

1 I. FACTS¹

2 Plaintiff is an inmate at the Washington State Penitentiary. The
3 parties agree that Plaintiff has been in Intensive Management Unit
4 (IMU) custody since 2009 based on Plaintiff's assault of another
5 inmate. At the time of the assault, Plaintiff was a member of the La
6 FUMA prison gang. See ECF No. 39-1. The victim of the assault was
7 recognized as the leader of the Paisa prison gang. ECF No. 39 at 3.

8 Plaintiff claims that his continued placement in the IMU
9 violates his Eighth and Fourteenth Amendment rights. Plaintiff has
10 completed all of his Behavior Plan requirements and been infraction
11 free since 2009. See, e.g., ECF Nos. 23 at 2, 22-1 at 8. Plaintiff
12 also argues that he is no longer a member of the La FUMA gang. ECF
13 No. 13 at 2.

14 Defendants have conducted periodic reviews of Plaintiff's status
15 pursuant to Washington Department of Corrections regulations. See ECF
16 No. 22-1; see also ECF No. 38-1. At those reviews, Defendants have
17 repeatedly found that continued IMU placement is justified. ECF
18 No. 22-1. Defendants represent that Plaintiff will be at risk of
19 retaliation by Paisa gang members if he is released to general

20 ¹ Along with their motion, Defendants submitted a statement of facts.
21 ECF No. 37. Plaintiff did not submit a separate statement of facts,
22 but he did include the basic factual background underlying his
23 claims both in his response, ECF No. 41, and in other filings, see
24 ECF Nos. 14, 19 & 23, and the Court considers those filings in
25 adjudicating Defendants' motion. When considering this motion and
26 creating this factual section, the Court (1) believed the undisputed
facts and the non-moving party's evidence, (2) drew all justifiable
inferences in the non-moving party's favor, (3) did not weigh the
evidence or assess credibility, and (4) did not accept assertions
made by the non-moving party that were flatly contradicted by the
record. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
(1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007).

1 population and that his release could inspire increased violence by La
2 FUMA members because Plaintiff has become a "folk hero" in the La FUMA
3 gang. ECF No. 39 at 4. Because it is Defendants' opinion that
4 Plaintiff will not be able to be released to general population in the
5 Washington prison system, Defendants have attempted to transfer
6 Plaintiff to an out-of-state facility. See ECF No. 38 at 3. Plaintiff
7 has resisted those attempts by writing to the out-of-state facilities
8 and encouraging them not to accept him. ECF No. 38-2.

9 **II. SUMMARY JUDGMENT STANDARD**

10 Summary judgment is appropriate if the record establishes "no
11 genuine dispute as to any material fact and the movant is entitled to
12 judgment as a matter of law." Fed. R. Civ. P. 56(a). The non-moving
13 party must point to specific facts establishing a genuine dispute of
14 material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324
15 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
16 574, 586-87 (1986). In addition, when the non-moving party is pro se,
17 the Court must consider all "contentions offered in motions and
18 pleadings, where such contentions are based on personal knowledge and
19 set forth facts that would be admissible in evidence, and where [the
20 pro se party] attested under penalty of perjury that the contents of
21 the motions or pleadings are true and correct." See *Jones v. Blanas*,
22 393 F.3d 918, 923 (9th Cir. 2004). If the non-moving party fails to
23 show a genuine dispute of material fact as to elements essential to
24 its case for which it bears the burden of proof, such that the moving
25 party is entitled to judgment as a matter of law, the trial court must
26 grant the summary judgment motion. *Celotex Corp.*, 477 U.S. at 322.

1 **III. DISCUSSION**

2 Section 1983 requires a plaintiff to prove (1) a person acting
3 under color of state law committed an act that (2) deprived the
4 plaintiff of a federally-protected right. *Leer v. Murphy*, 844 F.2d
5 628, 632-33 (9th Cir. 1988). "A person deprives another of a
6 constitutional right, within the meaning of section 1983, if he does
7 an affirmative act, participates in another's affirmative acts, or
8 omits to perform an act which he is legally required to do that causes
9 the deprivation of which [the plaintiff complains]." *Id.* at 633
10 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978))
11 (alteration in original)(internal quotation marks omitted). Plaintiff
12 alleges that Defendants, acting under color of state law in their
13 positions as prison officials, deprived him of his rights under both
14 the Eighth and Fourteenth Amendments.

15 **A. Fourteenth Amendment**

16 To state a claim under 42 U.S.C. § 1983 and the Fourteenth
17 Amendment, Plaintiff must establish that he suffered (1) deprivation
18 of a liberty interest, and (2) due process was not provided. See
19 *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). In the
20 administrative segregation context, a federal liberty interest exists
21 only if the administrative segregation was an "atypical and
22 significant hardship on the inmate in relation to the ordinary
23 incidents of prison life." *Sandin v. Connor*, 515 U.S. 472, 484 (1995).
24 This doctrine reflects the realities that individuals are stripped of
25 most privileges and rights when they are lawfully incarcerated and
26 prison officials must have wide discretion to safely and efficiently

1 manage a prison. *Id.* at 485; *Wolff v. McDonnell*, 418 U.S. 539, 556-58
2 (1974).

3 To determine whether the prison official's action constituted an
4 "atypical and significant hardship on the inmate," courts consider the
5 conditions of segregation and its duration. *Sandin*, 515 U.S. at 494;
6 see also *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978). In *Sandin*, a
7 30-day term of segregation was insufficient to require due process
8 protection. *Sandin*, 515 U.S. at 486. The Second Circuit has determined
9 that when placement in segregated housing is longer than 305 days the
10 placement constitutes "a sufficient departure from the ordinary
11 incidents of prison life to require procedural due process protections
12 under *Sandin*." *Palmer v. Richards*, 364 F.3d 60, 65 (2d Cir. 2004)
13 (internal quotation marks omitted). The Ninth Circuit has also held
14 that a Fourteenth Amendment liberty interest may be created when
15 inmates are deprived of periodic meaningful reviews of whether
16 continued segregation is appropriate because such a deprivation makes
17 segregation atypical. *Brown v. Oregon Dep't of Corrs.*, 751 F.3d 983,
18 988 (9th Cir. 2014).

19 The Supreme Court has indicated that, when there is a liberty
20 interest sufficient to implicate the Due Process Clause, "some sort of
21 periodic review" of confinement in segregated housing is necessary to
22 satisfy due process. *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983),
23 *rejected on other grounds by Sandin*, 515 U.S. 472; see also *Wilkinson*
24 *v. Austin*, 545 U.S. 209 (2005) (upholding Ohio's system for placing
25 inmates in high security, restrictive facilities, which includes
26 annual reviews of inmate status). The Court has noted that this

1 periodic review does not necessarily require new evidence or
2 statements, and continued placement in segregated housing may be based
3 on "facts relating to a particular prisoner" and "the officials'
4 general knowledge of prison conditions and tensions." *Id.* The Ninth
5 Circuit has further explained, however, that a prisoner's due process
6 rights will not be satisfied by "meaningless gestures." *Toussaint v.*
7 *McCarthy*, 801 F.2d 1080, 1102 (9th Cir. 1986), *abrogated on other*
8 *grounds by Sandin*, 515 U.S. 472.

9 Here, the Court finds that Plaintiff's due process rights are
10 implicated by his nearly eight-year confinement in the IMU, but that
11 due process has been satisfied in this case. The parties agree that
12 Plaintiff's placement in IMU has been reviewed periodically. Plaintiff
13 suggests that these reviews are meaningless because the committee
14 continues to rely on the assault he committed in 2009 to justify
15 Plaintiff's placement in the IMU, despite the fact that Plaintiff has
16 received no infractions since that time, has consistently completed
17 the requirements for his behavior plan, and asserts that he is no
18 longer a gang member.

19 Defendants explain that, while the committee continues to rely
20 on the 2009 assault to justify Plaintiff's placement in the IMU, that
21 reliance is due to the fact that the assault continues to be relevant
22 to security concerns related to the Paisa and La FUMA gangs.
23 Defendants note that Paisa gang members continue to cite the assault
24 as a reason why they will not negotiate with La FUMA, *see* ECF No. 39
25 at 3, and La FUMA members regard Plaintiff as a "folk hero" due to the
26 assault, ECF No. 39 at 4. Accordingly, Defendants represent that it is

1 necessary to maintain Plaintiff in the IMU because he would be at risk
2 for attack by Paisa gang members if he were released to general
3 population and his release may also provoke or inspire violence by La
4 FUMA members. ECF No. 39 at 4.

5 Although there is an issue of fact as to whether Plaintiff is an
6 active gang member and whether Plaintiff would either be at risk or
7 would himself present a security threat if release to general
8 population, the Court finds that these issues of fact are not
9 material. Defendants have afforded Plaintiff his due process rights by
10 conducting meaningful reviews of Plaintiff's IMU placement on a
11 regular basis. There is no indication that Defendants have conducted
12 these reviews in bad faith. Accordingly, the Court finds that there
13 are no disputes of material fact regarding Plaintiff's Fourteenth
14 Amendment claim. Defendants are entitled to judgment as a matter of
15 law.

16 **B. Eighth Amendment**

17 To prove an Eighth Amendment claim, a plaintiff must first
18 establish that the alleged deprivation is "sufficiently serious,"
19 meaning that the "prison official's act or omission must result in the
20 denial of 'the minimal civilized measure of life's necessities.'" *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*,
21 452 U.S. 337, 347 (1981)). For a case regarding failure to prevent
22 harm in the prison environment, a plaintiff must demonstrate "that he
23 is incarcerated under conditions posing a substantial risk of harm."
24 *Id.* A plaintiff must also establish that the prison official was
25 deliberately indifferent to his health or safety. *Id.* To prove this
26

1 element, a plaintiff must show that defendants knew of and disregarded
2 an excessive risk to inmate health or safety. *Id.* at 837.

3 Placement in solitary confinement is generally insufficient to
4 support an Eighth Amendment claim. See *Toussaint v. Yockey*, 722 F.2d
5 1490, 1494 n.6 (9th Cir. 1984) ("Even an indeterminate sentence to
6 punitive isolation does not without more constitute cruel and unusual
7 punishment."). Still, in addressing the prevalence of solitary
8 confinement in prisons, Supreme Court Justice Kennedy has recognized
9 that "[y]ears on end of near-total isolation exact a terrible price."
10 *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring)
11 (citing Grassian, *Psychiatric Effects of Solitary Confinement*, 22
12 Wash. U.J.L. & Pol'y 325 (2006) (common side-effects of solitary
13 confinement include anxiety, panic, withdrawal, hallucinations, self-
14 mutilation, and suicidal thoughts and behaviors)).

15 In this case, Plaintiff has produced no evidence that Defendants
16 have acted with deliberate indifference. As discussed above,
17 Defendants have conducted meaningful reviews of Plaintiff's placement
18 in the IMU. In addition, Defendants indicate that one reason
19 justifying Plaintiff's continued placement in IMU is the risk of harm
20 to Plaintiff by Paisa gang members if Plaintiff were released into
21 general population. Thus, rather than being indifferent to a risk to
22 Plaintiff's health or safety, it appears that Defendants have placed
23 Plaintiff in the IMU in part to avoid a substantial risk to
24 Plaintiff's safety. This weighing of risks to Plaintiff from continued
25 placement in the IMU against risks to Plaintiff if he were placed in
26 general population is a proper function for prison administrators,

1 rather than the Court. *See Griffin v. Gomez*, 741 F.3d 10, 20-21 (9th
2 Cir. 2014). Because Plaintiff cannot establish deliberate indifference
3 on the part of Defendants, his Eighth Amendment claim fails.

4 In addition, Plaintiff has failed to produce evidence that he is
5 incarcerated under conditions posing a substantial risk of harm. While
6 Plaintiff has noted that he is concerned about the psychological
7 effects of solitary confinement, *see, e.g.*, ECF No. 23 at 4, and the
8 Court is aware of research suggesting negative psychological effects
9 due to solitary confinement, Plaintiff has not presented evidence that
10 he is currently suffering any psychological effects or that he is
11 likely to suffer such effects.

12 Accordingly, the Court finds that there are no disputes of
13 material fact and Defendants are entitled to judgment as a matter of
14 law regarding Plaintiff's Eighth Amendment claims.

15 **C. Qualified Immunity**

16 Defendants also argue that, even if their actions did violate
17 Plaintiff's rights, they are entitled to qualified immunity. A state
18 officer is entitled to qualified immunity and thereby protected from
19 § 1983 liability if he shows his "conduct does not violate clearly
20 established statutory or Constitutional rights of which a reasonable
21 person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818
22 (1982). A state officer is not protected by qualified immunity if his
23 conduct does violate a clearly established constitutional right. "The
24 relevant, dispositive inquiry in determining whether a right is
25 clearly established is whether it would be clear to a reasonable
26 officer that his conduct was unlawful in the situation he confronted."

1 *Phillips v. Hust*, 588 F.3d 652, 657 (9th Cir. 2009) (quoting *Saucier*
2 *v. Katz*, 533 U.S. 194, 202 (2001)). "[I]f the defendants' conduct is
3 so patently violative of the constitutional right that reasonable
4 officials would know without guidance from the courts' that the action
5 was unconstitutional, closely analogous pre-existing case law is not
6 required to show that the law is clearly established." *Mendoza v.*
7 *Block*, 27 F.3d 1357, 1361 (9th Cir. 1994). Although the official's
8 subjective intent is irrelevant, *Anderson v. Creighton*, 483 U.S. 635,
9 641 (1987), the information actually possessed by the officer is
10 relevant to this determination. *Hunter v. Bryant*, 502 U.S. 224, 227
11 (1991) (per curiam).

12 As explained above, case law indicates that solitary
13 confinement, alone, does not violate the Eighth Amendment. *Toussaint*,
14 722 F.2d at 1494 n.6. Thus, Defendants are entitled to qualified
15 immunity regarding Plaintiff's Eighth Amendment claim because it is
16 based on Plaintiff' claim that continued solitary confinement, by
17 itself, violates his Eighth Amendment rights.

18 In addition, Supreme Court and Ninth Circuit law make clear that
19 solitary confinement is not a violation of Fourteenth Amendment due
20 process rights as long as the inmate is given meaningful, periodic
21 reviews. *Hewitt*, 459 U.S. at 477 n.9; *Brown*, 751 F.3d at 988. Because
22 Defendants provided meaningful, periodic reviews of Plaintiff's
23 status, their conduct did not clearly violate an established
24 constitutional right. Even if this Court or an appellate Court were to
25 find that the reviews of Plaintiff's status were deficient in some
26 way, Defendants would be entitled to qualified immunity because it is

1 not clear under the law precisely what is required for an adequate
2 review and there is no reason under current law to believe that
3 Defendants' review was inadequate. There is no indication that
4 Defendants acted in bad faith or otherwise attempted to deny Plaintiff
5 the meaningful review required under the law. Accordingly, the Court
6 finds that Defendants are entitled to qualified immunity in this
7 matter.

8 **IV. CONCLUSION**

9 As reflected in the analysis above, the Court finds that there
10 are no genuine issues of material fact related to Plaintiff's claims
11 and that Defendants are entitled to judgment as a matter of law.

12 Accordingly, **IT IS HEREBY ORDERED:**

- 13 1. Defendants Motion for Summary Judgment, **ECF No. 36**, is
14 **GRANTED.**
15 2. Plaintiff's claims are **DISMISSED WITH PREJUDICE.**
16 3. **JUDGMENT** shall be entered in favor of Defendants.
17 4. This case shall be **CLOSED.**

18 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
19 Order, enter judgment in favor of Defendants, and provide copies to
20 Plaintiff and all counsel.

21 **DATED** this 23rd day of August 2017.

22 s/Edward F. Shea
23 EDWARD F. SHEA
24 Senior United States District Judge
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