

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 THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CARLOS CASTRO,

Plaintiff,

No. C 98-04877 WHA

v.

CAL TERHUNE, ROBERT L. AYERS, JR.,
G. BONNIE GARIBAY, M. YARBOROUGH, A.
SCRIBNER, L. HOOD, J. STOKES, C.
CAMPBELL, A. M. GONZALES, M. AYALA, S.
C. WOLHWEND, A. JORDAN, J. MARTINEZ, J.
BATCHELOR, and E. DERUSHA,

**REMEDIAL ORDER
TO CONDUCT NEW
VALIDATION
PROCEDURE**

Defendants.

After a 2009 bench trial, plaintiff Carlos Castro was found to have been denied procedural due process by defendants in their validation of him as a prison gang associate. This order must determine the proper remedial procedure for a new validation of plaintiff.

Defendants tried to moot the entire action by voluntarily providing plaintiff with a new validation proceeding shortly before the bench trial. That validation proceeding, in retrospect, proved to be problematic and possibly tainted by machinations of counsel.

After briefing and a hearing, this order now establishes the remedial procedure for a new validation. The procedural due process violation was detailed in the findings of fact and conclusions of law (Dkt. No. 237). A new validation is needed because it is the only way to provide plaintiff with procedural due process. The proper remedy for a procedural due process violation is “a procedural correction” — *i.e.*, further process. *See Raditch v. United States*, 929

1 F.2d 478, 481 (9th Cir. 1991); *see also, e.g., Stewart v. Alameida*, 418 F. Supp. 2d 1154, 1166–67
2 (N.D. Cal. 2006).

3 The remedial proceeding shall follow state and CDCR regulations except as stated below.
4 The remedy should be the least intrusive into the state interest, as is required by the PLRA. 18
5 U.S.C. 3626(a)(1)(A); *see also Gilmore v. People of the State of California*, 220 F.3d 987, 1005
6 (9th Cir. 2000) (“the nature of the violation determines the scope of the remedy”) (citation
7 omitted). This order need not review the specifics of that procedure because it is laid out in the
8 regulations. *See* Cal. Admin. Code tit. 15, § 3378.

9 This validation procedure will evaluate whether plaintiff is a gang associate *now*, not in
10 1997 or 2009 (or any other time). Both sides stipulate to this aspect. This does not mean that
11 earlier evidence is inadmissible in the new validation process.

12 The following deviations from the regulations shall apply:

- 13 1. Each side may have one lawyer present at the validation interview and plaintiff’s
14 counsel may use discovery obtained herein to challenge the reliability of various source
15 items at the interview. If required for confidentiality, plaintiff himself must be excused
16 from the interview room while restricted material is discussed.
- 17 2. Counsel and plaintiff shall be given at least 72 hours notice of the source items to
18 be used against plaintiff and of the time and place of the interview.
- 19 3. While the validation process is pending, except for attendance and advocacy at the
20 interview, there shall be no communication between Deputy Attorney Generals Ken Roost
21 and Brendan Kenny, on the one hand, and anyone in the prison system, on the other,
22 directly or indirectly regarding prison gang validations. For example, there will be no
23 checking with defense counsel by prison authorities to see if the Carlos Castro validation
24 package passes muster. As to Attorney Tom Patterson, as discussed at the hearing, there
25 shall be no communication between him directly or indirectly with anyone in the prison
26 system regarding Carlos Castro; *and* there shall be no communication between him and
27 anyone in the prison system *directly* regarding anything having to do with prison gang
28 validations. The difference for Attorney Patterson follows from the fact that he is a

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

Supervising Deputy Attorney General and thus has other cases that might be prejudiced by a broader prohibition. Plaintiff’s counsel had no objection to this provision.

4. Assistant IGI Short shall not be involved in the revalidation. Other Assistant IGIs can assist the IGI if necessary. The IGI/decision-maker must be someone who has not previously acted in the matter but he can be from within the CDCR.

5. All participants must be warned in plain terms that they must follow the rules, be unbiased, fairly weigh the evidence, and reach just conclusions.

