ORIGINAL

No._____

In The
Supreme Court of the United States

MICHAEL D. KELLEY,

Petitioner,

v.

COLETTE S. PETERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX

Michael D. Kelley #8704552
Oregon State Correctional Institution
3405 Deer Park Drive, SE
Salem, Oregon 97301

Petitioner *pro se*

INDEX OF APPENDICS

APPENDIX A – Ninth Circuit Judgment Mandate dated April 1, 2019

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 01 2019

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

MICHAEL D. KELLEY,

Plaintiff - Appellant,

v.

COLETTE S. PETERS, being sued in her individual capacity; et al.,

Defendants - Appellees.

No. 18-35395

D.C. No. 6:16-cv-02400-AC
U.S. District Court for Oregon, Eugene

MANDATE

The judgment of this Court, entered January 04, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX B – Ninth Circuit Order denying petition for rehearing en banc filed March 22, 2019

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL D. KELLEY, Plaintiff-Appellant, v. COLETTE S. PETERS, being sued in her individual capacity; MICHAEL F. GOWER, is being sued in his individual capacity; CRAIG PRINS, is being sued in his individual capacity; D. YANCY, is being sued in his individual capacity; J. NOIZIGER, is being sued in his individual capacity, Defendants-Appellees.	No. 18-35395 D.C. No. 6:16-cv-02400-AC District of Oregon, Eugene ORDER

Before: TROTT, SILVERMAN, and TALLMAN, Circuit Judges.

The panel has voted to deny Appellant's petition for rehearing and to recommend denial of the petition for rehearing en banc.

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

The petition for rehearing and the petition for rehearing en banc are DENIED.

b

APPENDIX C – Ninth Circuit Order for Additional Briefing Filed January 29, 2019

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL D. KELLEY, Plaintiff-Appellant, v. COLETTE S. PETERS, being sued in her individual capacity; et al., Defendants-Appellees.	No. 18-35395 D.C. No. 6:16-cv-02400-AC District of Oregon, Eugene ORDER

Before: TROTT, SILVERMAN, and TALLMAN, Circuit Judges.

Citing Cato v. Rushen, 824 F.2d 703, 704-06 (9th Cir. 1987), Kelley argues that Hill's "some evidence" standard was not satisfied in this case because the record does not contain any information demonstrating that the informant's tip on which the district court relied was worthy of belief.[1] Moreover, Kelley alleges that the defendants abandoned in court the argument that the informant's tip constituted sufficient information to place him in administrative segregation, relying instead on the simple fact of an existing investigation. Defendants' Motion for Summary Judgment, p.3. We note that the district court concluded "that the fact that Mr.

[1] Superintendent v. Hill, 472 U.S. 445 (1985).

Kelley was under investigation is not, on its own, sufficient to satisfy the 'some evidence' standard."

The Defendants shall file a response to Kelley's arguments in his petition for rehearing and petition for rehearing en banc filed with this court on January 24, 2019. Their response shall address his Cato argument. The response shall not exceed fifteen (15) pages or 4200 words, and shall be filed with the Clerk of our court within 21 days of the date of this order. Parties who are registered for Appellate ECF must file the response electronically without submission of paper copies. Parties who are not registered Appellate ECF filers must file the original response.

So ORDERED.

APPENDIX D – Ninth Circuit Memorandum Opinion filed January 4, 2019

NOT FOR PUBLICATION

FILED

JAN 4 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL D. KELLEY, Plaintiff-Appellant, v. COLETT S. PETERS, being sued in her individual capacity; et al., Defendants-Appellees.	No. 18-35395 D.C. No. 6:16-cv-02400-AC MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, Chief Judge, Presiding

Submitted January 2, 2019**

Before: TROTT, SILVERMAN, and TALLMAN, Circuit Judges.

Michael D. Kelley, an Oregon state prisoner, appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging due process violations in connection with his confinement in administrative segregation. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Guatay Christian*

* 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).

D

Fellowship v. County of San Diego, 670 F.3d 957, 970 (9th Cir. 2011). We affirm.

The district court properly granted summary judgment for defendants because Kelley failed to raise a genuine dispute of material fact as to whether defendants provided insufficient notice of the reasons for retaining him in administrative segregation, or as to whether the "some evidence" standard was met. *See Bruce v. Ylst*, 351 F.3d 1283, 1287 – 88 (9th Cir. 2003) (explaining that due process claims based on administrative segregation are subject to the "some evidence" standard); *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990) (discussing "indicia of reliability" of evidence); *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 – 1101 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995) (describing due process notice and hearing requirements in the administrative segregation context).

AFFIRMED.

APPENDIX E – District Court's Order and judgment filed March 30, 2018

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

MICHAEL D. KELLEY

Plaintiff,

v.

COLETT S. PETERS, being sued in her individual capacity; **MICHAEL F. GOWER,** being sued in his individual capacity; **CRAIG PRINS,** being sued in his individual capacity; **D. YANCY,** being sued in his individual capacity; and **J. NOIZIGER,** being sued in his individual capacity,

Defendants.

No. 6:16-cv-2400-AC

OPINION AND ORDER

MOSMAN, J.,

On December 15, 2017, Magistrate Judge John V. Acosta issued his Findings and Recommendation (F&R) [55], recommending that Plaintiff Michael D. Kelley's Motion for Summary Judgment [14] should be DENIED, Defendants' Motion for Summary Judgment [34] should be GRANTED, and this action should be dismissed with prejudice. Mr. Kelley objected [58], Defendants responded [60], and Mr. Kelley replied [61].

E

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge, but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(1)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(1)(C).

Upon review, I agree with Judge Acosta's recommendation and I ADOPT the F&R [55] as my own opinion. Mr. Kelley's Motion for Summary Judgment [14] is DENIED, Defendants' motion for summary judgment [34] is GRANTED, and this action is dismissed with prejudice.

I write separately to clarify that the fact that Mr. Kelley was under investigation is not, on its own, sufficient to satisfy the "some evidence" standard. One might come under investigation for any reason or no reason at all, so that fact by itself cannot satisfy the requirement that decisions by prison officials have "some basis in fact." *Superintendent v. Hill*, 472 U.S. 445, 455 (1985).

Nevertheless, the records show that here there was some basis in fact: investigators had received information from a source that Mr. Kelley sold the spice. Kelley Decl. [18] at 2. Defendant Yancey told Mr. Kelley as much, and Mr. Kelley introduced this fact on the record at his administrative hearing. Nofziger Decl. [36] Ex. 2. Case law does not require that hearing

findings specify the evidence they rely on; instead, the Supreme Court has suggested that the findings need only be "supported by some evidence in the record." *Hill*, 472 U.S. at 454. Because a factual basis for the investigation was in the record, the "some evidence" requirement was satisfied in this case.

IT IS SO ORDERED.

DATED this 30th day of March, 2018.

/s/Michael W. Mosman
MICHAEL W. MOSMAN
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

MICHAEL D. KELLEY

Plaintiff,

v.

COLETT S. PETERS, being sued in her individual capacity; **MICHAEL F. GOWER,** being sued in his individual capacity; **CRAIG PRINS,** being sued in his individual capacity; **D. YANCY,** being sued in his individual capacity; and **J. NOIZIGER,** being sued in his individual capacity,

Defendants.

No. 6:16-cv-2400-AC

JUDGMENT

MOSMAN, J.

Based upon the Order of the Court adopting Judge Acosta's Findings and Recommendation [55], IT IS ORDERED AND ADJUDGED that Mr. Kelley's Motion for Summary Judgment [14] is DENIED, Defendants' Motion for Summary Judgment [34] is GRANTED, and this action is DISMISSED with prejudice.

IT IS SO ORDERED.

DATED this 30th day of March, 2018.

/s/Michael W. Mosman

MICHAEL W. MOSMAN
Chief United States District Judge

findings specify the evidence they rely on; instead, the Supreme Court has suggested that the findings need only be "supported by some evidence in the record." *Hill*, 472 U.S. at 454. Because a factual basis for the investigation was in the record, the "some evidence" requirement was satisfied in this case.

IT IS SO ORDERED.

DATED this 30th day of March, 2018.

/s/Michael W. Mosman
MICHAEL W. MOSMAN
Chief United States District Judge

APPENDIX F – December 15, 2017, Magistrates Judges Findings and Recommendations

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

MICHAEL D. KELLEY,

Plaintiff,

v.

COLETT S. PETERS, being sued in her individual capacity; MICHAEL F. GOWER, being sued in his individual capacity; CRAIG PRINS, being sued in his individual capacity; D. YANCY, being sued in his individual capacity; and J. NOIZIGER, being sued in his individual capacity,

Defendants.

Case No. 6:16-cv-2400-AC

FINDINGS AND RECOMMENDATION

ACOSTA, Magistrate Judge:

Introduction

Plaintiff Michael D. Kelley ("Kelley"), appearing *pro se*, filed this action under 42 U.S.C. § 1983 alleging defendants violated his Eighth Amendment right to be free from cruel and unusual

F

punishment and his due process rights under the Fourteenth Amendment when he was placed and held in administrative segregation. Presently before the court are the parties' cross-motions for summary judgment.[1]

The court finds Kelley was afforded the due process to which he was entitled and placement in administrative segregation does not amount to deliberate indifference. Accordingly, Kelley's motion for summary judgment should be denied, the defendants' motion for summary judgment should be granted, and this case should be dismissed.

Background

The following background facts are derived from the declarations and evidence offered by the parties with regard to the pending motions for summary judgment.[2] The court notes many of the "facts" contained in Kelley's declarations are irrelevant to the matter at hand or are legal conclusions. The court will limit its consideration to relevant facts.

Kelley is an inmate of the Oregon Department of Corrections (the "Department") and was housed at the Oregon State Prison ("Prison") during the relevant periods. (Spooner Decl., ECF No. 35, ¶3; Kelley Decl. dated May 12, 2107, ECF No. 15 ("Kelley May Decl."), ¶ 3.) In late June or early July 2016, inmate Waters obtained possession of a controlled substance known as "Spice" from his wife while attending a Native American event held in the Prison's visiting room. (Kelley Decl. dated July 14, 2107, ECF No. 50 ("Kelley July Decl."), ¶ 9.) On July 18, 2016, a Prison inmate died

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[1]The court informed Kelley of his obligations with regard to opposing an summary judgment motion through a Summary Judgment Advice Note and Scheduling Order dated June 22, 2017. Kelley filed responsive documents.

[2]Many of the exhibits Kelley offered to support his summary judgment response he also filed as attachments to the complaint. (Compl. Exs., ECF No. 2-1.) The court has referred to these exhibits, some of which are originals, where the summary judgment exhibits are difficult to read.

unexpectedly. His death was tentatively related his use of Spice. (Plante Decl., ECF No. 31, ¶ 3.) Both the Department's Special Investigations Unit ("the Unit") and the Oregon State Police (the "Police") initiated investigations into Kelley's potential involvement in the distribution of Spice within the Prison based on information obtained from one or more inmates, whose identities remain confidential. (Plante Decl. ¶¶ 3-5; Drew Decl., ECF No. 32, ¶¶ 3-4.)

On July 18, 2016, defendant Douglas Yancey, the Department's Security Threat Management Lieutenant ("Yancey"), placed Kelley in administrative segregation. (Yancey Decl., ECF No. 38. Ex. 1.) At the time Kelley was placed in administrative segregation, Yancey represented to Kelley that a reliable confidential informant had told him Kelley was selling Spice in the Prison yard. (Kelley May Decl. ¶ 5.) In the Request for Administrative Housing signed by Yancey on July 25, 2016, Yancey represented:

> I believe that this inmate is in need of Administrative Segregation and no other reasonable alternative exists at this time because:
>
> Inmate is the subject of an ongoing State Police and SIU investigation into the introduction of controlled substances in to OSP. The controlled substances in this case are responsible for numerous unscheduled inmate E.R. trips and one inmate death. Request inmate be held for up to 180 days pending investigation.

(Yancey Decl. Ex. 1.) Superintendent Premo approved the request on August 8, 2016. (Nofziger Decl., ECF No. 36, Ex. 1.)

On August 10, 2016, Joseph Laro, a correctional sergeant with the Department, served Kelley with a Notice of Administrative Hearing advising Kelley "an Administrative Hearing concerning your placement in the Administrative Housing Unit is scheduled for 7:50 a.m. on August 12, 2016." (Laro Decl., ECF No. 37, Ex. 1.) Kelley participated in the administrative hearing and submitted a ten-page document questioning the nature of the proceeding, the veracity and motive of the

confidential informant, the availability of sanctions other than administrative segregation, and whether distributing and selling was the same as introducing a controlled substance into the Prison, providing Kelley's description of the underlying facts, offering alternative scenarios in which Kelley was a scapegoat for the Department or the guilty inmates, and asserting his innocence. (Nofziger Decl, Ex. 2.) At the conclusion of the hearing, defendant Jeremy Nofziger, a Department hearings officer ("Nofziger"), issued Findings of Fact, Conclusion, and Recommendation dated August 12, 2016 ("the "Findings"), recommending "Kelley be assigned to Administrative Segregation for a period of up to 180 days: July 18, 2016, through January 13, 2017, or until placement is no longer necessary." (Nofziger Decl. Ex. 1 at 2.) In the Findings, Nofziger explained:

> Inmate Kelley is the subject of an ongoing State Police and Special Investigations Unit (SIU) investigation. Lieutenant Yancey reports this investigation involves the introduction of controlled substances into the Oregon State Penitentiary. Lieutenant Yancey reports information indicates the controlled substances in this case are responsible for numerous unscheduled inmate trips to the Emergency Room and may be linked to an inmate death. Lieutenant Yancey requested inmate Kelley be housed in Administrative Segregation to prevent interference with the ongoing investigation.
>
> During his hearing, inmate Kelley indicated that this hearing was in violation of his 6th and 14th amendment rights. This is an administrative hearing to determine if removal from General Prison Population is warranted. The inmate receives Due process as described in OAR 291-046. This hearing was conducted in compliance of this rule and does not violate the 6th or 14th amendment.
>
> The above finding of fact substantially supports the placement of inmate Kelley in Administrative Segregation. Inmate Kelley's retention in Administrative Segregation is required in order to maintain the safety, security and orderly operation of the facility.

(Nofziger Decl. Ex. 1 at 1-2.) The Findings were affirmed by the Assistant Director of August 15, 2016. (Nofziger Decl. Ex. 1 at 2.)

Kelley filed a Grievance Form dated August 15, 2016, asserting Yancey and Nofziger

engaged in unethical conduct, such as fraud, perjury, and obstruction of justice with regard to Kelley's administrative segregation placement (the "Grievance"). (Pl.'s Exs. to Support Mot. for Full or Partial Summ. J., ECF No. 14-1 ("Pl.'s Exs."), Ex. E.) The next day, Kelley completed a second Grievance Form, again complaining about the investigation and his placement in administrative segregation (the "Second Grievance"). (Pl.'s Exs. Ex. B.) The grievance coordinator received the Second Grievance on August 19, 2016, and denied it on September 6, 2016, because it requested review of more than one matter, action, or incident. (Pl.'s Exs. Exs. B, H.) Similarly, the grievance counselor received the Grievance on September 6, 2016, and denied it on September 26, 2016, because it grieved actions or decisions by more than one Department employee. (Pl.'s Exs. Ex. E.)

While his grievances were being processed, Kelley drafted a letter dated August 21, 2016, addressed to defendant Colett S. Peters, the Department Director ("Peters"), complaining that Yancey and Nofziger's placement of Kelley in administrative segregation was an act of deliberate indifference in violation of Kelley's Eighth Amendment rights and did not provide him the due process to which he was entitled under the Fourteenth Amendment. (Pl.'s Exs. Ex. C.) Kelley specifically asserted Yancey's reliance on false, misleading, and slanderous comments linking Kelley to the sale or distribution of Spice at the Prison subjected Kelley to significant hardship and Nofziger aided and abetted in Yancey's conduct. (Pl.'s Exs. Ex. C.) In a letter dated August 30, 2016, Michael F. Gower, Department Assistant Director, Operations Division ("Gower"), acknowledged receipt of Kelley's letter and encouraged Kelley to work with his "Institution Grievance Counselor" on his complaints. (Pl.'s Exs. Ex. D.) When Kelley communicated his concerns to his grievance counselor, the grievance counselor informed Kelley on September 26, 2016, he would forward the

information to the "hearings department at central office." (Pl.'s Exs. Ex. F.)

Kelley prepared a Petition for Administrative Review dated August 26, 2016 (the "Petition"), in which he asserted Yancey "intentionally committed negligence, recklessness and malice" against Kelley when he requested 180 days placement in administrative segregation based on "false/misleading/slanderous allegations" in violation of Kelley's Eight and Fourteenth Amendment rights. (Pl.'s Exs. Ex. I.) Kelley alleges a claim against Nofiziger based on Nofiziger's failure to verify the information obtained from the informant during the administrative hearing. (Pl.'s Exs. Ex. I.) While Kelley represents he filed the Petition with defendant Craig Prins ("Prins"), the record contains no evidence Prins received the Petition.

On September 27, 2016, Kelley completed an Inmate Communication Form expressing frustration resulting from his attempts to exhaust his administrative remedies with regard to the hearing on his administrative segregation. (Pl.'s Exs. Ex. B.) Kelley was advised on October 7, 2016, to follow the separate review system for involuntary administrative segregation outlined in OR. ADMIN. R. 291-046-0100. (Pl.'s Exs. Ex. B.) Kelley drafted what he identifies as a tort claim notice addressed to the Oregon Department of Administrative Service, Risk Management, and allegedly filed on November 9, 2016 (the "Notice"). (Pl.'s Exs. Ex. J.) In the Notice, Kelley asserts a claim for deliberate indifference against Yancey based on Kelley's placement in administrative segregation. (Pl.'s Exs. Ex. J.) There is no evidence in the record the Notice was ever received or of the manner in which the Notice was handled. Kelley was released from administrative segregation on December 21, 2016. (Nofziger Decl. ¶ 3.)

Kelley filed this action on December 27, 2016, against Gower, Peters, Prins, Yancey, and

Nofziger (collectively "Defendants").[3] In his First Claim for Relief, Kelley alleges Yancey acted with deliberate indifference when he placed Kelley in administrative segregation based on false, slanderous, and misleading allegations in violation of his rights under the Eighth and Fourteenth Amendment. In his Second Claim for Relief, Kelley asserts Nofziger aided and abetted Yancey's wrongful conduct and denied Kelley due process by finding substantial evidence supported Kelley's placement in administrative segregation and recommending the continuation of such placement at the conclusion of the administrative hearing. Kelley contends Gower, identified as "Director Asst. of Operations Division", Peters, and Prins, identified as "Oregon Inspector General," "failed to safeguard protecting his federal constitutional rights, investigate or review his claims." (Complaint, ECF No. 2, at 4-5.)

Legal Standard

Summary judgment is appropriate where 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." FED. R. CIV. P. 56(a) (2016). Summary judgment is not proper if material factual issues exist for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. A nonmoving party cannot defeat summary judgment by relying on the allegations in the complaint, or with unsupported conjecture or

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[3]Kelley attached numerous exhibits to his compliant, some of which were omitted from his summary judgment briefing. The court has not considered these omitted exhibits.

conclusory statements. *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Thus, summary judgment should be entered against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The court must view the evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982). All reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Life Ins. Co. of North America*, 638 F.2d 136, 140 (9th Cir. 1981).

However, deference to the nonmoving party has limits. A party asserting that a fact cannot be true or is genuinely disputed must support the assertion with admissible evidence. FED. R. CIV. P. 56(c) (2013). The "mere existence of a scintilla of evidence in support of the [party's] position [is] insufficient." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Therefore, where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotations marks omitted).

Discussion

Defendants move for summary judgment on Kelley's claims. Defendants assert Kelley failed to allege a viable claim against Peters, Gower, and Prins in the absence of personal involvement in the alleged constitutional violations. Defendants contend Kelley is unable to allege a claim under the Fourteenth Amendment because he received all the due process to which he was

entitled or a claim for violation of the Eighth Amendment as Kelley's placement in administrative segregation did not amount to deliberate indifference. Finally, Defendants argue they are entitled to qualified immunity.

I. Personal Participation

Kelley does not allege any direct involvement by Peters, Gower, or Prins in the violation of his constitutional rights based on his placement in administrative segregation. Rather, Kelley appears to allege Peters, Gower, and Prins had knowledge of the alleged constitutional violations and failed to take any action to remedy such violations. In support of these allegations, Kelley submitted his letter to Peters complaining about Yancey and Nofziger's actions, and a responsive letter from Gower in which Gower encourages Kelley to work with his grievance counselor. He also submitted the Petition, which he claims he filed with Prins.

Liability under § 1983 must be based on a defendant's personal participation in the deprivation of the plaintiff's constitutional rights. *Barron v. Harrington,* 152 F.3d 1193, 1194 (9th Cir.1998). "A supervisor is only liable for the constitutional violations of . . . subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989); *see also Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). Likewise, there is no *respondeat superior* liability under § 1983. *Taylor,* 880 F.2d at 1045. Thus, a supervisor may be held liable under § 1983 only if: (1) he was personally involved in the constitutional deprivation; or (2) a sufficient causal connection exists between the supervisor's wrongful conduct and the constitutional violation. *Jeffers v. Gomez,* 267

F.3d 895, 915 (9th Cir.2001).

Kelley has failed to allege any affirmative conduct of Peters, Gower, or Prins resulting in constitutional violations. Rather, Kelley alleges these defendants failed to investigate Kelley's complaints that Yancey and Nofziger engaged in conduct that violated Kelley's constitutional rights. While Kelley has not alleged Peters, Gower or Prins directed or participated in the alleged constitutional violations, he does allege they had knowledge of Yancey and Nofziger's offensive conduct and failed to act to prevent, or remedy, them. Viewing the evidence and allegations in a light most favorable to Kelley, it appears Kelley has asserted viable claims against Peters, Gowers, and Prins based on their failure to act. Defendants' motion for summary judgment in favor of Peters, Gower, and Prins based on the absence of personal participation should be denied.

II. Due Process

Defendants contend Kelley received all of the due process to which he was entitled and move for summary judgment on Kelley's claim under the Fourteenth Amendment. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property without due process of law." "Due process 'is a flexible concept that varies with the particular situation.'" *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015)(quoting *Zinermon v. Burch*, 494 U.S. 113, 127 (1990)). The Ninth Circuit limits the form of due process required when prison officials initially determine a prisoner should be segregated from the general population for administrative reasons to: (1) an informal nonadversary hearing within a reasonable time after the prisoner is segregated; (2) notice to the prisoner of the reasons for considering segregation; and 3) the opportunity for the prisoner to present his views. *Toussaint v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472, 483-84 (1995).

Additionally, prison officials must have only "some evidence" to support their underlying decision to move a prisoner into administrative segregation. *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-56 (1985).

Yancey advised Kelley of the reasons for his placement in administrative segregation. Kelley received notice of an administrative hearing and participated, both orally and in writing, in such hearing, which occurred within thirty days of Kelley's initial placement. Yancey and Kelly had some evidence to support their decision to place Kelley in administrative segregation – he was the subject of an investigation by the Unit and Police into the sale of Spice in the Prison. The record establishes Kelley received the due process to which he was entitled.[4] To the extent Kelley relies on Defendants' refusal to disclose the identity of the informant to Kelley as a due process violation, this argument is equally without merit. The Ninth Circuit has held "that due process does not require disclosure of the identity of any person providing information leading to the placement of a prisoner in administrative segregation." *Toussaint*, 801 F.2d at 1101. Summary judgment on Kelley's due process claims should be granted.

III. Deliberate Indifference

Defendants move for summary judgment on Kelley's Eighth Amendment claim arguing placement in administrative segregation does not amount to deliberate indifference. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend VIII. "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones,

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[4]Moreover, Kelley's due process rights were arguably not violated because temporary placement in administrative segregation does not implicate a protected liberty interest. *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003)("Typically, administrative segregation in and of itself does not implicate a protected liberty interest.")

and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' " *Farmer v. Brennan,* 511 U.S. 825, 832 (1994) (internal citations omitted). "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Id.* at 828. A prison official violates the Eighth Amendment when two requirements are met. *Id.* at 834. "First, the deprivation alleged must be, objectively, 'sufficiently serious.'" *Id.* (quoting *Wilson v. Seiter,* 501 U.S. 294, 298 (1991)). "The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" *Id.* (quoting *Wilson,* 501 U.S. at 297).

Kelley relies solely on his administrative segregation placement to support his claim of deliberate indifference under the Eight Amendments. He does not allege his placement in administrative segregation subjected him to a substantial, or even increased, risk of serious harm either from other inmates, untreated medical conditions, or the conditions found in administrative segregation. The Ninth Circuit has clearly held the mere placement of a prisoner in administrative segregation or isolation does not violate the Eighth Amendment. *Salstrom v. Sumner,* 959 F.2d 241, at *1 (9th Cir. 1992). Consequently, Kelley has failed to establish an actionable Eighth Amendment claim and Defendants' motion for summary judgment should be granted.

IV. Qualified Immunity

Defendants alternatively argue they are entitled to qualified immunity with regard to Kelley's placement and retention in administrative segregation. The doctrine of qualified immunity protects "government officials performing 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Therefore, public officials are generally immune from civil liability unless their actions violated clearly established law because "a reasonably competent public official should know the law governing his conduct." *Id.* "The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent of those who knowingly violated the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)(citation and internal quotations omitted). The key inquiry in determining whether an officer has qualified immunity is whether he or she has "fair warning" that the conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002).

To determine whether the doctrine of qualified immunity applies to individual defendants, the court must decide whether a plaintiff has shown a constitutional or statutory right has been violated and whether the right at issue was "clearly established" at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Courts may "exercise their sound 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." *Pearson v. Callahan*, 555 U.S. 223 236 (2009).

The clearly established inquiry "must be undertaken in the light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Officials may be held liable only for violation of a right the "contours [of which are] sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Id.* at 202. Therefore, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Id.* To be clearly established, the law need not be a "precise formulation of the standard" where "various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable

in a fair way from the facts presented in the case at hand." *Id.*

Because Kelley has failed to show a violation of the Eighth or Fourteenth Amendments, the court need not consider whether the constitutional rights at issue were clearly established when Yancey placed Kelley in administrative segregation or when Nofziger recommend continuing the placement. Defendants are alternatively entitled to qualified immunity, Defendants' motion for summary judgment should be granted, and Kelley's claims should be dismissed.

Conclusion

Kelley's motion (ECF No. 14) for summary judgment should be DENIED, Defendants motion (ECF No. 34) for summary judgment should be GRANTED, and this action should be dismissed with prejudice.

Scheduling Order

The Findings and Recommendation will be referred to a district judge for review. Objections, if any, are due **January 4, 2018**. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due within fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 15th day of December, 2017.

JOHN V. ACOSTA
United States Magistrate Judge

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