

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RENO FUENTES RIOS,  
Plaintiff,  
v.  
J.E. TILTON, et al.,  
Defendants.

No. 2:07-cv-0790 KJN P

ORDER RE: TRIAL PROCEDURES IN  
REMEDIES PHASE

Plaintiff is a state prisoner, proceeding through appointed counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. He proceeds against three defendants on claims related to his validation as an associate of a prison gang while housed at California State Prison-Sacramento (“CSP-Sac”).<sup>1</sup> Defendants Brandon and Parker are alleged to have violated plaintiff’s procedural due process rights under the Fourteenth Amendment, while defendants Parker and Mayfield are alleged to have retaliated against plaintiff for exercising his First Amendment right to file prison grievances. This order addresses (1) an amendment to the January 4, 2016 order, and (2) procedures for handling confidential information during the remedies phase, if any, of the trial.

///  
///

---

<sup>1</sup> Plaintiff is currently housed at Kern Valley State Prison.

1            Amendment to January 4, 2016 Order

2            In the January 4, 2016 order, the court determined that plaintiff would be allowed to seek  
3            “compensatory damages for the time spent in the SHU in connection with his procedural due  
4            process claims, if (i) he is able to prove that the procedures leading to his gang validation were  
5            defective and (ii) defendants fail to prove that proper procedures would have led to plaintiff’s  
6            validation.” (ECF No. 201 at 25.) The court further determined that plaintiff “cannot recover  
7            compensatory damages based on mental or emotional injury as a result of procedural due process  
8            violations, absent a showing of greater-than-de minimus injury.” (Id.) The remedies available to  
9            plaintiff in connection with his procedural due process claims were then summarized as follows:

10                            If plaintiff prevails on his procedural due process claim, he may  
11                            seek the following remedies: nominal damages; compensatory  
12                            damages for mental and emotional injuries, including any injuries  
13                            stemming from SHU placement; compensatory damages for mental  
14                            and emotional injuries resulting from procedural due process  
15                            violations, if plaintiff first demonstrates a greater-than-de minimus  
16                            physical injury resulting from these violations, and defendants then  
17                            fail to prove that proper procedures would have led to plaintiff’s  
18                            validation; punitive damages; and injunctive relief, in the form of  
19                            expungement of plaintiff’s gang validation and a new hearing.

20            (Id. at 30.)

21            In order to clarify the court’s finding that plaintiff may recover for injuries stemming from  
22            the SHU placement only if the SHU placement was unjustified, the summary of remedies in the  
23            January 4, 2016 order, ECF No. 201 at 26, 30, shall be amended as follows:

24            If plaintiff prevails on his procedural due process claim, he may seek the following  
25            remedies:

- 26                            • Nominal damages
- 27                            • Compensatory damages for mental and emotional injuries resulting from  
28                            procedural due process violations, if plaintiff first demonstrates a greater-than-de  
                                  minimus physical injury resulting from these violations. These damages may  
                                  include injuries stemming from the SHU placement only if defendants fail to prove  
                                  that proper procedures would have led to plaintiff’s validation.
- Punitive damages

- Injunctive relief, in the form of expungement of plaintiff’s gang validation and a new hearing

Trial Procedures in Remedies Phase

As discussed above, the court previously determined that if plaintiff prevails on his procedural due process claim in the liability phase of trial, defendants will then have the burden of proving in the remedies phase that plaintiff would have been sentenced to the SHU even if he had been accorded adequate due process. (ECF No. 201 at 28.) In the January 4, 2016 order, the court advised the parties that if the jury finds defendants liable on plaintiff’s procedural due process claim, the court would be inclined to instruct the jury, in connection with the jury’s determination of damages, as to the court’s finding that “some evidence” supported plaintiff’s validation as a gang associate. (Id. at 28-29.) The parties were granted leave to file supplemental briefing addressing whether other procedures ought to be employed to resolve the issue of whether, for the purpose of determining damages, plaintiff would have been sentenced to the SHU even if he had been accorded adequate due process. (Id. at 29, 30.) Plaintiff filed a brief objecting to the court’s decision to instruct the jury regarding the “some evidence” finding, and proposing that defendants move to seal the courtroom during the presentation of any confidential evidence.<sup>2</sup> (See ECF No. 205.)

Upon further consideration, the court has determined that, in light of the differences between the federal “some evidence” standard and the requirements for inmate gang validation under California law,<sup>3</sup> it would not be beneficial to instruct the jury as to the court’s finding that

---

<sup>2</sup> Plaintiff’s brief did not address whether Mr. Rios should be permitted to remain in the courtroom during this time.

<sup>3</sup> As explained in the January 4, 2016 order, ECF No. 201 at 28-29:

In mid-2006, when plaintiff was validated as a gang associate, applicable California regulations defined an “associate” of a prison gang as “an inmate/parolee who is involved periodically or regularly with members or associates of a gang.” Cal. Code Regs. tit. 15, §§ 3378(c)(4),(7) (2006). Validation as a prison gang associate required “at least three (3) independent source items of documentation indicative of association with validated gang members or associates.” Id. (listing thirteen categories of source items). At least one of the source items was required to be “a direct

1 “some evidence” supported plaintiff’s validation. Thus, if plaintiff prevails on his due process  
2 claim in the liability phase, the court will not instruct the jury in the remedies phase as to the  
3 court’s prior “some evidence” finding.

4 The court anticipates that for the purpose of determining damages, the parties will seek to  
5 introduce at least some of the confidential material used to validate plaintiff, which is currently  
6 filed under seal with the court. To the extent the parties will be permitted to introduce such  
7 confidential information in the remedies phase of trial, the court intends to adhere to the  
8 following approach: If and when any confidential evidence is to be used or referred to so that the  
9 identities of the confidential informants would be disclosed, the courtroom will be cleared, of the  
10 public and of Mr. Rios, and the trial will proceed in the presence of only the jury and persons  
11 authorized to know the identities of the confidential informants, as set forth in the Stipulated  
12 Protective Order, ECF No. 168. Plaintiff’s counsel will not be permitted to disclose to plaintiff  
13 any of the information produced by defendants on an attorney’s eyes only basis, including the  
14 identities and records of the informants used by CDCR to validate plaintiff. See Dkt. No. 417 in  
15 Lira v. Cate, Case No. 3:00-cv-00905-SI (N.D. Cal.) (Ninth Circuit Order setting forth procedures  
16 for presentation of confidential information at trial).

17 A further pretrial conference will be held to address the parties’ views concerning the  
18 approach set forth above, as well as any other procedures that should be followed with respect to  
19 the presentation of confidential evidence during the remedies phase of trial. Because the  
20

---

21 link to a current or former validated member or associate of the  
22 gang.” Id. “If a source item does not categorically evidence gang  
23 affiliation or activity, prison officials may only rely on it if they can  
articulate how that item provides such evidence.” Castro v.  
Terhune, 712 F.3d 1304, 1311 (9th Cir. 2013) (summarizing  
provisions of 15 Cal. Code Regs. § 3378).

24 By contrast, a validation decision meets federal substantive due  
25 process requirements if it is supported by “some evidence.” Bruce,  
26 351 F.3d at 1287 (citing Superintendent v. Hill, 472 U.S. 445, 454  
27 (1985)). A single piece of evidence may be sufficient to meet the  
“some evidence” requirement if it has “sufficient indicia of  
28 reliability.” Id. at 1288 (citing Toussaint v. McCarthy, 926 F.2d  
800, 803 (9th Cir. 1990)). “[T]he relevant question is whether  
there is any evidence in the record that could support the  
conclusion.” Id. at 1287 (quoting Hill, 472 U.S. at 455.)

1 procedures to be used depend in part on the nature of the confidential material to be presented, the  
2 court will also determine at the conference, or shortly thereafter, which confidential materials the  
3 parties will be permitted to introduce during the remedies phase of trial. In particular, the court  
4 seeks to determine what in format the confidential information will be presented, and for what  
5 periods of time Mr. Rios should be excluded from the courtroom. To facilitate the resolution of  
6 these issues at the upcoming conference, the parties will be required to file supplemental briefing,  
7 including authority for their positions, on the following issues:

- 8 a. Does plaintiff anticipate filing a motion to lift the attorneys' eyes only restrictions in  
9 the Stipulated Protective Order?
- 10 b. Do defendants anticipate moving to seal the courtroom during the presentation of any  
11 confidential evidence, assuming that some confidential evidence will be presented  
12 during the remedies phase?
- 13 c. If any of the confidential evidence currently filed under seal is presented during the  
14 remedies phase, should plaintiff and/or the public be excluded from the courtroom  
15 during the presentation of the confidential evidence? If so, at what point should  
16 plaintiff and/or the public be excluded?
- 17 d. Which confidential materials currently filed under seal, or other confidential  
18 information, do the parties anticipate introducing during the remedies phase of trial?

19 In particular, the parties should address the following questions:

- 20 1. Confidential Exhibit 1:<sup>4</sup> The court has determined that during the liability  
21 phase of trial, plaintiff will be permitted to present a redacted version of the  
22 **June 1, 2006** confidential memo authored by defendant **Parker** ("Parker  
23 Memo"); that defendants may introduce the exhibits attached to the Parker  
24 Memo for completeness; and that both the Parker Memo and any exhibits  
25 thereto will be published for the jury's eyes only. (ECF No. 201 at 18.) In the

---

26 <sup>4</sup> For the purposes of clarity, the court has identified each document by author and date, as well as  
27 by the exhibit numbers used in the parties' confidential briefing. The author and date of each  
28 memo is not confidential. (See ECF No. 134-9 at 4 (CDC 128-B Chrono summarizing  
information used to validate plaintiff).)

1 remedies phase of trial, will either party seek to introduce an unredacted  
2 version of the Parker Memo, or will the redacted version of the Parker Memo  
3 and exhibits suffice? If the redacted version is used, should plaintiff be  
4 permitted to remain in the courtroom during this time?

- 5 2. Confidential Exhibit Two: Will defendants seek to introduce the **January 25,**  
6 **2006** confidential memo authored by **Sgt. Bales** (“2006 Bales Memo”)? If so,  
7 which portions of the memo will defendants seek to introduce? Which  
8 portions of the memo will plaintiff seek to introduce, and for what purpose?  
9 Should any of the information be redacted? If so, which parts? Can plaintiff  
10 remain in the courtroom during the presentation of any of this information?
- 11 3. Confidential Exhibit Three: Will defendants seek to introduce the **October 21,**  
12 **2005** confidential memo authored by **Officer Zamudio**? If so, which portions  
13 of the memo will defendants seek to introduce? Which portions of the memo  
14 will plaintiff seek to introduce, and for what purpose? Should any of the  
15 information be redacted? If so, which parts? Can plaintiff remain in the  
16 courtroom during the presentation of any of this information?
- 17 4. Confidential Exhibit Four: Will defendants seek to introduce the **February 4,**  
18 **2004** confidential memo authored by **Officer Wheeler**? If so, which portions  
19 of the memo will defendants seek to introduce? Which portions of the memo  
20 will plaintiff seek to introduce, and for what purpose? Should any of the  
21 information be redacted? If so, which parts? Can plaintiff remain in the  
22 courtroom during the presentation of any of this information?
- 23 5. Confidential Exhibit Five: The parties have stipulated to the date of the alleged  
24 gang activity described in the **March 25, 2003** memo authored by **Sgt. Bales**  
25 (“2003 Bales Memo”). (See ECF No. 201 at 16-17.) In light of this  
26 stipulation, will either party seek to introduce the 2003 Bales Memo during the  
27 remedies phase, or will the stipulation regarding the date suffice? In other  
28 words, will defendants seek to introduce the contents of the 2003 Bales Memo,

1 beyond the date of alleged activity and the information contained in the (non-  
2 confidential) CDC 1030 Chrono, to prove that plaintiff would have been  
3 validated even if proper procedures were used? If defendants introduce the  
4 contents of the 2003 Bales Memo, what additional confidential information, if  
5 any, will plaintiff seek to introduce?

6 6. Are there confidential materials (or testimony concerning other confidential  
7 materials), other than those listed above, that the parties will seek to introduce  
8 during the remedies phase of trial?

9 e. To the extent the parties seek to introduce confidential information during the  
10 remedies phase, in what format do the parties anticipate introducing the evidence? In  
11 other words, will the parties seek to publish confidential documents to the jury, or will  
12 a witness testify regarding the contents of the confidential documents?

13 f. To the extent the parties assert that some portions of the confidential documents  
14 should be published to the jury in redacted form, is redaction necessary even if Mr.  
15 Rios and the public are excluded from the courtroom during the presentation of this  
16 evidence?

17 g. Is there any confidential information that has not yet been produced to plaintiff that  
18 plaintiff anticipates requesting from defendants prior to trial? In other words, is there  
19 any confidential information that the parties will seek to introduce at trial that has not  
20 been filed under seal with the court?

21 h. What instructions should be given to the jury regarding the confidential nature of the  
22 information used to validate plaintiff?

23 i. Assuming that Mr. Rios is excluded from the courtroom during the presentation of  
24 confidential evidence, what instructions should be given to the jury concerning  
25 plaintiff's absence from the courtroom?

26 j. To the extent plaintiff asserts that Mr. Rios should be permitted to remain in the  
27 courtroom during the presentation of some of the evidence used to validate him, will  
28 plaintiff request that the jury be prevented from seeing Mr. Rios enter or exit the

1 courtroom in handcuffs and/or leg restraints?

- 2 k. With respect to damages, what jury instructions should be used during the remedies  
3 phase of trial? Please consider how the jury instructions might differ in the following  
4 scenarios: (1) plaintiff prevails on his retaliation claim(s) only; (2) plaintiff prevails  
5 on his procedural due process claim(s) only; and (3) plaintiff prevails on both his  
6 retaliation and procedural due process claims.
- 7 l. If plaintiff prevails on his procedural due process claim, for what period of time can he  
8 recover damages for mental or emotional distress?<sup>5</sup> If Ninth Circuit Model Jury  
9 Instruction 5.2 (Measure of Types of Damages) is given, should the phrase “and that  
10 with reasonable probability will be experienced in the future” be included with respect  
11 to the “mental, physical, and emotional pain and suffering” experienced by plaintiff?
- 12 m. Should a special verdict be used in the remedies phase of trial? If yes, what would the  
13 special verdict entail?
- 14 n. Since plaintiff’s initial validation in 2006, has plaintiff had a subsequent gang  
15 validation hearing or other review of his validation? If so, what is the consequence of  
16 this hearing or review?
- 17 o. Do the parties believe that a further settlement conference would be beneficial?

18 The parties are reminded that the court intends to determine, based on the supplemental  
19 briefing and any arguments presented at the upcoming conference, what confidential material the  
20 parties will be permitted to present during the remedies phase of trial, and whether Mr. Rios will  
21 be permitted to remain in the courtroom during the presentation of any such evidence.

22 Accordingly, the parties’ responses to the above questions should be as detailed as possible. To  
23 the extent the parties seek to introduce confidential documents at trial, the parties should provide  
24 the specific page numbers of the portions of each document they seek to introduce during the  
25 remedies phase of trial. The parties are also encouraged to brief any matters not listed above that  
26 they believe will be helpful to conducting the trial in this matter.

27 \_\_\_\_\_  
28 <sup>5</sup> The parties are reminded to provide legal authority for their responses.




1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

In accordance with the above, IT IS HEREBY ORDERED that:

1. The January 4, 2016 order (ECF No. 201 at 26, 30) is amended as follows. If plaintiff prevails on his procedural due process claim, he may seek the following remedies: nominal damages; compensatory damages for mental and emotional injuries resulting from procedural due process violations, if plaintiff first demonstrates a greater-than-de minimus physical injury resulting from these violations. These damages may include injuries stemming from the SHU placement only if defendants fail to prove that proper procedures would have led to plaintiff’s validation; punitive damages; and injunctive relief, in the form of expungement of plaintiff’s gang validation and a new hearing.
2. Upon reconsideration, the jury will not be instructed as to the court’s “some evidence” finding during the remedies phase of trial (in connection with the jury’s determination of whether plaintiff would have been sentenced to the SHU even if he had been accorded adequate due process).
3. A further pretrial conference is set for July 20, 2016, at 10:00 a.m., in Courtroom 25 before Magistrate Judge Kendall J. Newman.
4. At least fourteen days before the July 20, 2016 conference, the parties shall file supplemental briefing addressing the issues set forth above. Reply briefs, if any, shall be filed within five days thereafter. To the extent the parties’ briefs discuss or reveal confidential information, the briefs may be filed under seal.

Dated: May 13, 2016

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

TS/rios0790.f\_ptc