

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 ALFREDO TORRES, Jr.,

No. C 10-03044 SBA (PR)

4 Plaintiff,

ORDER OF SERVICE

5 v.

6 A. LOPEZ, et al.,

7 Defendants.

8 **INTRODUCTION**

9 Plaintiff, a state prisoner, has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983
10 challenging his placement and retention in administrative segregation (ad-seg) on the basis of
11 association with a prison gang.

12 His motion for leave to proceed in forma pauperis has been granted.

13 Venue is proper because the events giving rise to the claim are alleged to have occurred at
14 San Quentin State Prison (SQSP), which is located in this judicial district. See 28 U.S.C. § 1391(b).

15 In his complaint, Plaintiff names the following Defendants: SQSP Correctional Officers A.
16 Lopez and D. Deseo; SQSP Sergeant J. R. Martinez; and SQSP Captain D. Hurley. Plaintiff seeks
17 declaratory and injunctive relief.

18 **DISCUSSION**

19 **I. Standard of Review**

20 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
21 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
22 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that
23 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary
24 relief from a defendant who is immune from such relief. Id. § 1915A(b)(1), (2). Pro se pleadings
25 must be liberally construed. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

26 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:

27 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the
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1 alleged violation was committed by a person acting under the color of state law. West v. Atkins,
2 487 U.S. 42, 48 (1988).

3 **II. Due Process Claim**

4 The Due Process Clause of the Fourteenth Amendment protects individuals against
5 governmental deprivations of "life, liberty or property," as those words have been interpreted and
6 given meaning over the life of our republic, without due process of law. Board of Regents v. Roth,
7 408 U.S. 564, 570-71 (1972); Mullins v. Oregon, 57 F.3d 789, 795 (9th Cir. 1995).

8 The touchstone of due process is protection of the individual against arbitrary action of
9 government, whether the fault lies in a denial of fundamental procedural fairness (i.e., denial of
10 procedural due process guarantees) or in the exercise of power without any reasonable justification
11 in the service of a legitimate governmental objective (i.e., denial of substantive due process
12 guarantees). See County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998).

13 Interests that are procedurally protected by the Due Process Clause may arise from two
14 sources -- the Due Process Clause itself and the laws of the states. See Meachum v. Fano, 427 U.S.
15 215, 223-27 (1976). Although the hardship associated with administrative segregation is not so
16 severe as to violate the Due Process Clause itself, see Toussaint v. McCarthy, 801 F.2d 1080, 1091-
17 92 (9th Cir. 1986), changes in conditions of confinement may amount to a deprivation of a state-
18 created and constitutionally protected liberty interest, provided the liberty interest in question is one
19 of "real substance," see Sandin v. Conner, 515 U.S. 472, 477, 484-87 (1995), and, in particular,
20 where the restraint "imposes atypical and significant hardship on the inmate in relation to the
21 ordinary incidents of prison life," see id. at 484. Indefinite placement in the SHU may amount to a
22 deprivation of a liberty interest of real substance within the meaning of Sandin, i.e., an "atypical and
23 significant hardship." See Wilkinson v. Austin, 125 S. Ct. 2384, 2394-95 (2005).

24 When prison officials determine that a prisoner is to be segregated for administrative reasons
25 and a liberty interest of real substance is implicated, due process requires that such officials hold an
26 informal nonadversary hearing within a reasonable time after the prisoner is segregated, inform the
27 prisoner of the charges against him or the reasons segregation is being considered, and allow the
28 prisoner to present his views. See Toussaint, 801 F.2d at 1100; see also Wilkinson, 125 S. Ct. at

1 2397 (determining prisoner constitutionally entitled only to informal, non-adversary procedures
2 prior to assignment to "supermax" facility).

3 Due process also requires that an evidentiary basis exist for a prison official's decision to
4 place an inmate in segregation for administrative reasons. See Superintendent v. Hill, 472 U.S. 445,
5 455 (1985); Toussaint, 801 F.2d at 1104-05. This standard is met if there is "some evidence" from
6 which the conclusion of the administrative tribunal can be deduced. Id. at 1105. Additionally, it
7 has been held that the evidence relied upon to confine an inmate to the SHU for gang affiliation
8 must have "some indicia of reliability" to satisfy due process requirements. See Madrid v. Gomez,
9 889 F. Supp. 1146, 1273-74 (N.D. Cal. 1995); Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987)
10 (holding evidence relied upon by prison disciplinary board must have "some indicia of reliability").
11 Finally, prison officials must engage in some sort of periodic review of an inmate's confinement in
12 administrative segregation, see Hewitt v. Helms, 459 U.S. 460, 477 n.9 (1983); Toussaint, 801 F.2d
13 at 1101, which review must amount to more than "meaningless gestures," Toussaint v. Rowland,
14 711 F. Supp. 536, 540 n.11 (N.D. Cal. 1989) (citing Toussaint, 801 F.2d at 1102).

15 Here, Plaintiff alleges that the evidence relied upon by Defendants in determining that he
16 should be placed in administrative segregation (ad-seg) was neither sufficient nor reliable. Plaintiff
17 claims he was improperly validated in 1999 based on information from a confidential informant, an
18 "address of [his] cousin, thru [sic] marriage, as a 'direct link,'" and a "photo copy of a drawing with a
19 'huelga bird.'"¹ (Compl., Attach. at 3.)

20 Plaintiff alleges he "walk[ed] up to [Defendant] Lopez and told him that [he] no longer
21 wanted to be around active [H]ispanic [inmates], because [he] was now a Christian man and not an
22 active inmate." (Id. at 2.) He claims Defendant Lopez then placed him in ad-seg and mis-quoted
23 Plaintiff in justifying the ad-seg placement in the "lock-up order." (Id.) Plaintiff also alleges that
24 Defendants Lopez, Martinez and Hurley "or whom ever wrote up that . . . order fabricated and
25 falsified my statement." (Id.) Because of these false statements, Plaintiff refused to sign the "lock-

27 ¹ The huelga bird is a symbol of both the United Farm Workers of America and the Norteños
28 gang.

1 up order." (Id.)

2 Plaintiff claims the Classification Committee who initially reviewed his placement "did not
3 want to hear anything that [he] had to say." (Id.) Additionally, Plaintiff alleges that he has "tried
4 everything [he could] to file a [602] appeal here at San Quentin State Prison on this unlawful gang
5 validation," without success. (Id. at 3.) Plaintiff alleges he has requested prison officials to give
6 him a copy of the "unlawful" gang validation chronos against him to no avail. He asks the Court to
7 "please look into this matter of C.D.C.R. not giving [him his] validation chronos or acknowledging
8 [his] 602 appeal." (Id.)

9 Plaintiff claims Defendant Deseo was eventually assigned to his "case" in order to interview
10 him regarding his appeal. (Id. at 5.) Plaintiff states: "At no time did [Defendant] Deseo interview
11 me about the evidence being used against me or did [Defendant] Deseo give me the opportunity to
12 refute the evidence being used against me." (Id.)

13 In sum, Plaintiff argues that no evidentiary basis existed for Defendants' decision to place
14 Plaintiff in ad-seg. See Toussaint, 801 F.2d at 1104-05. He alleges that Defendants Lopez, Deseo,
15 Martinez and Hurley were responsible for these violations insofar as they participated in the
16 decisions to place him in ad-seg. Liberally construed, such allegations state a cognizable due
17 process claim against these Defendants.

18 **CONCLUSION**

19 For the foregoing reasons, the Court orders as follows:

20 1. Plaintiff states a COGNIZABLE due process claim against Defendants Lopez,
21 Deseo, Martinez and Hurley.

22 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
23 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint and
24 all attachments thereto (docket no. 1) and a copy of this Order to **SQSP Correctional Officers A.
25 Lopez and D. Deseo; SQSP Sergeant J. R. Martinez; and SQSP Captain D. Hurley at SQSP.**
26 The Clerk of the Court shall also mail a copy of the complaint and a copy of this Order to the State
27 Attorney General's Office in San Francisco. Additionally, the Clerk shall mail a copy of this Order
28 to Plaintiff.

1 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires
2 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant
3 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of
4 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of
5 such service unless good cause be shown for their failure to sign and return the waiver form. If
6 service is waived, this action will proceed as if Defendants had been served on the date that the
7 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve
8 and file an answer before **sixty (60) days** from the date on which the request for waiver was sent.
9 (This allows a longer time to respond than would be required if formal service of summons is
10 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that
11 more completely describes the duties of the parties with regard to waiver of service of the summons.
12 If service is waived after the date provided in the Notice but before Defendants have been
13 personally served, the Answer shall be due **sixty (60) days** from the date on which the request for
14 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

15 4. Defendants shall answer the complaint in accordance with the Federal Rules of Civil
16 Procedure. The following briefing schedule shall govern dispositive motions in this action:

17 a. No later than **ninety (90) days** from the date their answer is due, Defendants
18 shall file a motion for summary judgment or other dispositive motion. The motion shall be
19 supported by adequate factual documentation and shall conform in all respects to Federal Rule of
20 Civil Procedure 56. If Defendants are of the opinion that this case cannot be resolved by summary
21 judgment, they shall so inform the Court prior to the date the summary judgment motion is due. All
22 papers filed with the Court shall be promptly served on Plaintiff.

23 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court
24 and served on Defendants no later than **sixty (60) days** after the date on which Defendants' motion
25 is filed. The Ninth Circuit has held that the following notice should be given to pro se plaintiffs
26 facing a summary judgment motion:

27 The defendant has made a motion for summary judgment by which they seek
28 to have your case dismissed. A motion for summary judgment under Rule 56 of the
 Federal Rules of Civil Procedure will, if granted, end your case.

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2 Rule 56 tells you what you must do in order to oppose a motion for summary
3 judgment. Generally, summary judgment must be granted when there is no genuine
4 issue of material fact -- that is, if there is no real dispute about any fact that would
5 affect the result of your case, the party who asked for summary judgment is entitled
6 to judgment as a matter of law, which will end your case. When a party you are
7 suing makes a motion for summary judgment that is properly supported by
8 declarations (or other sworn testimony), you cannot simply rely on what your
9 complaint says. Instead, you must set out specific facts in declarations, depositions,
10 answers to interrogatories, or authenticated documents, as provided in Rule 56(e),
11 that contradict the facts shown in the defendant's declarations and documents and
12 show that there is a genuine issue of material fact for trial. If you do not submit your
13 own evidence in opposition, summary judgment, if appropriate, may be entered
14 against you. If summary judgment is granted [in favor of the defendants], your case
15 will be dismissed and there will be no trial.

16 See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc).

17 Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex
18 Corp. v. Catrett, 477 U.S. 317 (1986) (party opposing summary judgment must come forward with
19 evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is
20 cautioned that because he bears the burden of proving his allegations in this case, he must be
21 prepared to produce evidence in support of those allegations when he files his opposition to
22 Defendants' dispositive motion. Such evidence may include sworn declarations from himself and
23 other witnesses to the incident, and copies of documents authenticated by sworn declaration.
24 Plaintiff will not be able to avoid summary judgment simply by repeating the allegations of his
25 complaint.

26 c. If Defendants wish to file a reply brief, they shall do so no later than **thirty**
27 **(30) days** after the date Plaintiff's opposition is filed.

28 d. The motion shall be deemed submitted as of the date the reply brief is due.
No hearing will be held on the motion unless the Court so orders at a later date.

5. Discovery may be taken in this action in accordance with the Federal Rules of Civil
Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose
Plaintiff and any other necessary witnesses confined in prison.

6. All communications by Plaintiff with the Court must be served on Defendants, or
Defendants' counsel once counsel has been designated, by mailing a true copy of the document to
Defendants or Defendants' counsel.

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7. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion.

8. Extensions of time are not favored, though reasonable extensions will be granted. Any motion for an extension of time must be filed no later than **fifteen (15) days** prior to the deadline sought to be extended.

IT IS SO ORDERED.

DATED: 5/24/11


SAUNDRA BROWN ARMSTRONG
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 ALFREDO TORRES JR.,

5 Plaintiff,

6 v.

7 A. LOPEZ et al,

8 Defendant.

Case Number: CV10-03044 SBA

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on May 25, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Alfredo Torres G-41302
16 959 Gemini Drive
17 Windsor, CA 95492

18 Dated: May 25, 2011

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk