

1 governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable
2 claims or dismiss the complaint, or any portion of the complaint, if the complaint “is
3 frivolous, malicious, or fails to state a claim upon which relief may be granted,” or
4 “seeks monetary relief from a defendant who is immune from such relief.” Id. §
5 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v.
6 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

7 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
8 elements: (1) that a right secured by the Constitution or laws of the United States
9 was violated, and (2) that the alleged violation was committed by a person acting
10 under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

11 B. Legal Claims

12 Plaintiff claims that defendants placed him in the SHU indeterminately based
13 on prison gang validation without due process of law on December 3, 2003.

14 Plaintiff alleges that a superior court decision issued on October 30, 2006, in a state
15 habeas action directed prison officials to void his gang validation, or in the
16 alternative, afford him with due process. (Am. Compl. at 3a.) Despite the court
17 order, Plaintiff claims that prison officials continue to deny him his right to due
18 process by retaining him in the SHU. Liberally construed, plaintiff states a
19 cognizable claim for the deprivation of his right to due process under Toussaint v.
20 McCarthy, 801 F.2d 1080 (9th Cir. 1986).

21 C. John Doe Defendant

22 Plaintiff alleges that defendant “John Doe” is a classification staff
23 representative, who was also involved in the violation of plaintiff’s right to due
24 process. (Am. Comp. at 14L.) Although the use of “John Doe” to identify a
25 defendant is not favored in the Ninth Circuit, see Gillespie v. Civiletti, 629 F.2d 637,
26 642 (9th Cir. 1980); Wiltsie v. Cal. Dep’t of Corrections, 406 F.2d 515, 518 (9th Cir.
27 1968), situations may arise where the identify of alleged defendants cannot be
28 known prior to the filing of a complaint. In such circumstances, the plaintiff should

1 be given an opportunity through discovery to identify the unknown defendants,
2 unless it is clear that discovery would not uncover their identifies or that the
3 complaint should be dismissed on other grounds. See Gillespie, 629 F.2d at 642;
4 Velasquize v. Senko, 643 F. Supp. 1172, 1180 (N. D. Cal. 1986). Accordingly,
5 defendant John Doe is DISMISSED from this action. If through discovery plaintiff
6 is able to identify the unknown defendant, he may then motion the Court for leave to
7 amend to name the intended defendant and to issue summons upon him. See
8 Gillespie, 629 F.2d at 642; Barsten v. Dep't of the Interior, 896 F.2d 422, 423-24
9 (9th Cir. 1990).

11 CONCLUSION

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

13 1. The clerk of the Court shall issue summons and the United States
14 Marshal shall serve, without prepayment of fees, a copy of the complaint in this
15 matter, all attachments thereto, and a copy of this order upon defendants **Francisco**
16 **Jacques, M. Cook, U. Silva, D. W. Bradbury, C. M. Patten, B. Freeland, F.**
17 **Vanderhoofven, C. Panny, T. Arneson, R. Cox, K. A. Nealy, D. Marvin, K.**
18 **Getz, K. Brandon, D. E. Milligan, and B. Thornton** at **Pelican Bay State Prison**
19 (P.O. Box 7000, Crescent City, Ca 95531), and defendant **Matthew Cates** at **CDCR**
20 (Office of Legal Affairs, P.O. Box 942883, Sacramento California, 94283).

21 Defendant John Doe is DISMISSED from this action for the reasons stated
22 above.

23 2. No later than **sixty (60) days** from the date of this order, defendants
24 shall file a motion for summary judgment or other dispositive motion with respect to
25 the claims in the amended complaint found to be cognizable above.

26 a. If defendants elect to file a motion to dismiss on the grounds
27 plaintiff failed to exhaust his available administrative remedies as required by 42
28 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion

1 pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied
2 Alameida v. Terhune, 540 U.S. 810 (2003).

3 b. Any motion for summary judgment shall be supported by
4 adequate factual documentation and shall conform in all respects to Rule 56 of the
5 Federal Rules of Civil Procedure. **Defendants are advised that summary**
6 **judgment cannot be granted, nor qualified immunity found, if material facts**
7 **are in dispute. If any defendant is of the opinion that this case cannot be**
8 **resolved by summary judgment, he shall so inform the Court prior to the date**
9 **the summary judgment motion is due.**

10 3. Plaintiff's opposition to the dispositive motion shall be filed with the
11 Court and served on defendants no later than **forty-five (45) days** from the date
12 defendants' motion is filed.

13 a. In the event the defendants file an unenumerated motion to
14 dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:¹

15 The defendants have made a motion to dismiss pursuant to Rule
16 12(b) of the Federal Rules of Civil Procedure, on the ground
17 you have not exhausted your administrative remedies. The
18 motion will, if granted, result in the dismissal of your case.
19 When a party you are suing makes a motion to dismiss for
20 failure to exhaust, and that motion is properly supported by
21 declarations (or other sworn testimony) and/or documents, you
22 may not simply rely on what your complaint says. Instead, you
23 must set out specific facts in declarations, depositions, answers
24 to interrogatories, or documents, that contradict the facts shown
25 in the defendant's declarations and documents and show that
26 you have in fact exhausted your claims. If you do not submit
27 your own evidence in opposition, the motion to dismiss, if
28 appropriate, may be granted and the case dismissed.

29 b. In the event defendants file a motion for summary judgment,
30 the Ninth Circuit has held that the following notice should be given to plaintiffs:

31 The defendants have made a motion for summary judgment by
32 which they seek to have your case dismissed. A motion for
33 summary judgment under Rule 56 of the Federal Rules of Civil

34 ¹ The following notice is adapted from the summary judgment notice to be given to
35 pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en
36 banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

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

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary judgment may be deemed to be a consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

4. Defendants shall file a reply brief no later than **fifteen (15) days** after plaintiff's opposition is filed.

5. 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.

6. All communications by the 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.

7. Discovery may be taken in accordance with the Federal Rules of Civil

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Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

8. 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. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

9. Extensions of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

DATED: August 26, 2010



JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO VASQUEZ JR.,
Plaintiff,

Case Number: CV09-03120 JW

CERTIFICATE OF SERVICE

v.

FRANCISCO JACQUEZ, et al.,
Defendants.

_____/

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

That on 8/30/2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Antonio Vasquez K-60575
Pelican Bay State Prison
P. O. Box 7500
Crescent city, Ca 95531

Dated: 8/30/2010

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk