



1 identify any cognizable claims and dismiss any claims that are frivolous, malicious,  
2 fail to state a claim upon which relief may be granted or seek monetary relief from a  
3 defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se  
4 pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police  
5 Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

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

10 **B. Plaintiff's Claims**

11 According to the complaint, Plaintiff's cell was searched on October 26 and  
12 27, 2011, by SVSP correctional officers Aquavia, Garcia, and Bayers; and no  
13 contraband was found. (Compl. at 3-4.) On November 3, 2011, Plaintiff witnessed  
14 Correctional Officer L. Hernandez assault his cellmate, and he told Hernandez to  
15 stop the assault. (Id. at 4.) Defendant Perez warned him to mind his own business.  
16 Plaintiff reported the assault to the facility captain and hand-delivered a written  
17 request to Perez requesting that Perez cease intimidating him. (Ibid.) In retaliation,  
18 Perez "falsified/fabricated" a rule violation report ("RVR"), which was approved by  
19 Defendant Ambriz. (Ibid.) The RVR charged Plaintiff with possession of inmate-  
20 manufactured alcohol that was allegedly discovered during the October 27, 2011 cell  
21 search. (Ibid.) Plaintiff claims that the RVR falsely claimed that Perez had  
22 conducted the October 27, 2011 cell search; that Perez had discovered inmate-  
23 manufactured alcohol during the search; that Perez had informed Defendant Ambriz  
24 of his findings; and that Plaintiff admitted to Perez that the alcohol belong to him.  
25 (Ibid.)

26 At the disciplinary hearing for this RVR, Defendant R. A. Kessler denied  
27 Plaintiff's request for witnesses and evidence that would have exonerated Plaintiff,  
28 and found Plaintiff guilty solely based on Perez's false statements. (Compl. at 4-5.)

1 Plaintiff was assessed 120 days of forfeiture of credits and segregated for 30 days in  
2 his cell. (Id. at 5.) Kessler also recommended that Plaintiff's segregation period be  
3 extended by falsely claiming that Plaintiff had received multiple RVRs in the past  
4 180 days. (Ibid.) On December 12, 2011, Defendants Binkele and Hedrick  
5 approved the guilty finding. (Ibid.)

6 Liberally construed, Plaintiff states a cognizable due process claim, see Wolff  
7 v. McDonnell, 418 U.S. 539, 556 (1974), which, if successful, may entitle him to  
8 compensatory damages or at least nominal damages. See Raditch v. United States,  
9 929 F.2d 478, 481 n.5 (9th Cir. 1991) (citations omitted). Plaintiff also states a  
10 cognizable retaliation claim, see Rhodes v. Robinson, 408 F.3d 559, 568-69 (9th Cir.  
11 2005).

## 12 CONCLUSION

13 For the reasons stated above, the Court orders as follows:

14 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for  
15 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a  
16 copy of the complaint, all attachments thereto, and a copy of this order upon  
17 **Defendants M. Perez, David Ambriz, Ross A. Kessler, R. Binkele, and Belinda**  
18 **Hedrick at the Salinas Valley State Prison (P.O. Box 1020, Soledad, CA 93960-**  
19 **1020)**. The Clerk shall also mail a copy of this Order to Plaintiff.

20 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
21 Procedure requires them to cooperate in saving unnecessary costs of service of the  
22 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified  
23 of this action and asked by the Court, on behalf of Plaintiff, to waive service of the  
24 summons, fail to do so, they will be required to bear the cost of such service unless  
25 good cause shown for their failure to sign and return the waiver form. If service is  
26 waived, this action will proceed as if Defendants had been served on the date that  
27 the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be  
28 required to serve and file an answer before **sixty (60) days** from the day on which

1 the request for waiver was sent. (This allows a longer time to respond than would be  
2 required if formal service of summons is necessary.) Defendants are asked to read  
3 the statement set forth at the foot of the waiver form that more completely describes  
4 the duties of the parties with regard to waiver of service of the summons. If service  
5 is waived after the date provided in the Notice but before Defendants have been  
6 personally served, the Answer shall be due **sixty (60) days** from the date on which  
7 the request for waiver was sent or **twenty (20) days** from the date the waiver form is  
8 filed, whichever is later.

9 3. No later than **ninety (90) days** from the date of this order, Defendants  
10 shall file a motion for summary judgment or other dispositive motion with respect to  
11 the claims in the complaint found to be cognizable above.

12 a. If Defendants elect to file a motion to dismiss on the grounds  
13 Plaintiff failed to exhaust his available administrative remedies as required by 42  
14 U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion  
15 pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied  
16 Alameida v. Terhune, 540 U.S. 810 (2003). **The Ninth Circuit has held that**  
17 **Plaintiff must be provided with the appropriate warning and notice under**  
18 **Wyatt concurrently with Defendants' motion to dismiss. See Woods v. Carey,**  
19 **Nos. 09-15548 & 09-16113, slip op. 7871, 7874 (9th Cir. July 6, 2012).**

20 b. Any motion for summary judgment shall be supported by  
21 adequate factual documentation and shall conform in all respects to Rule 56 of the  
22 Federal Rules of Civil Procedure. Defendants are advised that summary judgment  
23 cannot be granted, nor qualified immunity found, if material facts are in dispute. If  
24 any Defendant is of the opinion that this case cannot be resolved by summary  
25 judgment, he shall so inform the Court prior to the date the summary judgment  
26 motion is due.

27 4. Plaintiff's opposition to the dispositive motion shall be filed with the  
28 Court and served on Defendants no later than **twenty-eight (28) days** from the date

1 Defendants' motion is filed.

2 a. **In the event Defendants file a motion for summary**  
3 **judgment, the Ninth Circuit has held that Plaintiff must be concurrently**  
4 **provided the appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963**  
5 **(9th Cir. 1998) (en banc). See Woods, Nos. 09-15548 & 09-16113, slip op. at**  
6 **7874.**

7 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil  
8 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party  
9 opposing summary judgment must come forward with evidence showing triable  
10 issues of material fact on every essential element of his claim). Plaintiff is cautioned  
11 that failure to file an opposition to Defendants' motion for summary judgment may  
12 be deemed to be a consent by Plaintiff to the granting of the motion, and granting of  
13 judgment against Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54  
14 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

15 5. Defendants shall file a reply brief no later than **fourteen (14) days**  
16 after Plaintiff's opposition is filed.

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

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

22 8. Discovery may be taken in accordance with the Federal Rules of Civil  
23 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or  
24 Local Rule 16-1 is required before the parties may conduct discovery.

25 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must  
26 keep the court informed of any change of address and must comply with the court's  
27 orders in a timely fashion. Failure to do so may result in the dismissal of this action  
28 for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

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10. 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: 5/28/2015

  
EDWARD J. DAVILA  
United States District Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ENRIQUE DIAZ,  
Plaintiff,

v.

M. PEREZ, et al.,  
Defendants.

Case No. [5:15-cv-02204-EJD](#)

**CERTIFICATE OF SERVICE**


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 5/28/2015, 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.

Enrique Diaz ID: K-70268  
Salinas Valley State Prison  
P.O. Box 1050  
Soledad, CA 93960

Dated: 5/28/2015

Richard W. Wieking  
Clerk, United States District Court

By   
Elizabeth Garcia, Deputy Clerk to the  
Honorable EDWARD J. DAVILA