a false re-validation packet to  
11 OCS for Plaintiff's validation as a prison gang associate. The report lacked any actual gang  
12 activity by Plaintiff, and the matter had already been decided by OCS two weeks earlier, which  
13 Gentry knew because he was part of OCS's April 3, 2008 investigation and decision.

14 Plaintiff requests the reversal of his "active" gang validation status and release from the  
15 SHU. He seeks injunctive relief instructing defendants to cease using identification criteria as a  
16 substitute for actual gang activity, and an award of full due process in the active/inactive  
17 categorization process. Plaintiff also seeks a declaratory judgment and monetary damages.

#### 18 **IV. PLAINTIFF'S CLAIMS**

19 The Civil Rights Act under which this action was filed provides:

20 Every person who, under color of [state law] . . . subjects, or  
21 causes to be subjected, any citizen of the United States . . . to the  
22 deprivation of any rights, privileges, or immunities secured by  
23 the Constitution . . . shall be liable to the party injured in an  
action at law, suit in equity, or other proper proceeding for  
redress.

24 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal  
25 Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)  
26 (internal quotations omitted). "To the extent that the violation of a state law amounts to the  
27 deprivation of a state-created interest that reaches beyond that guaranteed by the federal  
28 Constitution, Section 1983 offers no redress." Id.

1 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted  
2 under color of state law and (2) the defendant deprived him of rights secured by the  
3 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.  
4 2006). “A person ‘subjects’ another to the deprivation of a constitutional right, within the  
5 meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts,  
6 or omits to perform an act which he is legally required to do that causes the deprivation of  
7 which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). “The  
8 requisite causal connection can be established not only by some kind of direct, personal  
9 participation in the deprivation, but also by setting in motion a series of acts by others which  
10 the actor knows or reasonably should know would cause others to inflict the constitutional  
11 injury.” Id. at 743-44.

#### 12 **Due Process – Gang Validation – Ad-Seg Placement**

13 The Due Process Clause protects Plaintiff against the deprivation of liberty without the  
14 procedural protections to which he is entitled under the law. Wilkinson v. Austin, 545 U.S.  
15 209, 221, 125 S.Ct. 2384 (2005). To state a claim, Plaintiff must first identify the interest at  
16 stake. Id. Liberty interests may arise from the Due Process Clause or from state law. Id. The  
17 Due Process Clause itself does not confer on inmates a liberty interest in avoiding more adverse  
18 conditions of confinement, id. at 221-22 (citations and quotation marks omitted), and under  
19 state law, the existence of a liberty interest created by prison regulations is determined by  
20 focusing on the nature of the condition of confinement at issue, id. at 222-23 (citing Sandin v.  
21 Conner, 515 U.S. 472, 481-84, 115 S.Ct. 2293 (1995)) (quotation marks omitted). Liberty  
22 interests created by prison regulations are generally limited to freedom from restraint which  
23 imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of  
24 prison life. Wilkinson, 545 U.S. at 221 (citing Sandin, 515 U.S. at 484) (quotation marks  
25 omitted); Myron v. Terhune, 476 F.3d 716, 718 (9th Cir. 2007). If a protected interest is  
26 identified, the inquiry then turns to what process is due. Wilkinson, 545 U.S. at 224.

27 The assignment of validated gang members and associates to Ad-Seg or the Security  
28 Housing Unit (SHU) is an administrative measure rather than a disciplinary measure, and is

1 “essentially a matter of administrative discretion.” Bruce v. Ylst, 351 F.3d 1283, 1287 (9th Cir.  
2 2003) (quoting Munoz v. Rowland, 104 F.3d 1096, 1098 (9th Cir. 1997)). As a result,  
3 prisoners are entitled to the minimal procedural protections of adequate notice, an opportunity  
4 to be heard, and periodic review. Bruce, 351 F.3d at 1287 (citing Toussaint v. McCarthy, 801  
5 F.2d 1080, 1100-01 (9th Cir. 1986), abrogated in part on other grounds by Sandin, 515 U.S.  
6 472. In addition to these minimal protections, there must be “some evidence” supporting the  
7 decision. Id. (citing Superintendent v. Hill, 472 U.S. 445, 454, 105 S.Ct. 2768 (1985)).  
8 Although discussed in the context of a disciplinary hearing, the Ninth Circuit has stated that  
9 under the Hill standard, the evidence should have some indicia of reliability. Cato v. Rushen,  
10 824 F.2d 703, 705 (9th Cir. 1987).

11 The Supreme Court has held that indefinite placement in Ohio’s “supermax” facility,  
12 where inmates are not eligible for parole consideration, imposed an “atypical and significant  
13 hardship within the correctional context.” Wilkinson, 545 U.S. at 223-25. Since indefinite  
14 placement in California’s SHU may render an inmate ineligible for parole consideration, this  
15 may create a liberty interest in not being placed indefinitely in the SHU which would entitle  
16 prisoners to the minimal procedural protections upon initial validation and subsequent reviews.  
17 See Ellis v. Cambra, No. 1:02-cv-05646 AWI SMS PC, 2010 WL 4137158, \*8 (E.D. Cal. Oct.  
18 19, 2010).

19 “It is clear . . . that prisons have a legitimate penological interest in stopping prison  
20 gang activity.” Bruce, 351 F.3d at 1289. To that end, California has developed procedures to  
21 identify and segregate gang members. See Cal.Code Regs., tit. 15 § 3378. To comply with due  
22 process, prison officials must provide the inmate with “some notice of the charges against him,  
23 and the opportunity to present his views to the prison official charged.” Bruce, 351 F.3d at  
24 1289. While Plaintiff alleges that some false information was used by defendants in deciding  
25 his re-validation, Plaintiff does not deny that defendants had “some evidence” with “some  
26 indicia of reliability” to decide that he was an “active” gang associate and should be housed  
27 indefinitely in Ad-Seg. Plaintiff has not alleged that the totality of evidence supporting the  
28 conclusion that he was an “active” gang associate was insufficient. Nor has Plaintiff alleged

1 any facts suggesting that he was not notified that he was going to be validated, or that he was  
2 not informed of the evidence and given an opportunity to respond. Wilkinson, 545 U.S. at 228-  
3 29. Plaintiff therefore fails to state a cognizable claim for denial of due process based upon  
4 facts alleged in the First Amended Complaint. The First Amended Complaint should therefore  
5 be dismissed.

6 **V. CONCLUSION**

7 The Court finds that Plaintiff's First Amended Complaint fails to state any claims upon  
8 which relief can be granted under § 1983 against any of the defendants. In this action, the  
9 Court previously granted Plaintiff an opportunity to amend the complaint, with ample guidance  
10 by the Court. Plaintiff has now filed two complaints without alleging facts against any of the  
11 defendants which state a claim under § 1983. The Court finds that the deficiencies outlined  
12 above are not capable of being cured by amendment, and therefore further leave to amend shall  
13 not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir.  
14 2000).

15 Therefore, **IT IS HEREBY ORDERED** that pursuant to 28 U.S.C. § 1915A and 28  
16 U.S.C. § 1915(e):

17 1. This action is **DISMISSED** with prejudice for failure to state a claim upon  
18 which relief may be granted under § 1983;

19 2. This dismissal is subject to the "three-strikes" provision set forth in 28 U.S.C. §  
20 1915(g). Silva v. Vittorio, 658 F.3d 1090, 1098 (9th Cir. 2011); and

21 3. The Clerk is directed to **CLOSE** this case.

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25 **IT IS SO ORDERED.**

26 Dated: **January 10, 2014**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE