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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

FERNANDO AVILA PEREZ, JR.,

Plaintiff,

No. 2:10-cv-1984 MCE JFM (HC)

vs.

MCDONALD, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that his constitutional rights were violated in connection with his validation as an associate of a prison gang. This matter is before the court on defendants’ motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Defendants contend that plaintiff has failed to state a claim for relief. Plaintiff opposes the motion.

STANDARDS FOR A MOTION TO DISMISS

Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept as true the allegations of the complaint in question, Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197 (2007), and construe the pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes,

1 416 U.S. 232, 236 (1974). In order to survive dismissal for failure to state a claim a complaint  
2 must contain more than “a formulaic recitation of the elements of a cause of action;” it must  
3 contain factual allegations sufficient “to raise a right to relief above the speculative level.” Bell  
4 Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007). However, “[s]pecific facts are not  
5 necessary; the statement [of facts] need only “give the defendant fair notice of what the . . .  
6 claim is and the grounds upon which it rests.”” Erickson, 551 U.S. 89, 127 S.Ct. at 2200  
7 (quoting Bell Atlantic at 554, in turn quoting Conley v. Gibson, 355 U.S. 41, 47 (1957).

#### 8 ANALYSIS

9 Plaintiff’s amended complaint, filed April 21, 2011, contains the following  
10 allegations:

11 On April 4, 2009, defendant St. Andrew, an institutional gang investigator, placed  
12 plaintiff in administrative segregation pending investigation into plaintiff’s presumed association  
13 with the Northern Structure prison gang. On August 27, 2009, defendant G. Bracket, disclosed  
14 to plaintiff the information used in the gang validation process. The information disclosed three  
15 “source points (tattoo, informant, debriefing)” being used to validate plaintiff as a gang associate.  
16 Amended Complaint, filed April 21, 2011, at 4. The tattoo was twenty years old, the information  
17 gather by the gang investigators from the informant was false and misleading, and there is no  
18 other relevant evidence that plaintiff is associated with a prison gang.

19 On September 16, 2009, defendant Marquez contacted defendant Bracket and  
20 directed him to review the “tattoo source.” Id. at 5. Defendants Bracket and Harrison reviewed  
21 plaintiff’s central file and decided to use a probation report to support use of the tattoo to support  
22 the gang validation. Gang investigators also added another confidential source. None of the  
23 evidence relied on to support the gang validation is reliable, nor could plaintiff’s probation report  
24 be considered without violating the ex post facto clause.

25 Plaintiff filed an inmate grievance contesting the gang validation. The grievance  
26 was screened out as untimely by the High Desert Prison Appeals Coordinator.

1 ANALYSIS

2 In support of their motion to dismiss, defendants contend that the allegations of  
3 the amended complaint show that plaintiff received all process due in connection with his  
4 transfer to segregated housing. Defendants also contend that the allegations of the amended  
5 complaint and the exhibits appended thereto show that there was “some evidence” to support the  
6 gang validation decision.

7 In Munoz v. Rowland, 104 F.3d 1096 (9<sup>th</sup> Cir. 1997), the United States Court of  
8 Appeals for the Ninth Circuit held that

9 California’s policy of assigning suspected gang affiliates to the  
10 Security Housing Unit is not a disciplinary measure, but an  
11 administrative strategy designed to preserve order in the prison and  
12 protect the safety of all inmates. Although there are some minimal  
legal limitations, see, e.g., Toussaint v. McCarthy, 801 F.2d 1080  
(9<sup>th</sup> Cir.1986) ..., the assignment of inmates within the California  
prisons is essentially a matter of administrative discretion.

13 Munoz at 1098. Due process requires only notice and an opportunity to be heard “within a  
14 reasonable time” after placement in administrative segregation. Toussaint v. McCarthy, 801 F.2d  
15 1080, 1100 (9<sup>th</sup> Cir. 1986), *overruled in part on other grounds*, Sandin v. O’Conner, 515 U.S.  
16 472 (1995). In addition, a decision to validate an inmate as a member or associate of a prison  
17 gang must be supported by “some evidence.” Bruce v. Ylst, 351 F.3d 1283, 1287 (9<sup>th</sup> Cir. 2003)  
18 (quoting Superintendent v. Hill, 472 U.S. 445, 455 (1985)). Under Hill’s “some evidence”  
19 standard, the court does “not examine the entire record, independently assess witness credibility,  
20 or reweigh the evidence; rather, ‘the relevant question is whether there is any evidence in the  
21 record that could support the conclusion.’” Bruce, *id.* (quoting Hill, 472 U.S. at 455-56).  
22 However, the evidence relied on must have some “indicia of reliability.” Bruce, at 1288 (citing  
23 Toussaint v. McCarthy, 926 F.2d 800, 803 (9<sup>th</sup> Cir. 1990)). Reliability may be established by

24 (1) the oath of the investigating officer appearing before the  
25 committee as to the truth of his report that contains confidential  
26 information, (2) corroborating testimony, (3) a statement on the  
record by the chairman of the committee that he had firsthand  
knowledge of sources of information and considered them reliable

1 based on the informant's past record, or (4) an in camera review of  
2 the documentation from which credibility was assessed.... Proof  
3 that an informant previously supplied reliable information is  
4 sufficient.

