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

ISSAC FLORES,
Petitioner,
vs.
ACTING WARDEN GREG LEWIS,
Warden,
Respondent.

No. C 10-2773 RMW (PR)
ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS;
DENYING CERTIFICATE OF
APPEALABILITY

Petitioner, a state prisoner proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a 2008 administrative decision to validate him as a prison gang member and order his continued housing in the Secured Housing Unit (“SHU”). Respondent was ordered to show cause why the writ should not be granted. Respondent has filed an answer, along with a supporting memorandum of points and authorities. Petitioner has filed a traverse. For the reasons stated below, the court DENIES petitioner’s petition for writ of habeas corpus.

BACKGROUND

In 1987, petition was convicted of conspiracy and second degree murder, and sentenced to a term of 16 years to life in state prison. In April 1996, petitioner was denied inactive status

1 and validated as an active gang member of the Northern Structure Prison Gang. He continued to
2 be housed in the SHU for an indeterminate term.

3 In October 2008, the prison determined that four source items supported petitioner's
4 revalidation as a member of the Northern Structure Prison Gang. (Resp. Exs. 2, 4.) The first
5 source item was a CDC 128B form, which indicated that on October 23, 2008, Correctional
6 Officer Bonffil discovered a drawing of a "Mexican Pistolero" that included symbols of the
7 "North Star," which had been identified as a symbol used by members of the Northern Structure
8 Prison Gang. (Resp. Ex. 2 at 2.) The second source item was a CDC 1030 confidential
9 information disclosure form, which indicated that on July 15, 2008, Correctional Officer Harlow
10 drafted a confidential memorandum noting that he searched a validated Northern Structure
11 member's personal property and found a piece of paper containing "Ghost Writing" that included
12 petitioner's identifying information, as well as identifying information of other validated
13 members and associates of the Nuestra Familia and Northern Structure Prison Gangs. (Id. at 3.)
14 The third source item was a CDC 1030 confidential information disclosure form, which
15 indicated that on August 5, 2008, Correctional Sergeant A. Barneburg drafted a confidential
16 memorandum noting that confidential information was recovered by prison staff on July 25,
17 2008, identifying petitioner as an active member/associate of the Northern Structure Prison
18 Gang. (Id. at 4.) The fourth source item was a CDC 1030 confidential information disclosure
19 form, which indicated that on August 9, 2007, Correctional Sergeant J. Bales drafted a
20 confidential debriefing report indicating that he received information from a confidential
21 informant identifying petitioner as an active member/associate of the Northern Structure Prison
22 Gang, and was in good standing. (Id. at 5.)

23 Petitioner challenges the October 2008 decision to deny him inactive status and retain
24 him in the SHU.

25 DISCUSSION

26 A. Standard of Review

27 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
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1 custody pursuant to the judgment of a state court only on the ground that he is in custody in
2 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).
3 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a district court
4 may not grant a petition challenging a state conviction or sentence on the basis of a claim that
5 was reviewed on the merits in state court unless the state court’s adjudication of the claim “(1)
6 resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
7 established federal law, as determined by the Supreme Court of the United States; or (2) resulted
8 in a decision that was based on an unreasonable determination of the facts in light of the
9 evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d). The first prong applies
10 both to questions of law and to mixed questions of law and fact, Williams v. Taylor, 529 U.S.
11 362, 384-86 (2000), while the second prong applies to decisions based on factual determinations,
12 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

13 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state
14 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of
15 law or if the state court decides a case differently than [the] Court has on a set of materially
16 indistinguishable facts.” Williams, 529 U.S. at 412-13. A state court decision is an
17 “unreasonable application of” Supreme Court authority, falling under the second clause of
18 § 2254(d)(1), if the state court correctly identifies the governing legal principle from the
19 Supreme Court’s decisions but “unreasonably applies that principle to the facts of the prisoner's
20 case.” Id. at 413. The federal court on habeas review may not issue the writ “simply because
21 that court concludes in its independent judgment that the relevant state-court decision applied
22 clearly established federal law erroneously or incorrectly.” Id. at 411.

23 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual determination
24 will not be overturned on factual grounds unless objectively unreasonable in light of the
25 evidence presented in the state-court proceeding.” Miller-El, 537 U.S. at 340. The court must
26 presume correct any determination of a factual issue made by a state court unless the petitioner
27 rebuts the presumption of correctness by clear and convincing evidence. See 28 U.S.C. §

1 2254(e)(1).

2 B. Petitioner's claims

3 Petitioner claims that the decision to revalidate him as an active gang member violated
4 his First Amendment right to association, right to equal protection, and right to due process.
5 Respondent argues that (1) the court lacks subject matter jurisdiction to hear petitioner's claims
6 because he does not challenge the legality or duration of his confinement, (2) petitioner fails to
7 state a First Amendment or equal protection claim, (3) petitioner does not have a federal liberty
8 interest in being free from the SHU, and (4) petitioner has received all the process he is due.

9 1. First Amendment

10 Plaintiff alleges that his First Amendment right of association was violated by his
11 validation as a gang member and placement in the SHU. Plaintiff claims that as a result of these
12 decisions, he is prohibited from associating with other inmates from Northern California. (Pet.
13 at 13.)

14 A federal court may only grant a petition for writ of habeas corpus if the petitioner can
15 show that "he is in custody in violation of the Constitution" 28 U.S.C. § 2254(a). A habeas
16 corpus petition is the correct method for a prisoner to challenge the "legality or duration" of his
17 confinement. Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991), quoting Preiser v. Rodriguez,
18 411 U.S. 475, 485 (1973). Here, petitioner's First Amendment claim does not affect the fact or
19 duration of his custody, and thus, it is dismissed for failure to state a claim.

20 Even assuming that petitioner's First Amendment claim is cognizable in habeas, the
21 claim is without merit. Prison regulations that infringe a prisoner's constitutional right are valid
22 so long as they are "reasonably related to legitimate penological interests." Turner v. Safley, 482
23 U.S. 78, 89 (1987); see also Pell v. Procunier, 417 U.S. 817, 822-23 (1974) (identifying four
24 central penological objectives: deterrence (by making incarceration undesirable), protection (by
25 quarantining criminal offenders), rehabilitation, and ensuring internal security of the prison
26 facility). Courts owe "substantial deference to the professional judgment of prison
27 administrators." Overton v. Bazzetta, 539 U.S. 126, 132 (2003). Turner held that restrictive

1 prison regulations are permissible if they are “reasonably related” to legitimate penological
2 interests, and are not an “exaggerated response” to such objectives. Turner, 482 U.S. at 87.

3 The Supreme Court has identified four factors to consider when determining the
4 reasonableness of a prison rule: (1) whether there is a “valid, rational connection between the
5 prison regulation and the legitimate governmental interest put forward to justify it”; (2) “whether
6 there are alternative means of exercising the right that remain open to prison inmates”; (3) “the
7 impact accommodation of the asserted constitutional right will have on guards and other inmates
8 and on the allocation of prison resources generally”; and (4) the “absence of ready alternatives”,
9 or, in other words, whether the rule at issue is an “exaggerated response to prison concerns.”
10 Turner, 482 U.S. at 89-90.

11 It is well established that the First Amendment right to freedom of association is among
12 the rights least compatible with incarceration, see Overton, 539 U.S. at 131, and such right “may
13 be curtailed whenever the institution’s officials, in the exercise of their informed discretion,
14 reasonably conclude that such associations . . . possess the likelihood of disruption to prison
15 order or stability.” Jones v. North Carolina Prisoners’ Labor Union, 433 U.S. 119, 132 (1977).
16 Based on the documents attached to the petition, it is clear that petitioner’s validation was based
17 on evidence showing that petitioner was involved with gang activity. It cannot be disputed that
18 the prison has a legitimate interest in preserving the safety of its inmates and staff, which
19 includes preventing gang violence. See also Bruce, 351 F.3d at 1289 (“It is clear . . . that prisons
20 have a legitimate penological interest in stopping prison gang activity.”). Accordingly,
21 petitioner’s First Amendment claim is dismissed.

22 2. Equal Protection

23 Petitioner’s equal protection claim is similarly dismissed for failure to state a cognizable
24 claim for habeas relief. See Badea, 931 F.2d at 574. There is no indication that his claim would
25 affect the fact or duration of his confinement. Moreover, petitioner does not state any facts
26 sufficient to support an equal protection claim. “The Equal Protection Clause of the Fourteenth
27 Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal
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1 protection of the laws,' which is essentially a direction that all persons similarly situated should
2 be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985),
3 quoting Plyler v. Doe, 457 U.S. 202, 216 (1982). Petitioner does not suggest that other persons
4 similarly situated with him are being treated differently. Accordingly, petitioner's equal
5 protection claim is dismissed.

6 3. Due Process¹

7 Plaintiff claims that defendants violated his right to due process because his placement in
8 the SHU was based on insufficient evidence.²

9 Changes in conditions of confinement may amount to a deprivation of a state-created and
10 constitutionally-protected liberty interest, provided the liberty interest in question is one of "real
11 substance," see Sandin v. Conner, 515 U.S. 472, 477, 484-87 (1995), and, in particular, where
12 the restraint "imposes atypical and significant hardship on the inmate in relation to the ordinary
13 incidents of prison life," see id. at 484. In Superintendent v. Hill, 472 U.S. 445, 455 (1985), the
14 Supreme Court held that disciplinary proceedings do not satisfy due process requirements unless
15 there is "some evidence" in the record to support the findings of the prison disciplinary board.
16 The Ninth Circuit requires that "some evidence" also support a decision to place an inmate in
17 segregation for administrative reasons. See Toussaint v. McCarthy, 801 F.2d 1080, 1104 (9th
18 Cir. 1986). This standard applies to placement in a SHU for gang affiliation. Bruce v. Ylst, 351
19 F.3d 1283, 1287-88 (9th Cir. 2003), and is met if there was some evidence from which the
20 conclusion of the administrative tribunal could be deduced. See Toussaint, 801 F.2d at 1105
21 (citing Hill, 472 U.S. at 455). Ascertaining whether the standard is satisfied does not require
22 examination of the entire record, independent assessment of the credibility of witnesses or
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25 ¹ Because the court has previously denied respondent's argument that it the petition lacks
26 habeas jurisdiction and fails to state a claim, it will not rehash that discussion again. (Docket
27 No. 23.)

28 ² Petitioner does not assert, and the record does not support, that he was not provided
notice or an opportunity to be heard. Hewitt v. Helms, 459 U.S. 460, 476 (1983).

1 weighing of the evidence. See id. Instead, the relevant question is whether there is any evidence
2 in the record that could support the conclusion reached. See id.

3 The Ninth Circuit also requires that the evidence relied upon by prison disciplinary
4 boards contain “some indicia of reliability,” Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987),
5 but has not directly considered whether a corresponding need for evidentiary reliability exists
6 when prison officials segregate an inmate for administrative reasons.³ Some district courts have
7 extended the reliability requirement to the administrative context, however, holding that “the
8 evidence relied upon to confine an inmate to the SHU for gang affiliation must have ‘some
9 indicia of reliability’ to satisfy due process requirements.” Madrid v. Gomez, 889 F. Supp.
10 1146, 1273-74 (N.D. Cal. 1995); see Jones v. Gomez, No. C 91-3875 MHP, 1993 WL 341282,
11 *3-4 (N.D. Cal. Aug. 23, 1993) (order denying summary judgment) (due process requires indicia
12 of reliability due to high risk of false information by informants, inherent prisoner conflicts and
13 necessity for independent factfinding by prison officials).

14 Here, the first source item was the CDC 128B stating that petitioner possessed a drawing,
15 within which was found symbols of the “North Star.” (Resp. Ex. 2 at 2.) The 128B stated that,
16 “[b]ased on gang training and experience,” the “North Star” symbol is indicative of membership
17 within the Northern Structure Prison gang. (Id.) “The North Star Concept is used to indoctrinate
18 Northern street gang members with the N[orthern] S[tar] prison gang’s ideologies.” (Id.)
19 Petitioner claims that the identified “symbol” is not indicative of gang activities because the
20 “North Star” is only one star and not four. (Pet. at 15.) The question for the court, however, is
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22 ³ If the information relied upon by the disciplinary committee are the statements of an
23 unidentified informant, due process requires that the record contain: (1) some factual information
24 from which the committee can reasonably conclude that the information was reliable and (2) a
25 prison official’s affirmative statement that safety considerations prevent the disclosure of the
26 informant’s name. See Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir. 1987). Reliability may
27 be established by: (1) the oath of the investigating officer appearing before the committee as to
28 the truth of his report that contains confidential 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 based on the informant’s past record, or (4)
in camera review of the documentation from which credibility was assessed. See id. at 186-87.

1 whether it was unreasonable for the state court to have viewed the symbol within the drawing as
2 depicting the “North Star.” The court cannot so conclude because the CDCR has expertise in
3 identifying what symbols and indicia gangs are using. Plaintiff’s arguments to the contrary
4 challenge the persuasiveness of this evidence, but the weighing and credibility of the evidence
5 are not part of the analysis of whether the relatively low “some evidence” standard was met.
6 Thus, the symbols within the drawing constitute some evidence to support the gang validation
7 decision. See Bruce, 351 F.3d at 1288 (recognizing that even one single piece of evidence is
8 sufficient to support validation under the lenient due process standard).

9 The second source item, the confidential memorandum referencing the discovery of a
10 “Ghost Writing” paper in the possession of another validated Northern Structure member, does
11 not originate from an unidentified informant. The memorandum explained that “Ghost Writing”
12 was a method of writing without ink, used by Northern Structure Prison Gang members, so that
13 it can be undetected by gang investigators and correctional staff. (Resp. Ex. 2 at 3.) Inspection
14 of this “Ghost Writing” showed a roster containing the names, aliases, birthdates, and CDCR
15 identification numbers belonging to several validated members, including petitioner’s, of the
16 Nuestra Familia and Northern Structure Prison Gangs. (Id.) As the Confidential Information
17 Form states, the information is considered reliable because it was gathered from staff
18 investigation or non-confidential sources, and also the notes were never intended to be seen by
19 CDCR staff or gang investigation staff. (Id.) Again, although petitioner argues against the
20 weight of the evidence, that is not the question before this court. This court does not decide
21 anew whether to validate him, but only whether there was some evidence with sufficient indicia
22 of reliability to support the decision reached by the defendant.

23 The third source item was another confidential memorandum, dated August 5, 2008,
24 which stated that confidential information was recovered by staff on July 25, 2008 during a
25 contraband watch, which identified petitioner as an active member or associate of the Northern
26 Structure Prison gang. (Resp. Ex. 2 at 4.) The information was considered reliable because it
27 had been confiscated and not solicited by, or intended for, staff. Further, part of the information
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1 provided by the source had already been proven true.

2 The fourth source item originated from a confidential informant (“CI”). The CI
3 identified petitioner as being an active member of the Northern Structure Prison Gang. (Resp.
4 Ex. 2 at 5.) Prison officials assessed that the information was reliable because it was
5 corroborated by another source, and the CI incriminated himself in a criminal activity at the time
6 he provided the information. (Id.) The fourth source item was corroborated by both the second
7 and third source items. Because the record contains some factual information from which the
8 state court could have reasonably concluded that the statements were reliable, the fourth source
9 item met the “some evidence” standard. See Freitas v. Auger, 837 F.2d 806, 811 (8th Cir.1988)
10 (upholding reliability determination where statements of two informants contained some factual
11 background, were consistent with each other, and at least one of them was against the
12 informant’s penal interest); Pratt v. Rowland, 770 F.Supp. 1399, 1403-04 (N.D. Cal. 1991)
13 (finding adequate indicia of reliability where confidential statement was lent some credibility by
14 confidential memoranda, was consistent with Rules Violation Report, and informant
15 incriminated himself in criminal activity at the time of providing the information); see also Cal.
16 Code of Regs. tit. 15, § 3321(c)(3) (confidential source may be deemed reliable if the provided
17 information is self-incriminating).

18 Although any one piece of evidence is sufficient to establish “some evidence,” that
19 petitioner continues to be involved in gang activity, see Bruce, 351 F.3d at 1288, a review of the
20 source items shows that each one supports the administrative decision.⁴ For the above reasons,
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22 ⁴ Petitioner states that the four source items may be sufficient to identify as a gang
23 member, see Cal. Code Regs. tit. 15, § 3378(c)(3) (listing criteria to determine whether an
24 inmate is a member of a gang), which is used for initial validation. (Pet. at 18.) To the extent
25 petitioner contends, however, that these same source items do not demonstrate that he was
26 involved in gang activity, see Cal. Code Regs. tit. 15, § 3378(e) (stating that a gang member may
27 be considered for inactive status when he “has not been identified as having been involved in
28 gang activity for a minimum of six years”), Petitioner’s claim appears to turn on the state’s
definition of “involved in gang activity.” This is a matter of state law. The state’s interpretation
and application of its own regulations does not state a federal claim for habeas relief.
Waddington v. Sarausad, 555 U.S. 179, 192 n.5 (2009).

1 this court has no basis for finding that the California courts' rejection of petitioner's claims were
2 either was contrary to or involved an unreasonable application of clearly established Supreme
3 Court law.

4 **CONCLUSION**

5 For the reasons set forth above, the petition for writ of habeas corpus is DENIED. The
6 clerk shall terminate all pending motions and close the file.

7 **CERTIFICATE OF APPEALABILITY**

8 The federal rules governing habeas cases brought by state prisoners require a district
9 court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its
10 ruling. Petitioner has failed to make a substantial showing that his claims amounted to a denial
11 of his constitutional rights, or demonstrate that a reasonable jurist would find the denial of his
12 claims debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, a COA
13 is DENIED.

14 IT IS SO ORDERED.

15 DATED: _____


RONALD M. WHYTE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ISAAC FLORES,
Plaintiff,

Case Number: CV10-02773 RMW

CERTIFICATE OF SERVICE

v.

FRANCISCO JACQUEZ et al,
Defendant.

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 February 21, 2013, 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.

Isaac Flores D 50574
Pelican Bay State Prison (SHU)
Housing: D-7-112
P.O. Box 7500
Crescent City, CA 95532-7500

Dated: February 21, 2013

Richard W. Wieking, Clerk
By: Jackie Lynn Garcia, Deputy Clerk