6. The decision-maker must state in writing each and every finding and state why each item of evidence does or does not show gang association. The decision-maker must fairly state plaintiff’s response to each item and the decision-maker’s evaluation of those responses.

7. A recording must be made of the interview with plaintiff and kept for use in court.

8. After the process is done, the decision-maker and all individuals involved in the process must file declarations with the Court that set forth the full process followed and identify and describe any communications that they had with *anyone* on the subject of Carlos Castro since June 30, 2010, other than communications appearing in the administrative record and communications with Carlos Castro. That means identifying the person they communicated with, the date, the subject matter, and a short description of the communications. It means all CDCR and prison officers involved in the validation process must keep a log of all communications going forward and from memory or their files reconstructing past communications. The declarations must then verify that the IGI and assistant IGI or anyone else who assisted in the process has no bias against Mr. Castro and made decisions solely on the merits.

9. In order to implement this requirement defense counsel must advise appropriate persons at the CDCR that this requirement will be necessary and that they must maintain the appropriate log of communications. Defense counsel are instructed to communicate with the CDCR and their clients to advise them of this ruling and to remove in advance any obstacle to the faithful and full implementation of this remedial order. In doing so,

1 however, counsel must not in any way try to steer the outcome of the validation
2 proceeding. Once defense counsel have advised the CDCR of this order and removed any
3 obstacles then counsel must stay clear of the process until it is complete (except for
4 attendance and advocacy at the interview).

5 10. The CDCR shall advise counsel of the final administrative decision at which point
6 counsel shall advise the Court of the decision and move to terminate this action. That
7 motion must be accompanied by the required declarations establishing full and fair
8 compliance with this remedial order. Defense counsel must file declarations at the end
9 verifying their compliance with this order. Plaintiff’s counsel may oppose the motion.

10 11. Any finding by the decision-maker that plaintiff is a prison gang “associate” must
11 state the definition used of “associate” and specify with particularity the reasoning for
12 finding him to meet the definition used.

13 This order finds that this relief is narrowly drawn, extends no further than necessary to
14 correct the violation of plaintiff’s federal rights, and is the least intrusive means necessary to
15 correct the violation of those rights. 18 U.S.C. 3626(b)(2).

16 Plaintiff argues that more is needed and that this order must diverge significantly from the
17 CDCR regulations for relief to be appropriate. More specifically, plaintiff’s counsel request
18 discovery during the validation procedure to determine what prison authorities are “not
19 includ[ing] in the ‘validation package’” (Br. 7). Plaintiff is not entitled to a formal judicial
20 hearing or the full range of due process protections. *See Hewitt v. Helms*, 459 U.S. 460, 476
21 (1983). Plaintiff is not entitled to discovery during the new validation process. But any
22 discovery material already turned over to plaintiff’s counsel (much has been) can be used at the
23 interview, and if the source item is confidential then plaintiff can be excused from the room
24 temporarily so that the underlying source item can be discussed without violating state regulations
25 or the protective order in this action.

26 Next, plaintiff argues that the critical decision-maker in the new validation should come
27 from outside the CDCR, because “the [CDCR] cannot be trusted to give Mr. Castro a fair
28 hearing” (Br. 5; *see also* Reply 3 (“no matter what Plaintiff does, no matter what the Court does,


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

and no matter what the law says, [defendants] will see to it that Plaintiff spends the rest of his life in the SHU”). Counsel paint a picture of an entire prison administration on a mission to get their client. This order, however, must fashion relief targeted at the specific violation. Plaintiff’s recommended course would supplant a central feature of state regulation: the decision-maker in validation proceedings. This would intrude on state authority to create its own regulations.

Defense counsel must file a status report when the foregoing validation procedure has begun, but no later than **NOVEMBER 18, 2010**, including the projected date of the interview with Castro required by the validation regulations. *See* Cal. Admin. Code tit. 15, § 3378(c)(6). Defense counsel must also file the declarations and motion described above when the validation procedure is complete. Nevertheless, this order sets a further case management conference for **MARCH 3, 2011, AT 11:00 A.M.**

IT IS SO ORDERED.

Dated: October 29, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE