Nos. 19-15224, 19-15359

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD ASHKER, et al.,

Plaintiffs-Appellees / Cross-Appellants,

v.

GAVIN S. NEWSOM, et al.,

Defendants-Appellants / Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California (Eureka)

Case No. 4:09-cv-05796-CW (RMI)
The Honorable Robert M. Illman, Magistrate Judge

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For years and even decades, the *Ashker* class was kept in solitary confinement in Security Housing Units (SHU), where they spent 23 hours per day in small, windowless cells devoid of all normal social interaction and environmental stimulation. The California Department of Corrections and Rehabilitation (CDCR) subjected Plaintiffs to these draconian conditions based not on evidence of violence or other prison rule violations, but rather on their "validation" as prison gang affiliates. After years of peaceful protests and litigation, Plaintiffs reached a settlement with CDCR that ended gang-based solitary confinement across the State and required the release of nearly all class members into the prison general population.

Plaintiffs also needed assurances that they would not be arbitrarily returned to the torture of solitary confinement. So they bargained for a Settlement that guaranteed they would only be placed in a SHU if found to have committed one of a limited number of serious prison rule violations at a disciplinary hearing which, under CDCR regulations, comports with the procedural protections accorded by *Wolff v. McDonnell*, 418 U.S. 539 (1974). CDCR agreed to train its staff to ensure that confidential information used against prisoners, including in disciplinary hearings, is accurate and properly disclosed. The parties also agreed to a two-year Settlement monitoring period, with a 12-month extension if systemic Constitutional violations continued or arose.

While CDCR complied with some important terms of the Settlement and released most class members from solitary, for many prisoners relief has been temporary. During the Settlement's two-year monitoring period, Plaintiffs uncovered evidence that Defendants are returning dozens of class members to solitary confinement (sometimes after only weeks in general population) for prison rule violations based on fabricated, distorted or unreliable confidential information. CDCR's misuse of confidential information is systemic, occurring in more than one third of SHU-eligible rule violations involving such information.

The *Ashker* class also had alleged that an unwritten policy prevented any prisoner housed in the SHU based on gang validation from being granted parole; this was an important factor in Plaintiffs' claim that the use of constitutionally deficient and unreliable gang validations to send prisoners to SHU deprived them of a liberty interest. Among the anticipated improvements of the Settlement, the release of class members from SHU to general population was intended to resolve this *de facto* parole bar.

Instead, CDCR continues to provide the Board of Parole Hearings (BPH) with the old, constitutionally infirm gang-validations without any indication of their unreliability, thus interfering with the *Ashker* class's opportunity to seek parole. Gang validation is frequently a dispositive factor in parole consideration, placing class members in an untenable Catch-22. CDCR's old validation system

fails to reliably indicate gang activity, yet when class members claim that their validation was unreliable, BPH considers the challenge itself to constitute evidence of dishonesty. Thus, CDCR's unqualified provision of Plaintiffs' validations to BPH effectively bars class members from a meaningful opportunity to seek parole.

Based on these two systemic and ongoing violations of due process, which were alleged in Plaintiffs' Second Amended Complaint and arose from the Settlement Agreement reforms, the Magistrate Judge ordered a 12-month extension of the District Court's jurisdiction and monitoring. Defendants appeal from that order.

A third asserted due process violation is also at issue. Magistrate Judge Illman agreed with Plaintiffs that a "Restricted Custody General Population" unit (RCGP) created by the Settlement for prisoners who face a serious threat to their safety in general population imposes an atypical and significant hardship in relation to the ordinary incidents of prison life, giving rise to a liberty interest. However, the Judge found that Plaintiffs had not demonstrated a systemic denial of due process related to placement and retention in the unit. Plaintiffs cross-appeal from this latter ruling based on evidence that once a prisoner is designated to the RCGP, there is no way out, rendering periodic review of RCGP placement a sham.

CDCR's continuing due process violations may very well require this Court's attention in the future. But as a threshold matter, Defendants' appeal is

incurably premature. Defendants appealed directly from the decision of a Magistrate Judge, who had not been specially designated by the District Court and therefore did not issue a final appealable order. For this reason, the Appeal must be dismissed.

STATEMENT OF JURISIDICTION

Plaintiffs adopt Defendants' statement of the District Court's jurisdiction. However, Defendants are incorrect in indicating that this Court has jurisdiction under 28 U.S.C. § 1291. (Defendants-Appellants' Opening Brief "AOB" 2). The challenged order extending the *Ashker* Settlement Agreement was entered by Magistrate Judge Illman on January 25, 2019 (Court Docket "CD" 1122, Defendants-Appellants' Excerpts of Record "ER" 43) without having been referred by the District Court for a final order with consent of the parties under 28 U.S.C. § 636(c). Where, as here, the Magistrate Judge was not specially designated to enter final judgment on behalf of the District Court, any appeal to this Court from the Magistrate Judge's ruling is improper, and must be dismissed for lack of jurisdiction. *Id.*[1]

[1] Plaintiffs moved to dismiss the appeal on this basis on August 16, 2019 (Dkt. No. 39-1). The Court denied the motion without prejudice to renewing the argument in this brief. (Dkt. No. 45).

The authority of a magistrate judge to issue a final appealable order derives from the Federal Magistrates Act of 1979, 28 U.S.C. §§ 631-39. Under subsection 636(b), an Article III district court may designate a magistrate judge to hear various matters subject to review by the district judge before becoming final for appeal. 28 U.S.C. § 636(b). Under subsection 636(c), by contrast, a magistrate judge may be "specially designated to exercise such jurisdiction by the district court," and then "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" "[u]pon the consent of the parties." 28 U.S.C. § 636(c)(1). Upon a special designation with consent under section 636(c), "an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court." 28 U.S.C. § 636(c)(3).

Thus, two requirements must be met before a magistrate judge may properly exercise civil jurisdiction under § 636(c): "(1) the parties must consent to the magistrate judge's authority and (2) the district court must 'specially designate[ ]' the magistrate judge to exercise jurisdiction." *Parsons v. Ryan*, 912 F.3d 486, 495 (9th Cir. 2018) (citation omitted); *see also Columbia Record Prods. v. Hot Wax Records, Inc.,* 966 F.2d 515, 516-17 (9th Cir. 1992) (magistrate judge who issued an order without special designation from the district court "lacked authority to

enter" a final order, and the Court of Appeals must "accordingly vacate that order and remand the matter to the district court"). Appellate jurisdiction "depends on the magistrate judge's lawful exercise of jurisdiction . . . which in turn depends on proper district court designation and the voluntary consent of the parties." *Anderson v. Woodcreek Venture Ltd.*, 351 F.3d 911, 914 (9th Cir. 2003) (internal citations omitted); *see also Jones v. Ass'n of Flight Attendants-CWA*, 778 F.3d 571, 574 (7th Cir. 2015) (internal citations omitted) ("A purported final decision issued by a magistrate judge acting outside of his authority is a nullity. That means that we have no final judgment in this case; it is still pending before the district court with a *de facto* recommendation from the magistrate judge. We therefore lack appellate jurisdiction and must dismiss the appeal."); *Estate of Conners*, 6 F.3d 656, 658-59 (9th Cir. 1993) (referral must be deemed to be under § 636(b) where special designation is not specified).

In the present case, Defendants appear to concede that the Extension Motion was referred to the Magistrate Judge without being "specially designated" by the District Court, as they fail to indicate in their Statement of Jurisdiction any such designation. (AOB 2). Magistrate Judge Illman granted Plaintiffs' motion without any indication it was a final order (CD 1122, ER 43), yet Defendants filed a notice of appeal directly to this Court (CD 1126, ER 158). After Plaintiffs received Defendants' notice of appeal, Plaintiffs' counsel contacted CDCR counsel to

inquire as to the jurisdictional basis for the appeal. (Dkt. No. 39-2, at 3 ¶ 7). Good faith conversations between the parties resulted in a shared assumption that Judge Wilken had likely intended to refer the Extension Motion to Magistrate Judge Illman for a final order and the parties documented that belief, and their consent, in writing. (*Id.*; CD 1129, ER 156-7).

However, Judge Wilken subsequently clarified that the parties' assumption was wrong. In an order denying Defendants' motion for a stay, Judge Wilken stated that the Magistrate Judge's Extension Order "was *not* issued pursuant to the consent statute [28 U.S.C. § 636(c)]." (CD 1198, ER 17) (emphasis added). As the District Court's referral was not for a final order the parties' consent is irrelevant; parties cannot consent to a designation that was never made. Magistrate Judge Illman's order therefore is not properly appealable under subsection 636(c)(3). Defendants' appeal and Plaintiffs' cross-appeal should be dismissed and the matter remanded to the District Court.

STATEMENT OF ISSUES

1. Does this Court have jurisdiction under 28 U.S.C. § 1291 to review an order by a Magistrate Judge that was not specially designated by the District Court for a final order under 28 U.S.C. § 636(c)?

2. The Magistrate Judge found that Plaintiffs proved by a preponderance of the evidence that CDCR is systemically using fabricated and unreliable

confidential information to return class members to solitary confinement. Did the Magistrate Judge commit clear error when making this factual finding?

3. Is the Magistrate Judge correct that CDCR's use of a shield of confidentiality to systemically deny class members any meaningful opportunity to participate in their disciplinary hearings violates the Fourteenth Amendment to the United States Constitution?

4. Is the Magistrate Judge correct that CDCR's systemic violation of due process through misuse of confidential information is a proper basis to extend monitoring under paragraph 41 of the Settlement Agreement because the violation resulted from CDCR's failure to adhere to its promised reforms to SHU policies?

5. Is the Magistrate Judge correct that CDCR's old gang-validation system lacked necessary checks and balances, allowed use of unreliable evidence, provided the class with misleading notice, and lacked timely periodic review in violation of due process?

6. Is the Magistrate Judge correct that CDCR's unqualified transmission of old, constitutionally infirm gang validations to BPH effectively barred class members from a meaningful opportunity to seek parole?

7. Is the Magistrate Judge correct that CDCR's systemic deprivation of a fair opportunity for the class to seek parole is a proper basis to extend monitoring

under paragraph 41 of the Settlement Agreement because the violation was alleged in Plaintiffs' Second Amended Complaint?

8. Did the Magistrate Judge commit clear error in finding that the RCGP, as compared to general population, limits prisoners' parole eligibility and is a singular, remotely located, prolonged and stigmatizing placement?

9. Did the Magistrate Judge correctly find that the few dozen prisoners confined in the RCGP have a liberty interest in avoiding indefinite designation to a singular, remote, and stigmatizing prison unit because such a unit is an atypical and significant hardship in relation to the ordinary incidents of prison life?

10. Did the Magistrate Judge err in finding that RCGP procedures satisfy due process despite Plaintiffs' evidence that, once designated to the unit, Plaintiffs have no way to earn release through good behavior or periodic review?

ADDENDUM

Except for the following, all applicable constitutional provisions, treaties, statutes, ordinances, regulations or rules are contained in the Addendum of Defendants-Appellants' Opening Brief: 28 U.S.C. §§ 636, 1291; Cal. Code Regs. tit. 15 §§ 3321, 3370 (2017).

STATEMENT OF THE CASE

For over 25 years, California used the Pelican Bay SHU to warehouse the *Ashker* class in prolonged solitary confinement. By 2011, more than 500 prisoners

(about half the population of the Pelican Bay SHU) had been there for more than 10 years, and 78 had been there for more than 20 years. (CD 136, ER 388 ¶ 2).

I. THE *ASHKER* LITIGATION

In 2012 Plaintiffs filed a Second Amended Class Action Complaint which set forth two Constitutional claims. (CD 136, ER 387). First, Plaintiffs asserted that "the cumulative effect of extremely prolonged confinement, along with denial of the opportunity of parole . . . and other crushing conditions of confinement at the Pelican Bay SHU," caused Plaintiffs significant physical and psychological harm in violation of the Eighth Amendment. (CD 191, Plaintiffs-Appellees' Supplemental Excerpts of Record "SER" 7). Plaintiffs claimed that spending "'22 and one-half to 24 hours a day' 'in a cramped, concrete, windowless cell' without access to 'telephone calls, contact visits, and vocational, recreational or educational programming'" for over a decade deprived them of basic human needs. (*Id.*, SER 7, 8).

Second, "Plaintiffs allege[d] that CDCR's procedures for assigning inmates to the SHU [Security Housing Unit] and periodically reviewing those assignments" violated Due Process. (*Id.*, SER 9). As alleged in the Complaint, the use of confidential information to place or retain prisoners in the SHU was a significant aspect of this constitutionally infirm system. (CD 136, ER 391-93 ¶ 16, 17, 21; ER 406 ¶ 93; ER 410-413 ¶ 108-110, 118, 119). Specifically, Defendants were

violating Plaintiffs' "due process rights" by *inter alia*, retaining them in the SHU "without *reliable* evidence that plaintiffs and the class members are committing any acts on behalf of a prison gang. . . ." (*Id.*, ER 432 ¶ 202) (emphasis added).

Plaintiffs asserted that SHU confinement deprived prisoners of a liberty interest due to its harsh conditions, lengthy duration and effect on the opportunity for parole. (*Id.*, ER 430 ¶ 196). Numerous Plaintiffs were "eligible for parole, but have been informed by parole boards that they will never attain parole *so long as they are housed in the SHU*." (*Id.*, ER 405 ¶ 87, 88-90) (emphasis added). Indeed, a common question of law and fact was "[w]hether SHU confinement extends the duration of incarceration because of a de facto policy of denying parole to SHU prisoners." (*Id.*, ER 424 ¶ 171(f)).

Defendants filed a motion to dismiss the Second Amended Complaint, which the District Court denied on April 9, 2013. (CD 191, SER 6). Relevant to Plaintiffs' current claims, the District Court noted that "[according] to Plaintiffs, CDCR assigns inmates to the SHU . . . without regard for the inmate's 'actual behavior.' CDCR relies instead on the word of confidential informants and various indicia [of gang affiliation]." (*Id.*, SER 7). The District Court held that Plaintiffs adequately plead a due process violation, based on allegations of "a wide range of procedural deficiencies," which "must be considered as a whole." (*Id.*, SER 15-16). The Court did not determine "at this stage whether [Plaintiffs] are entitled to

the specific hearing procedures described in *Wolff v. McDonnell* [as Plaintiffs had argued] or merely the 'minimal process' required in . . . *Hewitt v. Helms*." (*Id.*, SER 16 (citations omitted)).

II. THE REQUIREMENTS OF THE *ASHKER* SETTLEMENT

In 2015, after years of intensive litigation, including a successful motion for class certification and the filing of a supplemental complaint on behalf of class members transferred from prolonged solitary confinement at Pelican Bay to similar conditions of isolation in other California SHUs, the parties negotiated a settlement. The intent was broad: "to address and settle Plaintiffs' claims . . . regarding the policies and practices of [CDCR] for placing, housing, managing and retaining inmates validated as prison gang members and associates, as well as the conditions of confinement in the [SHU] at Pelican Bay State Prison and other CDCR SHU facilities." (CD 424-2, ER 251).

The Settlement created new criteria and procedures for placement in the SHU, Administration Segregation and a Step Down Program (SDP) for gang affiliates. CDCR would no longer be allowed to isolate prisoners on the basis of gang validation. (*Id.,* ER 254 ¶ 13). Instead, the parties negotiated for CDCR to amend its "SHU Term Assessment Chart," which provided a limited list of rule violations for which California prisoners could receive a SHU term and subsequent SDP placement. (*Id.*, ER 255 ¶ 14, ER 278-280). Under pre-existing California

regulations and the Settlement, such SHU and SDP placement would only be imposed after a disciplinary hearing with substantial procedural protections. (*Id.*, ER 254-5 ¶ 13-18); Cal. Code Regs. tit. 15 § 3315. Requiring disciplinary hearings achieved Plaintiffs' fundamental goal of assuring that class members could only be sent to SHU after receiving "heightened due process under *Wolff v. McDonnell* . . . ." (CD 486, ER 241).

To provide the benefit of the provisions limiting future SHU and SDP placements to the *Ashker* class, CDCR also agreed to release all persons then serving indeterminate SHU terms for gang validation so long as they had "not been found guilty of a SHU-eligible rule violation with a proven STG nexus within the last 24 months." (CD 424-2, ER 258 ¶ 25).

The Settlement required CDCR to adhere to the standards for consideration of and reliance on confidential information set forth in CDCR regulations, and to develop and implement appropriate trainings to ensure that confidential information used against prisoners is accurate and properly disclosed. (*Id.,* ER 263 ¶ 34). To monitor this provision, the Settlement listed various categories of confidential information CDCR would produce to Plaintiffs' counsel on a periodic basis, including confidential information relied on to find class members guilty of rule violations resulting in a return to the SHU. (*Id.,* ER 265 ¶ 37(h), (k)).

The Settlement also created a new unit, the RCGP, which would primarily house prisoners "against whom there is a substantial threat to their personal safety should they be released to the General Population." (*Id.,* ER 259 ¶ 27). The RCGP was "designed to provide increased opportunities for positive social interaction with other prisoners and staff," in a small (and thus safer) setting, providing educational opportunities and recreational opportunities in "small group yards," access to "religious services," job assignments and "leisure time activity groups." (*Id.*, ER 260-61 ¶ 28).

To ensure that RCGP placement was only imposed when necessary, the Settlement provided for heightened procedural protections, including Institution Classification Committee (ICC) review of a potential RCGP placement, followed by Departmental Review Board (DRB) review and "articula[tion of] the substantial justification for the need" for RCGP placement. (*Id*.*,* ER 260 ¶ 27). The ICC reviews RCGP prisoners every 180 days to "verify whether there continues to be a demonstrated threat to the inmate's personal safety." (*Id.*). If no such threat exists, the ICC must refer the case to the DRB for potential release to general population. (*Id.*).

Finally, the Settlement created a 24-month monitoring period. Plaintiffs would be entitled to move for a 12-month extension of the Settlement if, at the end of that period, they proved by a preponderance of the evidence current and ongoing

systemic Constitutional violations "as alleged in Plaintiffs' Second Amended Complaint . . . or as a result of CDCR's reforms to its Step Down Program or the SHU policies contemplated by this Agreement." (*Id.*, ER 266-67 ¶ 41).

III. PLAINTIFFS' FINDINGS DURING THE MONITORING PERIOD AND THE RESULTING EXTENSION OF THE *ASHKER* SETTLEMENT

During the initial 24-month monitoring period, CDCR fulfilled its class-review obligations and transferred nearly all class members from the SHU. However, Plaintiffs' monitoring uncovered continuing systemic Constitutional violations arising from CDCR's failure to properly implement other key aspects of the Settlement. First, to monitor paragraph 34's requirement that CDCR adhere to its regulations about confidential information and train its staff to ensure such material is accurate and properly disclosed, Plaintiffs' counsel reviewed documents produced by CDCR related to prisoners found guilty of SHU-eligible rule violations with a Security Threat Group[2] nexus. (CD 424-2, ER 265 ¶ 37(h)). The first set of documents produced by CDCR involved gang-validated prisoners found guilty of such rule violations. Of about forty files produced between 2015 and 2017, twenty involved class members returned to SHU for various "conspiracy" or attempted murder charges based on (a) fabricated or improperly disclosed

[2] During the course of the *Ashker* litigation, CDCR ceased referring to "prison gangs" in favor of reference to "security threat groups" or "STGs."

confidential information, or (b) confidential material used without any independent analysis of reliability. (SEALED ER 1396 ¶ 3; CD 905, SER 32).

CDCR was forced to produce a second category of documents in 2018 involving non-validated prisoners found guilty of the same type of rule violation. (CD 970, SER 1). Under a pre-existing agreement between the parties, CDCR produced only a random sample of the confidential material relied upon, amounting to approximately 110 files. (CD 1027, SER 19). Of the approximately 110 prisoners found guilty of SHU-eligible offenses with an STG nexus based on confidential information whose complete files were produced by CDCR, Plaintiffs found that more than 45 (over 40%) of the disciplinary hearings were flawed because CDCR officials fabricated, inadequately disclosed, or failed to independently assess the reliability of the confidential information. (*Id.*).

Plaintiffs submitted evidence of this systemic due process violation to the District Court, and in January of 2019 Magistrate Judge Illman extended the Settlement for 12 months. (CD 1122, ER 69). The Magistrate Judge catalogued Defendants' pattern and practice of fabricating confidential information, including one case where a prisoner found guilty of attempted murder was told he had been identified by a witness during a photographic line-up but "the underlying confidential memorandum indicates that the informant was shown a photographic array the day after the incident, and another array two weeks later, neither of which

resulted in the identification of this prisoner" (CD 1122, ER 53-60, 64-67); another case where a "prisoner was told that the evidence against him included two confidential sources . . . however, according to the underlying confidential memorandum, there were not two sources, there was only one, and that person stated that he did not witness the event in question" (*id.*, ER 58); and dozens of other examples, leading Magistrate Judge Illman to conclude that "time and again, the shield of confidentiality for informants and their confidential accounts is used to effectively deny class members any meaningful opportunity to participate in their disciplinary hearings" and that "CDCR systemically relies on confidential information without ensuring its reliability, thus, improperly returning class members to solitary confinement and frustrating the purpose of the Settlement Agreement." (*Id.*, ER 66).

Second, as described above, Plaintiffs' Second Amended Complaint had challenged CDCR's reliance on faulty gang validations to indefinitely isolate class members in SHU, which, beyond placing them in crushing conditions of confinement, also resulted in a *de facto* ban on parole. (CD 136, ER 389 ¶ 6, ER 430 ¶ 196). While the Settlement barred SHU placement based on gang validation, Plaintiffs' monitoring uncovered evidence that CDCR's unqualified transmittal of its old, faulty gang validations to the BPH continued to effectively bar class members from a fair opportunity to seek parole. Class members' parole transcripts

showed that gang validation is a significant if not dispositive factor in parole consideration, with parole commissioners continuing to rely on faulty gang validations notwithstanding a prisoner's release from SHU. (SEALED SER 1629-1633 ¶ 42-56, *summarizing* SEALED SER 1635-1893). During parole review, the simple fact of a prisoner's validation raises an irrebuttable presumption of actual gang activity or affiliation. The truth and accuracy of the validation goes unquestioned by BPH. As a Commissioner made clear: [REDACTED]

[REDACTED]

[REDACTED]." (SEALED SER 1855; *see also* SEALED SER 1787-88, 1790).

BPH's presumption of the legitimacy and accuracy of gang validation provided by CDCR could not be further from the truth. CDCR's Office of Correctional Safety (OCS) had exclusive authority to validate prisoners as gang affiliates, and OCS officials have admitted that this process lacked "independent review" and did not provide sufficient "check and balance . . . to review information generated by the OCS." (CD 908-1, SER 70, 84). Plaintiffs presented evidence to Magistrate Judge Illman of multiple flaws in CDCR's old gang-validation system, including that prisoners had no opportunity to meaningfully rebut alleged evidence of gang affiliation (CD 905, SER 35-36; CD 908-1, SER 314, 210), OCS's review of the Institution Gang Investigator's validation packet

was nothing more than a rubber stamp (CD 905, SER 36; CD 908-1, SER 196-96, 154, 172-77, 210-11), notice to prisoners of how to avoid being revalidated as an active gang member was misleading to the point of being nonsensical (CD 905, SER 38-40; CD 908-1, SER 300, 321), and CDCR's six-year periodic review of validation was far too infrequent to satisfy due process norms. (CD 905, SER 40-41; CD 908-1, SER 149, 160, 206-7, 292, 303, 418).

Magistrate Judge Illman credited Plaintiffs' "ample evidentiary examples" that "CDCR's old process for gang validation was constitutionally infirm." (CD 1122, ER 64). "As a result, prisoners' validations were sometimes based on as little as . . . having received correspondence (regardless of the content) or artwork, a birthday card, or other possessions from a validated gang member . . .". (*Id.*, ER 65). Despite these fundamental flaws, Magistrate Judge Illman found "evidence from a number of class members' parole transcripts" "that gang validation is a highly significant, if not often a dispositive factor in parole consideration, and that when prisoners dispute their validation at their parole hearings, Commissioners consider the challenge itself to constitute evidence of dishonesty and a manifestation of a lack of remorse or credibility." (*Id.*). Magistrate Judge Illman concluded that Plaintiffs demonstrated a systemic due process violation in CDCR's "use of unreliable gang validations to effectively bar class members a meaningful opportunity for parole." (*Id.*).

Having found two systemic due process violations, the Judge turned to the question of whether each violation arose from the Complaint or Settlement, as required for an extension. (*Id.*, ER 68). Magistrate Judge Illman concluded that "the systemic misuse of confidential information in disciplinary hearings to return class members to solitary confinement . . . is related to, and arose as a result of" the Settlement's reforms. (*Id.*). This violation "effectively frustrates the purpose of the agreement:" ending SHU placements based on "unreliable confidential information." (*Id.*). As for the parole issue, the violation was "alleged in" the Complaint itself, as Plaintiffs included allegations that the same unreliable gang validations which caused class members to be placed in indefinite solitary confinement also unfairly deprived them of a fair opportunity to seek parole. (*Id.*).

Finally, the Settlement allowed Plaintiffs to closely monitor CDCR's use of the RCGP. The RCGP was meant to be a transitional housing unit[3] designed to provide prisoners who face a safety threat with "increased opportunities for positive social interaction with other prisoners and staff" while they work towards release to general population. (CD 424-2, ER 260 ¶ 28). However, Plaintiffs found that in practice, CDCR was using the RCGP as an interminable placement

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[3] Details & History, *Pelican Bay State Prison (PBSP)*, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, http://www.cdcr.ca.gov/Facilities_Locator/PBSP.html (last visited Nov. 7, 2017) (describing the RCGP as a "transitional unit").

that is considerably more restrictive than general population. One CDCR senior official aptly described the unit as "[REDACTED]." (SEALED SER 1285).

Plaintiffs presented the Magistrate Judge with voluminous evidence regarding limitations on visitation, education and programming, and the unique and stigmatizing nature of the RCGP, especially as it relates to the majority of the population of the unit, who have been placed on indefinite "walk alone" status and are thus completely barred from any normal human interaction. (SEALED SER 1040-50). Based on this evidence, Magistrate Judge Illman found that prisoners have a liberty interest in avoiding RCGP placement. (CD 1122, ER 67).

Despite finding a liberty interest, the Magistrate Judge denied Plaintiffs' due process challenge to RCGP placement. This is reversible error. While the RCGP was meant to be a temporary unit, the evidence developed during monitoring shows that RCGP placement does not allow a path to general population. As shown below, RCGP prisoners are told they can earn release by programing without incident, but in practice their only avenue to release is to prove that they are no longer targeted for gang violence, though such evidence is virtually impossible for them to obtain. CDCR's periodic review of RCGP prisoners is thus frozen in time, with the outcome predetermined.

SUMMARY OF THE ARGUMENT

1. Magistrate Judge Illman found that CDCR is systemically relying on fabricated, inaccurately disclosed and unreliable confidential information to find prisoners guilty of SHU-eligible rule violations and return them to solitary confinement. Defendants do not challenge these factual findings, but instead argue their misuse of confidential information is harmless because a disciplinary hearing officer has access to the confidential information in question and can make her own assessment of reliability, and regardless in most cases there was some evidence to find each class member guilty. This argument ignores the requirement set forth in *Wolff v. McDonnell*, 418 U.S. 539 (1974), that a prisoner facing a loss of liberty pursuant to a rule violation must have an opportunity to marshal the facts and prepare a defense. A hearing in which a prisoner is falsely told of the existence of damning confidential evidence and has no means to challenge this evidence violates due process.

Similarly, Defendants misunderstand the requirements of *Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987) for ensuring that confidential information is reliable. Plaintiffs have shown (and Magistrate Judge Illman correctly found) that CDCR hearing officers systemically fail to make any independent assessment of whether confidential information is reliable; in most

cases it appears that hearing officers do not even read the confidential material, but rather rely on the fabricated summaries.

2. Magistrate Judge Illman properly extended the Settlement after finding that Defendants' systemic misuse of confidential information was a result of CDCR's reforms to its SHU policies. Defendants argue this was an error, insisting that the Settlement's provisions requiring CDCR to ensure the accuracy of confidential information and train its staff accordingly were not "reforms" to its SHU policies. Defendants' arguments ignore key Settlement Agreement reforms specific to confidential information and beg the question of why the parties contracted that Plaintiffs would spend 24 months monitoring CDCR's use of highly confidential information to find class members guilty of SHU-eligible rule violations if the issue were not raised by Plaintiffs' Complaint or part of the Settlement's reforms to Defendants' SHU policies. Defendants also ignore clear California law interpreting "as a result of" to require only a broad link between a factual situation and the event creating liability.

3. The Magistrate Judge found that gang validation is often a dispositive factor leading to denial of parole for class members, yet CDCR's process for validating class members as gang affiliates was fundamentally flawed and violates due process. CDCR's continued treatment of these flawed validations as reliable,

and unqualified transmittal of the validations to the BPH is currently and systemically depriving Plaintiffs of a fair opportunity to seek parole.

Defendants do not bother to defend CDCR's old validation system, but rather mischaracterize Plaintiffs' claim as an attack on BPH's procedures and decisions. This is not what Plaintiffs claim or Magistrate Judge Illman found. Rather, *Matthews v. Eldridge*, 424 U.S. 319 (1976) requires procedures which minimize the risk of erroneous decision making when a liberty interest is at stake. Plaintiffs have a state-created liberty interest in parole, and CDCR's *unqualified* transmission of unreliable gang validations to BPH denies them a meaningful opportunity to be heard by an unbiased decision-maker.

4. Magistrate Judge Illman correctly found that CDCR's systemic due process violations related to parole were alleged in Plaintiffs' Complaint, and thus require extension of the Settlement. Defendants disagree, arguing that Plaintiffs' Complaint did not include a *claim* regarding parole proceedings, so extension is improper. This ignores Plaintiffs' allegations detailing how gang validation and resulting SHU placement operated as a *de facto* bar to parole; this same bar operates today, after Plaintiffs' release from the SHU.

Defendants also argue that Plaintiffs should be estopped from seeking expungement of gang validations or changing BPH polices as the parties disavowed an intent to do either when seeking court approval of the Settlement.

Defendants waived their estoppel argument by failing to raise it below, but regardless it does not apply, because neither expungement of the past validations nor a change to BPH policies is necessary to remedy Plaintiffs' claim. Rather, CDCR must cease transmitting, without qualification, unreliable validations given their documented effect on prisoners' liberty interest in a meaningful opportunity to seek parole.

5. Magistrate Judge Illman found that the RCGP is "singular, remotely located, prolonged and stigmatizing" compared to general population and these characteristics render it atypical and significant in relation to the ordinary incidents of prison life, giving rise to a liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). Defendants offer no facts to rebut the Magistrate's findings, instead resting on vague assurances about what *may* be available to RCGP prisoners and understating the impact of "walk-alone status."

6. Finally, Plaintiffs seek to correct the Magistrate Judge's sole error below. Magistrate Judge Illman found that Plaintiffs failed to show a systemic due process violation in CDCR's procedures for placing and retaining class members in the RCGP. But Plaintiffs have presented evidence that once designated to an RCGP, for almost all prisoners there is no way out, and thus the "periodic review" required by *Wilkinson v. Austin*, 545 U.S. 209 (2005) operates as a sham.

STANDARD OF REVIEW

In reviewing enforcement of a settlement agreement, the Court of Appeal must defer to factual findings made by the district court unless they are clearly erroneous. *See Parsons v. Ryan*, 912 F.3d 486, 495 (9th Cir. 2018); *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982). The Court will not disturb factual findings without "a definite and firm conviction that a mistake has been committed." *Jones v. United States*, 127 F.3d 1154, 1156 (9th Cir. 1997).

Questions of law, including the District Court's interpretation of the terms of the Settlement Agreement, and whether certain facts amount to a due process violation, are reviewed *de novo*. *See Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989).

ARGUMENT

I. THE MAGISTRATE JUDGE PROPERLY EXTENDED THE SETTLEMENT BASED ON CDCR'S SYSTEMIC AND ONGOING MISUSE OF CONFIDENTIAL INFORMATION IN VIOLATION OF DUE PROCESS

The Magistrate Judge accepted Plaintiffs' evidence of more than 70 instances in which CDCR staff misused confidential information to return prisoners to solitary confinement for prison rule violations. These factual findings are subject to deference absent "a definite and firm conviction that a mistake has been committed." *Jones*, 127 F.3d at 1156. With very few exceptions, Defendants do not even attempt to contradict the Magistrate Judge's factual findings. Rather,

Defendants focus on 17 examples, arguing that none amount to a due process violation because the Constitution is not offended when a prison system fabricates confidential information to make it appear incriminating or corroborated when it is not or relies on confidential information without ensuring it is reliable, so long as the hearing officer has access to the confidential information and some evidence supports the guilty finding. This is erroneous as a matter of law and fact.

A. The Magistrate Judge's Factual Findings Are Not Clearly Erroneous; Plaintiffs' Evidence Shows Systemic Fabrication and Misuse of Confidential Information

Pursuant to the Settlement, gang-validated prisoners can only be returned to SHU if they are found guilty at a disciplinary hearing of specific misconduct constituting a SHU-eligible rule violation. (CD 424-2, ER 254-5, ¶13-18; ER 278); Cal. Code Regs. tit. 15 § 3315. When the alleged rule violation is based in part or in whole on confidential information, that confidential information is documented in a confidential memorandum written by a CDCR gang investigator. Confidential information may only be used by CDCR if it is found to be reliable. *Id.* § 3321(b)(1) & (c). The prisoner never sees the confidential memorandum, but rather receives a Rule Violation Report (RVR) and confidential disclosure form summarizing "as much of the confidential information as can be disclosed without identifying its source." *Id.* § 3321(b)(3)(B).

The Settlement requires CDCR to adhere to these regulations regarding confidential information and train its officials to ensure that confidential information used against prisoners is accurate and properly disclosed. (CD 424-4, ER 263 ¶ 34). To monitor this provision, Plaintiffs' counsel reviewed approximately 150 RVRs produced by CDCR with corresponding confidential memoranda and disclosures as a randomly selected subset of *all* disciplinary hearings for SHU-eligible offenses with an STG nexus involving confidential information. Plaintiffs' review showed that time and again, prisoners are provided with a confidential disclosure that is *more* inculpatory than what the confidential source actually reported and hearing officers charged with ensuring the reliability of confidential information credit this false—more inculpatory—material without noting any discrepancy or making any independent assessment of reliability.

Plaintiffs summarize the evidence below. To allow for public filing of this brief, and because Defendants have not made a serious challenge to the Magistrate Judge's factual findings, Plaintiffs follow the Magistrate Judge's example of describing the evidence in general terms. However, this approach does sacrifice significant detail. The non-redacted versions of Plaintiffs' Extension Motion, Reply, and Supplemental Brief in support of that motion, filed under seal in the District Court, provide rich details regarding each example (SEALED SER 1019-1039, 997-1006, 442-454) and Plaintiffs have attached a Prisoner Key so the Court

may review the more detailed version of the facts should it have questions regarding any of the incidents involving Prisoner-1 through Prisoner-69, described herein. The Prisoner Key is submitted and authenticated in Plaintiffs' Motion to Submit Documents Under Seal (filed herewith), and is filed as Attachment A to this brief and the Motion.

1. Plaintiffs' 40 Examples of Fabricated Confidential Information

First, the Magistrate Judge correctly found 40 instances in which CDCR fabricated confidential information in prisoner disciplinary hearings. For example, the Magistrate Judge found that in the case of three prisoners found guilty of attempted murder with a gang nexus, CDCR officials wrongfully indicated that a confidential source identified the three prisoners. (CD 1122, ER 57, 66). The RVR provided to Prisoner-1 indicated that he had been picked out of a photographic line-up by a confidential source, and the hearing officer relied on that evidence to find him guilty of attempted murder. (*Id.*, ER 57; SEALED ER 646, 655). However, the underlying confidential memorandum describing the investigation shows that the informant was shown a photographic array the day after the incident, and another two weeks later, and neither time did the source identify this prisoner. (SEALED ER 699-700). Prisoner-2 was told the same thing, when in fact the confidential source failed to pick him out of a photographic line-up the day after the incident (instead identifying others), and only positively

identified him (along with several other prisoners) in a follow-up photo array administered two weeks later. (CD 1122, ER 58; SEALED ER 665, 699-700). Even Prisoner-3, who *was* identified by the confidential source, received fabricated evidence: he was told that the confidential source had also informed authorities that the attempted murder was for the benefit of a gang, and the hearing officer cited this evidence when determining the offense had an STG nexus;[4] but the underlying confidential memorandum documenting the interview with the source contains no such information. (CD 1122, ER 58; SEALED ER 691, 694, 700-701).

This evidence—that CDCR fabricated a positive identification, failed to disclose a negative identification, and fabricated a source statement tying the incident to the gang—is uncontested. (AOB 56). Instead, Defendants argue that the fabrications do not matter, because "other evidence supported the charge." (*Id.*).

Similarly, the Magistrate Judge credited Plaintiffs' evidence regarding Prisoner-4, who was found guilty of ordering the murder of two prisoners in two separate RVRs. (CD 1122, ER 47, 66; SEALED ER 1417-19, 1463-65). The only

[4] The finding of an STG nexus renders a validated prisoner eligible for an additional two years in SHU, in the step down program. (CD 424-2, ER 255 ¶ 17, 19).

evidence connecting Prisoner-4 to the first incident was information provided by two confidential informants who each provided different accounts of why Prisoner-4 supposedly wanted the victim killed. (SEALED ER 1433, 1439-41). The Magistrate Judge properly found that CDCR misrepresented this confidential information in the confidential disclosures it provided to Prisoner-4, making it appear that the two sources corroborated each other, when in fact they provided different accounts. (CD 1122, ER 47, 66; SEALED ER 1424-27).

Again, Defendants do not attempt to contradict these factual findings, instead arguing that inconsistencies with respect to "such details" do not matter, because "the disclosure forms told the inmate that confidential sources said he ordered the murders." (AOB 51). This is yet another, even more troubling fabrication. Contrary to what the disclosures indicate, the first source *did not* state that Prisoner-4 ordered the murder; rather, the source stated that he was informed by someone else that Prisoner-4 ordered the murder. (SEALED ER 1433). Nor does it appear that the second source purported to have personal knowledge of this central fact. (SEALED ER 1439-41). Thus prisoner-4 (and now, it seems, CDCR counsel), was led to believe that two sources had personal knowledge he ordered a murder, when in fact the sources only reported hearsay.

A second RVR against Prisoner-4 was similarly flawed. The Magistrate Judge correctly found that two confidential sources provided different information

about a purported order by Prisoner-4 to kill someone, but CDCR's confidential disclosures harmonized the accounts, concealing from the prisoner the fact that the accounts differed in material respects. (CD 1122, ER 48, 66; SEALED ER 1444, 1470, 1472). The hearing officer relied on the harmonized evidence, apparently failing to read the confidential memorandum itself. (SEALED ER 1465). CDCR does not dispute this fabrication, arguing instead that the failure to disclose "details" does not offend due process because the hearing officer would have access to the underlying confidential documents and could therefore learn of any inconsistencies between the accounts (though he appears not to have done so). (AOB 52).

Prisoners-5, 6, 7, and 8 were found guilty of conspiring to murder another prisoner (who was never attacked). A confidential source stated that gang leaders had not decided what to do regarding a potential gang target, and until they could arrive at a decision, he should be treated with respect. (SEALED ER 1513). In direct contradiction, CDCR's confidential disclosure reported that the source said it was almost certain that killing would be sanctioned. (SEALED ER 1486-87).[5]

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[5] When Plaintiffs first brought this matter to CDCR's attention in the context of an enforcement motion, CDCR responded with a sworn declaration from a correctional administrator stating that CDCR never attributed the statement to a confidential source; rather it was the investigating officer's analysis of additional information gathered separately. (SEALED SER 1897-98 ¶ 15, 16). A second

As the Magistrate Judge summarized, "the potentially exculpatory part of the CI's account was never disclosed, and instead appears to have been replaced by an inculpating statement that the CI never uttered." (CD 1122, ER 48, 66). According to CDCR, this is just an "overstatement" which does not matter because it does not contradict the reliability of the confidential source. (AOB 52).

The Magistrate Judge found that Prisoner-9 and Prisoner-10 were also found guilty of conspiracy to murder after being provided fabricated evidence. (CD 1122, ER 50, 66). The two were told that an intercepted prisoner note evidenced a conspiracy to kill a fellow prisoner. (SEALED ER 1522). CDCR later learned from a confidential informant that its interpretation of the note was erroneous, and the sentence in question did not relate to the conspiracy the men were charged with. (SEALED ER 1535). The Magistrate Judge found that CDCR failed to disclose its error to the two men, instead providing them with another disclosure claiming, incorrectly, that the new confidential evidence "merely confirmed CDCR's initial interpretation." (CD 1122, ER 50, 66). Again, CDCR does not deny these central facts, but responds that the new evidence *also* provided some corroboration of the men's involvement in the charged conspiracy. (AOB 53).

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confidential memo shows this sworn testimony to be false. (SEALED ER 1503, 1022-23).

Prisoner-11 was told that a confidential source "indicated" that he conspired with another to commit a murder for the gang. (CD 1122, ER 58, 66; SEALED ER 714). The Magistrate Judge found no evidence that the source said this; rather, the source stated that Prisoner-11 had provided others with information about the victim. (CD 1122, ER 58, 66; SEALED ER 752-3). Here, Defendants would have the Court reverse the Magistrate Judge's factual finding of a fabrication—they insist the disclosure is accurate, because the source's statement "could 'indicate'" a conspiracy. (AOB 53). This is a remarkable slight-of-hand. A statement that *a confidential source indicated Prisoner-11 conspired with another to murder on behalf of a gang* paints a very different picture than a statement that *a confidential source provided evidence that could indicate Prisoner-11 conspired to commit murder*. (*Id.*).

The Magistrate Judge correctly found that no other evidence tied Prisoner-11 to the alleged conspiracy to murder. (CD 1122, ER 58, 66; SEALED ER 754). In response, CDCR vaguely argues that "interviews with other confidential sources and intercepted telephone calls" provide some corroboration, but a general citation to an 11-page confidential memorandum, without reference to any particular page or fact, cannot suffice to set aside the Magistrate Judge's factual finding. (AOB 53).

Defendants' half-hearted objections to the Magistrate Judge's findings with

respect to Prisoner-12 are equally unavailing. (*Id.*). Prisoner-12 was found guilty of playing a leadership role in a gang after his failure to obey a general command to get down on the ground appeared to be mirrored by other prisoners in the exercise yard. (CD 1122, ER 58; SEALED ER 771-80). He was told that two confidential sources both stated that if Prisoner-12 had made a move against the guard who ordered him down, other nearby gang members would have rushed to his aid. (CD 1122, ER 58; SEALED ER 772, 782, 784). However, the Magistrate Judge correctly found that there was only one source, not two, and that single source did not witness the events in question. (CD 1122, ER 58, 66; SEALED ER 772, 791, 799).

Defendants argue that "even if [this] were true," which "is not obvious," it would "make no difference" because the hearing officer did not rely on the confidential sources in making his decision and Prisoner-12 was able to mount a thorough defense. (AOB 54). This is incorrect; the hearing officer cited the two purported confidential sources in his decision. (SEALED ER 772, 775).[6]

[6] None of the fabrications of confidential information are "obvious." (AOB 54). Understanding each one requires a painstaking comparison of the RVR, confidential disclosures, and confidential memoranda. With respect to Prisoner-12, for example, a close review of the evidence demonstrates that CDCR drafted two separate confidential memoranda, and the first reported on an interview with one confidential source. (SEALED ER 788-93). A second confidential memorandum described the investigation more broadly (SEALED ER 796-801), and repeated the relevant information provided by the single confidential source,

The last example of fabricated evidence that Defendants deign to respond to (AOB 54), involves Prisoner-13, who was found guilty of battery, where the hearing officer's finding of a gang nexus was based solely on confidential information purportedly stating that the victim and Prisoner-13 were affiliates of rival gangs. (CD 1122, ER 58; SEALED ER 803, 814). However, the Magistrate Judge correctly found that the confidential memorandum included no statement that Prisoner-13 *was* an affiliate of the gang in question. (CD 1122, ER 58, 66; SEALED ER 818). Defendants make no effort to dispute these facts, but instead argue that one could still reasonably conclude that the altercation was gang-related, as three of the other prisoners involved in the battery were "believ[ed]" to be associated with the rival gang. (AOB 54).

Defendants ignore completely many other examples of fabricated confidential information found by the Magistrate Judge. Prisoner-14, for example, was found guilty of conspiracy to commit battery with a gang nexus based on an intercepted prisoner note. (CD 1122, ER 49; SEALED SER 1086 ¶

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with a reference to the first confidential memorandum (SEALED ER 799). Presumably, whomever drafted the RVR and the confidential disclosures did not realize they were reading two descriptions of a single source's statement (though the identical phrasing should have made that obvious) and concluded that two confidential sources provided the same, now-"corroborated" information. (SEALED ER 772). Defendants' general citation to 13 pages of confidential memoranda cannot refute the Magistrate Judge's factual findings based on Plaintiffs' careful analysis. (AOB 54; CD 1122, ER 66).

6). Prisoner-14 received an RVR and confidential disclosure stating that the author of the note had identified him as holding a position of authority in the gang and responsible for identifying two prisoners who were to be assaulted. (*Id.*). The Magistrate Judge correctly found, however, that the source provided this information about a person identified only by a nickname, which bore no resemblance to Prisoner-14's name. (CD 1122, ER 49; SEALED SER 1330). Thus Prisoner-14 was not only left "unaware that he had not been identified by name," but in fact "the contrary had been indicated to him through the materially inaccurate disclosure form" and thus he was unable to challenge the question of identity in the disciplinary proceeding. (CD 1122, ER 49, 66). The disciplinary hearing officer failed to notice the error; relying on the fabrication to find Prisoner-14 guilty. (SEALED SER 1321).

Prisoner-15 was found guilty of conspiring to commit murder. (CD 1122, ER 49; SEALED SER 1388). The RVR and confidential disclosure stated that a confidential source with firsthand knowledge said that Prisoner-15 ordered the murder of two other prisoners. (CD 1122, ER 49; SEALED SER 1376). But the Magistrate Judge correctly found that the "confidential source" was actually a recording of a phone call, and the transcript provided no indication that Prisoner-15 ordered the murder. (CD 1122, ER 49, 66; SEALED SER 1397-1401). Had the hearing officer reviewed the transcript, presumably he would have noticed the

issue; instead he relied on the fabrication to find Prisoner-15 guilty. (SEALED SER 1383).

Defendants also ignore Plaintiffs' evidence, credited by the Magistrate Judge, of two instances in which CDCR fabricated the existence of a corroborating source to confirm the account by the initial confidential informant. (CD 1122, ER 59). The disclosures provided to Prisoner-16 and Prisoner-17 stated that two sources provided the same information, when the confidential memoranda indicated there was only one. (SEALED SER 466, 471, 476-77, 498, 500). Both hearing officers relied on the fabricated corroborating source to find the informant reliable. (SEALED SER 464, 492). For Prisoner-17, there was significant evidence of actual innocence. (SEALED SER 493). Plaintiffs documented this same occurrence for Prisoners 18, 19 and 20. (SEALED SER 518, 532, 537, 544, 561).

Plaintiffs also provided the Court with four examples of confidential information being misstated or exaggerated when provided to Prisoners 21, 22, 23, and 24 to appear more definitive and reliable than it is. (SEALED SER 564, 589, 611, 633-637, 639-41, 660-664, 446). The hearing officers presiding over Prisoner-21 and 22's disciplinary hearings relied on these exaggerations rather than on the material in the confidential memoranda. (SEALED SER 570, 598).

Similarly, Defendants ignore Plaintiffs' evidence, also credited by the

Magistrate Judge, of a series of cases where CDCR officials portrayed their own investigatory conclusions as the statements of informants. (CD 1122, ER 59, 66). For example, the Magistrate Judge correctly found that Prisoner-25 was told that an informant identified him as perpetrating a beating on behalf of a gang; however, the confidential memorandum shows that the informant did not name Prisoner-25. (*Id.*; SEALED SER 676, 684, 686, 689-90). Instead, the gang investigator's own conclusion appears to have been the source of the identification. (SEALED SER 686, 689-90). The hearing officer relied on this fake confidential information when finding Prisoner-25 guilty. (SEALED SER 677). Plaintiffs provided the Court with evidence of gang investigator conclusions masked as statements from confidential informants for *fifteen other prisoners* (Prisoner-26 through Prisoner-40). (SEALED SER 694, 697-700, 702-4, 723, 725-731, 746, 748, 760, 761, 764-6, 768, 769, 773-7, 784, 447-8).

2. 15 Examples of Inadequately Disclosed Confidential Information

CDCR's systematic reliance on damning "confidential information" that has been fabricated out of thin air is perhaps the most shocking of Defendants' failures with respect to the use and disclosure of confidential information, but it is by no means their only unconstitutional practice. Defendants wholly ignore evidence of multiple occasions, credited by the Magistrate Judge, in which CDCR failed to disclose exculpatory confidential information. For example, Prisoner-41

was not informed that one confidential informant contradicted the reports of two other informants regarding Prisoner-41's involvement in a fight. (CD 1122, ER 59, 66; SEALED SER 790, 806-17). Prisoner-42 was found guilty of participating in a gang-related fight, despite his defense that the fight was not gang-related; confidential evidence corroborating his defense was not disclosed, and does not appear to have been considered by the hearing officer. (CD 1122, ER 59, 66; SEALED SER 824, 831, 842).

Plaintiffs also provided evidence to the Magistrate Judge regarding more than a dozen Prisoners (referred to collectively as Prisoner-43) who were found guilty of participating in a gang-related riot. (SEALED SER 867). No evidence supported an STG-nexus, and some of the prisoners had their RVRs reheard for that reason, while others, inexplicably, did not. (SEALED SER 850-1, 855-6, 867). Upon rehearing, the prisoners were informed that confidential information supported the STG nexus, and the hearing officer relied on this disclosure to issue a guilty finding; in fact, the confidential memorandum did not support the existence of an STG nexus. (SEALED SER 872, 881, 898).[7]

Prisoner-44, 45, 46, and 47 were charged with attempted murder of

[7] While the Magistrate Judge did not summarize this example, there is every indication that it and other examples provided to the court but not specifically mentioned in the court's decision played a role in the court's finding of a *systemic* violation. (CD 1122, ER 60, 66-67).

correctional officers stemming from a fight involving many participants. (ER 1359; SEALED SER 1412, 1478, 1514, 1545). The Magistrate Judge correctly found that their confidential disclosures omitted the exculpatory portions of confidential source accounts, including an informant's statement that the prisoners did not have weapons and did not appear to target any officers. (*Id.,* ER 50, 66; SEALED SER 1466, 1566-68).

Defendants similarly ignore the Magistrate Judge's finding of a series of inadequate disclosures of confidential information where the summary provided to the respective prisoners was so vague as to be completely useless. Prisoner-48 was charged with attempted murder, and the disclosure he received in advance of his disciplinary hearing (meant to allow him to defend against the charges) stated only that corroborated information identified Prisoner-48 as the assailant. (CD 1122, ER 50, 66; SEALED SER 1584).

Even more troubling, Prisoner-49 was found guilty of battery with an STG nexus even though prisoner witnesses provided evidence to the contrary. (SEALED SER 906, 911, 913). CDCR relied on one uncorroborated confidential source, which was disclosed to Prisoner-49 without any detail whatsoever, making a defense completely impossible. (SEALED SER 913, 934).[8]

[8] Prisoner-48's guilty finding led to extremely serious consequences. (SEALED SER 450).

Prisoner-19, 20, 50, 51, 52 and 53 were similarly provided with confidential disclosures so general as to be completely useless in preparing a defense. (SEALED SER 532, 561, 939, 942, 944, 1596).

3. 25 Examples of Unreliable Confidential Information

Along with these many examples of fabrication, mischaracterization and failure to effectively disclose confidential information, the Magistrate Judge also found that Plaintiffs proved that "CDCR systemically relies on confidential information without ensuring its reliability," for example by labeling confidential testimony reliable because it is corroborated, when in fact it is not, and by blocking class members' attempts to challenge reliability at their disciplinary hearings. (CD 1122, ER 66-67). Of Plaintiffs' voluminous examples, Defendants mention only a few, and insist they were harmless. (AOB 54-56).

Prisoner-54, for example, was found guilty of conspiracy to commit murder with a gang nexus based in part on a confidential informant who reported that he was instructed by Prisoner-54 to kill someone. (CD 1122, ER 51; SEALED ER 1544). Prisoner-54 attempted to defend himself by pointing out that this same confidential memorandum formed the basis of an identical rule violation report for a different prisoner and the hearing officer in that case had determined the informant was unreliable. (CD 1122, ER 51; SEALED ER 1542, 1553). The Magistrate Judge found that the hearing officer ignored this reasonable defense,

stating the confidential information was reliable with respect to Prisoner-54 without any exploration of substance or the other hearing officer's decision. (CD 1122, ER 51, 66; SEALED ER 1542).

Defendants insist this does not matter, as other sources corroborated the informant's statements "regarding [Prisoner-54's] authority to order murders in prison," (AOB 55), but this ignores the fact that the source in question provided *the only evidence* of the alleged conspiracy—all the other evidence involved incidents years earlier, relevant only to Prisoner 54's status. (SEALED ER 1544-46). Even more troubling, the confidential memorandum does not include the particular statement—implicating Prisoner-54 in the murder—allegedly attributed to Prisoner-54 by the source. (SEALED SER 1014). In other words, Prisoner-54 was found guilty of conspiracy to commit murder for a gang, where the purported victim was never touched, and the only evidence of any conspiracy was the word of one confidential source who was found unreliable by a different hearing officer. Prisoner-54's hearing officer did not consider reliability an issue worthy of consideration and failed to notice that the gang investigator attributed a statement to this source which he does not appear to have made.

Prisoner-55 received three hearings for a conspiracy to commit murder RVR due to procedural irregularities. (CD 1122, ER 51). He was found guilty each time by different hearing officers, who each found that two confidential

sources identified Prisoner-55 in the conspiracy, when in fact, the confidential memoranda showed that only one did. (CD 1122, ER 51; SEALED ER 1555-1557, 1586, 1596-1602, 1607, 1622). As the Magistrate Judge found, this error was replicated in the confidential disclosures provided to Prisoner-55, which even "went so far as to relate that one of the reasons that one informant had been deemed reliable was that another informant had independently provided the same information." (CD 1122, ER 51). Defendants object that "the documents' meaning is clear" and the "STG nexus" section was meant to summarize parts of the preceding evidence. (AOB 55). This argument makes no sense. The documents *are* clear: a statement that "[Source 1] and [Source 2] state [victim] was murdered on the orders of [Prisoner A, Prisoner-55, and Prisoner B] . . . ," (SEALED ER 1646), is generally understood to mean that both sources identified all three prisoners, not that one source identified all three and the other only identified two. This means that *none* of the correctional officers who prepared the disclosures, the hearing officers who made the guilty findings, or the chief disciplinary officers who reviewed those findings read the actual underlying confidential memorandum to determine what the informant said and whether his statements should be deemed reliable.

Prisoner-56 was seen assaulting another prisoner; no weapons were used, and the victim walked away. (CD 1122, ER 51; SEALED ER 1652, 1599-1600).

The only evidence to support a gang nexus, and to implicate Prisoner-57 (who was not physically present) in the alleged conspiracy, was the word of a single confidential informant. (CD 1122, ER 51; SEALED ER 1666, 1685-88). Confidential disclosure forms include seven check boxes to indicate why the confidential information can be considered reliable. Prisoner-56's confidential disclosure indicated that the informant was reliable because "[an]other confidential source . . . independently provided the same information" but, as the Magistrate Judge found, there was no other source. (CD 1122, ER 51, 66; SEALED ER 1672). Defendants argue this does not matter because other boxes were also checked: that the information was self-incriminating; and that part of the information was corroborated through investigation. (AOB 56). But the two key facts—that Prisoner-57 ordered the attack and that the attack had an STG nexus—were *not* corroborated by other investigation, nor are those facts incriminating as to the confidential source. (SEALED ER 1684-1688).

Moreover, Defendants ignore completely Plaintiffs' evidence showing how CDCR officials systematically rely on the check boxes to find confidential information reliable without bothering to undertake an independent evaluation of the reliability of the confidential information. For example, in rule violations issued to Prisoner-58 through Prisoner-66 the hearing officer explicitly stated that he was *assuming* the confidential information was corroborated by other sources

because that box was checked on the disclosure form. (SEALED SER 617, 618, 627, 647, 945). Similarly, even when the hearing officer indicates they *have* independently assessed the reliability of confidential information, it is frequently untrue. When corroborating sources were fabricated for Prisoner-16, 17 and 20 (see *supra*), the hearing officers repeated the *false* ground for reliability, demonstrating that they did not bother to read the underlying confidential memorandum or make their own determination as to reliability. (SEALED SER 464, 492, 549).

Finally, Defendants also ignore Plaintiffs' evidence that prisoners are frequently denied an opportunity to ask witnesses questions relevant to the confidential information's reliability. For example, when Prisoner-67 attempted to question the investigating officer as to the reliability of an informant, the hearing offer deemed the inquiry irrelevant, and refused to allow the questions. (CD 1122, ER 53; SEALED SER 1605-6). Prisoner-67's RVR was eventually ordered reheard for other reasons. (SEALED SER 1622 ¶ 2-3). A different hearing officer again found Prisoner 67 guilty and also refused to allow him to ask any questions relating to the reliability of the informant, stating the questions were irrelevant because a hearing officer cannot independently review a reliability

determination made by CDCR officials. (*Id.*, ¶ 4, 5).[9] This statement illuminates why so many hearing officers fail to properly assess the reliability of confidential information—they do not think it is their job. Defendants ignore this problem entirely, along with Plaintiffs' evidence that Prisoner-11, 26, 34, 60, 65, 68 and 69, were similarly denied the opportunity to ask questions relevant to the reliability of confidential sources during their disciplinary hearings. (SEALED SER 967-70, 982-3, 984; SEALED ER 722, 725).

B. CDCR's Fabricated, Distorted and Inadequate Disclosure of Confidential Information to Class Members Violates Due Process

Judge Illman reviewed Plaintiffs' voluminous evidence of Defendants' pattern and practice of fabricating and misreporting confidential information to class members and concluded that "time and again, the shield of confidentiality for informants and their confidential accounts is used to effectively deny class members any meaningful opportunity to participate in their disciplinary hearings, and resulting in their return to secured housing units – effectively frustrating the purpose of the Settlement Agreement." (CD 1122, ER 66). These violations are not isolated, but systemic, "pertaining to a number of disciplinary matters occurring in a number of different prisons, involving many prisoners, and various

[9] Prisoner-67 submitted significant evidence that the source was *not* reliable. (SEALED SER 1607, 1617-18 ¶ 6, 7).

levels of CDCR officials." (*Id.*). As shown above, Judge Illman's factual findings with respect to each instance of fabrication or misuse are subject only to clear-error review, Defendants do not even try to refute the vast majority of these facts, and Defendants' few attempts are embarrassingly weak and wholly inadequate to overturn the Judge's findings.

As they cannot refute the facts, Defendants' primary argument on appeal is that the fabrication or inaccurate disclosure of confidential material to over 55 members of the class "does not offend due process because the hearing officer, who decides whether the inmate will be disciplined, would have the underlying confidential documents, and would therefore know about any inconsistencies between them." (AOB 52). This misunderstands the requirements of due process: providing a prisoner with fabricated information about what an unidentified informant said denies the prisoner the ability to "marshal the facts and prepare a defense" guaranteed by *Wolff v. McDonnell,* 418 U.S. 539, 564 (1974). When a prisoner has no way to challenge fabricated confidential facts or uncover the true facts, he cannot mount a defense.

As the Magistrate Judge explained and Defendants agree, *Wolff* is the starting point for Plaintiffs' claim. (CD 1122, ER 62; AOB 49). *Wolff* requires that a prisoner receive "advance written notice" of disciplinary charges, along with a statement of "the evidence relied upon and the reasons for the disciplinary

action[.]" 418 U.S. at 563, 581. Without a written statement, "the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others." *Id.* at 565.

These fundamentals cannot be squared with Defendants' position that due process allows the provision of fabricated or inaccurate evidence to a prisoner so long as the hearing officer has access to accurate evidence. (AOB 52). As the Second Circuit has explained, "[i]t is but a slight turn on Kafka for the accused to be required to mount his defense referring to prison documents that, unbeknownst to him, differ from those before the hearing officer. Unquestionably, the right of an accused to know the evidence against him and to marshal a defense is compromised when the evidence he is shown differs from the evidence shown to the factfinder." *Grillo v. Coughlin*, 31 F.3d 53, 56 (2d Cir. 1994).

The introduction of fabricated *confidential* information in a disciplinary hearing must be distinguished from the use of fabricated *non-confidential* information, which some courts have found "cur[able]" through a "fair hearing, conforming to the due process standards of *Wolff*." *Id.* (citing *Freeman v. Rideout*, 808 F.2d 949, 953-54 (2d Cir. 1986)).[10] When fabricated non-confidential

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[10] In the criminal context, this Court has made it clear that fabrication of evidence by a state officer is a constitutional violation regardless of whether the accused receives a fair trial. *See Spencer v. Peters*, 857 F.3d 789, 793 (9th Cir. 2017);

evidence is introduced, a prisoner can challenge that evidence within a disciplinary proceeding. So long as the hearing accords with due process protections, arguably the Constitution is satisfied. *See Freeman*, 808 F.2d at 953; *see also Hanline v. Borg,* No. 93-15979, 1994 U.S. App. LEXIS 10331, at *11-14 (9th Cir. Apr. 29, 1994) (allegations of fabricated evidence and sham disciplinary hearing state due process claim); *Cook v. Solorzano*, No. 2:17-cv-2255 JAM DB P, 2019 U.S. Dist. LEXIS 50894, at *13 (E.D. Cal. Mar. 26, 2019) ("An inmate may state a

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Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (*en banc*). Even in an administrative context, an interviewer "who deliberately mischaracterizes witness statements in her investigative report . . . commits a constitutional violation." *Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111 (9th Cir. 2010). In *Freeman*, the Second Circuit ruled that fabrication in a prison disciplinary case does not inherently violate due process, and while the Ninth Circuit has cited *Freeman* approvingly in a few unpublished decisions regarding false prison disciplinary charges, *see e.g., Mulqueen v. Guiterrez*, 934 F.2d 324 (9th Cir. 1991) (unpublished), it has not yet analyzed the issue in any depth, nor has this Court grappled with *why*, when a liberty interest is at stake, a prison official may deliberately fabricate evidence consistent with due process so long as a hearing follows. After all, no "sensible concept of ordered liberty is consistent with law enforcement cooking up its own evidence." *Spencer*, 857 F.3d at 801, *quoting Halsey v. Pfeiffer*, 750 F.3d 273, 292–93 (3d Cir. 2014); *cf Edwards v. Balisok*, 520 U.S. 641, 647 (1997) ("The due process requirements for a prison disciplinary hearing are in many respects less demanding than those for criminal prosecution, but they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence."). Because Plaintiffs challenge fabrication of *confidential information*, which interferes with the requirements of a *Wolff* proceeding, the Court need not reach this issue, but of course, it has the authority to do so.

cognizable claim arising from a false disciplinary report . . . if the inmate was not afforded procedural due process in connection with the resulting disciplinary proceedings as provided in *Wolff*"); *Williams v. Foote*, No. CV 08-2838-CJC (JTL), 2009 U.S. Dist. LEXIS 81958, at *35-36 (C.D. Cal. Apr. 30, 2009) (same).

But when confidential information is fabricated, or not properly disclosed, a prisoner has no opportunity to defend herself, or to challenge reliability. Because a prisoner cannot rebut false confidential information, its introduction interferes with the *Wolff* requirements of notice and an opportunity to mount a defense. *See e.g.*, *Arnold v. Evans*, No. C 08-1889 CW (PR), 2010 U.S. Dist. LEXIS 13990 (N.D. Cal. Jan. 25, 2010) (refusing to dismiss an amended *pro se* complaint challenging use of false and unreliable confidential information).

Similarly, when prison officials withhold exculpatory information from a prisoner, he is denied the ability to marshal the facts and prepare a defense mandated by *Wolff*. In *Chavis v. Rowe*, 643 F.2d 1281, 1286-7 (7th Cir. 1981), *cert. denied*, 454 U.S. 907 (1981), the court held that a prisoner was denied *Wolff*'s minimum due process requirements when the prison disciplinary committee denied him access to an investigatory report containing exculpatory witness statements. That the committee considered the exculpatory report in reaching its decision did not render the violation harmless, as the prisoner was "deprived of his ability to make his own use of this exculpatory evidence before it was given to the fact-

finders." *Id.* at 1286. "If [the prisoner] had been given the [withheld] material . . . and argued it to the Committee, it may have been forced to consider the material more seriously." *Id.*

The Third Circuit "agreed with this approach" in *Young v. Kahn*, 926 F.2d 1396, 1403 (3d Cir. 1991). The court held that a prisoner's allegations that the hearing officer prevented him from hearing a guard's testimony about the contents of a confidential letter, if true, denied him the ability to "boost his credibility by impeaching the guard's testimony," which may have led to his argument being "considered . . . more seriously." *Id.* Approvingly quoting a district court of Massachusetts opinion that "if the testimony against the inmate is not to be presented directly by witnesses, it nevertheless must be revealed to the inmate with sufficient detail to permit the inmate to rebut it intelligently," the Third Circuit held that the denial of the prisoner's "due process rights was potentially outcome determinative." *Id.* (quoting *Diagle v. Hall*, 387 F. Supp. 652, 660 (D. Mass 1975)).

Similarly, in *Edwards v. Balisok*, 520 U.S. 641, 644, 646-8 (1997), Justice Scalia, writing for the Court, agreed there would be a due process violation if a hearing officer "concealed exculpatory witness statements and refused to ask specified questions of requested witnesses . . . which prevented [the prisoner] from introducing extant exculpatory material and 'intentionally denied' him the right to

present evidence in his defense," regardless of whether there was strong evidence that the prisoner had committed the violation in question. The exclusion of the exculpatory witness statements is "an obvious procedural defect." *Id.* at 647.

Here the due process violation is far more serious than in either *Chavis, Young* or *Balisok*. CDCR is not only withholding exculpatory or otherwise relevant information from prisoners; it is also providing prisoners with false or inaccurate information which differs from the actual information provided by the informant and appears to have been purposefully altered to appear more damning. Defendants' argument that CDCR can dispense with the requirements of *Wolff* so long as the hearing officer has the correct information would turn the hearing itself into a sham because it would deny the prisoner one of the "most important," due process protections, namely "notice of the factual basis leading to consideration of [SHU] placement and a fair opportunity for rebuttal." *Wilkinson v. Austin*, 545 U.S. 209, 225-26 (2005) (stating minimal due process requirement to be afforded prisoner). When officials provide a prisoner with misleading or fabricated confidential information, they deny the prisoner both notice of the factual basis of the charges and "a fair opportunity for rebuttal," even if the hearing official has access to the accurate information.[11]

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[11] The fabrication of confidential evidence also denies prisoners the right guaranteed by *Wolff* to "present documentary evidence . . . when [it] will not be

Defendants make the absurd claim that "there is no reason to believe a more accurate disclosure would have changed how the inmates defended against the rules-violation report." (AOB 52). It takes little imagination to see that prisoners who were properly notified that an informant had not identified them, or was not corroborated, or that two informants' statements materially differed, would be able to use that information in defending themselves against an alleged rule violation. Similarly, individuals like Prisoner-4, who received a confidential disclosure hiding the fact that all the confidential information against him was based on hearsay, could defend on that ground. *See Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987) (informant's hearsay statement that he was told a prisoner was involved in a plot cannot be verified as reliable and does not meet the *Hill* some-evidence standard).

Moreover, even if it were the case that only the hearing officer need receive accurate evidence to satisfy due process (and it is not, *see supra*), the record here is replete with evidence of systemic failures by CDCR hearing officers to even read the underlying confidential information; instead, the evidence shows that the hearing officer frequently relies on the fabricated description of the evidence

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unduly hazardous to institutional safety or correctional goals." 418 U.S. at 566; *Sira v. Morton*, 380 F.3d 57, 74-75 (2d Cir. 2004). Defendants can make no argument that the falsification of confidential information furthers institutional safety or any other valid penological goal.

provided to the prisoner. *See supra*, regarding Prisoner-1, 3, 4, 12-15, 21, 22, 25, and 43.

Defendants ignore the due process protections afforded by *Wolff*, erroneously arguing that Plaintiffs' *only* due process protection stems from the *some evidence* standard, thus no due process violation exists because Plaintiffs cannot make a showing that CDCR disciplined any "class member based on no evidence." (AOB 56, *see also* AOB 56-7 (even if Defendants falsified confidential information, "other evidence . . . alone would sustain the charge, so there was no due process violation"), AOB 20 ("court . . . ignored evidence, which showed that CDCR only disciplined inmates based on sufficient evidence of guilt.")). Plaintiffs' challenge is not based on the lack of evidence against any individual prisoner, but rather on CDCR's systemic deprivation of class members' opportunity to meaningfully defend themselves. As Justice Scalia explained regarding a prisoner's due process claim for denial of an opportunity to mount a defense, "that the record contains ample evidence to support the judgment under this [some evidence] standard . . . may be true, but when the basis for attacking the judgment is not insufficiency of the evidence, it is irrelevant . . . . Our discussion in *Hill* in no way abrogated the due process requirements enunciated in *Wolff*." *Edwards*, 520 U.S. at 648, *see also Rios v. Tilton*, No. 2:07-cv-0790 KJN P, 2016 U.S. Dist. LEXIS 241, at *15-16, *15 n. 7 (E.D. Cal. Jan. 4, 2016) (criticizing

CDCR for conflating the some-evidence rule and *Wolff*'s procedural requirements, noting that the "two due process claims are discrete and provide independent bases for liability, as is made clear in numerous Ninth Circuit cases that consider as separate issues whether . . . i) an inmate was provided adequate notice and an opportunity to be heard, and ii) there was "some evidence" to support the validation.").

The Magistrate Judge did "not . . . review[] CDCR's disciplinary findings for the purpose of affirming or reversing those decisions; instead, the court is merely reviewing evidence concerning CDCR's disciplinary *process*, submitted pursuant to a provision in a settlement agreement to which Defendants are a party." (CD 1122, ER 65-66) (emphasis in original). People in prison are entitled to a meaningful opportunity to argue before the decisionmaker that the preponderance of the evidence (required by CDCR rules for a guilty finding) does not support the charge. They are unable to do so where confidential evidence is systemically falsified and only the hearing officer has access to the accurate confidential evidence.

Defendants seek to minimize their violation, arguing that all the evidence shows is that "CDCR staff tried in good faith to summarize confidential information without endangering its sources," and the results were not "perfect," but not unconstitutional. (AOB 51). Their argument is belied by the record, which

shows not a few imperfect hearings, but rather 40 examples of fabrication and 15 examples of inadequate disclosure by numerous officials at numerous institutions. (*See supra, see also* CD 1122, ER 46-50, 57-60). These 55 examples (some of which involve multiple prisoners, and many of which appear to be purposeful) were identified from Plaintiffs' review of the 150 confidential information files produced by CDCR, illustrating that CDCR fabricates or fails to accurately disclose confidential information more than one third of the time. This is not merely imperfect; it is a broken system.

C. CDCR Hearing Officers' Systemic Failure to Undertake an Independent Review of the Reliability of Confidential Information Violates Due Process

The Magistrate Judge also correctly found that "CDCR systemically relies on confidential information without ensuring its reliability." (CD 1122, ER 66). As the Magistrate Judge recognized, prison officials may use confidential information in disciplinary proceedings, but the Ninth Circuit, consistent with other Courts of Appeal, has emphasized "the importance of reliability" in connection with such use. *Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987).

Defendants argue that so long as there is some ground to believe that confidential evidence used to find a prisoner guilty is reliable, due process is satisfied. Again, they misunderstand Plaintiffs' claim and the Magistrate Judge's

ruling, which is that a systemic due process problem afflicts the class' disciplinary hearings, as time after time hearing officers make no independent investigation into reliability, but instead rubber stamp the investigating officer's grounds for reliability. *See supra*. Indeed, some hearing officers openly state that such a sham process is their task.

Due Process does not allow for the reliability of confidential information to be assumed based on the assertion of an investigating official. Rather, the hearing official or board must make an independent assessment of the credibility of statements by confidential informants. *Sira v. Morton*, 380 F.3d 57, 77-78 (2d Cir. 2004); *see also Hensley v. Wilson*, 850 F.2d 269, 276-77 (6th Cir. 1988) (to simply accept the investigating officer's conclusion is "recordkeeping" and "not fact finding"). To pass Constitutional muster, the Committee must have an evidentiary basis "to determine for *itself* that the informant's story is probably credible") (emphasis in original); *Broussard v. Johnson*, 253 F.3d 874, 876-77 (5th Cir. 2001) ("Courts generally require that the disciplinary board independently assess the reliability of the informant's tip based on some underlying factual information before it can consider the evidence"); *Kyle v. Hanberry*, 677 F.2d 1386, 1390 (11th Cir. 1982) (committee's task to ensure a "genuine" fact finding hearing and not a "charade" requires that it make a *bona fide* evaluation of the credibility and reliability of confidential evidence).

Consistent with this requirement of an independent assessment, the Ninth Circuit requires that reliability be established by: "(1) the oath of the investigating officer appearing before the committee as to the truth of his report that contains confidential information; (2) corroborating testimony; (3) a statement on the record by the chairman of the committee that he had firsthand knowledge of sources of information and considered them reliable based on the informant's past record; or (4) an *in camera* review of the documentation from which credibility was assessed." *Zimmerlee*, 831 F.2d at 186-87. Strict adherence to these requirements is essential, given the high risk that prisoners with incentives to lie will provide false information. *Jones v. Gomez*, No. C-91-3875 MHP, 1993 U.S. Dist. LEXIS 12217 at *11 (N.D. Cal. Aug. 23, 1993) ("[G]iven the differences that arise between prisoners due to jealousies, gang loyalties, and petty grievances, and the unfortunate discrete instances where guards seek to retaliate against prisoners, to rely on statements by unidentified informants without anything more to establish reliability is worse than relying on no evidence: 'It is an open invitation for clandestine settlement of personal grievances'") (citing *Baker v. Lyles*, 904 F.2d 925, 934-35 (4th Cir. 1990)).

The requirement that the hearing officer independently judge reliability requires more than a *pro forma* review of the confidential information. As Judge Henderson noted in *Madrid v. Gomez*, prison officials "must do more than simply

invoke 'in a rote fashion' one of the five criteria" listed for reliability in CDCR's regulations; they "must also show that the 'realities of the particular informant report' were taken into consideration." 889 F. Supp. 1146, 1277 (N.D. Cal. 1995).

This independent review is essential. Since "the accuser is usually protected by a veil of confidentiality that will not be pierced through confrontation and cross examination, an accuser may easily concoct the allegations of wrongdoing. Without a *bona fide* evaluation of the credibility and reliability of the evidence presented, a prison committee's hearing would thus be reduced to a sham . . . ." *Kyle*, 677 F.2d at 1390 (emphasis added). The touchstone of due process is "not simply that an inmate facing a loss of liberty receive a hearing, but that he receive a fair hearing." *Sira*, 380 F.3d at 77-78. When "sound discretion forecloses confrontation and cross-examination, the need for the hearing officer to conduct an independent assessment of informant credibility to ensure fairness to the accused inmate is heightened." *Id.* Or as Judge Posner put it, "if the usual safeguards of an adversary procedure are unavailable it is all the more important that there be other safeguards . . . ." *McCollum v. Miller*, 695 F.2d 1044, 1048 (7th Cir. 1982). Thus, "if the committee does not discover, and assess, the investigating officer's *basis* for concluding that the informant is reliable, it cannot be said that the committee has made reasoned choices about the truth of the information provided to it, as

minimum due process requires it to do." *Hensley*, 850 F.2d at 277 (emphasis in original).

Here, the evidence is clear and compelling that CDCR hearing officers do not make independent, bona fide evaluations of informant reliability, but rather rubber stamp investigators' reliability determinations. Plaintiffs' evidence shows a pattern of hearing officers' failure to notice that the investigator has erroneously determined that information is reliable because it is corroborated when it is not, indicating that these hearing officers do not even read the underlying confidential memorandum. *See supra* regarding Prisoner-16, 17, 19, 20, 55, 57. Other officers do not even pretend to make an independent assessment, wrongly indicating that it is not their job. *See supra* regarding Prisoner-58 through Prisoner-66. And others do not allow the prisoners to present evidence that the informant is unreliable or question witnesses, even where strong evidence exists that the informant is lying. *See supra* regarding Prisoner-11, 26, 34, 54, 60, 65, 67-69. Whether any particular piece of confidential evidence is reliable or some reliable evidence exists to find any prisoner guilty of misconduct is irrelevant to Plaintiffs' claim; CDCR's process for determining reliability of confidential informants is fundamentally flawed.

CDCR insists that even if some of Plaintiffs' individual examples violate due process, as a whole they are too dissimilar to amount to a systemic violation.

(AOB 48, 50 n.11). First, CDCR did not challenge the systemic nature of the violation below, and thus it has waived the argument. (CD 1122, ER 65). The argument also fails on its own terms. Plaintiffs have shown a practice of misuse of confidential information that appears in various incarnations, but operates in the same way: to present unreliable, uncorroborated, or less-inculpatory information as if it were reliable, corroborated and inculpatory, thus denying *Ashker* class members a meaningful opportunity to challenge the basis on which they are returned to SHU. Not only do officers fabricate falsehoods in their disclosures, but the hearing officers who are supposed to double check the accuracy and reliability of the confidential information fail to conduct any meaningful independent evaluation. It is only failings at every level—failings of a systemic nature—that could explain the pattern demonstrated above. Finally, the systemic nature of the violation is confirmed by the existence of a systemic cure: should CDCR actually adhere to its promise in paragraph 34 of the Settlement, to train all staff who use confidential information to ensure it is accurate and properly disclosed, future disciplinary hearings should be free of this systemic error.

D. The Magistrate Judge Did Not Err by Extending the Settlement Based on CDCR's Systemic Misuse of Confidential Information to Return Class Members to SHU

The Settlement explicitly provides for a 12-month extension of the District Court's jurisdiction upon evidence that continuing and systemic due process

violations "exist" as "alleged in" Plaintiffs' Complaints, or "as a result of CDCR's reforms to its Step Down Program or the SHU policies contemplated by this Agreement." (CD 424-2, ER 267 ¶ 41). Both the District Judge who presided over the case since its inception and approved the Settlement, and the Magistrate Judge who monitored the Settlement's implementation, correctly held that CDCR's unconstitutional misuse of confidential information exists as a result of CDCR's reforms.

Magistrate Judge Illman explained that "by its nature this claim is intertwined with CDCR's reforms of its SHU policies." (CD 1122, ER 68). "[M]isusing confidential information in disciplinary proceedings to return class members to solitary confinement is related to, and is a result of, the CDCR's reforms to its SHU policies under the Settlement Agreement." (*Id.*). Judge Wilken similarly held: "Because the settlement agreement requires CDCR to take certain steps to ensure that the use of confidential information against inmates 'is accurate,' *see, e.g.* [Settlement] ¶ 34, these violations arise out of the reforms contemplated by the settlement agreement, and therefore constitute a proper ground for extending the settlement agreement under paragraph 41." (CD 1198, ER 29).[12]

[12] The District Court did not rule on this issue directly—as explained above Judge Wilken never reviewed the Magistrate's Extension Order; rather, this holding arose

Defendants argue that their disclosure of fabricated evidence to prisoners and failure to provide for any independent evaluation of the reliability of confidential information is not a result of CDCR's reforms, and thus is not a proper basis for extension. (AOB 36-41). Their argument misreads and distorts the Settlement, fails to construe the language of the Settlement as a whole (in contradiction to the requirements of paragraph 61 and California law) and ignores the proper interpretation of the phrase "as a result of."

Paragraph 13 of the Settlement prohibits CDCR from administratively transferring prisoners to the SHU, Administrative Segregation or the Step Down Program based on their status as a gang affiliate. (CD 424-2, ER 254, ¶13). Critically, prisoners may only be transferred into the SDP or SHU "if they have been *found guilty in a disciplinary hearing of committing,* with a proven nexus to an STG, a SHU-eligible offense*, as listed in the SHU Assessment Chart*." (*Id.*, ER 255 ¶ 15)[13] (emphasis added). In conjunction with this paragraph, CDCR was

in the context of Defendants' application for a stay of monitoring pending appellate review of the Extension Order. (CD 1198, ER 26). Judge Wilken denied Defendants' request on several grounds, including that Defendants had no likelihood of success on appeal. (*Id.*, ER 28-29).

[13] Paragraph 17 provides that gang affiliated prisoners, "shall be transferred into the Step Down Program as described in Paragraphs 15 and 16, upon completion of the determinate, disciplinary SHU term imposed by the Institutional Classification for that offense." (CD 424-2, ER 255).

required to amend its SHU Term Assessment Chart to narrow and define the list of offenses which could warrant SHU and SDP placement. (*Id.*, ER 255 ¶14, ER 278 (setting forth list of offenses)).

The import of these changes is not, as Defendants suggest, simply that prisoners "are not placed in the SHU based solely on gang status." (AOB 36 (summarizing paragraphs 13-17)). Rather, the Settlement ensures that prisoners will only face a SHU term for the offenses set forth in Attachment B, and will receive a disciplinary hearing that comports with *Wolff* procedures, as required by CDCR regulations. This reform was key to the settlement, as it provided Plaintiffs with the procedural protections they had been seeking. (CD 191, SER 16 ("Court need not decide at this stage whether [Plaintiffs] are entitled to the specific hearing procedures described in *Wolff v. McDonnell*. . . ")).

To avoid a repeat of the past, the Settlement specifically addressed CDCR's use of unreliable or inaccurate confidential information, which as Judge Illman held was "at the root" of many of the prior indeterminate SHU sentences. (CD 1122, ER 68). "[T]o ensure that the confidential information used against inmates is *accurate*," the Settlement instructs that "CDCR shall develop and implement appropriate training for impacted staff members who make administrative determinations based on confidential information . . . . The training shall include

procedures and requirements regarding the *disclosure* of information to inmates." (CD 424-2, ER 263 ¶ 34) (emphasis added).[14]

To monitor this process, the Settlement requires CDCR to produce, for "all inmates found guilty of a SHU-eligible offense with a nexus to an STG," the "decision of the hearing officer to find the inmate guilty of a SHU-eligible offense," and a "representative sample of the documents relied upon . . . including redacted confidential information." (CD 424-2, ER 265, ¶37(h)). As explained above, this paragraph allowed Plaintiffs' counsel to monitor whether the reforms to the SHU policies set forth in paragraphs 13-18 and 34 were properly implemented. What the voluminous documents produced under Paragraph 37(h) demonstrated, however, was that the reforms did not cure the Constitutional violations alleged in the Complaint, but rather resulted in ongoing due process violations related to SHU placement.

Defendants' failure to engage in any discussion of paragraph 15 is fatal to their argument. The systemic due process violations stemming from the misuse of confidential information by Defendants in the disciplinary hearings mandated by the Settlement clearly "exist as a result of the agreement." But for the Settlement's

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[14] In addition to ensuring the proper use of confidential information in disciplinary hearings, paragraph 34 also applies to hearings to determine RCGP or Administrative SHU placement.

guarantee of a disciplinary *Wolff* process to place prisoners in the SHU and SDP, the systemic misuse of confidential information within *those* hearings would not exist. Moreover, if CDCR had succeeded in providing training to ensure that all confidential information used against the class was accurate and properly disclosed, the systemic misuse of confidential information would have been prevented.

Defendants claim that any systemic violation of Paragraph 34 is irrelevant to extension because "none of the Agreement's terms that make promises relating to confidential information—i.e., paragraphs 34, 37 and 38—contemplate any reform to CDCR's 'Step Down Program . . . or SHU policies.'" (AOB 37). According to Defendants, the "reforms to [CDCR's] Step Down Program [and] SHU policies" are only "defined in paragraphs 13 through 33." (*Id*., 36). The other paragraphs are just "details" about "how CDCR will ensure compliance with certain regulations." (*Id.*, 34, 36).

This separation of Paragraphs 34 and 37 from the reform of CDCR's SHU policies makes no sense, finds no support in the language of the Settlement and contravenes the parties' clear instruction "that the language in all parts of this Agreement shall in all cases be construed as a whole." (CD 424-2, ER 271 ¶ 61); *see also State v. Cont'l Ins. Co.*, 281 P.3d. 1000, 1004-5 (2012) ("language in a

contract must be construed in the context of that instrument as a whole") (internal citations omitted); *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 18 (1995) (same).

Nothing in the Settlement supports Defendants' counterfactual notion that the provision requiring confidential information be used properly before a class member is placed in SHU is not part of CDCR's "SHU reforms." The Settlement is not separated into a "reforms" section and a "details" section; rather, paragraphs 34 and 37 are intertwined with, and are an aspect of CDCR's SHU reforms. Paragraph 34 is meant to ensure that the confidential information *used* in disciplinary proceedings pursuant to Paragraph 15 is reliable and accurate. (CD 424-2, ER 265 ¶ 34). This is a "reform" to CDCR's "SHU policies."

Similarly, Paragraph 37(h)'s requirement that CDCR produce confidential information used in disciplinary hearings can only be understood as designed to aid in the monitoring of CDCR's SHU reforms. If the misuse of confidential information were irrelevant to CDCR's reforms to its SHU policies, there would have been no reason for CDCR to undertake that time-consuming process.

Defendants next insist there is "no evidence that these reforms . . . *caused* the purported "misuse" (AOB 37) (emphasis added), but strict causation is not required; rather, extension is proper if the violations exists "as a result of CDCR's reforms." (CD 424-2, ER 267 ¶ 41). Under California precedent, the phrase "as a result of," similar to "arising out of," does not require a "particular causal

standard" but rather "broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." *Travelers Prop. Cas. Co. of Am. v. Actavis,* 16 Cal. App. 5th 1026, 1045 (2017); *Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co*., 307 F.3d. 944, 952 (9th Cir 2002) ("California courts have repeatedly construed the two phrases ['as a result of' and 'arising out of'] to require only a slight causal connection"); *Cont'l Cas. Co. v. City of Richmond*, 763 F.2d 1076, 1080 (9th Cir. 1985) ("'Arising out of' are words of much broader significance than 'caused by'. They are ordinarily understood to mean . . . 'incident to, or having connection with.'") (internal citations omitted).

Thus, the Settlement reflects the parties' intent to allow extension if Plaintiffs demonstrate continuing due process violations related or connected to the provisions of the Settlement. Here, there can be no question that the violations of due process found by Magistrate Judge Illman have more than "a connection with" or a "slight causal connection" to CDCR's reforms to its SHU policies.

Finally, while Judges Illman and Wilken rested exclusively on a finding that the confidential information due process violation exists *as a result* of the Settlement's reforms, those violations were also "alleged in" Plaintiffs' Complaints, thus giving rise to an alternate ground for extension. (CD 424-2, ER 265 ¶ 41). The Complaint is replete with allegations that confidential information

was being used to validate prisoners, which led to their placement or retention in the SHU. (CD 136, ER 391-393 ¶ 16, 17, 21; ER 406 ¶ 93; ER 410-413 ¶ 108-110, 118, 119). Moreover, Plaintiffs alleged that Defendants were violating due process by retaining them in the SHU "without *reliable* evidence that plaintiffs and the class are committing any acts on behalf of a prison gang. . . ." (*Id.*, ER 432 ¶ 202) (emphasis added). Paragraphs 15 and 34 were designed to remedy that violation by ensuring that prisoners would only be placed in the SHU based on reliable, accurate information that they had committed serious misconduct. Had the Complaint included no allegations regarding misuse of confidential information, there would have been no reason for the parties to include paragraphs 34 and 37(h) in the Settlement.

Defendants claim that this is not the same exact due process violation alleged in the Complaint, because the Complaint did not allege "misuse" of confidential information or "specific reliability problems." (AOB 35). And while Defendants are correct that the Second Amended Complaint only offered general allegations of CDCR's use of unreliable confidential information, paragraph 41 of the Settlement includes no specificity requirement. Indeed, the specific ways such information was misused has only now been uncovered, with the Settlement's requirement for production of these previously secret documents.

II. THE MAGISTRATE JUDGE PROPERLY RULED THAT DEFENDANTS VIOLATED DUE PROCESS BY DENYING PLAINTIFFS A MEANINGFUL OPPORTUNITY TO SEEK PAROLE

The Magistrate Judge correctly determined that CDCR's old gang-validation procedures failed to comport with due process, and its unqualified transmittal of the resulting constitutionally infirm gang validations to the BPH effectively bars class members from a meaningful opportunity to seek parole. (CD 1122, ER 65).

A key feature of the Settlement was for CDCR to cease its decades-long practice of sending prisoners to SHU based only on validation status. This would not only end the torture of prolonged solitary confinement, but would also cure the *de facto* bar on parole for SHU prisoners that constituted an important aspect of Plaintiffs' due process claim. Instead, the *de facto* bar continues. CDCR not only retained the old flawed gang validations but shares them with BPH with no qualification as to their unreliability. Without a warning from CDCR regarding the validations' unreliability, they are treated as reliably indicating gang activity, and this has a highly significant if not dispositive impact on parole chances. CDCR thus deprives numerous class members of a liberty interest by denying them a fair opportunity to seek release from incarceration through parole.[15]

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[15] CDCR's use of flawed validations affects parole in two discrete ways. (CD 1122, ER 55). The crux of Plaintiffs' motion is that CDCR's transmittal of the validations to the BPH as if they were reliable has led the BPH to rely on them to deny class members fair parole consideration. Secondarily, CDCR has used the

Rather than addressing the violation that was actually alleged and proven – that CDCR's transmittal of the old flawed gang validations violates due process – Defendants create a straw figure. They tell this Court that Plaintiffs argue "the Board of Parole Hearings violates due process by considering prior gang validations in making parole decisions," (AOB 16), despite Plaintiffs' repeated statements to the contrary. In the Extension Motion, and again in Reply, Plaintiffs stated: "To be clear, Plaintiffs do not challenge Parole Board procedures or decisions." (CD 905, SER 42; CD 1002, SER 23-24). The Magistrate Judge reinforced this point, quoting the same language. (CD 1122, ER 57).

Plaintiffs' actual demand is that CDCR cease obstructing meaningful access to the parole process; neither the motion nor the Magistrate Judge's order attack

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old validations to find *Ashker* class members categorically ineligible for relief under Proposition 57, which provides non-violent offenders an opportunity to parole. The Magistrate Judge did not separately analyze the Proposition 57 issue, and neither do Defendants on appeal. (CD 1122, ER 64-5). Likewise, this Court need not do so, since the analysis of the former necessarily controls that of the latter, *i.e.*, a finding that the unqualified use of the flawed validations violates due process means that the validations could not categorically exclude prisoners from Proposition 57 review. Plaintiffs also inform the Court that a subsequent state appellate decision and related legislation require CDCR to abandon the behavior-based public safety screening by which the old validations were applied, thereby presumably entitling class members to seek Proposition 57 eligibility. *In re McGhee,* 34 Cal. App. 5th 902 (2019). However, this reform is still under way and the use of old validations in the Proposition 57 context therefore remains part of Plaintiffs' claim.

BPH's decision-making process itself. In this focus, Defendants' appeal has no merit because they essentially plead no contest to the flaws evident in the former validation process, concede that CDCR does not provide any notice of the unreliability of the validations, and fail to rebut the evidence that CDCR's unqualified transmittal of those validations has a significant negative impact on the opportunity for parole. *See* Cal. Code Regs. tit. 15, § 3370(e) (providing that CDCR "release" case records file containing gang validation and other information to BPH); (CD 1122, ER 65) ("Plaintiffs have carried their burden to show systemic due process violations in the use of unreliable gang validations").

A. CDCR's Old System for Validating Gang Affiliates Violates Due Process

The gang-validation procedures previously used by CDCR – now relied on to deny class members a fair opportunity to seek parole – were devoid of the checks and balances deemed necessary by the Supreme Court to minimize the risk of error and fell far short of the procedures used by other prison systems when a liberty interest is at stake. *See Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005); *see supra*, 18-19; (CD 191, SER 10-16). Defendants failed to produce any evidence in the District Court to defend the reliability of past gang validations and likewise do not even attempt to defend the constitutionality of the validations on appeal. Instead, they simply contend that the Magistrate Judge "presumed" that all past validations are constitutionally infirm. (AOB 47; CD 1122, ER 61).

The Magistrate Judge made no such presumption. Judge Illman carefully reviewed a broad array of evidence and found that "Plaintiffs have provided the court with ample evidentiary examples that demonstrate that the CDCR's old process for gang validation was constitutionally infirm." (CD 1122, ER 22). Among the factual findings cited by the Magistrate Judge to demonstrate the constitutional infirmity of the old validation process was CDCR's practice of validating prisoners by interpreting the word "activity" to include "non-action piece[s] of evidence." (CD 1122, ER 22; CD 908-1, SER 300, 321). Typical so-called gang "activity" was: a prisoner's name appearing on a list of alleged gang members; having artwork or a birthday card from a validated gang affiliate; having a photograph of a former cellmate who is a gang-affiliated prisoner; having political and historical writings and photographs; having drawings or artwork; speaking to another prisoner, regardless of the substance of the conversation; receiving mail from a validated gang affiliate or being mentioned in a validated gang affiliate's mail, regardless of the content of the correspondence; appearing in a photograph with a validated gang affiliate; having a tattoo that CDCR determines is gang-related, despite the fact that CDCR does not provide a program that allows prisoners to remove tattoos; and having a book written by George Jackson. (CD 1122, ER 56; *see also* CD 908-1, SER 311, 326, 325, 327, 329, 288, 93, 333, 340, 343, 346, 353-4 ¶ 5, 185-86, 357, 131, 359, 367, 377-80, 185).

Another cause of the infirmity in the validations is that they sometimes were based entirely on confidential information that was not given to the prisoner. CDCR did not track informants who provided false confidential information, admits to having found some confidential information "not to be accurate," and admits that in some cases confidential information was neither corroborated within a confidential report nor elsewhere in a prisoner's file. (CD 908-1, SER 315, 132, 226-28). The office in charge of validation agreed there were not adequate checks to assure accuracy, and class members were only reviewed for a determination of active gang membership every six years. (CD 908-1, SER 149, 292-94, 298-99, 160, 206, 210, 217, 226-28, 418, 233, 235, 238, 246-47, 71, 79). Both Plaintiffs' and Defendants' trial experts agreed that six years is simply too long between reviews. (CD 908-1, SER 315, 279-80 ¶ 49, 414-15).

By ignoring the actual facts, as reflected in the judicial findings to which this Court must give deference, Defendants effectively concede the unconstitutionality of CDCR's old validation system. *See Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (opposing party is obligated to submit "evidence to the district court challenging . . . the facts asserted by the prevailing party in its submitted affidavits"); *Bland v. California Dep't of Corr.*, 20 F.3d 1469, 1474 (9th Cir. 1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000) (party essentially admits factual allegations by failing to dispute them).

Having effectively conceded the facts, Defendants argue now that the Ninth Circuit "has regularly upheld CDCR's validation process against due-process challenges." (AOB 47). This is a new argument that was not made to the District Court, and therefore need not be considered on appeal. *See Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004) (appellate court does not generally consider arguments raised for the first time on appeal). Moreover, it ignores the nature of Plaintiffs' challenge. As Judge Wilken recognized earlier in the case, addressing the same argument and caselaw from Defendants, a judicial decision upholding an *individual* gang validation does "not resolve the broader question . . . Plaintiffs here allege a wide range of procedural deficiencies, which . . . must be considered as a whole." (CD 191, SER 14). Plaintiffs established in the Extension Motion, and the Magistrate Judge agreed, that due process was violated by inadequate notice, hearing and review procedures *endemic* to CDCR's old validation system. (CD 1122, ER 65).

The cases cited by Defendants *support* the Magistrate Judge's decision, as the opinions discuss an additional requirement of due process: that gang validations be supported by "some evidence" with "sufficient indicia of reliability." *Bruce v. Ylst*, 351 F.3d 1283, 1287-88 (9th Cir. 2003) (*citing Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990); *see also Castro v. Terhune*, 712 F.3d 1304, 1313 (9th Cir. 2013) (same). (AOB 47-48). The

outcome of individual cases – which sometimes uphold a validation (as in all the cases selectively cited by Defendants), and sometimes go the opposite way – is not important here. *See, e.g., In re Martinez*, 242 Cal. App. 4th 299, 307 (2015) (granting habeas petition on finding that validation was not supported by "some evidence of a direct link" between petitioner and a specific validated gang affiliate). The salient point is that the Magistrate Judge reviewed the evidence upon which numerous old validations were made, according to the Ninth Circuit's reliability standard, and concluded that it was generally not reliable. (CD 1122, ER 64). This ruling of a *pattern* of violations distinguishes the present case from the individual-plaintiff cases. (CD 1122, ER 56, 64).

Thus, the Magistrate Judge's factual findings, which are entitled to deference and are uncontested, form a proper basis for the conclusion that CDCR's past gang-validation system, as a whole, violated due process.

B. CDCR Violates Due Process by Transmitting the Constitutionally Flawed Validations to the BPH Without Qualification

CDCR's treatment of the old validations paints unconstitutionally garnered evidence with the patina of reliability, and its unqualified transmittal of these validations to BPH violates due process by denying prisoners a meaningful opportunity to be heard and creating a systemic bias in the parole system.

The Supreme Court has held that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality

of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976); *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."). The Magistrate Judge applied this framework in holding that CDCR engaged in a constitutional violation here. (CD 1122, ER 64-65).

The parties agree that under *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011), California prisoners have a state-created liberty interest in parole, and thus have a federal Constitutional right to an opportunity to be heard in the parole process. (AOB 43). Procedural due process also guarantees an unbiased decision-maker. *O'Bremski v. Maass*, 915 F.2d 418, 422 (9th Cir. 1990); *Woods v. Valenzuela,* 734 Fed. Appx. 394 (9th Cir. 2017); *Branham v. Davison*, 433 Fed. Appx. 491 (9th Cir. 2011) ("To be sure, even after [*Swarthout v.*] *Cooke* the Due Process Clause must still protect parole applicants against truly arbitrary determinations to deny parole…"); *Coleman v. Board of Prison Terms,* No. Civ. S-96-0783LKK/PA, 2005 WL 4629202, at *4 (E.D. Cal. Dec. 2, 2005) ("The requirement of an impartial decision-maker transcends concern for diminishing the likelihood of error."). CDCR's unqualified transmittal of unreliable gang validations to BPH denies prisoners both these protections.

The Magistrate Judge made specific findings, which are entitled to deference on appeal, that validation is a "highly significant, if not often a dispositive" factor in parole consideration. (CD 1122, ER 65). During parole review, the simple fact of a prisoner's validation raises an irrebuttable presumption of actual gang activity or affiliation. As one Commissioner put it bluntly: [REDACTED] [16] [REDACTED] ." (SEALED SER 1805).

The presumption is unequivocal, as the truth and accuracy of the validation goes unquestioned by BPH. (CD 1122, ER 57). The fact of a validation by CDCR remains damning even where the prisoner has engaged in extensive programming and/or had a long history of discipline-free behavior. (SEALED SER 1642-45, 1738-41). When prisoners dispute their validation status or the use of confidential information, commissioners consider the challenge as evidence of dishonesty and lack of credibility, which supports the denial of parole. (CD 1122, ER 57; SEALED SER 1849-1853, 1667, *see also* 1660-61, 1760, 1866-67).

In this way, the unreliable and unconstitutional gang validations infect the parole process with a systemic bias, rigging the proceedings against the prisoner.

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[16] As discussed above, being on the SHU pod, prior to the Settlement's shift from status to behavior based SHU placement, was synonymous with being gang validated.

See Withrow v. Larkin, 421 U.S. 35, 58 (1975) (systemic bias may be established by showing "special facts and circumstances present in the case … that the risk of unfairness is intolerably high."); *Kenneally v. Lungren*, 967 F.2d 329, 333 (9th Cir. 1992) (bias exists where a court has "prejudged, or reasonably appears to have prejudged," an issue).

Several district courts in this Circuit have found systemic bias in similar factual scenarios, including where BPH used a "Forensic Assessment Division" protocol that generated unreliable future dangerousness findings, "rendering the suitability evaluation process biased and inherently unreliable." *Johnson v. Shaffer*, No. 2:12-CV-1059 KJM AC, 2014 WL 6834019, at *1 (E.D. Cal. Dec. 3, 2014), report and recommendation adopted, No. 2:12-CV-1059 KJM AC, 2015 WL 2358583 (E.D. Cal. May 15, 2015); *see also Brown v. Shaffer*, No. 1:18-cv-00470-JDP, 2019 WL 2089500 (E.D. Cal. May 13, 2019) (plaintiff asserted valid due process claim that certain unfair procedures resulted in systemically biased parole process); *Gilman v. Brown*, No. CIV. S-05-830 LKK, 2012 WL 1969200, at *4 (E.D. Cal. May 31, 2012) (where improper evidence is introduced in the parole process that predetermines the outcome, it taints the decision-makers and prevents them from being neutral and detached in violation of due process).

As the *Johnson* court held: "Any source of bias that distorts the decision-making process—whether that bias arises in the minds of individual decision-

makers or is generated by a . . . protocol skewed to support a particular outcome—is equally offensive to fundamental fairness. Parole decisions cannot reasonably be considered 'impartial' if they are products of a biased protocol that favors a particular outcome." *Johnson v. Shaffer*, 2014 WL 6834019, at *13; *see also Johnson v. Shaffer*, No. 2:12-CV-1059 GGH P, 2012 WL 5187779, at *5 (E.D. Cal. Oct. 18, 2012) (due process may be violated where materials are "used as part of a pattern or practice to provide a false evidentiary basis for the BPH commissioners to deny parole"). Here, the source of bias is even more powerful than the psychological protocols because the old validation process itself violated due process, so the unqualified transmittal of gang validations carries forward that unconstitutional infirmity. (CD 1122, ER 65).

Similarly, because the BPH predictably treats CDCR validations as reliable, and treats a prisoner's attempt to dispute validation as evidence of dishonesty and lack of remorse, CDCR's unqualified transmittal of the validations interferes with the prisoner's opportunity to be heard: on past gang behavior the prisoner *has no meaningful way to object*, as the validation has pre-determined how his disavowal will be received. (CD 1122, ER 64); *see supra* 17-18.

Defendants attempt to brush aside the actual harm created by the unqualified transmittal of the flawed validations by arguing that federal review of decisions made at a parole hearing is minimal, so that even the transmittal of material that is

indisputably violative of the Constitution passes federal muster. (AOB 45, citing *Greenholtz*, 442 U.S. 1 and *Swarthout*, 562 U.S. 216). But Plaintiffs do not challenge BPH processes or decisions; rather, the evidence shows that the unqualified transmittal of constitutionally flawed validations significantly and negatively tips the scales against the prisoner, infecting the parole process with a systemic bias, and depriving the prisoner of a meaningful opportunity to be heard. *Cf. Costanich v. Dep't of Social & Health Servs.*, 627 F.3d 1101, 1108 (9th Cir. 2010) (official who knowingly presents false evidence in civil proceeding may violate constitutional rights). Even if the federal courts abstained from any review of parole proceedings at all, it would not change these facts, nor their relevance to Plaintiffs' due process claim *against CDCR* (not BPH) when CDCR shares the validations without any qualification (not later at the BPH hearing).

Lastly, whether the BPH can consider the evidence underlying a flawed validation is a question not presented on this appeal. (AOB 47). Gang membership and gang-related misconduct could be a legitimate criterion for the BPH to consider. However, using gang validations that occurred under the old regulations as a proxy for gang activity and membership is constitutionally invalid because, as discussed above, the risk of error in that process was substantial. The only question on this appeal is whether CDCR can share the old validations with

BPH as if they were reliable, given the Magistrate Judge's factual findings that those validations have a significant negative impact on the opportunity for parole.

The Magistrate Judge therefore correctly held that CDCR's transmittal of past validations to BPH violates due process.

C. Plaintiffs' Claim Meets the Settlement Requirement that the Violation Is Alleged in the Complaint or Results from Policy Changes Created by the Settlement

Defendants argue that even if CDCR's actions with respect to validations violate due process, they do not form a proper basis to extend the Settlement, because they were not "alleged in Plaintiffs' Second Amended Complaint" and do not exist "as a result of . . . the SHU policies contemplated by this Agreement." (CD 424-2, ER 266; CD 1122, ER 68). Defendants contend Plaintiffs alleged "no due process claim relating to the use of gang validations in parole proceedings." (AOB 33). Magistrate Judge Illman disagreed, properly finding that "Plaintiffs' operative complaint alleged that these same unreliable gang validations, which had caused them to be placed in indefinite solitary confinement, unfairly deprived them (among other things) of a fair opportunity to seek parole." (CD 1122, ER 68 (*citing* CD 136, ER 427-432)). Judge Wilken agreed (in a ruling regarding Defendants' motion to stay), explaining that the Second Amended Complaint "contains allegations that gang validation could and did ultimately result in the

denial of a fair opportunity for parole." (CD 1198, ER 29). This analysis is correct.

Plaintiffs alleged that "an unwritten policy prevents any prisoner housed in the SHU from being granted parole," and asserted as a basis for a liberty interest in avoiding SHU the "effect on the possibility of parole being granted and the overall length of imprisonment that results from such confinement." (CD 905, SER 33-34, (citing CD 136, ER 405 ¶ 87-90, 424 ¶ 171(f), 420 ¶ 196(c))). The transfer of most class members from the SHU should have remedied this problem. However, the past validations continue to impact parole opportunities. The only difference is that the impact on parole used to be *indirect* – *i.e.*, the validations caused SHU confinement, which was a *de facto* ground for parole denial (a point Defendants do not contest) – and now the validations have the *direct* impact of preventing parole. Plaintiffs have described this as a "new incarnation" of the problem created by the flawed gang validations, which Defendants take as an admission that the impact on parole was not actually alleged in the Complaint. (AOB 33). But Defendants misunderstand: the claim at the time of the Complaint *and* now is that CDCR's flawed validations have deprived class members of a fair opportunity to seek parole. The essence of the claim has not changed; the only shift has been in the mechanics, whereby the impact has gone from indirect to direct.

Moreover, Defendants concede that a second ground for extension exists where CDCR's reforms cause "new, unexpected constitutional violations" (AOB 30), because such violations "arise from" CDCR's reforms, as contemplated by paragraph 41 of the Settlement. *See supra, Travelers Prop. Cas. Co. of Am.*, 16 Cal. App. 5th at 1045. If the Court disagrees that Plaintiffs' "new incarnation" of its initial claim was "as alleged" in the Complaint, it fits the second prong for extension comfortably: the parties' agreement to end CDCR's policy of status-based SHU placements resulted in some class members going to the BPH only to find that the same validations that originally put them in SHU and led to a *de-facto* parole bar now prevent them from gaining parole in a new way: because of CDCR's unqualified transmission of the validations to BPH. To the extent the violation has changed, it is because the Settlement removed the intervening step of SHU placement, precipitating a shift in *how* validations affect parole. The *de facto* bar of a meaningful opportunity to seek parole still exists as alleged in the Complaint, but as a result of the SHU reforms, it is the transmittal of the validations themselves and not the SHU placement that creates the bar.

D. Judicial Estoppel Does Not Bar Plaintiffs' Claim

Defendants falsely accuse Plaintiffs of "duplicity" by changing positions between the time of settlement approval and the motion to extend the Settlement,

thereby purportedly subjecting this claim to judicial estoppel. (AOB 22). The record reveals no such inconsistency and, thus, no ground for estoppel.

As an initial matter, by failing to raise estoppel below, Defendants have waived the argument. *See Morrison v. Mahoney,* 399 F.3d 1042, 1046 (9th Cir. 2005) ("Generally a party cannot raise on appeal contentions that were not raised below, because the trial court should have the first opportunity to address the issues.") (citing *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995)) (errors not raised in the trial court will not be considered on appeal). Defendants ask the Court to apply *de novo* review, claiming they raised the defense in their opposition to the Extension Motion but the Magistrate Judge failed to address it. (AOB 22). This is untrue: Defendants briefly described Plaintiffs' representations during settlement approval and asserted that "Plaintiffs cannot walk back on" those representations by now complaining of a due process violation. (CD 985, ER 173). Defendants did not explain they were making a judicial estoppel argument, and thus the Magistrate Judge was under no duty, let alone notice, to rule on the issue.

Alternatively, if the Court were to consider estoppel, it should review Defendants' claim for plain error, since review ordinarily would be for abuse of discretion had the defense been raised and ruled upon, and to the extent Defendants can be deemed to have raised the issue, Judge Illman clearly did not find it

compelling. As discussed below, there was no error in proceeding on Plaintiffs' claim.

Defendants acknowledge that estoppel only applies when a party has taken a position "clearly inconsistent" with its earlier position. (AOB 22). They fail at this threshold requirement. Defendants' argument stems, first, from a class member's comment during the final approval process that the Settlement "must have a provision that 'totally exonerate[s]' prisoners . . . [who are] 'actually innocent of all and any gang allegations and validation[.]'" (CD 486, ER 239-40). The parties jointly responded that the "Agreement is a forward-looking document with several forms of anticipated prospective reform, and as such does not contemplate the 'exoneration' of past validations," and that the old validations "no longer dictate prisoners' housing placements." (*Id.*). Thus, at the time of settlement, Plaintiffs believed that while all old validations would not be exonerated, they would no longer have the harmful impact of the past. That prediction turned out to be incorrect due to CDCR's continued treatment of the past validations as legitimate by transmitting them without qualification to BPH. Plaintiffs now seek a remedy for the continued unqualified use of the validations, which Defendants incorrectly characterize as a demand that all past validations be expunged, thereby trying to manufacture a distinction between a "no exoneration"

position at the time of settlement and an expungement remedy now. (AOB 24 (citing CD 898-3, ER 221)).

Defendants fail to inform the Court that in the Extension Motion, Plaintiffs offered an alternative remedy to expungement, in that CDCR could "inform the BPH that [the validations] cannot be treated as reliable." (SEALED SER 1051). In the reply brief Plaintiffs clarified that the remedy sought would simply be "CDCR issuing a directive that past validations are not reliable and should not be given consideration for parole purposes." (CD 1002, SER 25). There is no inconsistency and no duplicity.

Defendants also attempt to manufacture duplicity based on Plaintiffs' statement during settlement approval that they did "not seek to change parole policies," and that parole policies "were not a subject of the parties' negotiations." (AOB 23-24 (citing CD 486, ER 241-2)). But Defendants fail to show any inconsistency between this position and the Extension Motion. As discussed above, Plaintiffs do not challenge BPH procedures or decisions; rather, Plaintiffs' entire challenge is to CDCR's actions – *i.e.,* its continued retention of the old validations and their unqualified transmittal to BPH. (CD 905, SER 42).

III. THE MAGISTRATE JUDGE'S DECISION WITH RESPECT TO THE RCGP MUST BE REVERSED, AS PLAINTIFFS HAVE SHOWN A SYSTEMIC VIOLATION OF DUE PROCESS BASED ON CDCR'S FAILURE TO PROVIDE RCGP PRISONERS WITH MEANINGFUL PERIODIC REVIEW

The RCGP unit was meant to be a transitional placement for class members whose safety would be at risk in general population. (CD 424-2, ER 260-261 ¶ 28); *see supra* n. 3. Prisoners in the RCGP are there through no fault of their own; but rather because they are targeted for violence by other prisoners. Thus, the unit was created to provide enhanced social interaction and programing while they worked toward release to general population. (*Id.*).

Pursuant to the Settlement, a prisoner may be sent to the RCGP based on the Departmental Review Board ("DRB") finding a "substantial threat to their personal safety" should they be sent to general population. (*Id.,* ER 259 ¶ 27). Once designated to the RCGP, prisoners are reviewed every 180 days, at which time the ICC is required to "verify whether there continues to be a demonstrated threat to the inmate's personal safety." (*Id.*). If none exists, the ICC refers the case to the DRB for potential release to general population. (*Id.*).

Judge Illman correctly found that Plaintiffs have a liberty interest in avoiding the RCGP based on Plaintiffs' evidence that RCGP placement is prolonged and singular, that it limits parole eligibility and access to social interaction—because of the RCGP's remote location in the far northern part of the

State—and because the unit is stigmatizing. (CD 1122, ER 67). These factors, in combination, render RCGP placement "atypical and significant" in comparison to the ordinary incidents of prison life. (*Id.*); *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Defendants would have this Court reverse that determination, arguing, without evidence, that RCGP placement is not a "drastic departure" from "CDCR's other high-security housing units." (AOB 58-60). But Defendants utterly fail to make the required showing.

Despite finding a liberty interest, the Magistrate Judge held that Plaintiffs had not proven systemic due process violations. (CD 1122, ER 67). This decision must be reversed: Plaintiffs' evidence shows that once placed in the RCGP, there is no way out; thus, CDCR's promise of periodic review of RCGP placement is meaningless. Far from the "transitional" unit contemplated by the Settlement, the RCGP is a "purgatory" from which prisoners have no way to earn release.

A. The Magistrate Judge Correctly Found That Plaintiffs Have a Liberty Interest in Avoiding RCGP Placement

A prisoner has a liberty interest in avoiding placement in a prison unit that "imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 472. A "case by case, fact by fact consideration" is required to determine what "condition or combination of conditions or factors would meet the (*Sandin*) test." *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Judge Illman found that prisoners have a liberty interest in

avoiding the RCGP based on his "fact by fact" review of voluminous and unrefuted evidence submitted by Plaintiffs below. (CD 1122, ER 67-68).

1. Judge Illman's Factual Findings Are Not Clearly Erroneous

To establish the RCGP's atypicality and significance, Plaintiffs submitted twelve uncontested prisoner declarations and thousands of pages of documentary evidence. (SEALED SER 1040-50). Judge Illman analyzed this evidence and correctly held that the RCGP is significantly harsher than general population because it "limits prisoners' parole eligibility, is singular, remotely located, prolonged and stigmatizing." (CD 1122, ER 67).

With respect to parole eligibility, Judge Illman based his factual findings on Plaintiffs' evidence that the BPH has refused to grant parole to every RCGP prisoner it has considered, and RCGP placement played a dispositive role in these decisions. (CD 1122, ER 53, 67; *see also* SEALED ER 1375 ¶ 5, 1269-70, 1273-1274, 1277-1281).

Judge Illman also accepted Plaintiffs' evidence that RCGP placement is highly unusual—affecting only a few dozen prisoners out of 129,000. (CD 1122, ER 53). Because of this "singularity," and the RCGP's remote location and restrictions, the unit imposes severely and uniquely limited opportunities for social interaction, jobs and family visits compared to general population. (CD 1122, ER 53, 67). The RCGP is located at Pelican Bay State Prison (PBSP), just 13 miles

from the Oregon border, yet Defendants prohibit any contact visits during the weekend—when family members would be most available to make the long trip to PBSP. This means RCGP prisoners receive few, if any, visits. (*Id.*, *see also* SEALED SER 1088 ¶ 12-13, 1098 ¶ 18, 1256-66; SER 47; SEALED ER 1383 ¶ 15).

When the Settlement received preliminary approval, various class members wrote the District Court objecting to its provision of fewer contact visits for RCGP prisoners than those in regular general population units. (CD 432, SER 438; CD 433, SER 434; CD 444, SER 427; CD 447, SER 421). Judge Wilken opined that their objections had merit and suggested that the parties negotiate to fix this problem. (CD 477, ER 112-128). Plaintiffs and Defendants negotiated at length, but CDCR ultimately refused to equalize contact visits for RCGP prisoners and regular general population prisoners. (SEALED SER 1302-3). Indeed, when holidays fall on a Thursday or Friday, such that contact visiting might actually be convenient for RCGP loved ones, visiting is cancelled for RCGP prisoners to allow general population prisoners to get visits on those holidays. (SEALED SER 1010 ¶ 4).

Judge Illman also credited Plaintiffs' evidence that there are very few job opportunities in the RCGP, which is harmful in itself, but also means that RCGP prisoners are unable to achieve the highest privilege level, which in turn limits

their access to telephone calls and visits. (CD 1122, ER 53; *see also* SEALED SER 1078 ¶ 6-7, 1087 ¶ 9; SER 47); *see also* Cal. Code Regs. tit. 15 § 3044(d)-(j) (2017).

Plaintiffs' evidence shows that *all* RCGP prisoners have extremely limited access to programming and interaction (*see supra*), but this is severely compounded for the majority of RCGP prisoners, as 34 out of 64 people in the RCGP are on "walk alone status" and thus receive no group yard, no group exercise and no normal social interaction whatsoever. (SEALED ER 831-33 ¶ 4-7, 9; SEALED SER 1066 ¶ 2, 3; 1071 ¶ 9; 1086 ¶ 2-4).

Finally, Judge Illman found that the RCGP is stigmatizing and prolonged. (CD 1122, ER 53, 67). RCGP placement is indefinite, and due to various failings in the RCGP periodic review process, very few prisoners have actually been transferred to general population. (*Id.*, *see also* SEALED ER 1375 ¶ 4). Those in RCGP also face serious stigma, as individuals in other units conclude those in RCGP must have violated an STG rule. (SEALED ER 1369-70, 1383 ¶ 10, 1380 ¶ 7-8, 1390 ¶ 21). This perception, regardless of its validity, attaches a stigma to those in RCGP. (*Id.*).

These factual findings are subject to clear-error review. *United States v. Showalter*, 569 F.3d 1150, 1159 (9th Cir. 2009). They can only be overturned if found to be "illogical, implausible, or without support in the record." *United*

States v. Spangle, 626 F.3d 488, 497 (9th Cir. 2010). Defendants do not dispute that "walk alone" status is unique to the RCGP, nor do they dispute Judge Illman's findings as to impact on parole, the RCGP's singularity, or its stigma. And Defendants merely waive at refuting Judge Illman's other factual findings. They argue that RCGP prisoners have "yard time," "a dayroom in which to congregate," "rehabilitative services," "the library," "the canteen," "can have jobs" and "have access to rehabilitative and educational programs." (AOB 59). But Defendants cite no evidence demonstrating how often these services are available compared to general population, and how those in RCGP are able to access them. Defendants' vague assurances provide no grounds to overturn the Magistrate Judge's factual findings that these opportunities are not comparable to what general population prisoners receive. Nor can Defendants pretend that walk-alone status (which is currently imposed on a majority of RCGP prisoners) is *at all* comparable to general population; on walk-alone "yard time" is spent *alone* a cage, canteen is brought to their solitary cells once a month, they go to dayroom *alone*, and they share the very limited attention of one teacher, *alone* through their cell doors. (SEALED SER 1066 ¶ 3, 4; 1071 ¶ 9; 1086 ¶ 2-4).

2. RCGP Placement Implicates a Liberty Interest

Given these factual findings, Judge Illman was correct in finding that placement in the RCGP gives rise to a liberty interest. (CD 1122, ER 67-68).

The RCGP's impact on parole eligibility affects the duration of one's sentence, which is a significant factor in the liberty interest analysis. *Sandin*, 515 U.S. at 487. Defendants insist the Supreme Court has "expressly rejected" weighing "the speculative impact a circumstance may have on parole eligibility" (AOB at 60), but *Sandin* is not so categorical. In *Sandin,* the Supreme Court noted that a prisoner's guilty finding for misconduct would not "inevitably" affect the duration of his sentence, as a parole decision "rests on a myriad of considerations." 515 U.S. at 487. But the Court did not have before it any record establishing the impact of misconduct on parole determinations. *Id.* Contrary to Defendants' categorical approach, the Ninth Circuit has interpreted *Sandin* to require inquiry into the "*likelihood* that the transfer will affect the duration" of confinement. *Keenan* 83 F. 3d at 1089 (emphasis added). Here, Plaintiffs have provided evidence that the RCGP *does* impact parole eligibility (*see supra*), thus making it a relevant consideration. *Wilkinson*, 545 U.S. at 224.

Further, Judge Illman correctly relied on the RCGP's remote location, related impact on visitation, and extremely limited opportunities for programming and education, factors which give rise to a liberty interest. *See Aref v. Lynch*, 833 F.3d 242, 256 (D.C. Cir. 2016) (including diminished ability to communicate with loved ones as relevant aspect of liberty interest analysis); *see also Serrano v. Francis*, 345 F.3d 1071, 1078-79 (9th Cir. 2003) (analyzing the existence of liberty

interest based not on what amenities and privileges were theoretically available to the prisoner, but on his ability to take advantage of them). Defendants respond circularly that the RCGP "is one of CDCR's general-population facilities, and therefore its conditions reflect the 'ordinary incidents of prison life.'" (AOB 60). But calling a unit "general population" does not make it so; rather, the Court must engage in a "case by case, fact by fact consideration" to determine what conditions meet the *Sandin* test. *Keenan*, 83 F. 3d at 1089.

The prolonged and indefinite nature of RCGP placement is another significant factor in establishing a liberty interest. *See Wilkinson*, 545 U.S. at 224 (noting that the indefinite duration of the designation to a Supermax facility contributed to the liberty interest finding); *Keenan*, 83 F.3d at 1089; *Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014); *Aref*, 833 F. 3d at 254. Defendants acknowledge this is true as a matter of law, arguing only that the RCGP's prolonged nature does not matter because conditions are not harsher than general population. (AOB 60). But as explained above, Judge Illman's factual findings as to the many ways in which the RCGP is harsher than general population are not plainly erroneous.

Finally, Defendants complain that Judge Illman did not explain "what 'stigma'" attaches to the RCGP. (AOB 60). This is not so; Judge Illman credited Plaintiffs' evidence that RCGP prisoners are perceived as requiring protective

custody and thus are assumed to have broken an STG rule of conduct. (CD 1122, ER 53; SEALED SER 1048). As this Circuit has recognized, a stigmatizing classification gives rise to a liberty interest. *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997).

B. RCGP Placement and Retention Procedures Are Constitutionally Deficient

Judge Illman found that Plaintiffs presented evidence to establish that the current system for RCGP placement and retention gives rise to serious risks of erroneous and unnecessary deprivations of liberty. (CD 1122, ER 53). Plaintiffs showed that the Settlement only allows for RCGP placement when the DRB finds a substantial threat to the safety of that prisoner, but many prisoners were transferred to the RCGP based, at least in part, on a different reason altogether—that the prisoner's release to general population would pose a threat to institution security. (*Id.*; SEALED SER 1113, 1122, 1131, 1143, 1156, 1163, 1168, 1194, 1209, 1214). Judge Illman also found that Plaintiffs produced evidence of many instances in which the ICC used a restrictive presumption to retain prisoners in the RCGP, finding that even when there was no evidence of a continuing threat to a prisoner's safety if released to general population, it could not categorically state that no such threat still exists. (CD 1122, ER 54; SEALED SER 1239, 1245, 1253).

Along with CDCR applying the wrong standard and assuming the standard is met regardless of the evidence, Judge Illman found that Plaintiffs also produced evidence that CDCR actively misleads prisoners about how to secure return to general population—RCGP prisoners are told that participating in programming and remaining incident-free for 6 months will result in a transfer to general population, but they are instead retained in RCGP based on an essentially irrebuttable presumption that the threat continues. (CD 1122, ER 54; SEALED SER 1056 ¶ 6-7, 1061 ¶ 3, 1082 ¶ 3, 1092 ¶ 6, 1097 ¶ 11; *see also* SEALED SER 1291, 1294, 1297).

Defendants did not dispute any of this evidence below, nor did Judge Illman find it wanting as a factual matter; rather, the Magistrate Judge held that Plaintiffs' many examples of RCGP placements based on the wrong standard, misleading notice, and RCGP retentions based on the assumption (without evidence) of a continuing threat did not rise to the level of a "systemic" due process violation, as Plaintiffs did not present "detailed case-studies" to show that RCGP placement and retention decisions "are in fact arbitrarily made." (CD 1122, ER 67). But due process does not merely require decisions that are not arbitrary. In the context of transfer to a restrictive prison or prison unit, due process requires notice of the reason for the placement, an opportunity to be heard, and meaningful periodic review. *Wilkinson*, 545 U.S. at 226; *see generally Brown v. Oregon Dep't of*

Corr., 751 F. 3d 983 (9th Cir. 2014), *see also Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) ("[A]dministrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of period review of the confinement of such inmates."); *Williams v. Hobbs,* 662 F. 3d 994, 1007 (8th Cir. 2011).

Defendants must, among other things, provide a prisoner with an explanation for their placement and retention in RCGP and "a guide for future behavior." *Wilkinson*, 545 U.S. at 226 (*citing Greenholtz*, 442 U.S. 1, 15 (1979)); *See also Toevs v. Reid*, 685 F.3d 903, 913-14 (10th Cir. 2012). As applied to Plaintiffs, the initial reason for RCGP placement "must not only be valid at outset but must continue to subsist during the period of segregation." *Kelly v. Brewer* 525 F.2d 394, 400 (8th Cir. 1975).

Plaintiffs' evidence shows that neither RCGP placement nor retention decisions provide "a guide for future behavior." RCGP prisoners are told that programming and a clean record at the RCGP will constitute a pathway out, but the undisputed evidence shows this is false. (SEALED SER 1056 ¶ 6-7, 1061 ¶ 3, 1082 ¶ 3, 1092 ¶ 6, 1097 ¶ 11; *see also* SEALED SER 1291, 1294, 1297 (noting that DRB regularly informed prisoners that after programming in RCGP for six months, they would be transferred to general population)). As evidenced by class

members' experiences summarized below, programming success or a clean disciplinary record has no bearing on their retention.

The reviews are also procedurally meaningless because their results are predetermined—there is nothing that RCGP prisoners can do to *earn* release. Rather, release is only possible if the prisoner or CDCR uncovers or creates new documentation demonstrating unequivocally that safety threats no longer exist. Plaintiffs are required to prove a negative while locked in a unit with no means to uncover evidence. Without new evidence, CDCR relies on the past finding of a security concern to continue RCGP placement, even when that evidence dates back years or even decades. This is not meaningful review. Once placed in restrictive confinement, due process requires that there be some avenue out. *Hewitt*, 459 U.S. at 477 n.9.

Prisoner A,[17] for example, was designated to the RCGP because he was the victim of an assault in the 1990s and due to statements from confidential sources indicating that he would be targeted for assault by a prison gang if released to general population. (SEALED SER 1217). Prisoner A was told that he would be placed in RCGP to show that he could program successfully with peers, leading him to understand that he could be released to general population in six months as

[17] Each prisoner's name can be found in Attachment A.

long as he was not involved in any violent incidents. (SEALED SER 1056 ¶ 6, 7).[18] Instead, at his ICC review, he was retained in RCGP based on the same rationale provided by the DRB for his initial placement. (SEALED SER 1217). While there were "no new demonstrated threat(s)" to Prisoner A's safety, the ICC could not "state that such threat no longer exists." (*Id.*). The ICC ignored Prisoner A's successful programming with 20 other RCGP prisoners, including members of the gang in question, and his own statements indicating that he had no safety concerns. (*Id.*). His next ICC was nearly identical and lasted no more than a few minutes. (SEALED SER 1057). The ICC told Prisoner A that he needed to prove that his past issues with the gang had been fixed by committing an assault on behalf of the gang or by communicating with other validated members and having them talk to prison officials on his behalf. (SEALED SER 1057 ¶ 12-15). He followed these instructions and called a childhood friend to ask the friend's relative, who is in CDCR custody, to let CDCR know that Prisoner A is in good standing with the gang. (*Id.*, ¶ 16). He received a rule violation for STG communication as a result. (*Id.*, ¶ 17).

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[18] CDCR failed to introduce any evidence disputing any of the facts set forth in the class member declarations submitted to the District Court. Thus, Plaintiffs' evidence on this issue is unrefuted.

Prisoner B, too, is stuck in the RCGP with no way out. The DRB designated him for RCGP placement based on an anonymous note that he is in bad standing with a particular gang and an assault nearly a decade ago. (SEALED SER 1165). At subsequent reviews in 2016 and 2017, the ICC failed to identify any new safety concerns, but due to their inability to "state that such threat no longer exists," Prisoner B must remain in RCGP. (SEALED SER 1235, 1237). The ICC provided no rationale for Prisoner B's continued placement in RCGP, other than what was previously stated by the DRB. (*Id.*). They ignored his successful programming and his own statements indicating that he had no safety concerns and provided no guideline, action, or examples of steps he could complete in order to be released to general population. (*Id.*).

Prisoner C was placed in RCGP after decades in the SHU. (SEALED SER 1991). The only threat to his safety comes from an alleged gang power struggle which occurred in the mid-1990s. (*Id.*). At his ICC review, Prisoner C was retained in RCGP despite "no new demonstrated threat(s)" to his safety because the ICC was unable to "state that such threat no longer exists." (SEALED SER 1245). Prisoner C has been successfully programming with a group and has held a job in the unit. (SEALED SER 1077 ¶ 2-3). Despite his proven success in RCGP, because of a threat from over twenty years ago, Prisoner C has no chance to return

to general population. As Prisoner C has no means to dispel the threat, the evidence suggests he will remain in RCGP forever.

Similarly, **Prisoner D** was placed in RCGP due to a threat to his safety based on his decision to step down from a prison gang a decade ago. (SEALED SER 1170). While acknowledging that there is no evidence of any new threat to his safety, the ICC has retained Prisoner D in RCGP because "ICC cannot categorically state that such threat no longer exists." (SEALED SER 1239). While in RCGP Prisoner D has successfully programmed, maintained employment, and is taking advantage of educational opportunities. (*Id.*) The ICC failed to indicate to Prisoner D any way he might be able to dispel the threat against him; thus, his stint in RCGP will likely be permanent. (*Id.*).

These are just four examples of a larger pattern. As Judge Illman recognized, Plaintiffs produced evidence of many other RCGP prisoners stuck in the unit with no way to resolve their safety issues, for whom the 180-day review is a pro-forma check to see if new evidence has somehow appeared to address decades old safety concerns. (CD 1122, ER 53-54). Defendants mislead class members into believing they have their "keys to release," instead applying unattainable criterion, depriving class members of any meaningful review. *See Greenholtz*, 442 U.S. at 15; *Toevs*, 685 F.3d at 914. Defendant's "180-day-review" process does nothing but resuscitate the original reason for RCGP

placement and ensures class members will simply remain in RCGP until their sentence has run. RCGP was created as a transitional location for those inmates with security concerns. (CD 424-2, ER 259-261 ¶ 27, 28); *see supra* n. 3. Instead, CDCR has turned it into a "[redacted]." (SEALED SER 1285). As such, this Court should reverse the Magistrate Judge's ruling below and require that CDCR provide a "guide for future behavior" and meaningful process to ensure that RCGP placement is not a pretext for permanent confinement.

CONCLUSION

For the reasons set forth above, this Court should dismiss the Appeal and Cross-Appeal for lack of jurisdiction. In the alternative, if the Court determines that it has jurisdiction, it should affirm the Magistrate Judge's finding of systemic due process violations with respect to CDCR's misuse of confidential information and unqualified transmittal of gang validations to the Board of Parole Hearings. With respect to the RCGP, the Court should affirm the finding of a liberty interest and reverse the Magistrate Judge's finding regarding the adequacy of current CDCR procedures. The Magistrate Judge's ruling extending the Settlement Agreement for an additional 12-month term must be affirmed.

Dated: February 6, 2020 Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
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- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
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Case Nos. 19-15224, 19-15359

PLAINTIFFS-APPELLEES / CROSS-APPELLANTS' ADDENDUM

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Limited on Constitutional Grounds by U.S. v. Johnston, 5th Cir.(Tex.), July 13, 2001

United States Code Annotated Title 28. Judiciary and Judicial Procedure (Refs & Annos) Part III. Court Officers and Employees (Refs & Annos) Chapter 43. United States Magistrate Judges (Refs & Annos)

28 U.S.C.A. § 636

§ 636. Jurisdiction, powers, and temporary assignment

Effective: December 1, 2009
Currentness

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law--

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

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(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary--

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with

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the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority.--

(1) In general.--A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority.--A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases.--In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.--In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties.--The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.--Upon the commission of any such act--

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.--The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of

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chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 917; Pub.L. 90-578, Title I, § 101, Oct. 17, 1968, 82 Stat. 1113; Pub.L. 92-239, §§ 1, 2, Mar. 1, 1972, 86 Stat. 47; Pub.L. 94-577, § 1, Oct. 21, 1976, 90 Stat. 2729; Pub.L. 95-144, § 2, Oct. 28, 1977, 91 Stat. 1220; Pub.L. 96-82, § 2, Oct. 10, 1979, 93 Stat. 643; Pub.L. 98-473, Title II, § 208, Oct. 12, 1984, 98 Stat. 1986; Pub.L. 98-620, Title IV, § 402(29)(B), Nov. 8, 1984, 98 Stat. 3359; Pub.L. 99-651, Title II, § 201(a)(2), Nov. 14, 1986, 100 Stat. 3647; Pub.L. 100-659, § 4(c), Nov. 15, 1988, 102 Stat. 3918; Pub.L. 100-690, Title VII, § 7322, Nov. 18, 1988, 102 Stat. 4467; Pub.L. 100-702, Title IV, § 404(b)(1), Title X, § 1014, Nov. 19, 1988, 102 Stat. 4651, 4669; Pub.L. 101-650, Title III, §§ 308(a), 321, Dec. 1, 1990, 104 Stat. 5112, 5117; Pub.L. 104-317, Title II, §§ 201, 202(b), 207, Oct. 19, 1996, 110 Stat. 3848, 3849, 3851; Pub.L. 106-518, Title II, §§ 202, 203(b), Nov. 13, 2000, 114 Stat. 2412, 2414; Pub.L. 107-273, Div. B, Title III, § 3002(b), Nov. 2, 2002, 116 Stat. 1805; Pub.L. 109-63, § 2(d), Sept. 9, 2005, 119 Stat. 1995; Pub.L. 111-16, § 6(1), May 7, 2009, 123 Stat. 1608.)

Notes of Decisions (1281)

Footnotes

1 So in original. Probably should be "post-trial".

28 U.S.C.A. § 636, 28 USCA § 636

Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

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United States Code Annotated Title 28. Judiciary and Judicial Procedure (Refs & Annos) Part IV. Jurisdiction and Venue (Refs & Annos) Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

Notes of Decisions (3422)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

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State of California

California Code of Regulations

Title 15. Crime Prevention and Corrections

Division 3

Rules and Regulations of

Adult Institutions, Programs, and Parole

Department of Corrections and Rehabilitation

Updated through January 1, 2017

State of California

California Code of Regulations

Title 15. Crime Prevention and Corrections

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CDCR Intranet: http://intranet/adm/dss/rpmb

transmitted to OAL by 3-5-2012 or emergency language will be repealed by operation of law on the following day.
17. Certificate of Compliance as to 9-27-2011 order transmitted to OAL 2-3-2012; Certificate of Compliance withdrawn 3-19-2012 (Register 2012, No. 12).
18. Amendment of subsection (a) and Note refiled 3-19-2012 as an emergency; operative 3-19-2012 (Register 2012, No. 12). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 6-18-2012 or emergency language will be repealed by operation of law on the following day.
19. Reinstatement of section as it existed prior to 3-19-2012 emergency amendment by operation of Government Code section 11346.1(f) (Register 2012, No. 28).
20. Amendment of subsection (a) and Note filed 9-13-2012 as an emergency; operative 9-13-2012 (Register 2012, No. 37). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 2-20-2012 or emergency language will be repealed by operation of law on the following day.
21. Certificate of Compliance as to 9-13-2012 order transmitted to OAL 1-11-2013 and filed 2-25-2013 (Register 2013, No. 9).
22. Amendment filed 6-2-2016 as an emergency; operative 6-2-2016 (Register 2016, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2016 or emergency language will be repealed by operation of law on the following day.
23. Certificate of Compliance as to 6-2-2016 order, including amendment of subsection (a), transmitted to OAL 11-7-2016 and filed 12-22-2016; amendments effective 12-22-2016 pursuant to Government Code section 11343.4(b)(3) (Register 2016, No. 52).

3320.1. Hearings for Transferred Inmates.

(a) An inmate's pending disciplinary hearing shall be conducted before the inmate is transferred to another facility unless any one of the following circumstances apply:

(1) An emergency transfer to a higher security level is necessary based on charges of involvement in a major disturbance or serious incident.

(2) The inmate is charged with escape from a Level I or II facility and will not be returned to the facility from which the inmate escaped.

(3) The inmate requires emergency medical or psychiatric treatment.

(b) When an inmate is transferred before a disciplinary hearing or a rehearing is ordered on the rule violation charges after the inmate's transfer, one of the following methods shall be used to facilitate the disciplinary hearing process:

(1) The inmate may be returned to the facility where the violation occurred.

(2) The institution head at the facility where the violation occurred may request the hearing be conducted by staff where the inmate is currently housed or staff from the facility where the violation occurred may conduct the hearing at the facility where the inmate is housed.

(A) Facility staff where the rule violation occurred may appoint an investigative employee to conduct an investigation and prepare a report as outlined in section 3318.

(B) If a staff assistant is appointed, the staff assistant shall be present at the disciplinary hearing.

NOTE: Authority cited: section 5058, Penal Code. Reference: Sections 2932, 5054 and 5068, Penal Code.

HISTORY:
1. New section filed 8-7-87 as an emergency; operative 8-7-87 (Register 87, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-7-87.
2. Certificate of Compliance as to 8-7-87 order transmitted to OAL 12-4-87; disapproved by OAL (Register 88, No. 16).
3. New section filed 1-4-88 as an emergency; operative 1-4-88 (Register 88, No. 16). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 5-3-88.
4. Certificate of Compliance as to 1-4-88 order transmitted to OAL 5-3-88; disapproved by OAL (Register 88, No. 24).
5. New section filed 6-2-88 as an emergency; operative 6-2-88 (Register 88, No. 24). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-30-88.
6. Certificate of Compliance transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
7. Amendment filed 5-5-95; operative 6-5-95 (Register 95, No. 18).

3321. Confidential Material.

(a) The following types of information shall be classified as confidential:

(1) Information which, if known to the inmate, would endanger the safety of any person.

(2) Information which would jeopardize the security of the institution.

(3) Specific medical or psychological information which, if known to the inmate, would be medically or psychologically detrimental to the inmate.

(4) Information provided and classified confidential by another governmental agency.

(5) A Security Threat Group debrief report, reviewed and approved by the debriefing subject, for placement in the confidential section of the central file.

(b) Uses of specific confidential material.

(1) No decision shall be based upon information from a confidential source, unless other documentation corroborates information from the source, or unless other circumstantial evidence surrounding the event and the documented reliability of the source satisfies the decision maker(s) that the information is true.

(2) Any document containing information from a confidential source shall include an evaluation of the source's reliability, a brief statement of the reason for the conclusion reached, and a statement of reason why the information or source is not disclosed.

(3) The documentation given to the inmate shall include:

(A) The fact that the information came from a confidential source.

(B) As much of the information as can be disclosed without identifying its source including an evaluation of the source's reliability; a brief statement of the reason for the conclusion reached; and, a statement of reason why the information or source is not disclosed.

(c) A confidential source's reliability may be established by one or more of the following criteria:

(1) The confidential source has previously provided information which proved to be true.

(2) Other confidential source have independently provided the same information.

(3) The information provided by the confidential source is self-incriminating.

(4) Part of the information provided is corroborated through investigation or by information provided by non-confidential sources.

(5) The confidential source is the victim.

(6) This source successfully completed a polygraph examination.

(d) Filing confidential material.

(1) Only case information meeting the criteria for confidentiality shall be filed in the confidential section of an inmate's/parolee's central file.

(2) Proposed confidential documents shall be reviewed, signed, and dated by a staff person at the correctional counselor III, parole agent III, correctional captain, or higher staff level to indicate

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approval of the confidential designation and placement in the confidential section of the central file.

(3) Classification committees shall review the material filed in the confidential folder of each case considered. Any material not approved but designated confidential shall be removed from the folder and submitted to the designated staff person for review and determination.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 1798.34, 1798.40, 1798.41 and 1798.42, Civil Code; Section 6255, Government Code; Sections 2081.5, 2600, 2601, 2932, 5054 and 5068, Penal Code; and *Illinois* v. *Gates*, 462 U.S. 213 (1983).

HISTORY:

1. Repealer and new section filed 8-7-87 as an emergency; operative 8-7-87 (Register 87, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-7-87.
2. Certificate of Compliance as to 8-7-87 order transmitted to OAL 12-4-87; disapproved by OAL (Register 88, No. 16).
3. Repealer and new section filed 1-4-88 as an emergency; operative 1-4-88 (Register 88, No. 16). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 5-3-88.
4. Certificate of Compliance as to 1-4-88 order transmitted to OAL 5-3-88; disapproved by OAL (Register 88, No. 24).
5. Repealer and new section filed 6-2-88 as an emergency; operative 6-2-88 (Register 88, No. 24). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-30-88.
6. Certificate of Compliance transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
7. Amendment of subsection (c)(4) and Note filed 8-30-99 as an emergency; operative 8-30-99 (Register 99, No. 36). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 2-8-2000 or emergency language will be repealed by operation of law on the following day.
8. Certificate of Compliance as to 8-30-99 order transmitted to OAL 2-7-2000 and filed 3-21-2000 (Register 2000, No. 12).
9. New subsection (a)(5), amendment of subsection (b)(1) and new subsection (c)(6) filed 10-17-2014; operative 10-17-2014 pursuant to Government Code section 11343.4(b)(3) (Register 2014, No. 42).

3322. Length of Confinement.

(a) No inmate shall be kept in disciplinary detention or confined to quarters more than ten days. The chief disciplinary officer may shorten time spent in disciplinary detention or confined to quarters if the inmate appears ready to conform and the facility disciplinary process will benefit by such an action. When the disciplinary detention or confined to quarters disposition has expired and continued segregation is deemed necessary, the inmate shall be processed pursuant to section 3335.

(b) Time spent in segregation pending a disciplinary hearing shall normally be credited toward any disciplinary detention or confined to quarters sentence imposed. Reasons for not granting such credit shall be explained in the disposition section of the RVR.

(c) No inmate shall be confined to quarters or otherwise deprived of exercise as a disciplinary disposition longer than ten days unless, in the opinion of the institution head, the inmate poses such an extreme management problem or threat to the safety of others that longer confinement is necessary. The director's written approval is required for such extended confinement.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code.

HISTORY:

1. Amendment of section and new Note filed 5-5-95; operative 6-5-95 (Register 95, No. 18).
2. Amendment of subsection (b) filed 6-2-2016 as an emergency; operative 6-2-2016 (Register 2016, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2016 or emergency language will be repealed by operation of law on the following day.
3. Certificate of Compliance as to 6-2-2016 order transmitted to OAL 11-7-2016 and filed 12-22-2016 (Register 2016, No. 52).

3323. Disciplinary Credit Forfeiture Schedule.

(a) Upon a finding of guilt of a serious rule violation, a credit forfeiture against any determinate term of imprisonment or any minimum eligible parole date for an inmate sentenced to an indeterminate sentence, as defined in section 3000 Indeterminate Sentence Law (ISL), shall be assessed within the ranges specified in (b) through (h) below:

(b) Division "A-1" offenses; credit forfeiture of 181–360 days.

(1) Murder, attempted murder, and solicitation of murder. Solicitation of murder shall be proven by the testimony of two witnesses, or of one witness and corroborating circumstances.

(2) Manslaughter.

(3) Battery, including sexual battery, causing serious injury.

(4) Assault or battery with a deadly weapon or caustic substance.

(5) Rape, attempted rape, sodomy, attempted sodomy, oral copulation, and attempted oral copulation against the victim's will.

(6) Taking a hostage.

(7) Escape with force or violence.

(8) Possession, manufacture, or attempted manufacture of a deadly weapon or explosive device.

(9) Solicitation to commit an offense listed in subsections (b)(3), (b)(4) or (b)(5) above.

(10) Behavior or activities defined as a division "A-1" offense that promotes, furthers, or assists a STG or demonstrates a nexus to the STG.

(c) Division "A-2" offenses; credit forfeiture of 151–180 days.

(1) Arson involving damage to a structure or causing serious bodily injury.

(2) Possession of flammable, explosive, or combustible material with intent to burn any structure or property.

(3) Destruction of state property valued in excess of $400 during a riot or disturbance.

(4) Any other felony involving violence or injury to a victim not specifically listed in this schedule.

(5) Attempted escape with force or violence.

(6) Introduction or distribution of any controlled substance, as defined in section 3000, in an institution/facility or contract health facility.

(7) Extortion by means of force or threat.

(8) Conspiracy to commit any Division "A-1" or "A-2" offense.

(9) Solicitation to commit an offense listed in subsections (c)(1), (c)(3), or (c)(8) above.

(10) Behavior or activities defined as a division "A-2" offense that promotes, furthers, or assists a STG or demonstrates a nexus to the STG.

(d) Division "B" Offenses; credit forfeiture of 121–150 days.

(1) Battery on a peace officer not involving the use of a weapon.

(2) Assault on a peace officer by any means likely to cause great bodily injury.

(3) Battery on a non-prisoner.

(4) Threatening to kill or cause serious bodily injury to a public official, their immediate family, their staff, or their staff's immediate family.

(5) Escape from any institution or community correctional facility other than a camp or community-access facility.

(6) Theft, embezzlement, destruction, or damage to another's personal property, state funds, or state property valued in excess of $400.

Article 9.1. Research of Inmates/Parolees

3369.5. Research.

(a) No research shall be conducted on inmates/parolees without approval of the research advisory committee established to oversee research activities within the department. Members of the research advisory committee shall be named by the Secretary, and may include departmental staff and nondepartmental persons who are community academic representatives engaged in criminal justice research.

(b) No research project shall be considered without submission of a research proposal that shall contain the following:

(1) A statement of the objectives of the study.

(2) The specific values of the project.

(3) A description of the research methods to be used.

(4) A description of the measuring devices to be used, or if they are to be developed as part of the project, a statement of their intended use and reason.

(5) The name of the facility or office where the data will be collected.

(6) The names and titles of personnel involved and their responsibilities in the project.

(7) An estimate of departmental staff time needed for the project.

(8) Starting and ending dates of the research.

(9) Any additional costs to the state.

(10) An estimate of the inmate/parolee subjects' time needed for the project and a plan for the compensation of the inmates/parolees.

(11) The source of funding.

(12) A copy of the informed consent form to be used in the project which meets the requirements of Penal Code section 3521.

(13) A current resume for each professional staff member of the project.

(14) The full name, date of birth, and social security number of all project staff members who will enter an institution or other departmental facility to carry out the project.

(15) A certification of privacy signed by the project's principal investigator which outlines the procedure for protecting exempt personal information and certifies that the protective procedures shall be followed.

(16) If student research is involved, a letter from the student's faculty advisor stating that the student will be working under their supervision and the project is approved by their college/university.

(17) If the proposal was previously reviewed by a committee of another agency or organization, a copy of the record of that committee's approval.

(c) A nondepartmental person, agency or organization applying to conduct research within the department shall submit to the committee for approval a signed agreement to adhere to all departmental requirements.

(d) Any person, agency or organization conducting research shall, as requested by the department's chief of research or designee, submit progress reports on their projects.

NOTE: Authority cited: Sections 3509.5, 3517 and 5058, Penal Code. Reference: Sections 3500 through 3524 and 5054, Penal Code.

HISTORY:

1. Change without regulatory effect adding new article 9.1 (section 3369.5) and renumbering former section 3439 to new section 3369.5 filed 8-1-96 pursuant to section 100, title 1, California Code of Regulations (Register 96, No. 31).
2. Amendment of subsection (a), including incorporation of portion of former subsection (a)(5) and repealer of subsections (a)(1)–(5) filed 7-3-2001; operative 8-2-2001 (Register 2001, No. 27).
3. Amendment of subsection (a) filed 12-9-2008; operative 1-8-2009 (Register 2008, No. 50).

Article 9.5. Case Records

3370. Case Records File and Unit Health Records Material—Access and Release.

(a) Unit health records means a patient's health record that includes all records of care and treatment rendered to an inmate-patient.

(b) Except by means of a valid authorization, subpoena, or court order, no inmate or parolee shall have access to another's case records file, unit health records, or component thereof.

(c) Inmates or parolees may review their own case records file and unit health records, subject to applicable federal and state law. This review shall be conducted in the presence of staff, and may necessitate the use of a computer.

(d) No inmate or parolee shall access information designated confidential pursuant to section 3321 which is in or from their own case records file.

(e) No case records file, unit health records, or component thereof shall be released to any agency or person outside the department, except for private attorneys hired to represent the department, the office of the attorney general, the Board of Parole Hearings, the Inspector General, and as provided by applicable federal and state law. Any outside person or entity that receives case records files or unit health records is subject to all legal and departmental standards for the integrity and confidentiality of those documents.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 2081.5, 5054 and 6126.5, Penal Code; Sections 56.10, 1798.24 and 1798.40, Civil Code; and Code of Federal Regulations, Title 45, Sections 164.512 and 164.524.

HISTORY:

1. New section filed 12-20-91 as an emergency; operative 12-20-91 (Register 92, No. 4). A Certificate of Compliance must be transmitted to OAL 4-20-92 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 12-20-91 order transmitted to OAL 4-15-92 and filed 5-27-92 (Register 92, No. 24).
3. New subsection (b) and subsection relettering filed 3-24-99; operative 4-23-99 (Register 99, No. 13).
4. Amendment of section heading, section and Note filed 1-19-2006; operative 2-18-2006 (Register 2006, No. 3).
5. Amendment of subsection (e) filed 12-9-2008; operative 1-8-2009 (Register 2008, No. 50).

3370.5. Detainers.

(a) When a detainer is received by the department, the inmate shall be provided a copy of the detainer and written notification concerning any options available to the inmate.

(b) An inmate may request resolution of a detainer case by completing the indicated form below and forwarding it to the case records office where the necessary documents shall be prepared for the inmate's signature and mailing.

(1) CDC Form 643 (Rev. 4/88), Inmate Notice and Demand for Trial to District Attorney, shall be completed to request disposition of untried charges in California.

(2) CDC Form 616 (Rev. 4/91), Request for Disposition of Probation (PC 1203.2a), shall be completed to request disposition of probation.

(c) If an inmate is not brought to trial within 90 days after the district attorney acknowledged receipt of CDC Form 643, case records staff shall complete and file with the court having jurisdiction of the matter the motion and order to request dismissal of the matter.

(d) When a district attorney requests custody of an inmate pursuant to PC section 1389 the inmate shall be provided a copy of the

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-15224, 19-15359

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☐ I certify that I served the foregoing/attached document(s) via email to all registered case participants on this date because it is a sealed filing or is submitted as an original petition or other original proceeding and therefore cannot be served via the Appellate Electronic Filing system.

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Xavier Becerra, Monica Anderson, Neah Huynh
OFFICE OF THE ATTORNEY GENERAL
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Description of Document(s) *(required for all documents)*:

PLAINTIFFS-APPELLEES / CROSS-APPELLANTS' PRINCIPAL AND RESPONSE BRIEF and ADDENDUM (REDACTED)

Signature s/Linda Nakanishi **Date** Feb 11, 2020

(use "s/[typed name]" to sign electronically-filed documents)

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