5 Zimmerlee v. Keeney, 831 F.2d 183, 186-87 (9th Cir.1987).

6 Here, plaintiff challenges the sufficiency of the evidence relied on to support his  
7 validation as an associate of the Northern Structure prison gang. State regulations provide in  
8 relevant part that

9 An associate is an inmate/parolee or any person who is involved  
10 periodically or regularly with members or associates of a gang.  
11 This identification requires at least three (3) independent source  
12 items of documentation indicative of association with validated  
13 gang members or associates. Validation of an inmate/parolee or  
14 any person as an associate of a prison gang shall require at least  
15 one (1) source item be a direct link to a current or former validated  
16 member or associate of the gang, or to an inmate/parolee or any  
17 person who is validated by the department within six (6) months of  
18 the established or estimated date of activity identified in the  
19 evidence considered.

20 15 C.C.R. § 3378(c)(4). Documents attached to plaintiff's amended complaint<sup>1</sup> show that  
21 plaintiff was validated as a gang member on the basis of six items, falling into three categories: a  
22 CDCR 128B dated 8/25/09, a CDCR 128B dated September 16, 2009, and a Monterey County  
23 Probation Officers Report dated 9/20/04, all related to plaintiff's tattoo; a confidential  
24 memorandum dated 6/17/09, supported by another confidential memorandum dated 2/22/08,  
25 evidence of a direct link through debriefing; and a confidential memorandum dated 10/28/08,  
26 evidence of a direct link through written material. Ex. G to Amended Complaint.

27 A confidential information disclosure form appended to the amended complaint  
28 states that the February 22, 2008 memorandum was based on information by a "reliable  
29 confidential informant" who identified plaintiff as a "Building Channel (BC) for the Northerns  
30 (Northern Structure members/associates) while on Facility C upper yard building 7." Ex. A to

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<sup>1</sup> Exhibits attached to a complaint are a part thereof for all purposes. See Fed. R. Civ. P.  
10(c).

1 Amended Complaint, at 3. A second confidential information disclosure form states that the  
2 June 17, 2009 memorandum was based on information providing “during the Debriefing of a  
3 validated member of the NS” who identified plaintiff as “an associate of the NS and holding a  
4 position in the Chain of Command . . . [of] Building Channel for buildings 5 and 7 on Facility C  
5 HDSP.” *Id.* at 4. A third confidential information disclosure form appended to the amended  
6 complaint states that the October 28, 2008 memorandum was based on information obtained  
7 during a “contraband surveillance watch” of a suspected member of the Northern Structure,  
8 during which a roster of inmates associating themselves with the Northern Structure was  
9 discovered. Ex. D to Amended Complaint, at 3. Plaintiff’s name and identifying information  
10 was on the roster. *Id.* Neither the confidential memoranda nor the roster are appended to the  
11 amended complaint.

12           Plaintiff alleges that the information used to validate him as gang member was not  
13 reliable. As noted above, the confidential information relied on to validate plaintiff as a member  
14 of the prison gang must bear some “indicia of reliability.” None of the confidential information  
15 disclosure forms are attested to under oath by the investigating officers, nor are there any “on the  
16 record” statements by the decisionmaker concerning firsthand knowledge of the sources and their  
17 reliability. *Cf. Zimmerlee, supra.* Moreover, while one confidential disclosure form describes  
18 the information concerning plaintiff’s role as a “building channel” as coming from a  
19 “confidential informant” and the memo attributes it to a “debriefing,” it is not possible to tell on  
20 this record whether one individual or two provided that information. If only one person was the  
21 source of the information, it is not corroborated. *Cf. Zimmerlee, supra.*

22           Under the circumstances, this court finds that an in camera review of the  
23 confidential memoranda will be required to determine the reliability of key information used to  
24 validate plaintiff as an associate of a prison gang. Such a review will require consideration of  
25 matters outside the scope of the pleadings.

26 ////

1 For the foregoing reasons, this court finds that plaintiff has alleged that he was  
2 validated as a gang associate based on unreliable information in violation of his right to due  
3 process. It is not plain from the exhibits appended to the amended complaint that plaintiff is not  
4 entitled to relief on that claim. Accordingly, defendants' motion to dismiss should be denied.<sup>2</sup>

5 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 6 1. Defendants' February 13, 2012 motion to dismiss be denied; and
- 7 2. Defendants be directed to answer the amended complaint within ten days from  
8 the date of any order by the district court adopting these findings and recommendations.

9 These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
11 days after being served with these findings and recommendations, any party may file written  
12 objections with the court and serve a copy on all parties. Such a document should be captioned  
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the  
14 objections shall be filed and served within fourteen days after service of the objections. The  
15 parties are advised that failure to file objections within the specified time may waive the right to  
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: June 19, 2012.

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20 UNITED STATES MAGISTRATE JUDGE

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25 <sup>2</sup> Plaintiff also claims that use of his probation report as evidence in the gang validation  
26 proceedings violates the ex post facto clause. Defendants have not sought dismissal of this  
claim.