**NOT FOR PUBLICATION**

FILED

MAR 23 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| BILLY DEAN SMITH; JACOB LEE ANAGICK,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>ROBERT CORCORAN; G. SCOTT WELLARD, sued in their individual capacities,<br><br>Defendants-Appellees. | No. 17-35225<br><br>D.C. No. 1:13-cv-00010-TMB<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Alaska
Timothy M. Burgess, Chief Judge, Presiding

Submitted March 13, 2018**

Before: LEAVY, M. SMITH, and CHRISTEN, Circuit Judges.

Alaska state prisoners Billy Dean Smith and Jacob Lee Anagick appeal pro se from the district court's summary judgment in their 42 U.S.C. § 1983 action alleging a due process claim arising from their placement in administrative

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

segregation. We have jurisdiction under 28 U.S.C. § 1291. We review de novo both summary judgment and a defendant's entitlement to qualified immunity. *Hughes v. Kisela*, 862 F.3d 775, 779 (9th Cir. 2016). We affirm.

The district court properly granted summary judgment on the basis of qualified immunity because plaintiffs failed to raise a genuine dispute of material fact as to whether their placement in administrative segregation implicated a protected liberty interest. *See Sandin v. Conner*, 515 U.S. 472, 484-85 (1995) (a constitutionally protected liberty interest arises only when a restraint imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001) (the threshold question for a qualified immunity analysis is whether a defendant's conduct violated a constitutional right), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

The district court did not abuse its discretion by denying plaintiffs' motion under Fed. R. Civ. P. 59(e) because they did not establish any grounds for relief. *See SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1100 (9th Cir. 2010) (setting forth standard of review and listing grounds warranting reconsideration under Rule 59(e)).

**AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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| BILLY DEAN SMITH and JACOB ANAGICK,<br><br>Plaintiffs,<br><br>v.<br><br>ROBERT CORCORAN and SCOTT WELLARD,<br><br>Defendants. | Case No. 1:13-cv-00010-TMB<br><br>ORDER |

## I. INTRODUCTION

Plaintiffs Billy Dean Smith and Jacob Anagick, currently proceeding *pro se*,[1] brought this action under 42 U.S.C. § 1983 seeking damages from the defendants, Correctional Officer Robert Corcoran and Superintendent G. Scott Wellard, for placing them in administrative segregation "without due process of law on the basis of unsupported evidence and hearsay" in violation of the Fourteenth Amendment's Due Process Clause.[2] Defendants are being sued only in their individual capacities.[3] Before the Court are the following motions:

(1) Defendants' Motion for Summary Judgment at docket 142;

(2) Plaintiffs' Motion for this Court To Strike, And For this Court to Provide a CD-ROM Copy of the 4-14-2015 Hearing, And For Rulings in Doc.99 & In Doc.122 to be Upheld

[1] From February 9, 2015 to March 2015, Smith and Anagick were represented by Jon M. Buchholdt of Buchholdt Law Offices. *See* Dkt. 151 at 2.

[2] Dkt. 1-1 at ¶ 30 (complaint).

[3] *Id.* at ¶¶ 3–4.

By Defendants And For Doc.122 ORDER For ORAL ON SPOLIATION to be Upheld at docket 152;

(3) Dual Declaration by Plaintiffs', & Plaintiffs' Motion for Court to ORDER AN EVIDENCE HEARING With James E. Barber to be Telephonically Present to Testify and With Jon BuchHoldt Physically-Present so to EXHIBIT "His entire file to date" For This Case Captioned Above at docket 153;

(4) Plaintiffs' Motion for Court to Join 1JU-15-00657Ci Into this Case 1:13-cv-00010-TMB, . . . And. . . For This Court to Force Defendants to OBEY this Court's 2-3-15 VERBAL ORDERS GIVEN TO THE DEFENDANTS' And Dual Declaration by Plaintiffs' at docket 154;

(5) Plaintiffs' Motion to Compel and Declaration And 3 Day Mail Box Rule Notice at docket 162;

(6) Plaintiffs' Motion to Set Trial Date and, Plaintiffs' Motion For Court To Hold a Settlement Hearing and Joint Declaration By Jacob Anagick & Billy Smith at docket 163;

(7) Plaintiffs' MOTION FOR SPOLIATION OF EVIDENCE SANCTIONS & SPOLIATION JURY INSTRUCTIONS and JOINT/DUAL DECLARATION BY Anagick & Smith at docket 167;

(8) Plaintiffs' MOTION FOR ORAL ARGUMENTS ON EVIDENCE OF SPOLIATION OF VIDEOS & OTHER EVIDENCE AS WAS PREVIOUSLY ORDERED BY THIS COURT in Doc.122, & Motion To Amend Complaint & Declaration By Plaintiffs' Anagick and Smith at docket 168;

(9) Plaintiffs' 1st Motion For Deterance Jury Instruction And Declaration at docket 174;

(10) Plaintiffs' Motion for Status-Hearing on the Evidence That The Defendants' are w/Holding, and Joint Declaration by Plaintiffs' at docket 178;

(11) Plaintiffs' Motion for Court to Re-Open Discovery & For Court to give Plaintiffs' Recruitment of Pro Bono Counsel Declarations at docket 186; and

(12) PLAINTIFFS' MOTION FOR THIS COURT TO RESPOND TO DEFENDANTS' SUGGESTIONS FOR THIS COURT TO HOLD A STATUS HEARING In Ref To Doc. #160 at page 4, And, PLAINTIFFS' JOINT DECLARATIONS at docket 187.

For reasons of efficiency, and because the progression of Plaintiffs' lawsuit hinges on its disposition, the Court addresses the motion for summary judgment first.

## II. MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment on four grounds: (1) failure to exhaust administrative remedies, (2) claims barred by the settlement agreement in *Cleary et al. v. Smith et al.*, 3AN-81-5274 CI, (3) qualified immunity, and (4) *de minimis* damages.[4] Plaintiffs oppose Defendants' motion at docket 165.[5] At the Court's request, both parties filed supplemental briefing addressing whether Plaintiffs have a protected liberty interest in remaining free from administrative segregation, thus entitling them to certain procedural protections.[6] Based on the parties' filings, and for the reasons that follow, the Court **GRANTS** Defendants' motion for summary judgment.[7]

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[4] Dkt. 142.

[5] Plaintiffs supplement their opposition at dockets 161 and 170. Although D.Ak. L.R. 7.1(i) provides that supplemental briefs may not be filed without leave of court, the Court will consider Plaintiffs supplemental filings in ruling on the pending summary judgment motion in light of Plaintiffs' *pro se* status.

[6] *See* Dkt. 179 (order requesting additional briefing); Dkt. 180 (Defs.' reply re: liberty interest); Dkt. 183 (Pls.' sur-reply re: liberty interest). Plaintiffs supplement their sur-reply at dockets 184 (Pls.' joint declaration re: liberty interest) and 185 (Pls.' 3rd declaration with evidence attached).

[7] Neither party requested oral argument on the motion, and the Court finds this case suitable for decision without oral argument. *See* D.Ak. L.R. 7.1(j), 7.2(a).

### A. Background

Plaintiffs Smith and Anagick are both state prisoners. From at least September 12, 2011 to January 14, 2012, Plaintiffs were incarcerated at Lemon Creek Correctional Center ("LCCC") in Juneau, Alaska.[8] On January 14, 2012, Plaintiffs were transferred to Spring Creek Correctional Center ("SCCC") in Seward, Alaska.[9] Smith is scheduled to be released on April 22, 2064.[10] Anagick's release date is April 17, 2029.[11]

Officer Corcoran is a Correctional Officer III at LCCC and, at all relevant times, was responsible for all Administrative Segregation Initial Classification Hearings at LCCC.[12] Superintendent Wellard is the LCCC Facility Manager and Superintendent.[13]

#### a. The alleged escape attempt and Plaintiffs' subsequent placement in administrative segregation

According to prison records, on September 12, 2011, LCCC's security office received information that certain inmates, including Smith and Anagick, were planning to escape.[14] Based on that information, LCCC correctional officers searched Plaintiffs' respective work stations for escape implements.[15] According to an incident report prepared in connection with

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[8] Dkt. 142-1 at 1; Dkt. 142-2 at 1.

[9] Dkt. 142-1 at 15; Dkt. 142-2 at 16.

[10] Dkt. 142-1 at 10.

[11] Dkt. 142-2 at 8.

[12] Dkt. 1-1 at ¶ 3.

[13] *Id.* at ¶ 4.

[14] Dkt. 142-1 at 1 (incident report re: Smith); Dkt. 142-2 at 1 (incident report re: Anagick).

[15] Dkt. 142-1 at 1; Dkt. 142-2 at 1.

the search, the officer who searched Smith's work station found a white dress shirt; a tarp; five cords of rope, including one cord that was wrapped around what appeared to be altered coat-hangers or other wire; a black trash bag containing pieces of dry wood and two empty condiment containers; and a pair of grey sweatpants and a pair of tennis shoes, both of which were marked with Smith's name.[16] A second incident report states that two cords of rope—one 34 feet in length and another 109 feet in length—were found in the bottom drawer of a filing cabinet at Anagick's work station.[17]

Plaintiffs maintain that they were not trying to escape, and dispute the location of certain of the found items. In particular, Smith and Anagick claim that the ropes allegedly found at Anagick's work station were actually found "over 80 feet away from where falsely claimed found," and that LCCC video surveillance footage, if produced, would show as much.[18] Plaintiffs also express doubts as to how and from whom LCCC's security office learned of the escape attempt.[19]

Following the search, Smith and Anagick were deemed to "represent[] a substantial immediate threat to the security of the facility" and placed in administrative segregation on an emergency basis pursuant to 22 AAC 05.485 on September 13, 2011.[20] Both were specifically

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[16] Dkt. 142-1 at 1–2.

[17] Dkt. 142-2 at 1.

[18] Dkt. 183 at 6; *see also* Dkt. 165-3 at 2, ¶¶ 1–2 (Anagick declaration disputing that a rope was found at his work station); Dkt. 165-4 at 8 (same); Dkt. 142-2 at 4.

[19] *See, e.g.*, Dkt. 165 at 1–2.

[20] Dkt. 142-1 at 4; Dkt. 142-2 at 3; *see also* State of Alaska Department of Corrections Policy and Procedure [hereinafter "Alaska DOC P&P"] 804.01(VII)(B)(1) ("A staff member may immediately place an inmate in segregation if he or she reasonably believes that the inmate

designated to "Administrative Segregation Maximum."[21] The applicable admission forms indicate that both Smith and Anagick were verbally informed of the reasons for their placement in administrative segregation, and that Superintendent Wellard signed off on their designation.[22] The forms also indicate that from September 13, 2011 until at least September 19, 2011, Smith and Anagick were restricted from participating in some regular activities available to general population inmates, specifically communal meals and use of the gym, but were allowed to participate in other regular activities, such as outside recreation, visitation, and access to the law library, telephone, day room, and certain programs.[23]

**b. Plaintiffs' initial administrative segregation classification hearing**

On September 19, 2011, six days after Plaintiffs were placed in emergency administrative segregation, Officer Corcoran conducted a joint initial administrative segregation classification hearing.[24] Officer Corcoran did not record the hearing, nor is there any indication in the record that either Smith or Anagick (1) received notice of the hearing; (2) had access to a hearing

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presents a substantial immediate threat to him or herself, others, the security of the facility, or the public.").

[21] Dkt. 142-1 at 3–4; Dkt. 142-2 at 2–3; *see also* Alaska DOC P&P 804.01(V) ("A segregation maximum inmate must be placed in secure housing, with very limited program activities, with maximum supervision within the secure perimeter of the facility.").

[22] Dkt. 142-1 at 3; Dkt. 142-2 at 3. Smith and Anagick received copies of their administrative segregation admission forms on September 19, 2011 and September 14, 2011, respectively. Dkt. 142-1 at 3; Dkt. 142-2 at 3.

[23] Dkt. 142-1 at 3–4; Dkt. 142-2 at 2–3.

[24] Dkt. 142-1 at 5; Dkt. 142-1 at 4. Defendants concede that the hearing was held one day outside of the time period provided by Alaska DOC P&P 804.01(VII)(B)(1)(e). Dkt. 142 at 3.

advisor or counsel in advance of or during the hearing; (3) were given the opportunity to challenge the factual basis for their placement, including the opportunity to review the evidence against them or to cross-examine any witnesses; or (4) were permitted to present evidence in their defense.[25]

At the hearing, Smith and Anagick both denied planning an escape.[26] Despite their denials, Officer Corcoran recommended the continued placement of Plaintiffs in administrative segregation pending the outcome of the ongoing investigation into the escape attempt.[27] Officer Corcoran further recommended that Smith and Anagick be restricted from communal meals, use of the gym, and full participation in outside recreation, but be permitted access to the law library, visitation, telephone, and certain programs while segregated.[28]

Superintendent Wellard approved Plaintiffs' continued placement in administrative segregation on September 20, 2011.[29] Neither Smith nor Anagick appealed Superintendent Wellard's decision. Plaintiffs claim that they did not appeal the decision because Officer

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[25] *See* Dkt. 142 at 3; Dkt. 165 at 8; Dkt. 165-3 at 5; *see also* Alaska DOC P&P 804.01(VII)(C)(1)–(2) (listing hearing procedures, including, for example, that inmates be afforded 48 hours notice of hearing and given the opportunity to challenge the factual basis for the placement).

[26] Dkt. 142-1 at 5; Dkt. 142-2 at 4.

[27] Dkt. 142-1 at 5; Dkt. 142-2 at 4.

[28] Dkt. 142-1 at 5; Dkt. 142-2 at 4; *see also* Alaska DOC P&P 804.01(VII)(F) (listing rights and privileges that must be afforded segregated inmates).

[29] Dkt. 142-1 at 5; Dkt. 142-2 at 4.

Corcoran told Anagick on October 4, 2011 that the decision was "[n]ot appealable,"[30] and because Defendants refused to provide them with the forms necessary to initiate an appeal.[31]

**c. Plaintiffs' full administrative segregation classification hearings**

Three days after the initial administrative segregation hearing, on September 22, 2011, Plaintiffs each received a notice that he was scheduled to appear for a full administrative segregation classification hearing on September 26, 2011, at which LCCC's classification committee would consider the increase in his custody designation level to Administrative Segregation Maximum.[32] The notice forms, which Smith and Anagick each signed and dated, clearly state that an inmate "may appeal any action taken as a result of [the] hearing."[33] After meeting with his hearing advisor, Smith requested that his hearing be postponed until after a decision on his then-pending disciplinary proceedings relating to the alleged escape attempt.[34] Anagick elected to proceed with the hearing, but without a hearing advisor.[35]

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[30] Dkt. 165-3 at 3–4; *see also* Dkt. 165-3 at 6, ¶ 4 (indicating Smith had knowledge of Officer Corcoran's communication to Anagick no later than October 5, 2011).

[31] *See* Dkt. 183-1 at 10. *Contra* Dkt. 142-1 at 6 ("Forms to facilitate an appeal will be provided by institutional staff upon request by the prisoner."); Dkt. 142-2 at 5 (same).

[32] Dkt. 142-1 at 7–8; Dkt. 142-2 at 6–7.

[33] Dkt. 142-1 at 8; Dkt. 142-2 at 7.

[34] Dkt. 142-1 at 9. Plaintiffs' initial disciplinary hearings relating to their alleged escape attempt were held in October 2011, and the proceedings were finally resolved on May 27, 2014 for Anagick and on July 25, 2014 for Smith. *See* Dkt. 84-1 (order vacating Department of Correction's finding of guilt against Anagick because Department of Corrections failed to provide him with his due process right under the Alaska Constitution to confront and cross-examine adverse witnesses); Dkt. 93-1 (same).

[35] Dkt. 142-2 at 7.

LCCC held Anagick's classification hearing on September 26, 2011.[36] At the conclusion of the hearing, the classification committee found that Anagick "present[ed] a threat to facility security [and] safety by being in possession of possible escape implements," and recommended that he remain in Administrative Segregation Maximum.[37] Superintendent Wellard approved the committee's recommendation that same day.[38] Anagick did not appeal the decision. He did, however, send a Request for Interview form (or a "cop-out") to Superintendent Wellard on December 3, 2011 requesting a "legal A.D. Seg Max Hearing since first one done on 9-19-11 was An illegal hearing, According to Sgt. Corcoran."[39] In that same cop-out, Anagick states that he "wish[es] to remain in Seg Just done legally."[40] Anagick now claims he intended his statement to be sarcastic.[41] Superintendent Wellard responded to the cop-out on December 6, 2011, informing Anagick that "[his] ad-seg maximum hearing on 9/26/11 is valid for 4 months," after which he would be entitled to a review hearing.[42]

Plaintiffs now claim that the September 26, 2011 hearing "had no bearing/effects" on Superintendent Wellard's initial September 20, 2011 decision to confine Plaintiffs to

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[36] *Id.* at 8.

[37] *Id.*

[38] *Id.* at 8–10.

[39] Dkt. 142-2 at 22.

[40] *Id.*.

[41] Dkt. 165-3 at 3, ¶ 6.

[42] Dkt. 142-2 at 22.

administrative segregation,[43] and maintain that its later occurrence is irrelevant for purposes of the present lawsuit.[44]

**d. Plaintiffs' transfer and first administrative segregation review hearings**

About four months after Anagick's full classification hearing, on January 14, 2012, Smith and Anagick were transferred from LCCC to SCCC.[45] Prior to their transfer, Plaintiffs received notice that they were each scheduled to appear before the LCCC classification committee for an administrative segregation review hearing.[46] The notice forms, like those Plaintiffs received on September 22, 2011, explicitly state that an inmate "may appeal any action taken as a result of a hearing."[47] Smith and Anagick both selected P.O. Sullivan as their hearing staff advisor.[48]

The review hearings were held on January 13, 2012.[49] The classification committee recommended that both Smith and Anagick remain in Administrative Segregation Maximum "due to threat to facility security and safety by being in possession of possible escape

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[43] Dkt. 165-3 at 5, ¶ 3; *see also id.* at ¶ 1 (referring to the September 19, 2011 hearing as "the one and only" administrative segregation hearing).

[44] Dkt. 183 at 7; Dkt. 184 at 4–5.

[45] Dkt. 142-1 at 15; Dkt. 142-1 at 16.

[46] Dkt. 142-1 at 13–14; Dkt. 142-2 at 14–15. Anagick's notice of appearance form is signed and dated January 10, 2012; Smith's form is signed, but not dated.

[47] Dkt. 142-1 at 14; Dkt. 142-2 at 15.

[48] Dkt. 142-1 at 14; Dkt. 142-2 at 15.

[49] Dkt. 142-1 at 10; Dkt. 142-2 at 11.

implements."[50] Superintendent Wellard adopted the committee's recommendations that same day.[51] Neither Plaintiff appealed the decision.

**e. Plaintiffs' second administrative segregation review hearings**

Shortly after their transfer to SCCC, Plaintiffs each received a notice that he was scheduled to appear for another administrative segregation review hearing, this time before the SCCC classification committee.[52] The review hearings took place on January 18, 2012,[53] though it appears that Smith declined to appear at his hearing.[54] As with the LCCC review hearing, the SCCC classification committee recommended that both Smith and Anagick remain in Administrative Segregation Maximum.[55] SCCC's acting superintendent adopted the committee's recommendation that same day.[56] There is no evidence in the record that either Smith or Anagick appealed the decision.

Four months later, on May 22, 2012, Smith and Anagick were released from administrative segregation to general population.[57]

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[50] Dkt. 142-1 at 10; Dkt. 142-2 at 11.

[51] Dkt. 142-1 at 11–12; Dkt. 142-2 at 12–13.

[52] Dkt. 142-1 at 16–17; Dkt. 142-2 at 17–18.

[53] Dkt. 142-1 at 15; Dkt. 142-2 at 16.

[54] Dkt. 142-1 at 15 (stating prisoner "[d]eclined to appear").

[55] Dkt. 142-1 at 15, 18; Dkt. 142-2 at 16, 19.

[56] Dkt. 142-1 at 19; Dkt. 142-2 at 20.

[57] Dkt. 142-1 at 20 (Smith's Notice of Release from Segregation); Dkt. 142-2 at 21 (Anagick's Notice of Release from Segregation).

### f. Conditions in administrative segregation

Smith and Anagick claim that while designated to Administrative Segregation Maximum they were not allowed to use or possess televisions and Xbox game systems, including mature-rated Xbox games.[58] Defendants do not dispute this contention. By contrast, SCCC prisoners in general population are authorized to use and possess televisions, Xboxes, and up to 50 Xbox games.[59] Plaintiffs further aver that, while in administrative segregation, (1) the light in their cells was on twenty-four hours a day; (2) they were denied access to microwaves, refrigerators, and use of the day room and outdoor recreation yard; and (3) they were escorted in ankle shackles and hand cuffs to the showers, medical center, and outdoor recreation cage.[60] Neither party disputes that, while in administrative segregation, Smith and Anagick were able to send and receive written communications with prison staff, including Officer Corcoran and Superintendent Wellard, and were permitted access to legal materials.[61]

### g. Plaintiffs' allegations

Plaintiffs initiated the current litigation on November 12, 2013 by filing a complaint in Alaska state court, which Defendants subsequently removed to this Court.[62] The complaint alleges that Defendants denied Plaintiffs their Fourteenth Amendment rights by placing them in administrative segregation "without due process of law on the basis of unsupported evidence and

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[58] Dkt. 183 at 3; *see also* Dkt. 183-3; Dkt. 183-4; Dkt. 183-5.

[59] Dkt. 183-5 at 2.

[60] Dkt. 183 at 4.

[61] *See, e.g.*, Dkt. 183-1 at 6 (cop-out from Smith to Officer Corcoran dated October 4, 2011 thanking him for getting Smith copies of certain prison regulations Smith had requested).

[62] *See* Dkt. 1 (notice of removal).

hearsay."[63] Specifically, the complaint alleges that Sergeant Corcoran violated Plaintiffs' federal due process rights by: (1) "intentionally fail[ing] to provide either plaintiff with 48 hours advance written notice of the Ad-Seg initial classification hearing and the facts to be relied upon at the hearing;"[64] (2) "intentionally fail[ing] to advise either plaintiff of their [sic] right under the Cleary FSAO . . . to counsel at the classification hearing;"[65] (3) "intentionally refus[ing] to hold a formal classification hearing, opting instead to address both plaintiffs simultaneously through the bars of their segregation cell that the plaintiffs shared together;"[66] (4) "intentionally refus[ing] to tape-record the Administrative Segregation Hearing in accordance with the Cleary FSAO;"[67] and (5) failing to "issu[e] a written decision including factual findings and evidence relief upon in sufficient detail so as to provide an adequate basis for review."[68]

With respect to Superintendent Wellard, the Complaint alleges that he denied Plaintiffs' federal due process rights by: (1) "intentionally refu[sing] to provide plaintiffs with decision [sic]

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[63] Dkt. 1-1 at ¶ 30; *see also id.* at ¶ 20.

[64] *Id.* at ¶¶ 11, 25.

[65] *Id.* at ¶¶ 12, 25. Based on the parties' briefing, the Court understands "the Cleary FSAO" to mean the final settlement agreement in *Cleary et al. v. Smith et al.*, 3AN-81-5274 CI (Alaska Super. Ct.).

[66] Dkt. 1-1 at ¶¶ 13, 25.

[67] *Id.* at ¶¶ 14, 25.

[68] *Id.* at ¶¶ 24, 26.

including a description of the appeal process available to them;"[69] (2) "refus[ing] to permit the plaintiffs to appeal the Ad-Seg initial classification;"[70] and (3) "direct[ing] that both plaintiffs be held in Ad-Seg until January 19th 2012 [sic] without allowing any appeal."[71]

In relief, Plaintiffs seek compensatory and punitive damages, as well as costs.[72]

**B. Summary Judgment Standard**[73]

Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in his favor,[74] "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[75] Material facts are those which may affect the outcome of the case.[76] A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."[77]

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[69] *Id.* at ¶¶ 15, 27.

[70] *Id.* at ¶¶ 16, 27–28.

[71] *Id.* at ¶¶ 17, 28.

[72] *Id.* at 5–6.

[73] The Court has provided Plaintiffs with fair notice of the requirements of Fed. R. Civ. P. 56, consistent with the Ninth Circuit's instructions in *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988), and *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998). *See* Dkt. 9 (initial order to self-represented party); D.Ak. *Pro Se* Handbook at 21–23.

[74] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Hooper v. Cnty. of San Diego*, 629 F.3d 1127, 1129 (9th Cir. 2011).

[75] Fed. R. Civ. P. 56(a).

[76] *Liberty Lobby*, 477 U.S. at 248–49.

[77] *Id.* at 248.

### C. Discussion

The Court turns first to Defendants' argument that they are entitled to summary judgment on all of Plaintiffs' claims against them on qualified immunity grounds.[78] The doctrine of qualified immunity protects government officials who perform discretionary functions from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[79] The Supreme Court has set forth a two-part analysis for resolving qualified immunity claims, which, under *Pearson*, a court may address in any order.[80] First, a court must consider whether the facts "[t]aken in the light most favorable to the party asserting the injury . . . show [that] the [defendant's] conduct violated a constitutional right."[81] Second, a court must determine whether the right was clearly established at the time of the alleged violation.[82] For a constitutional right to be clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[83]

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[78] Dkt. 142 at 11–15.

[79] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[80] *Id.* at 236 ("The judges of the district courts and the courts of appeals should be permitted to exercise their discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."); *see also Brown v. Oregon Dep't of Corr.*, 751 F.3d 983, 989 (9th Cir. 2014).

[81] *Brown*, 751 F.3d at 989 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by Pearson*, 555 U.S. at 236) (alterations in original).

[82] *Id.* (citing *Saucier*, 533 U.S. at 201).

[83] *Krainski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 968 (9th Cir. 2010) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)).

The Court begins its qualified immunity analysis with the first prong, whether Defendants' conduct deprived Smith and/or Anagick of procedural protections guaranteed by the Fourteenth Amendment.

**a. Plaintiffs lack a protected liberty interest, thus no due process violation**

In the present case, Plaintiffs complain that Defendants confined them to administrative segregation "without due process of law on the basis of unsupported evidence and hearsay" in violation of the Fourteenth Amendment's Due Process Clause.[84] While it is certainly true that an inmate may claim the protections of the Due Process Clause,[85] a court "need reach the question of what process is due only if the inmate[ ] establish[es] a constitutionally protected liberty interest."[86] "In the absence of such a constitutionally protected interest, the Constitution does not require the provision of *any* process."[87] A protected liberty interest may arise from one of two sources—either from the Constitution itself or from an expectation or interest created by

[84] Dkt. 1-1 at ¶ 30.

[85] *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (stating prisoners "may not be deprived of life, liberty, or property without due process of law").

[86] *Wilkinson v. Austin*, 545 U.S. 208, 221 (2005); *accord Chappell v. Mandeville*, 706 F.3d 1052, 1062 (9th Cir. 2013) ("For [state prison inmate] to be entitled to due process we must first find that he has a liberty interest triggering procedural protections."); *Krainski*, 616 F.3d at 970 ("A procedural due process claim has two elements: deprivation of a constitutionally protected liberty or property interest and denial of adequate procedural protection."); *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003) (noting Fourteenth Amendment's "healthy procedural protections" adhere only when the complained-of wrong implicates a protected liberty interest).

[87] *Sandefur v. Lewis*, 937 F. Supp. 890, 894 (D. Ariz. 1996) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972)).

state law.[88] Because Plaintiffs do not specify whether they base their claim on the Due Process Clause or on a state-created liberty interest, the Court analyzes both theories.

**i. No liberty interest arising from the Constitution itself**

Turning first to the constitutional inquiry, the Supreme Court has "repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests."[89] Consistent with these two concepts, the Supreme Court also has held that the Due Process Clause, standing alone, confers on an inmate "no liberty interest from state action taken *within* the sentence imposed."[90] Rather, an inmate can claim a liberty interest arising from the Due Process Clause on its own force only if the state action at issue "exceed[s]" the inmate's sentence "in . . . an unexpected manner."[91] Courts consider both transfers to more adverse

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[88] *Wilkinson*, 545 U.S. at 221 (noting a liberty interest "may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty'"); *Chappell*, 706 F.3d at 1062–63 ("A state may create a liberty interest through statutes, prison regulations, and policies.").

[89] *Hewitt v. Helms*, 459 U.S. 460, 468 (1983), *receded from by Sandin v. Conner*, 515 U.S. 472 (1995); *see also Wolff*, 418 U.S. at 556 ("[T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.").

[90] *Sandin*, 515 U.S. at 480 (quoting *Hewitt*, 459 U.S. at 468) (emphasis added); *accord Montanye v. Haymes*, 427 U.S. 236, 242 (1976) ("As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (holding convicted inmate's due process claim fails because he has no liberty interest in freedom from state action taken within sentence imposed).

[91] *Sandin*, 515 U.S. at 484 (citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (finding liberty interest arising from the Due Process Clause itself in avoiding involuntary administration of psychotropic drugs) and *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (finding liberty interest arising from the Due Process Clause itself in avoiding involuntary psychiatric treatment and transfer to mental institution)).

conditions of confinement—for example, from general population to administrative segregation—and increases in classification level, without more, to be within the sentence imposed,[92, 93] as both are "the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration."[94]

In this case, Plaintiffs challenge their placements in administrative segregation pending the resolution of an ongoing investigation into their alleged involvement in an escape attempt.[95] The Court therefore concludes that Plaintiffs cannot directly claim a liberty interest arising from

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[92] *See, e.g.*, *Wilkinson*, 545 U.S. at 221 ("The Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement."); *Hewitt*, 459 U.S. at 467–68 (holding a prisoner has no liberty interest arising under the Due Process Clause in remaining in the general prison population); *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (holding no liberty interest arising from the Due Process Clause itself in transfer from low- to maximum-security prison because "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose"); *Smith v. Noonan*, 992 F.2d 987, 989 (9th Cir. 1993) ("[T]he Constitution provides no liberty interest to be free from ad-seg. Only the state may create such an interest." (citations omitted)); *McFarland v. Cassady*, 779 F.2d 1426, 1427–28 (9th Cir. 1986) (finding no liberty interest in remaining in the general prison population rather than in administrative confinement while information alleging misconduct affecting institutional security was investigated); *Deadmon v. Grannis*, No. 06cv1382-LAB (WMC), 2008 WL 595883, at *6 (S.D. Cal. Feb. 29, 2008) ("The Due Process Clause itself does not confer on inmates a liberty interest in remaining housed in the general prison population.").

[93] *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th Cir. 1987) (recognizing an inmate has no constitutional right to a particular classification status); *Myron v. Terhune*, 476 F.3d 716, 718 (9th Cir. 2007) (finding classification of inmate at "level IV" prison rather than at a "level III" prison did not affect protected liberty interest); *see also Weston v. Easter*, 15 F.3d 1095, at *1 (9th Cir. 1993) (unpublished table decision) ("[T]he Constitution does not provide [an inmate] with a liberty interest either in remaining free from administrative segregation or in receiving a particular classification status.").

[94] *Hewitt*, 459 U.S. at 468.

[95] *See* Dkt. 1-1.

the Due Process Clause itself; their transfer from general population to administrative segregation did not exceed their sentences in any unexpected manner. Accordingly, to survive Defendants' motion for summary judgment, Plaintiffs must establish a liberty interest in remaining free from administrative segregation arising from state law.

**ii. No state-created liberty interest**

"States may under certain circumstances create liberty interests which are protected by the Due Process Clause."[96] For many years, courts analyzed whether a state had created a liberty interest in its prison regulations by looking at the language of the particular regulation or regulations at issue, based on the Supreme Court's decision in *Hewitt*.[97] In *Sandin*, however, the Supreme Court abandoned the "substantive predicate" approach it had endorsed in *Hewitt*, and "refocused the test for determining the existence of a liberty interest away from the wording of prison regulations and toward an examination of the hardship caused by the prison's challenged action relative to 'the basic conditions' of life as a prisoner."[98] After *Sandin*, whether a state prison regulation confers on an inmate a liberty interest in avoiding restrictive conditions of

[96] *Sandin*, 515 U.S. at 484. *But see Gray v. Hernandez*, 651 F. Supp. 2d 1167, 1176 (S.D. Cal. 2009) ("While state statutes and prison regulations may grant prisoners liberty interests sufficient to invoke due process protections, the instances in which due process can be invoked are significantly limited.").

[97] *See Brown*, 751 F.3d at 989; *Chappell*, 706 F.3d at 1063.

[98] *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) (quoting *Sandin*, 515 U.S. at 485); *see also Chappell*, 706 F.3d at 1064 (noting *Sandin* "abandoned" the discretionary/mandatory substantive predicates approach announced by the Supreme Court in *Hewitt*).

confinement depends on whether the challenged condition "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[99]

There is no single standard for determining whether a condition or conditions of confinement meet the *Sandin* test.[100] Rather, whether the challenged condition or combination of conditions impose atypical and significant hardship on an inmate "requires case by case, fact by fact consideration."[101] In undertaking this "case by case, fact by fact" analysis, the Ninth Circuit Court of Appeals has identified three guideposts by which to frame the inquiry, based on the Supreme Court's analysis in *Sandin*: "(1) whether the challenged condition 'mirrored those conditions imposed upon inmates in administrative segregation and protective custody,' and thus comported with the prison's discretionary authority; (2) the duration of the condition, and the degree of restraint imposed; and (3) whether the state's action will invariably affect the duration of the prisoner's sentence."[102]

While "[t]ypically, administrative segregation in and of itself does not implicate a protected liberty interest,"[103] the Ninth Circuit has recognized that some cases present "novel situation[s]" in which a plaintiff's confinement in administrative segregation does, in fact,

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[99] *Brown*, 751 F.3d at 983 (quoting *Sandin*, 515 U.S. at 484); *see also Wilkinson*, 545 U.S. at 223 ("After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" (quoting *Sandin*, 515 U.S. at 484)).

[100] *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003); *Serrano*, 345 F.3d at 1078.

[101] *Serrano*, 345 F.3d at 1078 (quoting *Keenan v. Hall*, 83 F. 3d 1083, 1089 (9th Cir. 1996)); *accord Ramirez*, 334 F.3d at 861.

[102] *Ramirez*, 334 F.3d at 861 (citing *Keenan*, 83 F.3d at 1089); *Serrano*, 345 F.3d at 1078.

[103] *Serrano*, 345 F.3d at 1078 (citing cases).

impose an atypical and significant hardship on him.[104] Plaintiffs suggest that their designation to Administrative Segregation Maximum presents such a "novel situation."[105] The Court disagrees, and instead finds that, under the *Sandin* standard, their confinement does not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest.

It is plain that the conditions Plaintiffs faced in Administrative Segregation Maximum were more restrictive than for general population inmates and permitted fewer privileges. Indeed, while segregated, Smith and Anagick were deprived of personal property, including televisions and Xbox game systems; denied access to the general population day room and use of the gym; restricted to caged areas during outside recreation; and escorted in ankle shackles and hand cuffs to such outside recreation, as well as to the showers and medical center. They were also required to eat all meals in their cells, and the lights in their cells were on twenty-four hours a day. But such deprivations, though burdensome, do not amount to a "dramatic departure" from

[104] *See, e.g.*, *id.* at 1078 (holding wheelchair-bound prisoner plaintiff identified protected liberty interest in his being free from confinement in non-handicapped-accessible administrative housing unit, where plaintiff could not take a proper shower, could not use the toilet without hoisting himself up by the seat, had to crawl into bed by his arms, could not participate in outdoor exercise, and was forced to drag himself around a vermin and cockroach-infested floor while so confined).

[105] *See* Dkt. 183 at 4–5.

the conditions of confinement in general population,[106] nor are they of the degree and kind other courts have recognized as atypical and significant or potentially so.[107]

Moreover, the Court cannot find that the duration of Plaintiffs' segregation, whether considered by itself or in combination with the aforementioned conditions, animates due process concerns. The evidentiary record establishes that Smith and Anagick were confined to administrative segregation for 252 days, from September 13, 2011 to May 22, 2012, with

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[106] *See, e.g.*, *Sandin*, 515 U.S. at 486 (finding inmate's placement in disciplinary segregation for 30 days "did not work a major disruption to his environment," where such segregation "with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody"); *Hewitt*, 459 U.S. at 468 ("It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence."); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (finding inmate's due process claim failed, where inmate was placed in the disciplinary segregation unit allegedly without opportunity to exercise, access to medical treatment, or adequate food, water, or sanitation pending a disciplinary hearing, because "administrative segregation falls within the terms of confinement ordinarily contemplated by a sentence"); *Gray*, 651 F. Supp. 2d at 1177 (finding due process concerns not implicated, where placement in administrative segregation "forced [inmate] to endure: (1) 24 hour lock-down; (2) lack of medical treatment; (3) only one shower every three days; (4) poisonous food; and (5) lack of exercise"); *Wyatt v. Hackett*, No. CV 05-5498 VAP(JC), 2009 WL 5062343, at *7–*8 (C.D. Cal. Dec. 21, 2009) (holding California state prisoner had not raised genuine factual dispute showing a liberty interest in avoiding a 60-day confinement in administrative segregation because "inmates in segregation typically cannot access the general population canteen or yard. Nor could plaintiff expect to participate in general population work programs. Limitations on contact visitation, telephone calls, canteen visits and physical access to the law library are, likewise, within the range of limitations contemplated by plaintiff's sentence.").

[107] *See, e.g.*, *Wilkinson*, 545 U.S. at 223–24 (finding inmate's placement in solitary confinement at "Supermax" prison implicated liberty interest, where, among other things, inmate was "deprived of almost any environmental or sensory stimuli and of almost all human contact" and his placement was "indefinite and, after an initial 30-day review, . . . reviewed just annually"); *Brown*, 751 F.3d at 988 (finding inmate's placement in solitary confinement for over 23 hours each day with almost no interpersonal contact and without "most privileges" afforded inmates in the general population may create liberty interest); *Serrano*, 345 F.3d at 1078.

periodic reviews to determine whether they should remain in segregation. Under the applicable case law, that duration does not impose upon a plaintiff an atypical or significant hardship in relation to the ordinary incidents of prison life as a matter of law.[108]

As to the third and final guidepost, Plaintiffs claim that their confinement in administrative segregation altered the duration of their sentences because Anagick was denied parole on August 31, 2015.[109] But there is nothing in the record to support an inference that Anagick was denied parole because of his confinement in administrative segregation over three years ago. Indeed, the Notice of Board Action informing Anagick that the Parole Board had denied his parole and continued his case for review in 2022 suggests that the Board denied Anagick's parole pending Anagick's completion of certain programs.[110]

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[108] *See, e.g., Williams v. Foote*, 2009 WL 1520029, at *10 (C.D. Cal. May 28, 2009) (holding allegations that California prisoner was confined in administrative segregation pending a disciplinary hearing and then in disciplinary segregation for a total of 701 days insufficient to establish liberty interest); *Rodgers v. Reynaga*, 2009 WL 62130, at *2 (E.D. Cal. Jan. 8, 2009) (holding plaintiff's placement in administrative segregation for five months was not an atypical and significant); *Deadmon*, 2008 WL 595883, at *1, *6–*8 (holding confinement in administrative segregation for 15 months does not give rise to state-created liberty interest); *Bonner v. Parke*, 918 F. Supp. 1264, 1270 (N.D. Ind. 1996) (finding three years in segregation does not by itself create an atypical and insignificant hardship); *Carter v. Carriero*, 905 F. Supp. 99, 104 (W.D.N.Y. 1995) (270 days not enough); *Delaney v. Selsky*, 899 F. Supp. 923, 927 (N.D.N.Y. 1995) (197 days not enough); *cf. Brown*, 751 F.3d at 988 (finding confinement in solitary segregation for "fixed and irreducible period" of 27 months gave rise to liberty interest); *Ramirez*, 334 F.3d at 861 (remanding for district court to consider whether the plaintiff's two-year placement in administrative segregation constituted an atypical and significant hardship where the segregated unit was "overcrowded and violent," the isolation "severed" the plaintiff's ties with his family, and the plaintiff was "made a patient of psychiatric programs" while segregated).

[109] Dkt. 183 at 5; Dkt. 183-7 at 4 (notice of board action).

[110] Dkt. 183-7 at 4.

Therefore, having undertaken a "case by case, fact by fact" inquiry into the conditions of Plaintiffs' confinement in administrative segregation, the Court concludes as a matter of law that the segregation in question did not impose an "atypical and significant hardship" on either Smith or Anagick so as to create a liberty interest under any Alaska state prison regulation.

* * *

Having determined that neither the Constitution itself nor Alaska state prison regulations confers on Plaintiffs a liberty interest in them being free from confinement in administrative segregation, the Court concludes that Plaintiffs were not entitled to any process before being designated to Administrative Segregation Maximum.[111] Because Plaintiffs were not due any process, neither Officer Corcoran nor Superintendent Wellard violated the Fourteenth Amendment's Due Process Clause in placing Plaintiffs in administrative segregation "without due process of law on the basis of unsupported evidence and hearsay."[112] Both are therefore entitled to qualified immunity under the first prong of *Saucier*.

**b. Even assuming existence of a liberty interest, such interest was not clearly established at relevant time**

Finally, even if the duration and concomitant conditions of Plaintiffs' confinement in administrative segregation did, in fact, confer on Plaintiffs a liberty interest in avoiding such placement, the Court finds that Defendants are nonetheless entitled to qualified immunity under the second prong of *Saucier*. As of May 2012, the law of this Circuit had not established that

[111] *Sandefur*, 937 F. Supp. at 894 ("In the absence of [a] constitutionally protected interest, the Constitution does not require the provision of *any* process.").

[112] Dkt. 1-1 at ¶ 30; *see also id.* at ¶ 20.

conditions of confinement similar to those imposed on Plaintiffs in this case imposed an atypical or significant hardship on inmates under the *Sandin* standard. Because there was no case law so holding and because the "atypical and significant hardship" test is so fact-specific, Defendants did not have fair notice of whether the conditions that Plaintiffs experienced violated a state-created liberty interest that would trigger due process protections.[113] Defendants cannot be held liable for the violation of a right that was not clearly established at the time the violation occurred.[114] Thus, Officer Corcoran and Superintendent Wellard are entitled to qualified immunity on Plaintiffs' due process claim under the second prong of the *Saucier* test, in addition to the first.

**D. Conclusion**

Even construed broadly and viewed in the most favorable light,[115] Plaintiffs' claim that they were confined to administrative segregation "without due process of law on the basis of unsupported evidence and hearsay" in violation of the Due Process Clause lacks merit; they have failed to raise a genuine dispute of material fact as to whether their placement in administrative

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[113] *See Chappell*, 706 F.3d at 1065 (finding defendants entitled to qualified immunity, where they did not have fair notice that conditions of inmate's segregation violated state-created liberty interest); *see also Saucier*, 533 U.S. at 201 (instructing inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition").

[114] *Brown*, 751 F.3d at 989–90 (holding defendants entitled to qualified immunity because it not clearly established at time of violation that lengthy confinement in segregation without meaningful review may constitute atypical and significant hardship).

[115] *See Christensen v. Commissioner*, 786 F.2d 1382, 1384–85 (9th Cir. 1986) (pro se pleadings should be liberally construed, particularly where civil rights claims are involved); *see also Rand*, 154 F.3d at 957 (noting courts "tolerate informalities from civil pro se litigants" consistent with the "policy of liberal construction in favor of pro se litigants").

segregation implicates a protected liberty interest, whether arising from the Constitution itself or from state law. The Court therefore finds that Defendants are entitled to summary judgment on all of Plaintiffs' claims in their favor on qualified immunity grounds. In light of that finding, the Court need not address Defendants' remaining arguments in support of their summary judgment motion.

## III. PLAINTIFFS' OUTSTANDING MOTIONS

Having found that Defendants are entitled to summary judgment in their favor, the Court also finds Plaintiffs' motions at dockets 152, 153, 154, 162, 163, 167, 168, 174, 178, 186, and 187 to be MOOT. Many of these motions relate to evidence that Plaintiffs believe has been withheld or destroyed. Plaintiffs' motion at docket 162, for example, moves to compel the production of LCCC surveillance video of the September 12, 2011 search of Plaintiffs' work stations, along with other video and/or audio evidence. Similarly, their motion at docket 167 seeks sanctions for and jury instructions on spoliation of that evidence. But such evidence, assuming it actually has been withheld or destroyed, is not relevant to whether Plaintiffs have a protected liberty interest in remaining free from administrative segregation; the Court therefore need not rule on these additional outstanding motions in light of its determination that Plaintiffs have failed to raise a genuine dispute of material fact as to whether their placement in administrative segregation implicates a protected liberty interest entitling them to certain due process protections.

## IV. CONCLUSION

For the above reasons, Defendant's Motion for Summary Judgment at docket 142 is **GRANTED**, and Plaintiffs' claims against Officer Corcoran and Superintendent Wellard are

**DISMISSED WITH PREJUDICE**. Plaintiffs' motions at dockets 152, 153, 154, 162, 163, 167, 168, 174, 178, 186, and 187 are **FOUND MOOT**.

Dated at Anchorage, Alaska, this 30th day of March, 2016.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

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| BILLY DEAN SMITH and JACOB ANAGICK,<br><br>Plaintiffs,<br><br>v.<br><br>ROBERT CORCORAN and SCOTT WELLARD,<br><br>Defendants. | Case No. 1:13-cv-00010-TMB<br><br>ORDER RE:<br>DOCKETS 195, 201, 202, & 212 |

## I. INTRODUCTION

By order at docket 188, this Court dismissed on summary judgment all claims brought against Defendants Robert Corcoran and G. Scott Wellard by Plaintiffs Billy Dean Smith and Jacob Anagick, and a final judgment was subsequently entered at docket 189. This matter is now before the Court on the following motions:

(1) Defendants' Motion for Attorney's Fees at docket 195;[1]

(2) Plaintiffs' Federal Civil Rule 59(e) Motion to Alter and/or Amend Summary Judgment; & Plaintiffs' Joint Declaration at docket 201;

(3) Plaintiffs' Motion for STAY and to Correct Mistaken Dated Date, and Plaintiffs' Joint Declaration at docket 202; and

(4) Plaintiffs' REQUEST FOR RULING AND STATUS NOTIFICATION OF RULE 59(e) MOTION Doc. 201 And Plaintiffs' Joint Declaration at docket 212.[2]

The Court addresses these motions below, beginning with Plaintiffs' Rule 59(e) motion.

[1] *See also* Dkt. 196 (Decl. Supp. Mot. for Attorney's Fees).

[2] Defendants respond at docket 213.

## II. PLAINTIFFS' MOTIONS AT DOCKETS 201 & 212

At docket 201, Plaintiffs move the Court pursuant to Fed. R. Civ. P. 59(e) to alter or amend the judgment at docket 189, which dismissed on summary judgment all of Plaintiffs' claims against Defendants Corcoran and Wellard.[3] Plaintiffs supplement their Rule 59(e) motion at docket 203. Defendants oppose at docket 205, and Plaintiffs reply at docket 207. For the reasons that follow, Plaintiffs' motion at docket 201 is **DENIED**.

Rule 59(e) permits a party to file a motion to alter or amend a judgment no later than 28 days after the entry of the judgment.[4] "Because specific grounds for a motion to amend or alter are not listed in Rule 59(e), [a] district court enjoys considerable discretion in granting or denying a motion."[5] In general, a court may alter or amend a judgment under Rule 59(e) if (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based, (2) the moving party presents newly discovered or previously unavailable evidence, (3) the motion is necessary to prevent manifest injustice, or (4) there is an intervening change in controlling law.[6]

Here, Plaintiffs contend that the judgment at docket 189 must be altered or amended pursuant to Rule 59(e) because this Court, in granting summary judgment in favor of Defendants on qualified immunity grounds, "misconceived material facts which lead to misconceptions of

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[3] *See* Dkt. 188 (order granting summary judgment in favor of Defendants).

[4] There is no dispute that Plaintiffs' motion at docket 201 is timely.

[5] *Straight Through Processing Inc. v. AmeriCERT Inc.*, 325 F. App'x 590, 591 (9th Cir. 2009); *accord Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003).

[6] *Hiken v. Dep't of Defense*, 836 F.3d 1037, 1042 (9th Cir. 2016); *Turner*, 338 F.3d at 1063 (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1254 n.1 (9th Cir. 1999)).

law."[7] According to Plaintiffs, the Court committed legal error when it determined, taking the record in the light most favorable to Plaintiffs, that neither Smith nor Anagick had a state-created liberty interest giving rise to federal due process protections in avoiding placement in administrative segregation pending an investigation into and disciplinary proceedings relating to their alleged escape attempt. The Court disagrees, and **DENIES** Plaintiffs' Federal Civil Rule 59(e) Motion to Alter and/or Amend Summary Judgment; & Plaintiffs' Joint Declaration at docket 201.

An inmate is entitled to the Fourteenth Amendment's due process protections only if the inmate first establishes that he has a liberty interest triggering those protections.[8] A protected liberty interest may arise either from the Due Process Clause of the Fourteenth Amendment itself or from state law.[9] As announced by the Supreme Court of the United States in *Sandin v. Connor*,[10] a state law confers on an inmate a liberty interest in avoiding restrictive conditions of confinement (such as placement in administrative segregation pending disciplinary proceedings) only if that more restrictive condition "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[11] In applying the *Sandin* test, the United States Court of Appeals for the Ninth Circuit has instructed the lower courts that the determination of whether a condition of confinement imposes atypical and significant hardship on an inmate

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[7] Dkt. 201 at 1.

[8] *See* Dkt. 188 at 16 & nn.86–87.

[9] *Id.* at 16–17 & n.88.

[10] 515 U.S. 472 (1995).

[11] *See* Dkt. 188 at 19–20 & nn.98–99.

"requires case by case, fact by fact consideration."[12] In its order at docket 188, this Court undertook that "case by case, fact by fact" analysis and, for the reasons stated in that order, concluded that the conditions of Plaintiffs' confinement in administrative segregation did not impose atypical and significant hardship on them in relation to the ordinary incidents of prison life under *Sandin* and subsequent decisions applying the *Sandin* test.[13]

Plaintiffs now take issue with the Court's conclusion, arguing that the provisions at Title 22 of the Alaska Administrative Code confer on inmates a liberty interest in avoiding placement in administrative segregation without due process of law. But Plaintiffs' position is in tension with *Sandin*, in which the Supreme Court of the United States abandoned the "substantive predicate" approach it had endorsed in *Hewitt* and instead "refocused the test for determining the existence of a liberty interest away from the wording of prison regulations and toward an examination of the hardship caused by the prison's challenged action relative to the 'basic conditions' of life as a prisoner."[14] Moreover, the cases cited by Plaintiffs in support of their Rule 59(e) motion are not persuasive. *Brandon v. State of Alaska, Department of Corrections*, for instance, involves Alaska, and not federal, constitutional questions.[15] And none of the other

[12] *See id.* at 20 & nn.100–102.

[13] *See id.* at 21–24 & nn.104–108.

[14] *Mitchell v. Dupnik*, 75 F.3d 517, 522 (9th Cir. 1996) (quoting *Sandin*, 515 U.S. at 485); *see also Deadmon v. Grannis*, No. 06cv1382-LAB (WMC), 2008 WL 595883, at *6 (S.D. Cal. Feb. 29, 2008) ("In order to find a liberty interest conferred by state law, the analysis focuses on the nature of the deprivation rather than on the language of any particular regulation, to avoid involvement of federal courts in day-to-day prison management.").

[15] 938 P.2d 1029 (Alaska 1997).

cases cited by Plaintiffs, to the extent those cases even involve federal due process claims,[16] undertakes any analysis into whether the challenged conditions of confinement impose atypical and significant hardship on the inmate, as this Court must under *Sandin*.

Finally, as to Plaintiffs' claim that the Court has "misconceived the law regarding the award of attorney fees and costs," the Court notes that no award of attorney's fees or of costs has been entered in this case and that Plaintiffs' challenge is thus groundless.

Plaintiffs' Federal Civil Rule 59(e) Motion to Alter and/or Amend Summary Judgment; & Plaintiffs' Joint Declaration at docket 201 is **DENIED** for the reasons set out above. That motion having now been resolved, Plaintiffs' REQUEST FOR RULING AND STATUS NOTIFICATION OF RULE 59(e) MOTION Doc. 201 And Plaintiffs' Joint Declaration at docket 212 is **DENIED AS MOOT**.

## III. MOTIONS AT DOCKETS 195 & 202

At docket 195, Defendants' counsel moves for an award of attorney's fees pursuant to 42 U.S.C. § 1988(b) in the amount of $19,150.00—the product of the 95.75 hours counsel worked to defend Defendants in this case at a rate of $200.00 per hour.[17] Plaintiffs do not respond directly to Defendants' motion, but instead, at docket 202, have filed a Motion for STAY and To Correct Mistaken Dated Date, and Plaintiffs' Joint Declaration. The Court addresses each motion in turn.

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[16] The *Perotti v. State of Alaska, Department of Corrections* order submitted by Plaintiffs at docket 203-1, for example, does not clarify whether the due process claims at issue in that case are based on the Alaska Constitution or the Constitution of the United States.

[17] *See also* Dkt. 196.

**a. Defendants' Motion at Docket 195**

Section 1988 provides that in a civil rights action brought pursuant to 42 U.S.C. § 1983, a district court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."[18] Section 1988, however, "is asymmetrical,"[19] and a defendant requesting attorney's fees from a plaintiff under that provision "must meet a heightened standard"[20]—namely, defendants prevailing in civil rights actions are to be awarded attorney's fees "'not routinely, not simply because [they] succeed, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'"[21] "The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees."[22]

Counsel for Defendants bases his request for an award of a reasonable attorney's fee on the fact that Defendants prevailed on their summary judgment motion and on the manner in which Plaintiffs pursued their claims against Defendants. But the Court finds those reasons insufficient to support an award of attorney's fees in this case. To begin with, both the Supreme Court of the United States and the Court of Appeals for the Ninth Circuit have repeatedly recognized that "[a] claim is not frivolous in this context merely because the plaintiff did not

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[18] 42 U.S.C. § 1988.

[19] *Kelly v. Wengler*, 822 F.3d 1085, 1099 (9th Cir. 2016) (citing *Hughes v. Rowe*, 449 U.S. 5, 14–15 (1980)).

[20] *Manufactured Home Cmty. Inc. v. City of San Jose*, 420 F.3d 1022, 1036 (9th Cir. 2005).

[21] *Mayer v. Wedgewood Neighborhood Coalition*, 707 F.2d 1020, 1021 (9th Cir. 1983) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (Title VII case)); *accord Galen v. Cty. of Los Angeles*, 477 F.3d 652, 666 (9th Cir. 2007) (quoting *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994)); *see also Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990) ("Attorneys' fees in civil rights cases should only be awarded to a defendant in exceptional circumstances.").

[22] *Hughes*, 449 U.S. at 14.

prevail."[23] Indeed, "[t]he more carefully a court must examine a claim to establish its legal insufficiency, the less likely it is that the claim is frivolous."[24] Here, the outcome of Plaintiffs' lawsuit was not obvious, but instead required the parties—and the Court—to engage with and analyze a rather involute and fact-dependent area of constitutional law.[25] Further, although the Court agrees with Defendants that Plaintiffs could have pursued their claim against Defendants in a less zealous and agonistic manner, the test for whether to assess attorney's fees against an unsuccessful civil rights plaintiff focuses on the merits of the claims themselves, and not the manner in which the plaintiff pursued those claims.[26] Defendants' Motion for Attorney's Fees at docket 195 accordingly is **DENIED**.

**b. Plaintiffs' Motion at Docket 202**

In addition to his request for attorney's fees, Defendants' counsel has filed, at docket 198, a bill of costs.[27] At docket 202, Plaintiffs request that the Court stay any cost bill proceedings pending the resolution of their Rule 59(e) motion, as well as any appeal to the Ninth Circuit. To

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[23] *Mohammadkhani v. Anthony*, 524 F. App'x 350, 351 (9th Cir. 2013); *accord Hughes*, 449 U.S. at 15–16 (concluding that "[a]llegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation'"); *Galen*, 477 F.3d at 667 ("But, that [the plaintiff] lost at summary judgment does not render his case per se frivolous, unreasonable, or without foundation.").

[24] *Mohammadkhani*, 524 F. App'x at 351.

[25] *See Hughes*, 449 U.S. at 15 ("An unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims.").

[26] *See, e.g., Mitchell v. Los Angeles Cmty. Coll. Dist.*, 861 F.2d 198, 202 (9th Cir. 1989) (affirming denial of attorney's fees under 42 U.S.C. § 1988 where appellees "heatedly asserted" that plaintiff brought the action for vexatious purposes, concluding that appellees' "contention is cast more as a quest for sanctions under Fed. R. Civ. P. 11 than a request for attorneys' fees under section 1988").

[27] *See also* Dkt. 199.

the extent Plaintiffs' motion seeks a stay pending the resolution of their Rule 59(e) motion, it is **DENIED AS MOOT**; that motion has been resolved.[28] To the extent Plaintiffs' motion seeks a stay pending an appeal to the Ninth Circuit, it is **DENIED WITHOUT PREJUDICE** as premature; no appeal has been filed. If an appeal is taken, Plaintiffs may move for a stay at that time.

Defendants are directed to contact the Clerk of Court **on or before March 20, 2017** to schedule a cost bill hearing.

## IV. CONCLUSION

For the reasons set forth above, Defendants' Motion for Attorney's Fees at docket 195; Plaintiffs' Federal Civil Rule 59(e) Motion to Alter and/or Amend Summary Judgment; & Plaintiffs' Joint Declaration at docket 201; Plaintiffs' Motion for STAY and to Correct Mistaken Dated Date, and Plaintiffs' Joint Declaration at docket 202; and Plaintiffs' REQUEST FOR RULING AND STATUS NOTIFICATION OF RULE 59(e) MOTION Doc. 201 And Plaintiffs' Joint Declaration at docket 212 are **DENIED**.

IT IS SO ORDERED.

Dated at Anchorage, Alaska this 9th day of March, 2017.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE

[28] *See* Section II above.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILLY DEAN SMITH; JACOB LEE ANAGICK,

Plaintiffs-Appellants,

v.

ROBERT CORCORAN; G. SCOTT WELLARD, sued in their individual capacities,

Defendants-Appellees.

No. 17-35225

D.C. No. 1:13-cv-00010-TMB
District of Alaska,
Juneau

ORDER

Before: LEAVY, M. SMITH, and CHRISTEN, Circuit Judges.

Plaintiffs' motion to stay the filing of the petition for rehearing (Docket Entry No. 41) is denied.

Plaintiffs' motion for an extension of time to file a petition for rehearing (Docket Entry No. 42) is denied as unnecessary.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Plaintiffs' petition for panel rehearing and petition for rehearing en banc

(Docket Entry No. 43) are denied.

No further filings will be entertained in this closed case.