

## A LEGAL VICTORY

12/13/12

Attached to this is the opinion of a federal judge in one of my lawsuits. If any of my readers is an attorney, knows one or is willing to email info about my case to attorneys in the Los Angeles area I'd be grateful for your help. So far I've defeated the Government's strategies but I'm an untrained novice at law and can always use help.

- Jeremy Pinson

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 JEREMY PINSON,

12 Plaintiff,

13 v.

14 PABLO PRIETO, et al.,

15 Defendants.  
16

Case No. ED CV 10-811-PSG (SP)

**REPORT AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE  
JUDGE**

17 This Report and Recommendation is submitted to the Honorable Philip S.  
18 Gutierrez, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636  
19 and General Order 05-07 of the United States District Court for the Central District of  
20 California.

21 **I.**

22 **INTRODUCTION**

23 On September 17, 2010, plaintiff Jeremy Pinson, a federal prisoner proceeding  
24 pro se and in forma pauperis, filed a civil rights complaint pursuant to *Bivens v. Six*  
25 *Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999,  
26 29 L. Ed. 2d 619 (1971). On August 15, 2011, plaintiff filed a First Amended  
27 Complaint ("FAC"), which names nine defendants – the Federal Bureau of Prisons  
28 ("BOP") and various BOP employees.



1 The FAC asserts a single claim: that defendants acted with deliberate  
2 indifference to plaintiff's safety in violation of the Eighth Amendment. FAC at 5. In  
3 addition to the three defendants named in the original complaint (who have already  
4 been served), the FAC names six new defendants. The three served defendants named  
5 in the FAC are: (1) Pablo Prieto, a Correctional Counselor at the U.S. Penitentiary at  
6 Victorville ("USP Victorville"); (2) Richard Bourn, a Captain at the USP Victorville;  
7 and (3) Josh Halstead, an SIS Lieutenant at USP Victorville. The six new defendants  
8 are: (1) Joseph Norwood, the Warden at USP Victorville; (2) V. Graham, an Officer at  
9 USP Victorville; (3) Robert McFadden, a BOP Regional Director in Stockton,  
10 California; (4) BOP; (5) John Dignam, BOP Chief of Internal Affairs in Washington,  
11 D.C.; and (6) Delbert Savers, BOP D.S.C.C. Chief in Grand Prairie, Texas. *Id.* at 3-4.

12 On October 24, 2011, the court screened the FAC and found it subject to  
13 dismissal for failure to state a claim against defendants Graham, Dignam, and Savers,  
14 but granted plaintiff leave to amend. *See* Oct. 24, 2011 Order. On November 7, 2011,  
15 plaintiff filed a Voluntary Partial Dismissal – dismissing defendants Graham, Dignam,  
16 and Savers – and elected to proceed on the FAC with the remaining defendants.

17 On March 23, 2012, defendant BOP filed a Motion to Dismiss the FAC under  
18 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("BOP Motion"), arguing that:  
19 (1) the court lacks subject matter jurisdiction over plaintiff's claim for declaratory  
20 relief; and (2) the FAC fails to state a claim for injunctive relief that can be granted.  
21 BOP Mot. at 4-7. Because plaintiff seeks only declaratory and injunctive relief  
22 against BOP, BOP seeks dismissal due to the FAC's failure to state a claim for relief  
23 that can be granted against BOP. *Id.* at 3-7.

24 On March 26, 2012, defendants McFadden and Norwood moved to dismiss the  
25 FAC under Federal Rule of Civil Procedure 12(b)(6) ("M&N Motion"), arguing the  
26 FAC fails to state a claim upon which relief can be granted against them. M&N Mot.  
27 at 6-9. Defendants McFadden and Norwood also argue they are entitled to qualified  
28 immunity. *Id.*

1 On April 2, 2012, plaintiff opposed the BOP Motion (“First Opposition”), and  
2 defendant BOP filed a Reply on April 16, 2012. Plaintiff opposed the M&N Motion  
3 on April 13, 2012, and defendants McFadden and Norwood filed their Reply on April  
4 26, 2012. The court also stayed this case from April 17 to June 13, 2012 based on  
5 plaintiff’s request and defendant’s non-objection.

6 As described in more detail below, the court finds that plaintiff is not entitled to  
7 the declaratory or injunctive relief he seeks against BOP. The court also finds that the  
8 FAC sufficiently states an Eighth Amendment claim against defendants McFadden  
9 and Norwood. As such, it is recommended that defendant BOP’s Motion to Dismiss  
10 be granted, and defendants McFadden’s and Norwood’s Motion to Dismiss be denied.

## 11 II.

### 12 X PERTINENT ALLEGATIONS OF THE FIRST AMENDED COMPLAINT

13 Plaintiff was convicted in federal court and sentenced to 240 months in prison  
14 in 2007. FAC at 7. After plaintiff was termed a “snitch” by other inmates and  
15 assaulted, plaintiff was reassigned to USP Florence in Colorado. *Id.* at 7-8. At USP  
16 Florence, plaintiff engaged in certain gang activity, and then attempted to leave his  
17 gang. *Id.* at 8. Defendant BOP denied plaintiff’s request for protection from the gang  
18 and its associates. *Id.* On or about December 12, 2007, plaintiff was beaten  
19 unconscious by his cellmate at USP Florence. *Id.*

20 On February 14, 2008, plaintiff was transferred to USP Victorville. FAC at 8.  
21 Defendants Norwood and McFadden were responsible for supervising and training  
22 staff, and for the security plans at USP Victorville, and they were notified of the  
23 details concerning every gang-related assault or murder at the prison. *Id.* Defendants  
24 Bourn and Halstead were responsible for security, and for investigating assaults and  
25 reporting to defendants Norwood and McFadden. *Id.* at 8-9. Defendants Norwood,  
26 Bourn, McFadden and Halstead were aware of illegal activity, including assaults and  
27 murders, but failed to investigate or take steps to stop the illegal activity and protect  
28 inmates. *Id.* at 9. Defendant Prieto actively assisted the Mexican Mafia in extortion,



1 drug trafficking, and gang activity. *Id.*

2 On February 15, 2008, during a classification review, plaintiff warned  
3 defendants Bourn and Halstead he would be attacked by his gang, but they refused to  
4 segregate him. FAC at 9-10. Although the gang in his assigned unit was not yet  
5 aware of plaintiff's history, plaintiff continued to request protection, but defendants  
6 Bourn, Halstead, and Norwood denied his requests. *Id.* at 10.

7 Plaintiff began to file administrative grievances through defendant Prieto, who  
8 became upset by this. FAC at 10. Defendant Prieto provided an administrative  
9 response discussing plaintiff's sexuality and desire for protection to plaintiff's  
10 cellmate, who gave it to the Mexican Mafia. *Id.* The Mexican Mafia then ordered an  
11 assault on plaintiff. *Id.* The assault took place in a cell and caused bruises and  
12 swelling to plaintiff's face. *Id.* Defendants Bourn, Norwood, and Halstead observed  
13 plaintiff's injuries, but refused to protect plaintiff. *Id.*

14 Shortly thereafter, the Mexican Mafia ordered plaintiff killed. FAC at 10. On  
15 April 9, 2008, five inmates armed with shanks entered plaintiff's cell and attempted to  
16 kill him. *Id.* at 11. Plaintiff sustained severe injuries, including stab wounds and  
17 broken bones. *Id.* Immediately following the assault, defendants Norwood and Bourn  
18 attempted to house plaintiff with a member of the gang that had just assaulted him;  
19 plaintiff refused. *Id.*

20 After the April 9, 2008 assault, plaintiff attempted to help defendants Bourn,  
21 Halstead, and McFadden investigate the assault. FAC at 11. Defendant McFadden  
22 rejected plaintiff's submission. *Id.* Defendants Bourn and Halstead interviewed gang  
23 allies and falsely reported on the incident to cover it up. *Id.* Defendant Norwood  
24 deliberately ignored plaintiff's pleas to refer the matter to the FBI. *Id.* No inmates  
25 were disciplined for the attempted murder. *Id.*

26 Based upon these allegations, plaintiff claims defendants were deliberately  
27 indifferent to his safety, in violation of the Eighth Amendment. Plaintiff requests: (1)  
28 compensatory damages of \$5,000 against defendants Halstead, Bourn, Prieto,

1 Norwood, and McFadden; (2) punitive damages of \$2,500,000 against defendants  
2 Halstead, Bourn, Prieto, Norwood, and McFadden; (3) “Declaratory Judgment that  
3 Bureau of Prison is grossly inadequate in investigating gang activity and acting to  
4 segregate gangs, disrupt gang activity, prevent assaults, stop criminal activity in  
5 violation of the 8th Amendment”; and (4) an injunction compelling BOP to: (a)  
6 “Consider placing plaintiff in Witness Security Program or state prison for his  
7 protection”; (b) “Formulate procedure to identify and segregate any inmate who is a  
8 member or associate of a prison gang until such time that person credibly renounces  
9 gang activity or that gang is no longer deemed a threat to the safety, security and order  
10 of correctional facilities”; and (c) “Fully debrief the plaintiff and refer all information  
11 provided to the Federal Bureau of Investigation [(“FBI”)] for criminal investigation.”  
12 FAC at 6.

13  III.

14 LEGAL STANDARDS

15 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may  
16 move to dismiss a complaint for “failure to state a claim upon which relief can be  
17 granted.” A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests  
18 the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).  
19 Dismissal for failure to state a claim “can be based on the lack of a cognizable legal  
20 theory or the absence of sufficient facts alleged under a cognizable legal theory.”  
21 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

22 “When there are well-pleaded factual allegations, a court should assume their  
23 veracity and then determine whether they plausibly give rise to an entitlement to  
24 relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868  
25 (2009). But “the tenet that a court must accept as true all of the allegations contained  
26 in a complaint is inapplicable to legal conclusions. Threadbare recitals of the  
27 elements of a cause of action, supported by mere conclusory statements, do not  
28 suffice.” *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555,



1 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The allegations made in a complaint must  
2 both “contain sufficient allegations of underlying facts to give fair notice and to  
3 enable the opposing party to defend itself effectively . . . [and] must plausibly suggest  
4 an entitlement to relief, such that it is not unfair to require the opposing party to be  
5 subjected to the expense of discovery and continued litigation.” *Starr v. Baca*, 652  
6 F.3d 1202, 1216 (9th Cir. 2011).

7 Where a plaintiff proceeds pro se in a civil rights case, the court must construe  
8 the pleadings liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi*  
9 *v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal  
10 construction is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963  
11 F.2d 1258, 1261 (9th Cir. 1992) (citation omitted). Nonetheless, in giving liberal  
12 interpretation to a pro se civil rights complaint, courts may not “supply essential  
13 elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of*  
14 *Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of  
15 official participation in civil rights violations are not sufficient to withstand a motion  
16 to dismiss.” *Id.* (citations omitted); *see also Jones v. Cmty. Redev. Agency*, 733 F.2d  
17 646, 649 (9th Cir. 1984) (finding conclusory allegations unsupported by facts  
18 insufficient to state a claim under § 1983). “The plaintiff must allege with at least  
19 some degree of particularity overt acts which defendants engaged in that support the  
20 plaintiff’s claim.” *Jones*, 733 F.2d at 649 (internal quotation marks omitted).

21 The court must give a pro se litigant leave to amend his complaint “unless it  
22 determines that the pleading could not possibly be cured by the allegation of other  
23 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quotation  
24 marks and citations omitted). Thus, before a pro se civil rights complaint may be  
25 dismissed, the court must provide the plaintiff with a statement of the complaint’s  
26 deficiencies. *Karim-Panahi*, 839 F.2d at 623-24. But where amendment of a pro se  
27 litigant’s complaint would be futile, denial of leave to amend is appropriate. *See*  
28 *James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000).

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IV.

DISCUSSION

Preliminarily, plaintiff's assertion that defendants' motions are moot, or amount to improper motions for reconsideration of the court's October 24, 2011 Order Dismissing First Amended Complaint, is mistaken. The court's October 24th Order was nothing more than a screening order, in which the court sought to identify glaring deficiencies in the FAC pursuant to its obligations under 28 U.S.C. §§ 1915(e)(2) and 1915A. It was not intended to, and did not, foreclose defendants' right to contest the adequacy of the FAC under Rule 12 of the Federal Rules of Civil Procedure.

Accordingly, the court will consider defendants' motions.

A. BOP Should Be Dismissed from this Action

Plaintiff seeks a declaration that BOP is "grossly inadequate in investigating gang activity and acting to segregate gangs, disrupt gang activity, prevent assaults, stop criminal activity in violation of the 8th Amendment." FAC at 6. Plaintiff also seeks injunctive relief compelling BOP to: (1) consider placing plaintiff in Witness Security Program or state prison for his protection; (2) formulate procedures to identify and segregate any inmate who is a member or associate of a prison gang; and (3) fully debrief plaintiff and refer all information provided to the FBI for criminal investigation. *Id.* For the reasons detailed below, the court finds that plaintiff is not entitled to declaratory or injunctive relief against BOP and his claim against BOP should therefore be dismissed.

1. Plaintiff's Request for Declaratory Relief Should Be Stricken

A party does not have an absolute right to a legal determination of its claim under the Declaratory Judgment Act, 28 U.S.C. § 2201. *See United States v. Washington*, 759 F.2d 1353, 1356 (9th Cir. 1985) (en banc) (per curiam). "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431, 68 S. Ct. 641, 92 L. Ed. 784 (1948)



1 (citations omitted); *see Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 533 (9th  
2 Cir. 2008) (“Federal courts do not have a duty to grant declaratory judgment;  
3 therefore, it is within a district court’s discretion to dismiss an action for declaratory  
4 judgment.” (citations omitted)). Declaratory relief should be denied when “prudential  
5 considerations counsel against its use,” or when the relief requested “will neither serve  
6 a useful purpose in clarifying and settling the legal relations in issue nor terminate the  
7 proceedings and afford relief from the uncertainty and controversy faced by the  
8 parties.” *Washington*, 759 F.2d at 1357 (citations omitted). It is unnecessary to settle  
9 the entire controversy; it is enough if “a substantial and important question currently  
10 dividing the parties” is resolved. *L.A. Cnty. Bar Ass’n v. Eu*, 979 F.2d 697, 703-04  
11 (9th Cir. 1992).

12 Here, in the event this action reaches trial and the jury returns a verdict in favor  
13 of plaintiff, that verdict will be a finding that plaintiff’s Eighth Amendment rights  
14 were violated. But a declaration that BOP violated plaintiff’s Eighth Amendment  
15 rights “will neither serve a useful purpose in clarifying and settling the legal relations  
16 in issue nor terminate the proceedings and afford relief from the uncertainty and  
17 controversy faced by the parties.” *See Washington*, 759 F.2d at 1357. Indeed, as  
18 defendant notes, the declaratory relief plaintiff seeks amounts to an improper request  
19 for an advisory opinion regarding alleged gross inadequacies by BOP generally, going  
20 far beyond the scope of plaintiff’s case. It would be improper for the court to issue  
21 such an advisory opinion. *See Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333  
22 U.S. 103, 113-14, 68 S. Ct. 431, 92 L. Ed. 568 (1948).

23 Because plaintiff’s request for declaratory relief is improper and cannot be  
24 granted, it should be stricken from the FAC without leave to amend.

25 2. The Court Lacks Jurisdiction to Grant Plaintiff’s Request to Be Placed in  
26 the Witness Security Program or State Prison

27 It is well established that a federal court may issue an injunction only “if it has  
28 personal jurisdiction over the parties and subject matter jurisdiction over the claim; it

1 may not attempt to determine the rights of persons not before the court.” *Zepeda v.*  
2 *United States Immigration and Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir.  
3 1985); *see also In re Rationis Enters., Inc. of Panama*, 261 F.3d 264, 267 (2d Cir.  
4 2001) (“requirement that jurisdiction be established as a threshold matter springs from  
5 the nature and limits of the judicial power of the United States and is inflexible and  
6 without exception” (internal quotation marks and citation omitted)). Accordingly,  
7 “[u]nder Federal Rule of Civil Procedure 65(d), an injunction binds only ‘the parties  
8 to the action, their officers, agents, servants, employees, and attorneys, and . . . those  
9 persons in active concert or participation with them.’” *Zepeda*, 753 F.2d at 727; *see*  
10 *also Citizens Alert Regarding the Env’t v. United States Env’tl. Prot. Agency*, 259 F.  
11 Supp. 2d 9, 17 n.7 (D.D.C. 2003), *aff’d*, 102 Fed. App’x 167 (D.C. Cir. 2004) (a  
12 district court is “powerless to issue an injunction against” an entity that is “not a party  
13 to [the] action”); *Gilchrist v. Gen. Elec. Capital Corp.*, 262 F.3d 295, 301 (4th Cir.  
14 2001) (“any injunction entered against individuals is an *in personam* action that may  
15 be enforced against individuals only over whom the court has personal jurisdiction,”  
16 unless the individuals “could be shown to have been ‘in active concert or participation  
17 with’ parties over whom the court ha[s] jurisdiction” (citations omitted)).

18 Here, in order to grant part of plaintiff’s desired relief – to be considered for  
19 admission into the Witness Security Program – the court must be able to exercise  
20 jurisdiction over the Department of Justice’s Criminal Division’s Office of  
21 Enforcement Operations (“OEO”). It is OEO, not BOP, that determines who is  
22 admitted into the Witness Security Program. Opp’n, Eliezer Ben-Shmuel Decl. ¶ 10,  
23 Nov. 3, 2011, ECF No. 63; *see also Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646,  
24 649 (9th Cir. 1988) (“it is proper for the district court to ‘take judicial notice of  
25 matters of public record outside the pleadings’ and consider them for purposes of the  
26 motion to dismiss” (citations omitted)). The court’s jurisdictional reach fails to extend  
27 that far. OEO is not a party to this action. *See* FAC at 3-4. Plaintiff also does not  
28 contend, much less establish, that OEO is somehow acting “in active concert or



1 participation with” defendants. *See generally id.* at 5-12. The court therefore lacks  
2 the authority to direct OEO to consider admitting plaintiff into the Witness Security  
3 Program.

4 With respect to plaintiff’s request that BOP be ordered to consider transferring  
5 him to a state prison, plaintiff has no constitutional right to be incarcerated in a  
6 particular institution nor to be transferred from one facility to another. *See Olim v.*  
7 *Wakinekona*, 461 U.S. 238, 245, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) (“inmate  
8 has no justifiable expectation that he will be incarcerated in any particular prison”);  
9 *see also Meachum v. Fano*, 427 U.S. 215, 224-25, 96 S. Ct. 2532, 49 L. Ed. 2d 451  
10 (1976) (“Confinement in any of the State’s institutions is within the normal limits or  
11 range of custody which the conviction has authorized the State to impose.”).  
12 Moreover, where a prisoner is challenging conditions of confinement and is seeking  
13 injunctive relief, transfer to another prison renders the request for injunctive relief  
14 moot absent some evidence of an expectation of being transferred back. *See Preiser v.*  
15 *Newkirk*, 422 U.S. 395, 402-03, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975); *Johnson v.*  
16 *Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam). In this case, because plaintiff  
17 is challenging conditions of confinement at USP Victorville and is seeking injunctive  
18 relief to be placed in the Witness Security Program or transferred to state prison for  
19 his protection, his transfer from USP Victorville in May 2008 rendered his request for  
20 injunctive relief moot. *See id.*; *see also* FAC at 12.

21 3. Plaintiff’s Request that BOP Formulate Procedures to Identify and  
22 Segregate Inmate Gang Members Is Not Relief Available in this Case

23 For injunctive relief to be granted in a civil action with respect to prison  
24 conditions, the relief must be “narrowly drawn, extend[] no further than necessary to  
25 correct the violation of the Federal right, and [be] the least intrusive means necessary  
26 to correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1). In this case, the  
27 harm plaintiff apparently seeks to prevent is harm inflicted on him by his former gang  
28 and the Mexican Mafia. *See* FAC at 9-12. But plaintiff’s request that BOP formulate

1 procedures to identify and segregate inmates who are members or associates of a  
2 prison gang reaches much farther than the harm at issue and extends to all prisoners.  
3 This is not a class action, and plaintiff has no right to assert claims on behalf of other  
4 inmates. *See Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008) (“the  
5 privilege to represent oneself *pro se* provided by [28 U.S.C.] § 1654 is personal to the  
6 litigant and does not extend to other parties or entities”); *Oxendine v. Williams*, 509  
7 F.2d 1405, 1407 (4th Cir. 1975) (“it is plain error to permit this imprisoned litigant  
8 who is unassisted by counsel to represent his fellow inmates in a class action”).

9 Because the relief plaintiff seeks would extend to prisoners other himself, and  
10 would “bind[] prison administrators to do more than the constitutional minimum,” the  
11 court may not grant plaintiff’s desired relief. *See Gilmore v. California*, 220 F.3d 987,  
12 999 (9th Cir. 2000). In addition, as with the housing relief plaintiff requests,  
13 plaintiff’s request for relief with respect to prisoner classification is moot, since  
14 plaintiff has been transferred to a prison other than the one with the conditions at issue  
15 in this case. *See Preiser*, 422 U.S. at 402-03; *Johnson*, 948 F.2d at 519. For these  
16 reasons, plaintiff’s request for relief affecting BOP gang classification procedures  
17 cannot be granted.

18 4. The Court Has No Legal Basis to Grant Plaintiff’s Request to Be Fully  
19 Debriefed and for the Information to Be Forwarded to the FBI

20 Plaintiff argues that “[t]he Crime Victims Rights Act confers upon Plaintiff the  
21 right to confer with the government and the right to be protected from his attackers[;]  
22 these rights may be enforced by injunction.” First Opp’n at 7 (citing 18 U.S.C.  
23 § 3771(a)(1), (a)(5), (d)). But, as defendant BOP points out, the relief plaintiff  
24 requests does not implicate any of the rights enumerated under § 3771.<sup>1</sup> BOP Reply at  
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26 <sup>1</sup> Under 18 U.S.C. § 3771(a), a crime victim has the following rights: (1) the right  
27 to be reasonably protected from the accused; (2) the right to reasonable, accurate, and  
28 timely notice of any public court proceeding, or any parole proceeding, involving the  
crime or of any release or escape of the accused; (3) the right not to be excluded from



1 3; *see also* Order, Sept. 29, 2011, ECF No. 49 (the court denied plaintiff's September  
2 19, 2011 Motion to Enforce Rights Under Crime Victims Rights Act, finding plaintiff  
3 failed to demonstrate that he is entitled to relief under 18 U.S.C. § 3771). At a  
4 maximum, § 3771 would only entitled plaintiff to "[t]he reasonable right to confer  
5 with the attorney for the Government in [a] case" against his attackers, but would not  
6 entitled plaintiff to an injunction compelling BOP to fully debrief him and forward  
7 that information to the FBI. *See* 28 U.S.C. § 3771(a)(5). This court has no  
8 jurisdiction to direct criminal investigations by the Executive branch.

9 Accordingly, because plaintiff has identified no legal basis for any of the  
10 requested injunctive relief, he is not entitled to such relief. Plaintiff's request for  
11 injunctive relief should be stricken from the FAC. And because the striking of  
12 plaintiff's requests for declaratory and injunctive relief will leave plaintiff without any  
13 claims against BOP, defendant BOP should be dismissed.

14 **B. Defendants McFadden and Norwood Should Not Be Dismissed at this**  
15 **Juncture**

16 Defendants McFadden and Norwood contend that – aside from alleging they  
17 had general knowledge of gang activity at USP Victorville – plaintiff fails to allege  
18 they had any knowledge that plaintiff would be assaulted and therefore fails to state an  
19 Eighth Amendment claim against them for failure to protect. M&N Mot. at 6-7. In  
20 addition, they contend that because plaintiff fails to allege facts showing they violated  
21 his Eighth Amendment rights that were clearly established in the specific context of  
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23 any such public court proceeding, unless the court, after receiving clear and  
24 convincing evidence, determines that testimony by the victim would be materially  
25 altered if the victim heard other testimony at that proceeding; (4) the right to be  
26 reasonably heard at any public proceeding in the district court involving release, plea,  
27 sentencing, or any parole proceeding; (5) the reasonable right to confer with the  
28 attorney for the Government in the case; (6) the right to full and timely restitution as  
provided by law; (7) the right to proceedings free from unreasonable delay; and (8) the  
right to be treated with fairness and with respect for the victim's dignity and privacy.

1 this case, they are entitled to qualified immunity. *Id.* Having duly reviewed the  
2 factual allegations, the court disagrees that dismissal of defendants McFadden and  
3 Norwood is warranted at this juncture.

4 1. The FAC Sufficiently States an Eighth Amendment Claim Against  
5 Defendants McFadden and Norwood for Failure to Protect

6 To state a claim against a prison official for violations of the Eighth  
7 Amendment based on the failure to protect an inmate from harm, the inmate must  
8 show that the official was deliberately indifferent to the inmate's safety. *Farmer v.*  
9 *Brennan*, 511 U.S. 825, 834, 847, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). To  
10 demonstrate that a prison official was deliberately indifferent to a serious threat to the  
11 inmate's safety, the prisoner must show that "the official [knew] of and disregard[ed]  
12 an excessive risk to inmate . . . safety; the official must both be aware of facts from  
13 which the inference could be drawn that a substantial risk of serious harm exists, and  
14 [the official] must also draw the inference." *Id.* at 837. Moreover, even when an  
15 official knows of a substantial risk to inmate health and safety, that official does not  
16 violate the Eighth Amendment if he or she responded reasonably to the risk, "even if  
17 the harm ultimately was not averted." *Id.* at 844.

18 Here, plaintiff alleges that he was termed a "snitch" by other inmates for  
19 cooperating with authorities and testifying against another inmate. FAC at 7. Before  
20 being transferred to USP Victorville, plaintiff engaged in certain gang activity as  
21 "punishment" for snitching on another inmate. *Id.* at 8. Plaintiff "attempted to leave  
22 his gang by seeking protection via the Administrative Remedy Program" and was later  
23 transferred to USP Victorville on February 14, 2008. *Id.* At USP Victorville, plaintiff  
24 continued to seek protection and filed administrative remedies about the conditions at  
25 USP Victorville. *Id.* at 10. An administrative response, discussing plaintiff's  
26 sexuality and desire for protection, was relayed from defendant Prieto to the Mexican  
27 Mafia. *Id.* The Mexican Mafia ordered an assault on plaintiff, which later occurred in  
28 a cell and caused bruises and swelling to plaintiff's face. *Id.* According to plaintiff,



1 “[f]ollowing each gang related assault, murder or event[, defendants] Norwood and  
2 McFadden were notified of the details and identities of [the] participants.” *Id.* at 8. In  
3 addition, “[d]efendants Norwood and McFadden were responsible for supervising and  
4 training staff, reviewing security plans or procedures, directing their preparation  
5 and/or modification, evaluating progress and effectiveness of plans or procedures at  
6 USP Victorville.” *Id.*

7 Following the assault, plaintiff was interviewed and his injuries were  
8 photographed. FAC at 10. Also, defendant Norwood personally observed plaintiff’s  
9 injuries but refused to protect plaintiff. *Id.* Shortly thereafter, the Mexican Mafia  
10 ordered plaintiff killed. *Id.* On April 9, 2008, five inmates armed with shanks entered  
11 plaintiff’s cell and attempted to kill him. *Id.* at 11. Plaintiff sustained severe injuries,  
12 including stab wounds and broken bones. *Id.*

13 Based upon these factual allegations, the court could reasonably infer that  
14 defendants McFadden and Norwood knew of and disregarded the substantial risk that  
15 the Mexican Mafia would further assault plaintiff, given plaintiff had already been  
16 assaulted by members or associates of the Mexican Mafia for his “sexuality and desire  
17 for protection.” *See Starr*, 652 at 1216. Moreover, given the gravity of the situation,  
18 the court may fairly infer from the facts alleged that defendants McFadden and  
19 Norwood exhibited deliberate indifference by their alleged nonfeasance. Although the  
20 factual allegations are not as specific as might be desired with respect to exactly what  
21 defendants Norwood and McFadden knew, given the liberal construction of the FAC  
22 to which plaintiff is entitled (*see Ferdik*, 963 F.2d at 1261), they are sufficient at this  
23 stage.

24 Accordingly, the court finds that plaintiff sufficiently states an Eighth  
25 Amendment claim against defendants McFadden and Norwood for failure to protect.

26 2. Defendants McFadden and Norwood Are Not Entitled to Qualified  
27 Immunity Based on the Facts Alleged in the FAC

28 “The doctrine of qualified immunity protects government officials ‘from

1 liability for civil damages insofar as their conduct does not violate clearly established  
2 statutory or constitutional rights of which a reasonable person would have known.”  
3 *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)  
4 (citation omitted). The qualified immunity standard “provides ample protection to all  
5 but the plainly incompetent or those who knowingly violate the law.” *Malley v.*  
6 *Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

7 In determining whether a public official is entitled to qualified immunity, the  
8 court employs a two-step inquiry: (1) whether the facts alleged show the officer’s  
9 conduct violated a constitutional right; and (2) whether the right was clearly  
10 established. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d  
11 272 (2001), *overruled in part on other grounds by Pearson*, 555 U.S. at 236. The  
12 two-step inquiry, however, need not be resolved in sequence; rather, the court may  
13 exercise its discretion in deciding which of the two-step inquiry should be addressed  
14 first. *Pearson*, 555 U.S. at 236. If a plaintiff satisfies both prongs by demonstrating  
15 that the officer violated his clearly established constitutional right, then the officer is  
16 not entitled to qualified immunity. *Foster v. Runnels*, 554 F.3d 807, 810 (9th Cir.  
17 2009). To determine whether a constitutional right was clearly established, the court  
18 considers “whether it would be clear to a reasonable officer that his conduct was  
19 unlawful in the situation he confronted.” *Ford v. Ramirez-Palmer*, 301 F.3d 1043,  
20 1050 (9th Cir. 2002) (internal quotation marks and citation omitted); *see also Saucier*,  
21 533 U.S. at 201 (the determination of whether the law was clearly established “must  
22 be undertaken in light of the specific context of the case”). Raising a qualified  
23 immunity defense in a motion to dismiss should be done with caution because it  
24 places the court in the difficult position of deciding “far-reaching constitutional  
25 questions on a nonexistent factual record.” *Kwai Fun Wong v. United States*, 373 F.3d  
26 952, 956-57 (9th Cir. 2004).

27 Here, as set forth above, “[t]aken in the light most favorable to the party  
28 asserting the injury,” the facts are sufficient to establish that the conduct of defendants



1 McFadden and Norwood violated plaintiff's constitutional rights under the Eighth  
2 Amendment. *See Saucier*, 533 U.S. at 201; *supra* Part IV.B.1. Further, at the time of  
3 defendants' alleged unconstitutional conduct (deliberate indifference to plaintiff's  
4 safety) in 2008, the law regarding a prison official's deliberate indifference to an  
5 inmate's safety had long been clearly established. *See, e.g., Farmer*, 511 U.S. at 833-  
6 34. Particularly, it was clearly established that "prison officials have a duty . . . to  
7 protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at  
8 833 (internal quotation marks and citation omitted). Once a prison official becomes  
9 subjectively aware of an excessive risk of harm to an inmate's safety, the official  
10 violates the inmate's Eighth Amendment rights if he disregards that risk. *Id.* at 837;  
11 *see also Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986) (a prison official need  
12 not "believe to a moral certainty that one inmate intends to attack another at a given  
13 place at a time certain before that officer is obligated to take steps to prevent such an  
14 assault" (internal quotation marks and citation omitted)).

15 Defendants may be able to show entitlement to qualified immunity once the  
16 record is further developed. But based just on the facts alleged in FAC, defendants  
17 McFadden and Norwood are not entitled to qualified immunity.

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V.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order:  
(1) approving and accepting this Report and Recommendation; (2) granting defendant BOP's Motion to Dismiss, dismissing BOP and striking plaintiff's requests for declaratory and injunctive relief from the FAC; and (3) denying defendants McFadden's and Norwood's Motion to Dismiss.

Dated: July 2, 2012



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SHERI PYM  
UNITED STATES MAGISTRATE JUDGE