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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 TLN 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. By order filed September 28, 2012 (ECF No. 60), plaintiff's due process claim was dismissed and plaintiff was granted leave to file a second amended complaint raising only a claim under the Ex Post Facto Clause. On October 12, 2012, plaintiff filed a second amended complaint (ECF No. 61). This matter is now before the court on defendants' motion to dismiss the second amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendants contend that plaintiff has failed to state a claim for relief and, in the alternative, that they are entitled to qualified immunity. Plaintiff opposes the motion.

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1 gang. Id. The tattoo was then used for three points in the gang validation process. Id. at 3.  
2 Plaintiff claims this violated his rights under the Ex Post Facto Clause.<sup>1</sup>

3 ANALYSIS

4 Defendants make three contentions in support of their motion to dismiss. First,  
5 they contend that there are no allegations linking defendant St. Andre to the Ex Post Facto claim  
6 so defendant St. Andre should be dismissed. Second, they contend that use of plaintiff's  
7 probation report in the gang validation process did not violate the Ex Post Facto clause. Finally,  
8 they contend they are entitled to qualified immunity. For the reasons set forth infra, defendants'  
9 second contention is correct.

10 "The Ex Post Facto Clause forbids both the punishment for acts not punishable at  
11 the time the offense was committed and the imposition of an additional punishment beyond that  
12 permitted at the time of the offense. Violation of the Ex Post Facto Clause occurs where there is  
13 (1) retroactive application of a criminal law, and (2) such application disadvantages the  
14 defendant." Aponte v. Gomez, 993 F.2d 705, 708 (9<sup>th</sup> Cir. 1993). To violate the ex post clause,  
15 "the law must be retrospective, that is, it must apply to events occurring before its enactment;  
16 and second, it must disadvantage the offender affected by it." Hamilton v. United States, 67 F.3d  
17 761, 764 (9<sup>th</sup> Cir.1995) (quoting Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2450, 96  
18 L.Ed.2d 351 (1987)). [Footnote omitted.] In terms of disadvantage, the Supreme Court has held  
19 that the Ex Post Facto Clause 'is aimed at laws that "retroactively alter the definition of crimes or  
20 increase the punishment for criminal acts.'" California Dep't of Corrections v. Morales, 514 U.S.  
21 499, 504, 115 S.Ct. 1597, 1600, 131 L.Ed.2d 588 (1995) (quoting Collins v. Youngblood, 497

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23 <sup>1</sup> Plaintiff also claims violations of the protection against Double Jeopardy, and a due  
24 process violation based on insufficient evidence to support the validation. The latter claim is  
25 foreclosed by the district court's September 28, 2012 order. The Double Jeopardy claim is  
26 invalid on its face, since plaintiff alleges that his underlying criminal prosecution and sentence  
did not involve any use of alleged gang activity. See, e.g., U.S. v. Gartner, 93 F.3d 633  
(9<sup>th</sup> Cir. 1996) ("The Double Jeopardy Clause prohibits successive punishment for the "same  
offense." Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, ----, 114 S.Ct.  
1937, 1945, 128 L.Ed.2d 767 (1994).")

1 U.S. 37, 43, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990)).” Neal v. Shimoda, 131 F.3d 818,  
2 825 (9<sup>th</sup> Cir. 1997).

3 In support of their motion to dismiss, defendants demonstrate that applicable state  
4 regulations have permitted the use of probation reports as part of the gang validation process  
5 since 1999. See 15 CCR § 3023(a) (prohibiting inmate gang affiliation); 15 CCR § 3378(c)(8)(J)  
6 (including probation report as permissible “independent source item” for gang validation;  
7 provision added as emergency language effective August 30, 1999 and required certificate of  
8 compliance transmitted February 7, 2000 and filed March 21, 2000.) The probation report used  
9 as part of plaintiff’s gang validation process is dated September 20, 2004. See Ex. D to First  
10 Amended Complaint, filed April 21, 2011 (ECF No. 29) at 29.

11 The state regulation applied to permit consideration of plaintiff’s probation report  
12 as part of the gang validation process preceded by five years the probation report that was used.  
13 Therefore, use of that probation report as evidence to support plaintiff’s gang validation did not  
14 violate the Ex Post Facto Clause. For that reason, defendants’ motion to dismiss should be  
15 granted and this action should be dismissed.

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

- 17 1. Defendants’ December 18, 2012 motion to dismiss be granted;  
18 2. This action be dismissed for failure to state a claim upon which relief may be  
19 granted.

20 These findings and recommendations are submitted to the United States District  
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
22 days after being served with these findings and recommendations, any party may file written  
23 objections with the court and serve a copy on all parties. Such a document should be captioned  
24 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
25 objections shall be filed and served within fourteen days after service of the objections. The

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1 parties are advised that failure to file objections within the specified time may waive the right to  
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: April 24, 2013

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5 CAROLYN K. DELANEY  
6 UNITED STATES MAGISTRATE JUDGE

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