No. 18-16427

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD ASHKER, et al.,

Plaintiffs-Appellees,

v.

EDMUND BROWN, JR., et al.,

Defendants-Appellants.

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

Case No. 4:09-cv-05796-CW
The Honorable Claudia Wilken

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INTRODUCTION

This case presents a challenge to the imposition of devastatingly prolonged solitary confinement upon over 1,500 prisoners by the California Department of Corrections and Rehabilitation (CDCR). The Plaintiff class was confined in their cells more than twenty-two hours per day for years and even decades on end. Plaintiffs sought to remedy that Eighth Amendment violation through transfer from solitary confinement in Security Housing Units (SHU) to General Population. The parties settled the case with an agreement which, at its foundation, would end the practice of indefinite solitary confinement, and provide Plaintiffs with relief from the torture of being locked in their cells nearly all day every day.

Defendants refuse to abide by the core of the settlement, insisting that "General Population" is anything the State says it is, even if it continues or even worsens Plaintiffs' isolation. The District Court correctly rejected this double-speak, holding that the transfer of Plaintiffs from the SHU into an environment with the same or *even less* out-of-cell time than that which they claimed was cruel and unusual punishment violates the Settlement Agreement. This ruling is squarely supported by the Ninth Circuit's recent holding that the defining characteristic of restricted housing is not "an inmate's mere location in a housing unit," but rather is "*the amount of time confined in a cell*." *Parsons v. Ryan*, 912

F.3d 486, 505 (9th Cir. 2018) (emphasis added).

The District Court also correctly held that Defendants violated the settlement provision that all Restricted Custody General Population (RCGP) prisoners are to be allowed participation in "group yards" and "activity groups" by placing half of the RCGP prisoners on "Walk-Alone" status, whereby they are completely barred from any group activities. Here, Defendants argue that they have to violate the Settlement Agreement to protect the class from violence. Yet, Defendants agreed to group activities with full awareness of the difficulties inherent in ensuring prisoners' safety while also allowing adequate social interaction. If CDCR truly believes the provisions to which they agreed are impossible to safely enforce, they could seek modification; they have not.

Having properly found these two violations of the Settlement Agreement, the District Court ordered the parties to meet and confer, and to submit either joint or separate remedial proposals. Defendants refused to comply with those orders, and provided no input whatsoever regarding a proper remedy. The District Court therefore designed remedies based on its lengthy familiarity with the case and Plaintiffs' proposals; these remedies have been incorporated into this appeal. The resulting General Population order allows CDCR discretion in deciding how to increase out-of-cell time for class members, and creates a process for the parties, with the assistance of an expert and the Magistrate Judge, to work through a

resolution. With respect to the RCGP, the District Court accounted for CDCR's safety concerns, and issued a remedy requiring prison officials to make their best efforts to place each prisoner in a group, but allowing CDCR discretion to use Walk-Alone status in limited circumstances. These measured and rational remedial plans are the least intrusive means of achieving compliance.

Having declined to present any evidence in the District Court to refute Plaintiffs' showing on the General Population violation, and having refused to take part in the design of a remedial process when ordered by the Court, Defendants' current and wholly unsupported pronouncements of "catastrophic" results should their appeal be denied are particularly inappropriate. Beneath the hyperbole, mischaracterizations, and unsupported representations, Defendants are unable to show error or abuse of discretion in any of the District Court orders, all of which should be affirmed.

STATEMENT OF JURISDICTION

This Court has jurisdiction over each of the orders subject to this appeal under 28 U.S.C. § 1292(a)(1). Defendants are incorrect that jurisdiction also arises under § 1291, since none of the orders at issue are final orders.

ISSUES PRESENTED

1. Did the District Court correctly hold that Defendants violated the Settlement Agreement provision requiring the transfer of all eligible class members

from solitary confinement in SHU to General Population, by placing many class members into conditions of isolation as severe, or even more so, than they experienced in the SHU?

2. Did the District Court correctly hold that Defendants violated the Settlement Agreement provision requiring that all prisoners in the RCGP housing unit must be provided time in "small group yards" and other "group" activities, by placing many of these prisoners on "Walk-Alone" status whereby they are completely deprived of any group interaction?

3. Did the District Court show appropriate deference to CDCR by creating remedies that allow for significant and continued input from prison officials, and use the least intrusive means to correct each violation of the Settlement Agreement?

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: Eighth Amendment to the United States Constitution; 18 U.S.C. § 3626; Cal. Code Regs., Title 15, §§ 3341, 3343, 3044; Cal. Civ. Code §§ 1646, 1647.

STATEMENT OF THE CASE

A. The Nature of the Case

For over 25 years, California used the Pelican Bay SHU to warehouse the *Ashker* class in extremely prolonged solitary confinement. By 2011, more than 500 prisoners (about half the population at the Pelican Bay SHU) had been there for more than 10 years and 78 had been there for more than 20 years. (Court Docket (CD) 388, Defendants-Appellants' Excerpts of Record (ER) 477 ¶ 2).

In December 2009, Plaintiffs Todd Ashker and Danny Troxell filed a *pro se* lawsuit against the State for isolating them in Pelican Bay's SHU for well over a decade in violation of the Eighth and Fourteenth Amendments. (CD 1, ER 627). The case was assigned to the Honorable Claudia Wilken, who in September 2012, granted leave to file a Second Amended Complaint with class allegations. (CD 136, ER 579). A crucial aspect of Plaintiffs' allegations was that prisoners in the SHU were subjected to "prolonged conditions of brutal confinement and isolation" and spent "22 ½ to 24 hours per day in their cell." (CD 136, ER 580-81 ¶¶ 3-4). Plaintiffs further alleged: "Defendants persistently deny these men the normal human contact necessary for a person's mental and physical well-being. These tormenting and prolonged conditions of confinement have produced harmful and predictable psychological deterioration among Plaintiffs and class members." *Id.*[1]

[1] Defendants' Statement of the Case gives the false impression that time in cell was

In June 2014, the District Court granted Plaintiffs' motion for class certification, emphasizing Plaintiffs' allegation "that SHU inmates live in almost total isolation." (CD 317, ER 69). After Defendants transferred hundreds of class members into SHUs in other California prisons, Plaintiffs sought to file a Supplemental Complaint, adding a subclass of men held in the Pelican Bay SHU for over a decade before being transferred to similar conditions of solitary confinement elsewhere. (CD 388, ER 530–32). Central to the supplemental allegations was the class's continued isolation, nearly all day, in their cells. The District Court granted leave, finding little difference between SHU at Pelican Bay and the other prisons where individuals still were "confined to their cells for twenty-two to twenty-three hours a day." (CD 387, SER 4).

The parties settled this case on September 1, 2015, explaining in the preamble that the basic purpose of the Settlement Agreement (Agreement) was two-fold: (1) to settle Plaintiffs' claims regarding "the *conditions of confinement* in the Security Housing Unit (SHU) at Pelican Bay State Prison and other CDCR SHU facilities" and (2) to change California's practice of indefinitely segregating

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barely even a concern of Plaintiffs (AOB 7) by omitting Plaintiffs' paramount concern of social isolation. (CD 136, ER 581 ¶ 4) (complaining of denial of "normal human contact" and "prolonged conditions of brutal confinement and isolation").

prisoners based solely on gang validation status. (CD 424-2, ER 446) (emphasis added).

Additionally, the parties agreed that, "for settlement purposes only … this Agreement meets the requirements of 18 U.S.C. § 3626(a)(1)," i.e. that the prospective relief in the Agreement "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right … [and that the court has] give[n] substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." (CD 424-2, ER 445). 18 U.S.C. § 3626(a)(1). The Agreement protected Defendants from it being used by non-parties in other proceedings by including a provision that it was made "without any admission or concession by Defendants of any current and ongoing violations of a federal right." (CD 424-2, ER 446).

The District Court granted preliminary approval in October 2015. (CD 445, ER 47; CD 477, ER 66.) The Court then supervised the notice period, taking comments and objections and holding a fairness hearing, after which the Court approved the Agreement in January 2016. (CD 488, ER 38.). Since then, the District Court has ruled on a number of *de novo* motions for enforcement of the Agreement, including the two at issue on this appeal.

B. Background Regarding Defendants' Transfers of Class Members to Units Labeled "General Population"

The Settlement Agreement provides that class members who had not committed any recent serious misconduct were to be released from the SHU and "transferred to a General Population level IV 180-design facility, or other general population institution consistent with [their] case factors." (CD 424-2, ER 450 ¶ 25). Over 1,500 class members were reviewed under this provision. The great majority were released from the SHU, and now are housed at various institutions around the State, with many remaining in Level IV facilities and others being transferred to lower security facilities. (CD 993-1, SER 39 ¶¶ 2-3).

Prisoners in General Population units in California prisons are legally entitled to well over ten hours out of their cells each week. Title 15 § 3343(h) & § 3044(d)(2)(E) (Supplemental Addendum (S-ADD) 14, 20); CD 617, ER 411 at 53:24]). However, a significant number of class members sent to Level IV prisons reported receiving much less than this. Instead of an actual General Population experience, they reported conditions that are similar to what they experienced in the SHU: they are still being locked in their cells over 22 hours a day.

Plaintiffs raised this problem with Defendants and the Magistrate Judge early in the monitoring phase of the settlement, seeking information and informal resolution as to isolation for class members released to Level IV institutions. (CD 617, ER 420-21). Defendants refused to provide information or engage in

resolution of the issue, and the Magistrate Judge did not grant Plaintiffs' requests. *Id.*

Without access to information from Defendants, Plaintiffs' counsel investigated on their own, communicating with class members about their experiences, and conducting a survey of a representative sample of class members to assess the extent of the problem. (CD 993-1, SER 39-40 ¶¶ 4-5). Plaintiffs' counsel spoke with eight class members who described their isolation in sworn declarations, none of which have been subject to objection. (CD 930-2, ER 313-50). Plaintiffs' counsel also sent 205 surveys to randomly selected class members in a variety of Level IV facilities. The survey asked prisoners to track time out of their cells every day in the month of March 2017. Fifty-five completed surveys were returned. (CD 993-1 at 2, SER 40). Each individual log and an exhaustive spreadsheet compiling all the data were submitted with Plaintiffs' General Population enforcement motion. (CD 993-1, SER 41 at 3; CD 930-2, ER 195-304; CD 930-2, ER 306-11). The data show that many class members are being isolated in their cells as much or *more* than when they were in the Pelican Bay SHU.

Plaintiffs retained a corrections expert to analyze the declarations and out-of-cell data and evaluate the relevant Level IV prisons. Eldon Vail is the former Secretary for the Washington State Department of Corrections (WDOC), and has nearly thirty-five years of experience with adult and juvenile institutions. (CD

930-3, ER 351-68, ¶¶ 1-4). Mr. Vail has served as an expert witness and correctional consultant for over 40 jail and prison cases and disputes in nineteen different states. (*Id.* ¶¶ 5-11). He has extensive knowledge of the California prison system, having toured and inspected many of the institutions, and having been retained as an expert witness in five previous cases regarding CDCR. (*Id.*).

Mr. Vail's analysis showed that many class members are spending days on end locked in their cells with virtually no out-of-cell time for yard, day room, or other activities. As one data point, Mr. Vail identified 16 of 55 survey respondents who reported averaging *less than one hour per day* out-of-cell for the entire month. (CD 930-3, ER 363 ¶ 49; CD 930-2, ER 306-11). Mr. Vail identified another 11 respondents who reported averaging less than two hours per day out-of-cell for the entire month. (*Id.*).

The following illustrative narratives are drawn entirely from the survey data, which covers the month of March 2017:

Class Member No. 1 (CM1) **left his cell** at Kern Valley State Prison (KVSP) **only twelve times** the entire month. For at least **twenty days during the month, he was isolated in his cell the entire day**. He had yard only five days (ranging from thirty minutes to two hours), dayroom only once, and was required to eat all meals in-cell. His total **out-of-cell time** for the month was ten hours, an average of **0.32 hours/day**. (CD 993, SER 26 at 3:12).

CM2 was **isolated in his cell** at KVSP **all day for twenty-three days** of the month. He had yard on six days, three of which were under 45 minutes, dayroom on three days, and all meals were in-cell. His total **out-of-cell time** for the month was 12.56 hours, an average of **0.41 hours/day**. (*Id.* at 3:19-22).

CM3 was **isolated in his cell** at KVSP **all day for twenty-three days** of the month. Of the seven days he left his cell, two were for fifteen minutes or less. He had yard five times, dayroom twice, made one 15-minute phone call, and all meals were in-cell. His total **out-of-cell time** for the month was approximately 12 hours, an average of **0.39 hours/day**. (CD 993, SER 26-27 at 3:25-4:1).

CM4 was **isolated in his cell** at KVSP **all day for half the month**. He left his cell on 15 days, 10 of which were for 30 minutes or less. He had yard on 5 days, dayroom twice, one phone call, one visit to the law library, and all meals were in-cell. His total out-of-cell time for the month was 17.36 hours, an average of 0.56 hours/day. (CD 993, SER 27 at 4:4-9).

CM8 was **isolated in his cell** at High Desert State Prison (HDSP) **all day for 16 days** of the month**.** He had yard on 7 days and dayroom on 11 days (which included shower time). His total **out-of-cell time** for the month was 33.16 hours, an average of **1.07 hours/day**. All meals were eaten in-cell. (CD 993, SER 28 at 5:10-12).

CM10 was **isolated in his cell** at HDSP **all day for 18 days of the month**.

He had yard on 12 days, day room on 8 days, and one phone call. All meals were eaten in-cell. His total **out-of-cell time** for the month was 38.44 hours, an average **1.24 hours/day**. (*Id.* at 5:22-24).

CM12 was **isolated in his cell** at HDSP **all day for 25 days of the month**. He had yard and day room on 6 days (which included phone and shower time). His total **out-of-cell time** for the month was 17.67 hours, an average of **0.57 hours/day**. (CD 993, SER 29 at 6:8-10).

CM14 was **isolated in his cell at** Corcoran State Prison (CSP) **all day for 17 days of the month,** and on four other days he only left his cell for half-hour meals. He had yard on 8 days, day room on 2 days, out-of-cell meals on 8 days, and a GED program on 5 days. His total **out-of-cell time** for the month was 25.11 hours, an average of **0.81 hours/day**. He reports that yard and dayroom are supposed to occur twice daily with tiers alternating (and an evening day room for workers), but the program is rarely fully operational. (*Id.* at 5:21).

CM15 was **isolated in his cell** at CSP **all day for 7 days of the month, and on 6 days only left his cell for a shower or meal for 15 minutes or less.** He had yard on 16 days (with occasional day room overlap), day room or programming on 3 days, attended at least 2 religious services, had out-of-cell meals on 9 days, and showers on 7 days. His total **out-of-cell time** for the month was approximately 25.58 hours, an average of **0.83 hours/day**. (CD 993, SER 30 at 7:3). *See also*

CD 993, SER 27 at 4:12 (CM5), 4:20 (CM6), SER 28 at 5:1 (CM7), 5:16 (CM9), 6:1 (CM11), SER 29 at 6:15 (CM13).

The survey respondents identified reasons given by staff for cancelled or limited out-of-cell time. Cumulatively, these include: "down day," radios not working, school vacation, limited or cancelled program, lost phone list, "code," holiday, lockdown, staff training, no reason given, staff shortened, incident on another yard, maintenance, missing tray, count delayed, pizza sale, food sale, altercation, worker yard only, priority for another tier, installation of a computer monitor, modified program, power outage, fight, interviews, and holiday. (CD 993, SER 26-30; CD 930-2, ER 195-304).

Additionally, a number of class members provided undisputed declarations, demonstrating days and weeks of total confinement to their cells, and near-total deprivation of day room, chow hall, and yard access over a period of many months. Examples are summarized below:

Mr. Cannon, who was transferred from SHU to Level IV "General Population" housing at Corcoran, reports that he was **confined 24-hours per day in his cell for ten days** of March 2017; on **eight days he was allowed out of his cell for less than 30 minutes per day**; he had yard only ten days, and day room only six days (with some overlap), and was allowed to shower only five days. These figures are **typical of other months** during more than a year in which he has

been housed in Corcoran General Population following his release from SHU. He concludes: "Corcoran 'general population' conditions are worse than SHU in that the program is highly dysfunctional and irregular, resulting in less out-of-cell time." (CD 930-2, ER 318-20).

Mr. Esquivel, who was transferred following release from SHU to Level IV "general population" housing at Calipatria State Prison, reports that on **13 out of 23 days** he tracked (June-July 2017), he was **confined to his cell the entire day except for meals**. He had yard only 5 days. This has been his **typical experience** for **over two years** in "general population." (ER 313-14). Thus, Mr. Esquivel declared: "my average daily out-of-cell time at [Pelican Bay SHU] was greater than my average daily out of cell time at Calipatria." He also describes the effect of this prolonged isolation:

> The conditions in "general population" at Calipatria are similar to SHU, and my experience is likewise similar. I have limited social interaction and intellectual stimulation. I rarely go outside. It is difficult to find productive uses for my time. I have difficulty maintaining relationships with my family, especially since my ability to use the telephone is so infrequent and irregular. I suffer from insomnia. I suffer from anxiety that I feel is directly linked to the irregular programming: I am anxious because I do not know what will happen next.

(CD 930-2, ER 313). *See also* CD 993-3, SER 55-91.

Mr. Mendiola, who was transferred following release from SHU to Level IV "General Population" housing at KVSP, reports that for **23 days of March 2017 he was permitted to leave his cell for only 30 minutes or less each day, and**

that on eight days he did not leave his cell at all. His average **yard time** for the month was **.31 hours per day**, and his **day room time** averaged **.06 hours per day**. He was required to eat all meals in his cell. His out-of-cell time was **less** than he had been provided in the SHU. This is **typical of the nearly two years** he has been at KVSP. As a result, he states: "I feel like I have been forgotten by CDCR, and it depresses me: management and staff either do not see the negative impact of the lack of programming and out-of-cell time, or do not care." (CD 930-2, ER 328-30). *See also* CD 930-2, ER 323-350 [declarations of five other class members].

C. Background Regarding Defendants' Refusal to Place RCGP Class Members in Groups

The Settlement Agreement provides for the creation of a new housing unit for prisoners whose safety may be threatened in General Population—the RCGP. (CD 424-2, ER 452 ¶ 28). This is a non-disciplinary placement intended to afford General Population privileges. With the parties' full understanding of the challenges presented in safely housing prisoners with safety issues, the parties agreed that the RCGP prisoners are to be provided:

> … increased opportunities for positive social interaction with other prisoners and staff, including but not limited to: Alternative Education Program and/or small *group* education opportunities; yard/out of cell time commensurate with Level IV GP in *small group yards*, in *groups* as determined by the Institution Classification Committee; access to religious services; support services job assignments for eligible inmates as they become available; and leisure time *activity groups*.

(CD 424-2, ER 452-53 ¶ 28 [emphasis added]; *see, e.g.*, CD 561, SER 94-98).

Nevertheless, it is uncontested that half the prisoners in the RCGP (thirty out of sixty) receive none of these group experiences, but are instead on "Walk-Alone" status. (CD 985-5, ER 111–12, ¶¶ 6–8; CD 927-8, ER 370 ¶¶ 3-4). For approximately one-third (or twenty) of the RCGP prisoners, Walk-Alone status is not short-term or transitional (imposed because they are new arrivals to the RCGP), but is indeterminate and will continue "until such time that prison staff determine that the inmate can program safely with other inmates." (CD 927-8, ER 370 ¶ 4).

Walk-Alone status entails a number of significant deprivations. Purported "yard time" is spent inside small cages twenty-by-ten feet in size – which Defendants euphemistically call "fenced individual exercise yards" – where prisoners have no physical contact with others. (CD 927-8, ER 371). While Walk-Alone prisoners are able to communicate with the prisoner in the next cage, there is no group exercise or activity, as they are physically separated from all other prisoners at all times. (*Id.* ¶ 6). Indeed, these exercise cages are the *same* kind of cage used in segregation units throughout CDCR, even though the RCGP is *not* intended for discipline. (CD 424-2, ER 452-53 ¶ 28; CD 1005-1, SER 18; CD 927-8, ER 371 ¶ 6).

Walk-Alone prisoners have no group activities, such as classes, informal discussion groups, work projects, or sports. (CD 844, ER 384-85 at 2-3). Defendants recite the ways in which Walk-Alone prisoners have social interaction, but notably absent in their description is *any physical contact* between Walk-Alone prisoners and any other prisoner. AOB 14-15.

D. Background Regarding Plaintiffs' Enforcement Motions

To remedy Defendants' violations of the Agreement, Plaintiffs filed the General Population Motion (CD 930) on December 7, 2017, and the Walk-Alone Motion (CD 844) on October 13, 2017. The Magistrate Judge denied both motions (CD 986, ER 33–35; CD 987, ER 29–30), and Plaintiffs sought *de novo* review. (CD 992 & 993). The District Court reversed the Magistrate Judge's recommendations, holding that Defendants breached the Agreement. (CD 1028, ER 21–22; CD 1029, ER 19–20.)

1. The General Population Order

With respect to Plaintiffs' General Population motion, the District Court held that the continued isolation of prisoners already subjected to ten or more continuous years in SHU violates paragraph 25 of the Settlement Agreement. In particular, the District Court made findings that "many Plaintiffs spend an average of less than an hour of out-of-cell time each day, which is similar to the conditions they endured in the SHU," that this is not "consistent with the CDCR's regulations

and practices with respect to Level IV General Population inmates," and "is substantially less than the amount of time a General Population inmate spends out-of-cell, which Defendants represented was a minimum of ten hours a week." (CD 1028, ER 8; CD 1028, ER 21-22). The District Court ruled that class members "must receive more out-of-cell time than they received in the Pelican Bay SHU," and that "[t]hey should receive out-of-cell time consistent with the CDCR's regulations and practices with respect to Level IV General Population inmates, as well as its constitutional obligations." (CD 1028, ER 21 at 1:14-20). The District Court also held that "the breach was materially noncompliant pursuant to paragraphs fifty-two and fifty-three of the Settlement Agreement." (CD 1113, ER 11).

2. The Walk-Alone Order

The District Court also found that Walk-Alone status violates the Settlement Agreement, determining that "a substantial percentage of Plaintiffs in RCGP are on 'Walk-Alone' status and are not permitted to exercise in small group yards or engage in group leisure activities," and this "does not comply with the terms of the Settlement Agreement." (CD 1029, ER 19-20). Due to this breach, Defendants were "substantially noncompliant pursuant to paragraph fifty-three" of the Agreement. (CD 1113, ER 11).

3. The District Court's Remedial Process

The District Court ordered a remedial process providing CDCR with flexibility and discretion in resolving the violations. The General-Population and Walk-Alone Orders required the parties to "meet and confer . . . with the goal of presenting a proposed remedial plan for Court approval." (CD 1028, ER 22; CD 1029, ER 20; CD 1113, ER 10.)

Defendants flouted this order, refused to engage with Plaintiffs to create a joint plan or to submit their own plan. (CD 1113, ER 11). The Court thus ordered a remedy "based on Plaintiffs' plans and [the District Court's] own familiarity with this litigation." *Id.*

With respect to the General Population violation, the Court ordered that all class members in Level IV prisons "must be accorded an amount of time out of their cells that is meaningfully greater than when they were in the Security Housing Unit (SHU), consistent with [CDCR's] legitimate security needs. CDCR shall have discretion as to how to implement this general remedy." (CD 1104, ER 4). To ensure compliance, the Court ordered CDCR to produce targeted documentation of out-of-cell time, and allowed for one year of limited monitoring by Plaintiffs' counsel and an expert, with the potential for an extension if substantial compliance is not achieved. (CD 1104, ER 4-6). The Court noted that this relief "is narrowly drawn, extends no further than necessary to correct the

violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." (CD 1113, ER 12, 14-15).

To address the Walk-Alone violation, the District Court adopted Plaintiffs' proposal allowing "individuals to opt into Walk-Alone status" (CD 1113, ER 15), but otherwise rejected Plaintiffs' proposal as insufficiently deferential to CDCR. (CD 1113, ER 16). The Court crafted an order designed "to allow Defendants discretion to determine if Walk-Alone status is necessary." (CD 1113, ER 16). The order requires that the Institution Classification Committee (ICC) make Walk-Alone determinations and provide an explanation to the prisoner and his counsel "to the extent possible without disclosing information that could create a security breach;" that the finding may be reviewed by the Departmental Review Board (DRB), which is to provide its own finding promptly to the prisoner and counsel; and that the ICC and DRB reassess the determination every two months. (CD 1113, ER 16-17). The remedial order further provides that "Defendants shall have discretion on implementing the alternative social interactions, consistent with safety concerns," and that Plaintiffs are entitled to monitor the remedy for one year with the possibility of an extension. (CD 1113, ER 17).

The District Court granted Defendants' motion to stay implementation of both remedial plans pending appeal. (CD 1113, ER 18).

STANDARD OF REVIEW

On the appeal of an order enforcing a settlement agreement, the Court of Appeals reviews *de novo* the district court's interpretation of its terms. *See Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). Nevertheless, where the district court has had "extensive oversight" of the case, the Court of Appeals should "give deference to the district court's interpretation." *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir. 1995). Here, Judge Wilken has supervised the case continually for ten years, from the commencement of the litigation, through final approval of the Agreement, to the current appeal.

Upon review of the interpretation of a settlement, the Court of Appeals must defer to any factual findings, including mixed questions of law and fact, made by the district court unless they are clearly erroneous. *See Parsons v. Ryan*, 912 F.3d 486, 495 (9th Cir. 2018). Where, as here, most facts are uncontested, deference to the district court is particularly appropriate.

Beyond the interpretation of particular terms, the enforcement of a settlement agreement is reviewed for abuse of discretion. *See Parsons*, 912 F.3d at 495. Under abuse-of-discretion review, the Court of Appeals "will reverse only if the district court made an error of law, or reached a result that was illogical, implausible, or without support in the record." *Parsons*, 912 F.3d at 495.

SUMMARY OF THE ARGUMENT

I. The Settlement reflects the parties' agreement that CDCR would remove class members from isolation in SHU and transfer them to General Population. Yet the uncontroverted evidence – including prisoner declarations, extensive survey data, and an expert declaration – shows that many class members in these General Population units are held in their cells well over 22 hours per day. By definition, this is actually a transfer to restricted housing, with the same or *even more* time isolated in their cells than in SHU, and is inconsistent with California regulations and CDCR's asserted practice regarding out-of-cell time in General Population. *See Parsons*, 912 F.3d at 505 (restricted housing is defined not by "an inmate's mere location in a housing unit," but rather by "the amount of time confined in a cell"). The District Court correctly held that the transfer of class members from one form of isolation to another violates the Settlement Agreement.

Defendants argue that the Agreement does not explicitly speak to General Population conditions and makes no guarantee of any minimum out-of-cell time, so that as long as class members have been transferred to units labelled "General Population," there is no legitimate ground for complaint. But restricted housing and General Population are mutually exclusive terms, principally defined by time out-of-cell. Title 15, §§ 3341(a) & § 3343(h). By agreeing to transfer class members out of the SHU and into General Population, Defendants necessarily

became bound to place these prisoners in conditions, in accordance with California's own standards, distinct from restricted housing.

To remedy the General Population violation, the District Court sought proposals from the parties. Defendants refused, so the District Court crafted a reasonably specific remedy that also grants CDCR maximal discretion to shape how to provide class members with "meaningfully greater" out-of-cell time than they received in SHU, recognizing CDCR's "legitimate security needs," while providing Plaintiffs a role in a monitoring process overseen by the Magistrate Judge.

II. The Settlement Agreement requires that CDCR provide RCGP prisoners with increased opportunities for positive social interaction, including yard and leisure time in small groups. Defendants admit that half of the prisoners in the RCGP are *not* in groups, but instead are on Walk-Alone status. The District Court therefore did not abuse its discretion or err in finding that "[t]his does not comply with the terms of the Settlement Agreement." (CD 1029, ER 19-20).

Defendants acknowledge that the Agreement requires RCGP programming "including but not limited to" group yard and group activities, but argue that this language is illustrative rather than mandatory, and subject to CDCR's discretion. AOB 34. This is nonsensical, since "including" means that *all items* listed (group activity and more) must be provided. Defendants also argue that their breach is

justified by their need to prevent harm within the unit. But this ignores Defendants' agreement, informed by their expertise and judgment, to settle this case on specific terms, including that each and every RCGP prisoner (all of whom by definition have safety issues) *can* recreate in a small group.

Defendants refused to provide input regarding remedy, despite the District Court's order. The District Court could have mandated strict compliance with the Agreement through a ban on Walk-Alones, but instead deferred to CDCR by allowing Walk-Alone status on a limited basis in uncommon circumstances, with procedural constraints to ensure that CDCR makes "every effort" to create groups. This was a proper exercise of the District Court's equitable discretion.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS VIOLATED THE SETTLEMENT AGREEMENT BY CONTINUING TO SUBJECT PLAINTIFFS TO IN-CELL ISOLATION IN "GENERAL POPULATION," AND ORDERED A PROPER REMEDY

The District Court correctly held that the continued isolation of prisoners who already had been subjected to ten or more continuous years in SHU violates paragraph 25 of the Settlement Agreement. In particular, the District Court made a factual finding that "many Plaintiffs spend an average of less than an hour of out-of-cell time each day, which is similar to the conditions they endured in the SHU," and this "is substantially less than the amount of time a General Population inmate

spends out-of-cell, which Defendants represented was a minimum of ten hours a week." (CD 1028, ER 22). The District Court concluded that this violates the Settlement Agreement (*id.*), ruling that class members "must receive more out-of-cell time than they received in the Pelican Bay SHU," and that "[t]hey should receive out-of-cell time consistent with the CDCR's regulations and practices with respect to Level IV General Population inmates, as well as its constitutional obligations." (CD 1028, ER 21). Simply put, the parties agreed through the settlement that CDCR would transfer class members from isolation in solitary confinement to General Population. The transfer of class members from one form of isolation to another is not transfer to "General Population," and this violates that agreement.

A. Defendants Violated the Settlement Agreement

1. Class Members Have been Transferred to a Different Form of Restricted Housing, Not General Population

As CDCR recognizes, and as is universally understood, restricted housing and General Population are mutually exclusive terms. *See* Title 15, § 3341(a) (differentiating segregated units from General Population) & § 3343(h) (mandating minimum times for "exercise outside their rooms or cells" for prisoners in segregated housing); *Arteaga v. Hubbard*, No. 15-CV-03950 NC (PR), 2017 WL 2633121, at *1 (N.D. Cal. June 19, 2017) (differentiating "segregated housing" from "general population").

The defining distinction between General Population and restricted housing is time out-of-cell. *See Parsons*, 912 F.3d at 493, 503 ("touchstone" for restricted custody is "the amount of isolation experienced by inmates," as defined by the daily number of hours "confined in a cell"). The American Correctional Association (ACA) defines restricted housing as "a placement that requires an inmate to be confined to a cell at least 22 hours per day," and the United States Department of Justice (DOJ) defines "isolation" or "solitary confinement" as "being confined to one's cell for approximately 22 hours per day or more." (CD 993-2, SER 47; CD 930-3, ER 356 ¶ 23).

California's regulations conform to this definition, with SHU and other restricted housing prisoners held in their cell 22 hours a day or more. (CD 136, ER 580; CD 387, SER 4; Title 15, § 3343(h)). Thus, it is specious for Defendants to insist that they have complied with the settlement by moving class members to a unit called "General Population," when class members actually have been transferred to a different form of restricted housing, as defined by time out-of-cell. (CD 930-3, ER 351 ¶¶ 16, 24-28, 60) (testimony of Plaintiffs' expert that class members "are not actually in what reasonably may be considered General Population; rather, they are in a form of restricted housing as these terms are commonly understood within the corrections profession"); AOB 49 (recognizing that out-of-cell time is a "significant" condition of SHU placement). The District

Court properly recognized that transfers to units where class members receive out-of-cell time at or below the level of restricted housing violate Paragraph 25's promise of transfer to General Population, i.e. non-restricted, housing.[2]

Defendants insist that CDCR regulations "make no guarantees with respect to out-of-cell time for General Population inmates," AOB 31, but this is misleading. As the District Court recognized, Title 15 provides that prisoners in SHU receive a minimum of ten hours per week of yard time, without exception. Title 15, § 3343(h). In contrast, Title 15 provides that General Population prisoners are to be afforded "[a]ccess to yard, recreation and entertainment activities during the inmate's non-working/training hours and limited only by security needs." Title 15, § 3044(d)(2)(E). Hence, class members in General Population should be going to yard, day room, chow hall, etc. as their *regular* daily routine, limited only by legitimate security needs, and not by bureaucratic convenience or unsubstantiated blanket security assertions. As Plaintiffs' expert explained, without objection, Defendants are "failing to live up to their own policy language" by not providing the class with General Population out-of-cell time. (CD 930-3, ER 351 ¶ 52).

[2] Defendants distort the record to manufacture a purported concession by Plaintiffs' counsel about transfers to General Population. AOB 8, quoting CD 981, ER 160. In fact, Plaintiffs' counsel clearly stated that "what our people who were in the SHU for years and decades were supposed to get … is to be transferred to something that's not restricted housing anymore." (CD 981, ER 161).

Instead of General Population conditions, the District Court found that a significant number of class members are receiving *less* time out of their cell than they received in SHU. (CD 1113, ER 8). According to CDCR, prisoners in General Population are provided *at least ten hours of yard time* per week, but Plaintiffs are not receiving even that. (CD 617, ER 411–12). While CDCR's regulations contemplate far more than ten hours total out-of-cell time for General Population prisoners (as it includes not only yard, but also day room, work, education, social meals, etc.), Defendants' failure to provide at least as much yard time as SHU prisoners are mandated places the issue in stark relief. For Defendants to accord class members less out-of-cell time in General Population than they received in SHU is illogical and inconsistent with both CDCR's regulatory scheme and asserted practice.

The District Court's conclusion that many class members were not transferred to actual General Population is mandated by the recent Ninth Circuit decision in *Parsons v. Ryan,* 912 F.3d at 493, 505. In that case, an "isolation subclass" of "maximum custody" prisoners was defined as those who are "'subjected … to isolation, defined as confinement in a cell for 22 hours or more each day or confinement in [five enumerated] housing units.'" *Id*. The *Parsons* plaintiffs sought to include in the subclass prisoners who were housed in the units enumerated in the settlement agreement but who were offered a greater amount of

out-of-cell time. *Id.* This Court rejected plaintiffs' argument that subclass membership depended upon the identity of the housing unit, holding that membership must depend on the degree of isolation, as follows: "We therefore reject the argument that an inmate's mere location in a housing unit, rather than *the amount of time confined in a cell*, suffices to place the inmate within the subclass." *Id.* at 505 (emphasis added). Here, as in *Parsons*, the name of the housing unit is not determinative. Plaintiffs who are receiving the same *or less* out-of-cell time as when they were held in SHU are not in "General Population."

Defendants do not, and cannot, explain away Title 15, the DOJ and ACA standards, the uncontested testimony of Plaintiffs' expert, nor the standard recognized in *Parsons*. Instead, they take issue with the District Court's reliance on their representation regarding the minimum yard time provided in General Population, arguing that it was taken "out-of-context." AOB 47. However, the transcript shows that, during a hearing about the housing of a segment of prisoners entitled to General Population conditions, a question arose as to the "minimum yard time for General Population." CDCR counsel stated without exception or qualification: "It's a minimum of ten hours yard time in GP." (CD 617, ER 411–12; CD 1028, ER 22). The District Court properly relied on Defendants' representation, which is reviewed for abuse of discretion as a factual finding. (CD 1028, ER 22). *See, e.g. Adobe Sys., Inc. v. Taveira*, No. C 08-2436 PJH, 2009 WL

506861, at *5 (N.D. Cal. Feb. 27, 2009) (attorney's representation to court constitutes admission by party-opponent); *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991) (counsel's factual assertion in court proceeding is "binding concession" adverse to client); *United States v. Wilmer*, 799 F.2d 495, 502 (9th Cir. 1986) (attorney's statement during oral argument constitutes "judicial admission"), *cert. denied*, 481 U.S. 1004 (1987); *Magallanes-Damian v. INS*, 783 F.2d 931, 934 (9th Cir. 1986) (absent egregious circumstances, parties are generally bound by admission of attorney).

Defendants further argue that "paragraph 25 says nothing about the amount of time out-of-cell class members will receive in general population facilities" in contrast to the Settlement Agreement's provisions regarding various restricted housing placements (RCGP and Administrative SHU). AOB 30. But that is for good reason. Under CDCR regulations, the default for prisoners in restricted housing is 1.5 hours yard time a day; that would have been inadequate for class members in the RCGP or Administrative SHU who had already suffered over 10 years in SHU. In contrast, for class members transferred to General Population, it makes no sense to define mandated out-of-cell time in reference to the restricted housing standard; the Agreement contemplates that they would *not* remain in restricted housing but instead would be transferred to a unit where the default is

out-of-cell yard, recreation and entertainment limited only by security needs.[3]

2. Defendants' Continued Confinement of Class Members in Their Cells for More Time Than in SHU Violates the Central Purpose of the Agreement

While the meaning of General Population in the Agreement is sufficiently clear, as discussed above, to support affirmance of the District Court, that ruling also finds support if this Court were to look to the purpose of the parties. California law provides that "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." AOB at 31, citing Cal. Civ. Code §§ 1646, 1647. The central circumstance and the key matter at stake when the parties decided to forego trial and settle this case was the release of Plaintiffs from the oppressive and inhumane experience of being locked in their cells nearly all day, every day. (CD 424, ER 432-433; CD 136, ER 580, 592-593 ¶¶ 3, 63) (Complaint frames Eighth Amendment violation in conditions of SHU confinement, particularly detention in cell 22 ½ to 23 hours a day). Defendants' placement of class members in units where they receive less out-of-cell time than in the SHU thus violates this central purpose.

Defendants insist that the central purpose of the agreement has been

[3] Defendants cite *Stephenson v. Drever*, 16 Cal. 4th 1167, 1174–76 (1997) (AOB 34), which actually supports Plaintiffs by holding that the terms of the contract "must be viewed in light of the statutory scheme in which the contract operates," and therefore rejecting the implication "urged by defendants [which] would have the effect of stripping plaintiff of all these statutory [] rights." *Id.* at 1176-77.

satisfied, as Plaintiffs were transferred to "General Population level IV 180-design facilit[ies]," and that contractual term must refer to the way those prisons were being run at the time of the settlement. AOB 32-33. But Defendants provide *no* evidence as to the amount of out-of-cell time provided in those prisons at that time, so their argument has no substance. The only citation for their proposition is to Title 15, § 3375.1 (2014) (ADD 17), which states *nothing* about out-of-cell time. AOB 31. Moreover, Defendants themselves stated that General Population prisoners get at least as much yard time as SHU prisoners, yet many class members are not even receiving that. (CD 617, ER 411–12).

The District Court correctly rejected the semantic sleight-of-hand whereby facilities called "General Population" function as segregation units, or worse. Just as placement in SHU cells within a Level IV facility would be a blatant violation of the Settlement Agreement, so too is placement in "General Population" cells that in the most critical regard are the same or worse than SHU. *See In re Safeguard Self-Storage Tr.*, 2 F.3d 967, 970 (9th Cir. 1993) (where meaning of contractual term is disputed, court evaluates substance of agreement to "determine whether an animal which looks like a duck, walks like a duck, and quacks like a duck, is in fact a duck"); *Phillippe v. Shapell Indus.*, 43 Cal. 3d 1247, 1256 (1987) (party cannot flout meaning of contractual agreement through "semantic sleight-of-

hand").[4]

Finally, in an argument that is legally irrelevant but apparently an attempt to normalize the deprivations inflicted on Plaintiffs, Defendants assert (without evidence) that class members are treated the same as all other prisoners in Level IV institutions. AOB 30. This argument is a red herring – there is no equal protection claim here, simply a claim that one group of prisoners (class members who spent years or decades in isolation) is being denied actual General Population conditions, as promised. If Defendants have evidence that General Population prisoners, including all class members, actually get what the regulations and defense counsel's representations say they should, then Defendants should have (and presumably would have) put that in the record. Instead, the only evidence cited in the Opening Brief is defense counsel's declaration that all prisoners are subject to the same rules, that class members are now housed "alongside" other general population prisoners who have "no connection to this case," and counsel's statement at oral argument that "they're not being treated differently." AOB 9-10 (citing CD 985-4, ER 117–18, ¶¶ 4, 7; CD 981, ER 174–75.). These statements are

[4] The history of this litigation shows that the *reality* of conditions matters above all, and that transfers and labels cannot mask that reality. In granting leave for the filing of the Supplemental Complaint, the District Court recognized that class members transferred to prisons with conditions "slightly different" or "not meaningfully different" than Pelican Bay were entitled to pursue their constitutional claims. (CD 387, SER 8; *see also* CD 445, ER 49).

not evidence and are irrelevant to out-of-cell time, and thus do not support Defendants' argument.

B. The Continued Isolation of Plaintiffs is a Material Breach of the Settlement Agreement

Despite the centrality and severity of the continued isolation of Plaintiffs in "General Population" units, Defendants contend that the violation does not rise to the level of material breach (as required under paragraph 52) or substantial non-compliance (paragraph 53). AOB 40. Central to the promise of the Agreement was release from isolation; failure to abide by that promise is material and substantial. Defendants' attempts to belittle Plaintiffs' evidence is equally unavailing.

1. Failure to Remove the Plaintiff Class from Isolation is Far From a "Cosmetic" Defect

As Defendants recognize, substantial compliance has not been achieved where the party alleging breach has not "realized the contemplated benefit." AOB 42, *citing Cline v. Yamaga*, 97 Cal. App. 3d 239, 247 (1979). Where, as here, the benefit is release from isolation, and that condition continues (or even worsens) in a different location, the benefit has not been realized. Defendants' citation to *Joseph Musto Sons-Keenan Co. v. Pac. States Corp.*, 48 Cal. App. 452, 459 (1920) for the proposition that "cosmetic deviations from the promised performance" do not rise to the level of a breach surely does not advance their appeal, as the

continued severe isolation of so many prisoners is hardly a mere cosmetic flaw. AOB 42.

The analysis and result are no different in the analogous evaluation of material breach. AOB 48-51. Defendants principally argue that any "deficiencies Plaintiffs allege are slight." *Id.* This is fanciful, since, as explained above, the "deficiency" at issue is the transfer from isolation to isolation, and the central benefit Plaintiffs sought was the removal from isolation.

Defendants also argue that they "have otherwise fully performed." *Id.* The idea that performance on other issues could excuse breach on even just one issue is incorrect. As this Court has held: "Like terms in a contract, distinct provisions of consent decrees are independent obligations, each of which must be satisfied before there can be a finding of substantial compliance." *Rouser v. White*, 825 F.3d 1076, 1081 (9th Cir. 2016).

The other material breach factors are largely irrelevant, but one deserves mention because Defendants claim that their "conduct—even if a contractual breach—was innocent" and occurred late in the compliance period "over the month of March 2017." AOB 50. In fact, Plaintiffs raised this issue as a significant problem very soon after the monitoring phase of the settlement began, both informally with Defendants and formally in compliance proceedings before the Magistrate Judge. (CD 617, ER 420-21). *See Sackett v. Spindler*, 248 Cal. App.

2d 220, 230 (1967) (earlier notification of party's breach means behavior "could certainly not be characterized as innocent").

Defendants' effort to diminish the scope of the problem by framing class members' isolation in "General Population" to a single month (AOB 30) is contradicted by the evidence. A one-month survey was used to create a representative sampling, not because there was anything special about that month. (CD 993-1, SER 38-42; CD 930-3, ER 355). Indeed, every one of the declarants explicitly states that the isolation they describe has been typical of their entire time in general population following transfer from SHU, and these time frames last from many months to over two years. (CD 930-2, ER 314, 319, 324, 329, 334, 338, 343, 348).

In the event that this Court affirms the finding of breach, Defendants imply that they should be excused for their continued isolation of class members on the ground that CDCR is entitled to "wide-ranging deference … to preserve internal order and discipline." (AOB 46). The kind of unfettered discretion sought here is exactly what led CDCR to engage in the discredited practice of holding thousands of prisoners in solitary confinement for years and decades on end.[5] While Defendants are entitled to *some* deference, their argument would sap the meaning

[5] *See* https://www.cbsnews.com/news/60-minutes-reforming-solitary-confinement-at-an-infamous-california-prison/ (former CDCR Secretary stating past solitary confinement policy was a "mistake").

out of Defendant's contractual obligations. *See Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979) ("Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary").

Defendants rationalize the confinement of class members to their cells for days and weeks at a time as necessary to meet bare assertions of institutional security demands. AOB 46. But the Court will not wholly accept security risk assertions where the "premise is not supported by the record." *Parsons*, 912 F.3d 486, 500 (9th Cir. 2018); *see also Shorter v. Baca*, 895 F.3d 1176, 1183–84 (9th Cir. 2018) (deference to prison officials not mandated when unnecessary for prison security); *Brown v. Plata*, 563 U.S. 493, 511 (2011) (affirming order limiting prison population even after giving substantial weight to safety concerns). There is no reason in the record as to why staff scheduling cannot accommodate regular yard and other out-of-cell programming, nor why all meals must be served in-cell in many Level IV facilities. Defendants contend that the reasons identified in the data for restricting class members to their cells "generally reflect appropriate justifications related to institutional needs" by informing the Court of just three reasons (lockdown threat on staff, staff training, and lockdown search for missing metal), leaving out the many reasons having nothing to do with safety or security, such as: pizza day, "down" day, holiday, not on schedule, maintenance, food sale,

missing tray, staff training, and simply no reason at all. (CD 930-2, ER 306-11; CD 993, SER 20-35).

Plaintiffs have not demanded, and the Court has not ordered, that a threshold out-of-cell time be met every single day, given prison exigencies. However, the evidence here shows that excessive confinement is the *regular* practice for these class members, and that restricted housing in "General Population" units persists for weeks, months, and even years on end.

2. The Largely Undisputed Evidence Supports the District Court's Finding that Class Members Experience Widespread Severe Isolation

Defendants did not seriously contest Plaintiffs' evidence in the District Court, and presented *no evidence whatsoever* to refute Plaintiffs' motion. On appeal, Defendants' main point is that Plaintiffs' evidence is not substantial enough to support a material breach. The District Court properly found otherwise, relying upon Plaintiffs' extensive – and largely undisputed – testimony and data showing dramatic isolation for a substantial number of class members in Level IV facilities, with a sizeable subset of class members experiencing *less* out-of-cell time than when they were in SHU. (CD 930-2, ER 195-304; CD 930-2, ER 306-11; CD 930-2, ER 313-50; CD 930-3, ER 356 ¶ 22). The District Court's findings are reviewed for clear error, and should not be disturbed. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1136 (9th Cir. 2011) (clear error standard "is

significantly deferential and is not met unless the reviewing court is left with a 'definite and firm conviction that a mistake has been committed'"), quoting *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993).

In particular, Plaintiffs submitted eight sworn declarations describing days on end of total confinement to their cells, and near-total deprivation of day room, chow hall, and yard access, extending over a period of months and even years. (CD 930-2, ER 313-50). Defendants do not contest *any* of the declarations, which *by themselves* establish that there is a policy and practice of keeping many class members in their cells nearly all day every day. (*Id.*). *See Mansour v. Ashcroft*, 390 F.3d 667, 672 (9th Cir. 2004) (witness statement alone may establish proof, absent explicit adverse credibility finding); Federal Rule of Evidence 602 ("Evidence to prove personal knowledge may consist of the witness's own testimony.").

Plaintiffs presented 55 survey responses to show the widespread virtual lockdown of many class members in Level IV prisons and to enhance the picture so starkly drawn by the eight declarations. (CD 930-2, ER 306-11). Defendants failed to introduce any evidence to contradict this detailed factual data before the Magistrate Judge or on *de novo* review. On appeal, Defendants' only objections to the survey responses are based on sample size and alleged self-selection, which

were waived below. AOB 45-46. *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012) (failure to object to evidence constitutes waiver). While such objections could potentially impact a study designed to establish typicality, that was not the purpose of this survey; rather, the point here is that a substantial number of class members are suffering severe isolation at a scale sufficient to establish substantial non-compliance, regardless of whether this is so broad as to be typical of all class members. Neither objection addresses the crucial impact of the evidence, which is that 35 declarants and respondents in a random sample experienced the same or worse isolation as in SHU. This raw number of class members in the equivalent of restricted housing, or worse, is more than sufficient to establish substantial non-compliance with the Agreement. Furthermore, since blank surveys were sent to less than one-third of all class members in Level IV prisons, all of whom were randomly selected, the actual number of affected class members is necessarily much larger. (CD 993-1, ER 352-353).[6] As Mr. Vail stated, without objection:

> [T]he responses provided by the prisoners are sufficiently detailed and comprehensive to provide a reliable data set. The quality and size of the data

[6] Defendants grossly undervalue the significance of the number of declarants and respondents by contending that the data covers only 2% of the class. This statistical manipulation fails to recognize that the survey was sent to only a representative sample of Level IV prisoners. Defendants' percentage also is calculated in reference to all class members – including hundreds in lower level prisons and even those who have been released from prison entirely – as the total population group. (AOB 45).

> set provides a reliably representative sample of the overall population of class members in Level IV facilities, so that the opinions, conclusions, and recommendations in this Declaration are applicable generally to the experience in Level IV facilities and not just to the individual survey respondents.

(CD 930-3, ER 355 ¶ 15). *See, e.g., Ratanasen v. State of Cal., Dep't of Health Servs.*, 11 F.3d 1467, 1471 (9th Cir. 1993) (affirming validity of sample size of 3.4 percent of relevant population); *Gates*, 987 F.2d at 1398; *FEC v. Toledano*, 317 F.3d 939, 949 (9th Cir. 2002).

Defendants did not raise an objection as to bias in the District Court, so it is waived. AOB 46. *See Skydive Arizona*, 673 F.3d at 1113. Further, it is of no import whether survey recipients with grounds for complaint were more likely to respond; all that matters is that the number of class members with reliable evidence of severe isolation rises to the level of substantial non-compliance.

Separate and apart from direct reliance on the declarations and survey responses, they formed an uncontested basis for the opinions of Mr. Vail, and his uncontradicted expert testimony alone is sufficient to support the District Court's order. Mr. Vail explained his reliance as follows:

> [T]he facts contained in [the declarations and surveys] are the sort reasonably relied upon by experts in the field of corrections in forming opinions as to the nature and appropriateness of various housing, programming, and other aspects of prisoner conditions and treatment. Furthermore … I find that the survey instrument and process were conducted in a professional manner."

(CD 930-3, ER 355); Federal Rule of Evidence 703. Defendants do not challenge this reliance, which formed the basis for Mr. Vail's ultimate conclusion that class members were not being housed in "General Population and would not be considered as such in the corrections community nationally." (CD 930-3, ER 364, 367 ¶¶ 52, 60). The only legal objection Defendants reference from the District Court is that that the expert declaration purportedly "bears no relation to any settlement term that the parties agreed to." AOB 45 n. 8, citing CD 998, ER 107 & n.4 (relying exclusively on relevance objection under Federal Rules of Evidence 401 & 403). Thus, there is no objection to evidence, opinion, or qualification, but rather just a reiteration of Defendants' legal argument that the Settlement Agreement does not cover this issue.

Defendants also argue they could not verify or assess the anonymous survey results. AOB 47. But Defendants had every opportunity to (1) verify the testimony of the named declarants, all of whom volunteered their names, (2) seek the identities of the survey respondents, or (3) develop their own evidence through prisoner interviews and review of CDCR records of prisoner movement and programming. Defendants chose to do none of these, even when told by the Magistrate Judge that "it would seem a simple matter for you to then verify

whether those people have received that General Population designation and are treated the same as General Population…" (CD 981, ER 171).[7]

Given that Defendants conceded most of the factual evidence and expert opinion, the District Court had a firm basis to conclude "that many Plaintiffs spend an average of less than an hour of out-of-cell time each day, which is similar to the conditions they endured in the SHU," and it is understandable that the Court did not individually address the few peripheral objections Defendants raised. Defendants' claim to have "objected to much of Plaintiffs' evidence," and their complaint that the District Court did not address these objections, rings hollow. AOB at 45 n. 8 (citing CD 998, ER 107 & n.4; CD 1028, ER 21–22).

C. The District Court Acted Within Its Discretion by Ordering a Remedy that Grants Appropriate Deference to CDCR

The District Court ordered the following substantive remedy:

> All class members who have been transferred to General Population prisons and remain there must be accorded an amount of time out of their cells that is meaningfully greater than when they were in the [SHU], consistent with [CDCR's] legitimate security needs. CDCR shall have discretion as to how to implement this general remedy.

(CD 1114 at 1; ER 4). The order also provides for a monitoring process by which

[7] Defendants offer a conjecture that class members may have been "offered opportunities for out-of-cell time that they declined." AOB 46-47. There is no evidence in the record that any opportunities were offered and rejected, thus making Defendants' argument purely hypothetical. *Cf. Parsons,* 912 F.3d at 503–05 (relying on proof class was "offered meaningful opportunities for weekly out-of-cell time that far exceeds 14 hours per week").

the parties are to meet every three months with one another and every six months with the Magistrate Judge. The remedial language and process provide Defendants with the maximum amount of discretion to shape how to provide sufficient out-of-cell time. *See Parsons*, 912 F.3d at 498 (upholding remedial order on basis that it allowed implementation decisions to "remain within Defendants' discretion").

Defendants raise two principal objections: (1) that the District Court exceeded its authority by extending jurisdiction to enforce the remedy, and (2) that the remedy is vague because it requires a "meaningful" amount of out-of-cell time. AOB 55. However, as discussed below, the Agreement specifically allows the Court to retain jurisdiction over enforcement motions pending at the end of the two-year term until they are fully resolved. Further, the District Court's use of the term "meaningful" is reasonably specific in context, and it is particularly appropriate here, as it allows Defendants discretion in how they remediate the problem.

1. The Agreement Authorizes Continued Jurisdiction to Remedy Violations

Defendants acknowledge that the Agreement allows the Court to retain jurisdiction over enforcement motions pending at the end of the two-year term, but seem to argue that a remedy cannot occur after the two-year term. AOB 5 (Issue No. 5). These positions are mutually inconsistent. By the logic of the latter argument, CDCR could engage in a host of eleventh-hour violations with no threat

of repercussion, as successful motions brought toward the end of the two-year term could not be fully remedied within the period. Paragraph 46 of the Agreement makes it clear this is not what the parties intended: "If there is a motion contesting Defendants' compliance with the terms of this Agreement pending at the time the case is otherwise to be terminated, the Court will retain limited jurisdiction to resolve the motion." (CD 424-2, ER 459 ¶ 46). The parties put no substantive or temporal limit on this exception, allowing the Court to remedy a violation in whatever time is necessary. (CD 1113, ER 13 at 7:6-10).

Defendants insist that only a violation of the termination clause in Paragraph 41 could authorize the District Court to "extend[] the Agreement's duration." AOB 60. But just because Paragraph 41 allows the court to extend the life of the Agreement does not mean the parties intended that to be the *only* means by which the Agreement could be partially extended. The District Court acted well within its discretion to order a presumptive one-year monitoring period. *See, e.g.*, *Parsons*, 912 F.3d at 498 (district court did not abuse its discretion in issuing remedial order). This Court must defer to this exercise of discretion. (CD 1113, ER 13 at 7:6-10).

2. The Remedial Order is Not Vague.

Defendants argue that they have been given too much latitude, as the term "meaningfully greater" is "too vague to satisfy the requirements of Rule 65." AOB

63. Under Rule 65, courts do not set aside injunctions "unless they are so vague that they have no reasonably specific meaning." *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1097 (9th Cir. 2002) (quoting *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir.1992)). In the present context, the term "meaningful" is reasonably specific in that it has a floor, i.e. time out of cell must be greater than what prisoners experienced in SHU. *See, e.g., John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 552-53 (3d Cir. 2003) (concluding that an injunction, which contained the terms "reasonably calculated to afford meaningful educational progress," in light of the surrounding circumstances, was not too vague to be enforced); *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 191-92 (2d Cir. 2010) (statute using term "substantial and significant" was not unconstitutionally vague). Indeed, the District Court's remedy is consistent with California's own regulations, which do not require a fixed number of out-of-cell hours but require access to yard and other recreational activities "limited only by security needs." Title 15, § 3044(d)(2)(E).

Moreover, Defendants are in a poor position to complain about a remedy they refused to help shape. *See e.g., Parsons* 912 F.3d at 500 ("We will not fault the district court for failing to adopt a partial solution that Defendants did not timely propose."); *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1410 (9th Cir. 1990) (requiring parties to comply with court orders with which they disagree).

Hence, the District Court's finding of a violation of the Agreement through the in-cell isolation of class members in General Population units is supported by the record, and the remedial order was proper.

II. THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS VIOLATED THE SETTLEMENT AGREEMENT BY REFUSING TO PROVIDE ANY GROUP ACTIVITY FOR A SUBSTANTIAL PERCENTAGE OF THE PRISONERS IN THE RCGP

A. Defendants Violated the Agreement by Placing a Substantial Percentage of the RCGP Prisoners on Walk-Alone Status

The District Court properly held that Defendants' use of Walk-Alone status in the RCGP violates the plain language of the Agreement. Paragraph 28 of the Agreement requires that CDCR "will" provide to prisoners in the RCGP "increased opportunities for positive social interaction … including but not limited to: … yard/out of cell time … in small *group* yards, in *groups* as determined by the Institutional Classification Committee… and leisure time activity *groups*." (CD 424-2, ER 452-53 ¶ 28 [emphasis added]; CD 424-3, ER 469 (specifying that "[s]mall group yards" and "Leisure Time Activity Groups" shall be made "[a]vailable to all RCGP inmates."). The inclusion of the word "will" creates a mandatory obligation, and "group" is unambiguous, excluding the option of being entirely alone. *See, e.g.*, Oxford English Dictionary (3d ed., 2014) (defining group as: "A number of people … positioned, or located close together so as to form a collective unity"); *Kelly v. Wengler*, 979 F. Supp. 2d 1104, 1114 (D. Idaho 2013),

aff'd, 822 F.3d 1085 (9th Cir. 2016) (holding that defendants must "'comply with the staffing pattern'" as promised in its contract since that promise was "not a qualified commitment" and did not permit defendant the "leeway" it sought). As the District Court correctly held: "The Court, like Plaintiffs, defines a 'group' as consisting of more than one person." (CD 1113, ER 15).

Despite the clear language of the Agreement, Defendants' own evidence shows that half the prisoners in the RCGP are not in groups, but instead are on Walk-Alone status. (CD 927-8, ER 370 ¶ 3). For approximately one-third of the RCGP prisoners, this status is indefinite. (*Id*. ¶ 4). The District Court certainly did not abuse its discretion in finding that "a substantial percentage of Plaintiffs in RCGP are on 'walk-alone' status and are not permitted to exercise in small group yards or engage in group leisure activities," thereby concluding that "[t]his does not comply with the terms of the Settlement Agreement." (CD 1029, ER 19-20). *See, e.g., Sharpe v. F.D.I.C.*, 126 F.3d 1147, 1153 (9th Cir. 1997) ("We now apply ordinary principles of contract interpretation in examining the rights between the parties… It is beyond cavil that [the] failure to perform the express terms of the settlement agreement is a breach."); Witkin, *Summary of California Law, Contracts* § 791 (9th ed. 1987) ("The *wrongful*, i.e., the unjustified or unexcused, failure to perform a contract is a breach.").

1. Defendants' Interpretation of the Agreement is Nonsensical

Defendants' main argument on appeal is that the Agreement's requirement that CDCR provide opportunities in the RCGP "including but not limited to" group yard and group activities does not mandate that CDCR provide these opportunities, but rather is "illustrative" of the kind of opportunities CDCR may provide if it wishes. AOB 35. This reading of the plain contractual language, raised for the first time on appeal, is nonsensical. "Including" ordinarily signals that *all items* listed are encompassed within the whole. "Including but not limited to" is a phrase of enlargement, which indicates not only that all of the listed terms are mandatory, but that the listed terms are not exhaustive. *See F.T.C. v. EDebitPay, LLC*, 695 F.3d 938, 943–44 (9th Cir. 2012), *citing In re Johnny M.*, 100 Cal.App.4th 1128 (2002); *see also Kashmiri v. Regents of Univ. of California*, 156 Cal. App. 4th 809, 831 (2007) ("Where contract language is clear and explicit and does not lead to absurd results, we normally determine intent from the written terms alone."); Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."). As such, Defendants are contractually bound to provide class members with the opportunity to participate in *all* of the programming listed in paragraph 28 of the Agreement.

Defendants argue that "CDCR could comply with paragraph 28 by providing RCGP inmates only some of [the listed] privileges" so long as "those privileges, in

the aggregate, amounted to 'increased opportunities for positive social interaction.'" AOB 39. But this conclusion can only be reached by selective reading. The Agreement *mandates* group yard and group activities, and explains that their function, along with other enumerated and unenumerated activities, is to increase social interaction. The language of the Agreement simply cannot be read to grant CDCR discretion to achieve increased social interaction without including group activities.

Defendants also argue that group yard and group activities are not mandatory because individual prisoners can choose not to avail themselves of some opportunities. AOB at 34, 39. Surely, if a class member decides to forego a contractual benefit, that is within his rights. *See Sabo v. Fasano*, 154 Cal.App.3d 502, 505 (1984) (it is a well-established principle of California law that "a contracting party may waive conditions placed in a contract solely for that party's benefit"); *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 63 (1903). But a particular class member's choice, such as religious preference, does not bear on CDCR's contractual obligations to all remaining class members.

Defendants similarly twist the plain meaning of the Agreement to argue substantial compliance. AOB 53. Defendants contend that placing half the RCGP population on Walk-Alone status is substantially compliant with the Agreement because CDCR's "alternative programming" provides the Walk-Alones with the

"promised 'opportunities for positive social interaction.'" *Id.* But programming *within cells or cages* is not an adequate substitute for actual group interaction. Defendants are not in substantial compliance where, as here, Plaintiffs have not "realized the contemplated benefit," i.e. actual group yard and activity. AOB 42, *citing Cline*, 97 Cal. App. 3d at 247.

Defendants' final effort to escape the plain meaning of the group requirement is to nullify it entirely as being contradicted by the RCGP remedial order. AOB 35. But there is no inconsistency between the liability and remedial orders. Trial courts have flexibility in crafting equitable relief based on the practicalities presented, and remedial orders therefore often vary somewhat from the strict dictates of a declaration of rights. *See Prudence Corp. v. Shred-It Am., Inc.*, 365 F. App'x 859, 861 (9th Cir. 2010), citing *Rogers v. Davis,* 28 Cal.App.4th 1215 (1994) (quoting Restatement (First) of Contracts, § 359(2)) ("a 'decree [of specific performance] need not be absolute in form, and the performance that it requires need not be identical with that promised in the contract'"); Restatement (Second) of Contracts § 358(1). Here, the District Court exercised its equitable latitude by crafting a remedy requiring CDCR to "make every effort" to create groups, even as small as two individuals if necessary,[8] while allowing prison

[8] The three groups actually created in the RCGP at the time of the District Court briefing had seven to nine prisoners each, and Defendants have not claimed that smaller groups are infeasible. (Sealed ER 817).

officials limited discretion to consider Walk-Alone status in uncommon circumstances. (CD 1113, ER 16-17). What the District Court refused to countenance was Defendants exercising unbounded discretion to place prisoners on Walk-Alone status. The District Court's creation of a remedy that does not precisely mirror the declaratory order does not nullify or contradict the contractual interpretation, and the Court can hardly be blamed for issuing the least intrusive remedy possible.[9]

2. Defendants Cannot Unilaterally Escape their Obligation to Place all RCGP Prisoners in Groups

Defendants argue that the Agreement cannot be interpreted to require that all Walk-Alone prisoners be placed in groups because CDCR cannot safely do so, and this would render the Agreement unenforceable. AOB 36. But Defendants understood the challenges presented by prisoners whose safety issues prevent transfer to a regular General Population setting; they nonetheless agreed to institute a plan for each RCGP prisoner to have access to group activity because a critical purpose of the Settlement Agreement is to ensure that formerly segregated prisoners are afforded out-of-cell time in a group setting. Indeed, Defendants

[9] Even if Defendants were correct that the declaratory and remedial orders are incompatible, the declaratory order should prevail, in which case CDCR simply would be barred from using Walk-Alone status in the RCGP (absent agreement with Plaintiffs for a modification of the Agreement).

confirmed during the final approval hearing that the settlement fully accounts for prisoner and staff safety:

> The Court: And certainly the CDCR and the Attorney General's Office had in mind throughout the negotiations the safety of the staff as well as the prisoners.
>
> [Defendants' Counsel]: To this day, your Honor.

(CD 493, ER 44). Defendants cannot now backtrack on that agreement. *See, e.g.*, *Hook v. State of Ariz., Dept. of Corr.*, 972 F.2d 1012, 1016–17 (9th Cir. 1992) (despite prison officials' "strong argument" for deviating from term of consent decree, court required compliance with the settlement absent a court-ordered modification).

Furthermore, Defendants' position that compliance presents too great a risk is not supported by the evidence. Defendants rely on two correctional administrator declarations, asserting that there were "almost fifty" rule violation reports (RVRs) issued in the RCGP over two years. (ECF Nos. 999-5 & 927-8, ER 821 & 369). The declarant provides no evidence as to whether this average of two RVRs per month is greater than the norm in Level IV prisons or in Special Need Yards, how many individuals account for the RVRs, how many RVRs were resolved informally, nor whether any were overturned or dismissed on appeal. The declarations identify only five specific incidents over the two year period, involving prisoners who were released from Walk-Alone status, of which only one

was assaulted by others. (ER 814, 820-21). There is no evidence as to whether these incidents resulted from CDCR mistakes in assigning RCGP prisoners to particular groups, and whether CDCR is devoting sufficient staff, resources, and space to foster small groups. That Defendants might have to spend more money, for example, to provide smaller groups to ensure safety, does not justify their refusal to grant the Walk-Alones group exercise and activities. *See Parsons*, 912 F.3d at 501 ("'[a] demonstration that an order [issued to vindicate the federal rights of prisoners] is burdensome does nothing to prove that it was overly intrusive.'"), *quoting Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010).

The caselaw Defendants rely upon is also unavailing. In *Keehn v. Lucas*, No. CIV.A. 09-16, 2012 WL 269632, at *7 (W.D. Pa. Jan. 30, 2012), plaintiff allegedly *requested* to be tasered (as an experiment to settle an argument), and the court excluded from trial reference to the alleged consent. In *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1056 (9th Cir. 2007), this Court held that the parties could not agree to terms that directly violate the explicit terms of the city's zoning ordinance. None of these cases support the notion that the parties could not agree to place RCGP prisoners in groups within prison officials' ordinary mandate to protect safety and security.

Plaintiffs, like Defendants, are concerned with prisoner safety; this is why Plaintiffs proposed creating the RCGP. But Plaintiffs are equally concerned with

overcoming years of social isolation. As the parties mutually understood and agreed at the time of the settlement, safety and social contact need not be mutually exclusive. Defendants' evidence is insufficient to demonstrate a fundamental change of circumstances. In any event, if group activity in the RCGP is truly impossible for some individuals, Defendants could have sought to negotiate a modification of the Agreement, barring which they could have moved for relief in the District Court, submitting the substantial evidence necessary to modify the Agreement. Defendants have no right to unilaterally institute a drastic change in a basic feature of the RCGP.

B. The District Court Acted Within Its Discretion by Ordering a Remedy that Grants Appropriate Deference to CDCR

To address the Walk-Alone violation, the District Court allowed individuals "to opt into walk-alone status," and granted Defendants "discretion to determine whether a prisoner should be categorized as a walk-alone if reasonably necessary for safety purposes." (CD 1113, ER 16). The Court limited CDCR's discretion with certain procedural constraints and by requiring the provision of information to the prisoners and counsel. (*Id.* 16-17).

The District Court saw CDCR's policy and practice for what it really is: long-term indeterminate isolation based on prison administrators' unsubstantiated and generalized desire to maintain unchecked control. While respecting CDCR's management of its own prisons, the District Court took a practical and measured

approach to impel CDCR to only act on specific threats of harm and to genuinely work toward providing human contact for as many RCGP prisoners as possible, and was unintimidated by Defendants' empty refrain that any constraints on its unbridled discretion would lead to "catastrophic results." AOB 37. *See, e.g.*, *Parsons*, 912 F.3d at 500 (where defendants asserted an order would create an "unprecedented" security risk by requiring Defendants to transport "hundreds of inmates on a daily basis" to outside medical facilities, Ninth Circuit "reject[ed] this argument because it relies on a premise not supported by the record."); *Thomas v. Ponder*, 611 F.3d 1144, 1154 (9th Cir. 2010) ("an emergency cannot be deemed to exist simply because there are documented threats and assaults from time to time—otherwise every prison would be in a constant state of emergency.").

Defendants contend that the remedial order extends beyond what is necessary to achieve substantial compliance and exceeds the prospective relief limits imposed by the PLRA. AOB 56. The opposite is true: the remedial plan does *less* than is required by the Agreement. While the Agreement requires that CDCR place every RCGP prisoner in a group, the order allows CDCR to exercise its authority to have exceptions. If the remedial order required *absolute* compliance, i.e. a bar on all Walk-Alones, then there would be no need for any further conditions on Defendants. The criteria, monitoring, and supervision requirements come only as part of the District Court's decision to allow

Defendants to *substantially* (i.e. less than fully) comply, thereby necessitating some means of constraining the discretion being granted. Since the remedy does not go beyond substantial compliance, the terms of the PLRA are irrelevant.

Even if, for the sake of argument, the PLRA were relevant, Defendants disregard that they agreed to a global provision that "for settlement purposes only … this Agreement meets the requirements of 18 U.S.C. § 3626(a)(1)." (CD 424-1, ER 445 ¶ 9). The cited section of the PLRA includes: "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Thus, Defendants' argument that the RCGP remedy exceeds the PLRA because there is no violation of a federal right is defied by the Agreement's incorporation of the relevant section of the PLRA itself.[10] As this Court held in *Parsons*, a conclusion that a settlement was "'necessary to correct the violations of the Federal right of the Plaintiffs,'" "necessarily required a finding of a constitutional violation – that is, if there were

[10] It is of no matter that paragraph 53 does not reiterate the "violation of federal right" language, since paragraph 9 applies to the entire Agreement (including paragraph 28 regarding the RCGP). Defendants' contrast between paragraphs 52 and 53 is inconsequential; paragraph 52 contains the "violation of federal right" language because it encompasses the enforcement of matters that may not be explicated in the Agreement, *viz.* contentions of constitutional violations made in the Complaint.

no violation of a federal right, there would be nothing for the [settlement] to 'correct.'" *Parsons*, 912 F.3d at 501. Hence, the District Court's finding that the widespread use of Walk-Alone status violates the Agreement is supported by the record and the remedial order was proper.

III. THE COURT HAS THE INHERENT AUTHORITY TO ENSURE COMPLIANCE WITH THE TERMS AND SPIRIT OF THE SETTLEMENT AGREEMENT

A federal court has jurisdiction to "manage its proceedings, vindicate its authority, and effectuate its decrees." *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016), *quoting Kokkonen v. Guardian Life. Ins. Co*., 511 U.S. 375, 380 (1994). Here, CDCR's release of class members from SHU into Level IV institutions with even less out-of-cell time, and the extensive use of Walk-Alone status in the RCGP, undermine the District Court's Order approving the Agreement. (CD 488, ER 37-38). *See K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 967 (9th Cir. 2014). The District Court's rulings on violation and remedy thus have an independent basis upon which this Court should affirm.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's General Population, Walk-Alone, and remedial orders.

Dated: May 31, 2019

Respectfully submitted,

s/ Samuel Miller

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Amendment VIII. Excessive Bail, Fines, Punishments

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18 U.S.C.A. § 3626

§ 3626. Appropriate remedies with respect to prison conditions

Effective: November 26, 1997
Currentness

(a) Requirements for relief.--

(1) Prospective relief.--(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief.--In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court

makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) Prisoner release order.--(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.--

(1) Termination of prospective relief.--(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief.--Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.--

(1) Consent decrees.--In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.--(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies.--The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.--

(1) Generally.--The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay.--Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay.--The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Order blocking the automatic stay.--Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.--

(1) In general.--(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.--(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal.--Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation.--The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment.--In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties.--A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions.--As used in this section--

(1) the term “consent decree” means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term “civil action with respect to prison conditions” means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term “prisoner” means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

CREDIT(S)

(Added Pub.L. 103-322, Title II, § 20409(a), Sept. 13, 1994, 108 Stat. 1827; amended Pub.L. 104-134, Title I, § 101[(a)] [Title VIII, § 802(a)], Apr. 26, 1996, 110 Stat. 1321-66; renumbered Title I, Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327; amended Pub.L. 105-119, Title I, § 123(a), Nov. 26, 1997, 111 Stat. 2470.)

Notes of Decisions (172)

18 U.S.C.A. § 3626, 18 USCA § 3626
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West's Annotated California Codes
Civil Code (Refs & Annos)
Division 3. Obligations (Refs & Annos)
Part 2. Contracts (Refs & Annos)
Title 3. Interpretation of Contracts (Refs & Annos)

West's Ann.Cal.Civ.Code § 1646

§ 1646. Law and usage of place

Currentness

A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

Credits
(Enacted in 1872.)

Notes of Decisions (191)

West's Ann. Cal. Civ. Code § 1646, CA CIVIL § 1646
Current with urgency legislation through Ch. 5 of 2019 Reg.Sess

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West's Annotated California Codes
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Title 3. Interpretation of Contracts (Refs & Annos)

West's Ann.Cal.Civ.Code § 1647

§ 1647. Circumstances

Currentness

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

Credits
(Enacted in 1872.)

Notes of Decisions (300)

West's Ann. Cal. Civ. Code § 1647, CA CIVIL § 1647
Current with urgency legislation through Ch. 5 of 2019 Reg.Sess

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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, 2016

State of California

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Information and updates available online at:
http://www.cdcr.ca.gov/regulations/adult_operations
CDCR Intranet: http://intranet/adm/dss/rpmb

BMU inmates shall be placed in the appropriate workgroup, as designated by committee. The effective date of both workgroups shall be the first day of placement into SHU, PSU, BMU or ASU.

(f) Community Correctional Center (CCC) transfers. Transfers of inmates approved for a CCC program are considered non-adverse. With the exception of inmates assigned to Work Group F, inmates shall retain their current work group status while en route to a program. Inmates assigned to Work Group F shall revert to Work Group A-1 effective the date removed from the camp or institution fire fighter assignment.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 1203.8, 1364, 2684, 2690, 2933, 2933.05, 2933.3, 2933.6, 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 including amendment transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
7. New subsection (a)(4), amendment of subsection (b)(1) and new subsections (e)–(f) 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.
8. Certificate of Compliance as to 12-20-91 order including amendment of subsection (b)(1) transmitted to OAL 4-20-92 and filed 5-28-92 (Register 92, No. 24).
9. Change without regulatory effect amending subsection (c)(1) filed 2-5-97 pursuant to section 100, title 1, California Code of Regulations (Register 97, No. 6).
10. Amendment of section and Note filed 10-23-2003 as an emergency; operative 10-23-2003 (Register 2003, No. 43). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-1-2004 or emergency language will be repealed by operation of law on the following day.
11. Certificate of Compliance as to 10-23-2003 order transmitted to OAL 3-19-2004 and filed 5-3-2004 (Register 2004, No. 19).
12. Amendment filed 6-9-2006; operative 7-9-2006 (Register 2006, No. 23).
13. Amendment of subsection (a)(3), new subsection (a)(3)(A), subsection relettering, amendment of newly designated subsections (a)(3)(C)–(E) and amendment of Note filed 2-5-2009 as an emergency; operative 2-5-2009 (Register 2009, No. 6). This filing contains a certification that the operational needs of the Department required filing of these regulations on an emergency basis and were deemed an emergency pursuant to Penal Code section 5058.3. A Certificate of Compliance must be transmitted to OAL by 7-15-2009 or emergency language will be repealed by operation of law on the following day.
14. Certificate of Compliance as to 2-5-2009 order transmitted to OAL 6-25-2009 and filed 7-28-2009 (Register 2009, No. 31).
15. Amendment of section and Note filed 1-25-2010 as an emergency; operative 1-25-2010 (Register 2010, No. 5). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-6-2010 or emergency language will be repealed by operation of law on the following day.
16. Certificate of Compliance as to 1-25-2010 order transmitted to OAL 6-23-2010 and filed 8-4-2010 (Register 2010, No. 32).
17. Amendment of subsection (a)(3) and new subsection (a)(4) filed 12-20-2011; operative 1-19-2012 (Register 2011, No. 51).
18. Amendment of subsection (a)(4) filed 10-29-2013 as an emergency; operative 10-29-2013 (Register 2013, No. 44). A Certificate of Compliance must be transmitted to OAL by 4-7-2014 or emergency language will be repealed by operation of law on the following day.
19. Certificate of Compliance as to 10-29-2013 order, including amendment of subsection (a)(4), transmitted to OAL 4-4-2014 and filed 5-14-2014; amendments effective 5-14-2014 pursuant to Government Code section 11343.4(b)(3) (Register 2014, No. 20).

3043.7. Impact of 45-Day Notification on Credit Earnings.

Inmates shall not be placed in a greater credit earning category if it prevents notification to local law enforcement officials of the release of inmates described in Section 3327(c)(2) in the 45-day time frame, as required by Penal Code Sections 3058.6 and 3058.9.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 3058.6, 3058.9 and 5054, Penal Code.

HISTORY:

1. New section filed 5-22-2006; operative 5-22-2006 pursuant to Government Code section 11343.4 (Register 2006, No. 21).

3044. Inmate Work Groups.

(a) Full-time and half-time defined.

(1) Full-time work/training assignments normally mean eight (8) hours per day on a five day per week basis, exclusive of meals.

(2) Half-time work/training assignments normally mean four (4) hours per day on a five day per week basis, exclusive of meals.

(b) Consistent with the provisions of section 3375 of these regulations, all assignments or reassignments of an inmate to a work group shall be by a classification committee action in accordance with this section.

(1) Work Group F: Full-time conservation camp worker, or correctional institution inmate firefighter who has completed training for an assignment to a conservation camp or correctional institution inmate firefighter. Inmates eligible to earn day-for-day credits under Penal Code section 2933 shall be awarded two days credit for each day of qualifying performance. An inmate's ability to earn two-for-one credit shall not begin until he/she has completed conservation camp training or is assigned as an institutional firefighter. Pursuant to Penal Code section 2933.3, effective July 1, 2009, inmates eligible and assigned as institutional firefighters shall receive two-for-one credit. Conservation camp and correctional institution firefighter inmates eligible for two-for-one credit, as defined in this section, may be eligible for Work Group F credit during temporary removals from the conservation camp or correctional institution inmate firefighter setting. Inmates who become ineligible for continued conservation camp placement or as a correctional institution inmate firefighter for any reason shall be removed from Work Group F and assigned to an appropriate Work Group consistent with the remaining provisions of this section.

(2) Work Group A-1: Full-time assignment. Inmates eligible to earn Penal Code section 2933 credits shall be awarded one day credit for each day assigned to this work group. The work day shall not be less than 6.5 hours of work participation and the work week no less than 32 hours of work participation, as designated by assignment. Those programs requiring an inmate to participate during other than the normal schedule of eight-hours-per-day, five-days-per-week (e.g., 10-hours-per-day, four-days-per-week) or programs that are scheduled for seven-days-per-week, requiring inmate attendance in shifts (e.g., three days of 10 hours and one day of five hours) shall be designated as "special assignments" and require departmental approval prior to implementation. "Special

assignment" shall be entered on the inmate's timekeeping log by the staff supervisor.

(A) Any inmate assigned to a Rehabilitative Program, to include but not be limited to: Substance Abuse Treatment, Cognitive Behavioral Treatment, Transitions, Education, Career Technical Education or any combination thereof, shall be designated Work Group A-1.

(B) Any combination of half-time work assignment, and any rehabilitative program as described in subsection (A) above, shall be designated Work Group A-1.

(C) A full-time college program may be combined with a half-time work or Career Technical Education program equating to a full-time assignment. The college program shall consist of 12 units in credit courses only leading to an associate degree in two years or a bachelor's degree in four years.

(D) An inmate diagnosed by a physician and/or psychiatrist as totally disabled and therefore incapable of performing an assignment, shall remain in Work Group A-1 throughout the duration of their total disability.

(E) An inmate when diagnosed by a physician and/or psychiatrist as partially disabled shall be assigned to an assignment within the physical and/or mental capability of the inmate as determined by the physician and/or psychiatrist, unless changed by disciplinary action.

(3) Work Group A-2: Involuntarily unassigned.

An inmate willing but unable to perform in an assignment shall be placed in Work Group A-2. Inmates eligible to earn Penal Code section 2933 credits shall be awarded one day credit for each day assigned to this work group, in the following status:

(A) The inmate is placed on a waiting list pending availability of an assignment.

(B) An unassigned inmate awaiting adverse transfer to another institution.

(4) Work Group B: Half-time assignment. Half-time programs shall normally consist of an assignment of four hours per workday, excluding meals, five-days-per-week, or full-time enrollment in college consisting of 12 units in credit courses leading to an associate or bachelor's degree. Inmates eligible to earn Penal Code section 2933 credits shall be awarded one day credit for each day assigned to this work group. The work day shall be no less than three hours and the work week no less than 15 hours.

(5) Work Group C: Disciplinary unassigned. Zero credit.

(A) Any inmate who twice refuses to accept assigned housing, or who refuses to accept or perform in an assignment, or who is deemed a program failure as defined in section 3000, shall be placed in Work Group C for a period not to exceed the number of disciplinary credits forfeited due to the serious disciplinary infraction(s).

(B) An inmate shall remain in zero credit earning status, not to exceed the amount of disciplinary credits forfeited, and shall revert to his/her previous work group upon completion of the credit forfeiture. Inmates shall be returned to a classification committee for placement on an appropriate waiting list.

(6) Work Group D-1: Lockup status. Inmates assigned to a segregated housing program, except for reasons specified within section 3043.4, shall be awarded one day credit for each day assigned to this work group. Segregated housing shall include, but not be limited to, the following:

(A) Administrative Segregation Unit (ASU).

(B) Security Housing Unit (SHU).

(C) Psychiatric Services Unit (PSU).

(D) Non-Disciplinary Segregation (NDS).

(7) Work Group D-2: Lockup Status. Inmates placed in SHU, PSU, or ASU for disciplinary related offenses described in Penal Code section 2933.6 or upon validation as an STG-I member or associate are ineligible to earn credits during placement in SHU, PSU, or ASU. Inmates placed in SHU, PSU, or ASU following the commission of any other serious disciplinary infraction(s) are ineligible to earn credits for a period not to exceed the number of disciplinary credits forfeited. Zero credit.

(A) An inmate assigned to a determinate SHU term which included a forfeiture of credits shall not be placed in a credit earning assignment during the period of credit forfeiture or 180 days, whichever is less, starting from the date of change in custodial classification. An inmate confined in a secure housing unit for a division A-1 offense, as designated in section 3323(c) of these regulations, and which included great bodily injury on a non-prisoner shall not receive participation or work-time credits for up to 360 days. Upon completion of the period of credit forfeiture, the inmate shall be re-evaluated by a classification committee.

(B) An inmate's status in Work Group D-2 may be extended, in up to six-month increments, by a classification committee in unusual cases where no credit qualifying program can be assigned the inmate without causing a substantial risk of physical harm to staff or others. At the end of the designated period (six months or less), the determination shall be reviewed by an institution classification committee.

(C) An inmate in ASU, SHU, or PSU, serving an administrative or determinate SHU term, who is deemed a program failure as defined in section 3000, may be assigned Work Group D-2 by a classification committee. An inmate assigned to Work Group C at the time of placement in ASU, SHU, or PSU, or who refuses to accept or perform work assignments, shall be assigned Work Group D-2. An inmate released from ASU, SHU, or PSU may be placed back into Work Group C by a classification committee not to exceed the remaining number of disciplinary credits forfeited due to the serious disciplinary infraction(s).

(D) If the administrative finding of the misconduct is overturned or if the inmate is criminally prosecuted for the misconduct and is found not guilty, credit earning status shall be restored to the inmate's previously-designated work group at the time of placement into segregated housing.

(8) Work Group U: Unclassified. An inmate undergoing reception center processing is in this status from the date of their reception until classified at their assigned institution. Inmates eligible to earn Penal Code section 2933 credits shall be awarded one day credit for each day assigned to this work group.

(c) Privileges. Privileges for each work group shall be those privileges earned by the inmate. Inmate privileges are administratively authorized activities and benefits required of the secretary, by statute, case law, governmental regulations, or executive orders. Inmate privileges shall be governed by an inmate's behavior, custody classification and assignment. A formal request or application for privileges is not required unless specified otherwise in this section. Institutions may provide additional incentives for each privilege group, subject to availability of resources and constraints imposed by security needs.

(1) To qualify for privileges generally granted by this section, an inmate shall comply with rules and procedures and participate in assigned activities.

(2) Privileges available to a work group may be denied, modified, or temporarily suspended by a hearing official at a disciplinary hearing upon a finding of an inmate's guilt for a disciplinary offense as described in sections 3314 and 3315 of these regulations or by a classification committee action changing the inmate's custody classification, work group, privilege group, or institution placement.

(3) Disciplinary action denying, modifying, or suspending a privilege for which an inmate would otherwise be eligible shall be

for a specified period not to exceed 30 days for an administrative rule violation or 90 days for a serious rule violation.

(4) A permanent change of an inmate's privilege group shall be made only by classification committee action under provisions of section 3375. Disciplinary or classification committee action changing an inmate's privileges or privilege group shall not automatically affect the inmate's work group classification.

(5) No inmate or group of inmates shall be granted privileges not equally available to other inmates of the same custody classification and assignment who would otherwise be eligible for the same privileges.

(6) Changes in privilege group status due to the inmate's placement in lockup:

(A) An inmate housed in an ASU, SHU, or PSU shall be designated Privilege Group D with the exception of inmate designated as NDS who shall retain their privilege group prior to ASU placement.

(7) An inmate in a Reentry Hub assignment shall be eligible for available privileges subject to participating in assignment programs and shall not require a privilege group designation.

(8) An inmate's privileges shall be conditioned upon each of the following:

(A) The inmate's compliance with procedures governing those privileges.

(B) The inmate's continued eligibility.

(C) The inmate's good conduct and satisfactory participation in an assignment.

(9) Inmates returned to custody from parole may be eligible to receive privileges based upon their satisfactory participation in an assignment.

(d) Privilege Group A:

(1) Criteria:

(A) Full-time assignment as defined in section 3044(a).

(B) An inmate diagnosed by a physician and/or psychiatrist as totally disabled shall remain in Privilege Group A unless changed by disciplinary action.

(C) An inmate designated by a physician and/or psychiatrist as partially disabled pursuant to section 3044(a) shall remain in Privilege Group A unless changed by disciplinary action.

(2) Privileges for Privilege Group A are as follows:

(A) Family visits limited only by the institution/facility resources, security policy, section 3177(b), or other law.

(B) Visits during non-work/training hours, limited only by availability of space within facility visiting hours, or during work hours when extraordinary circumstances exist as defined in section 3045.2(e)(2). NDS inmates in Privilege Group A are restricted to non-contact visits consistent with those afforded to other inmates in ASU.

(C) Maximum monthly canteen draw as authorized by the secretary.

(D) Telephone access during the inmate's non-work/training hours limited only by institution/facility telephone capabilities. Inmates identified as NDS are permitted one personal telephone access per week under normal operating conditions.

(E) Access to yard, recreation and entertainment activities during the inmate's non-working/training hours and limited only by security needs.

(F) Excused time off as described in section 3045.2.

(G) The receipt of four inmate packages, 30 pounds maximum weight each, per year. Inmates may also receive special purchases, as provided in subsections 3190(j) and (k).

(e) Privilege Group B:

(1) Criteria, any of the following:

(A) Half-time assignment as defined in section 3044(a) or involuntarily unassigned as defined in section 3044(a) or involuntarily unassigned as defined in section 3044(b).

(B) A hearing official may temporarily place an inmate into the group as a disposition pursuant to section 3314 or 3315.

(2) Privileges for Privilege Group B are as follows:

(A) One family visit each six months, unless limited by section 3177(b) or other law.

(B) Visits during non-work/training hours, limited only by availability of space within facility visiting hours, or during work hours when extraordinary circumstances exist, as defined in section 3045. NDS inmates in Privilege Group B are restricted to non-contact visits consistent with those afforded to other inmates in ASU.

(C) Seventy-five percent (75%) of the maximum monthly canteen draw as authorized by the secretary.

(D) One personal telephone access period per month under normal operating conditions.

(E) Access to yard, recreation, and entertainment activities during the inmate's non-working/training hours and limited only by institution/facility security needs.

(F) Excused time off as described in section 3045.2.

(G) The receipt of four inmate packages, 30 pounds maximum weight each, per year. Inmates may also receive special purchases, as provided in subsections 3190(j) and (k).

(f) Privilege Group C:

(1) Criteria, any of the following:

(A) The inmate who twice refuses to accept assigned housing, or who refuses to accept or perform in an assignment, or who is deemed a program failure as defined in section 3000.

(B) A hearing official may temporarily place an inmate into the group as a disposition pursuant to section 3314 or 3315.

(C) A classification committee action pursuant to section 3375 places the inmate into the group. An inmate placed into Privilege Group C by a classification committee action may apply to be removed from that privilege group no earlier than 30 days from the date of placement. Subsequent to the mandatory 30 days placement on Privilege Group C, if the inmate submits a written request for removal, a hearing shall be scheduled within 30 days of receipt of the written request to consider removal from Privilege Group C.

(2) Privileges and non-privileges for Privilege Group C are as follows:

(A) No family visits.

(B) One-fourth the maximum monthly canteen draw as authorized by the secretary.

(C) Telephone calls on an emergency basis only as determined by institution/facility staff.

(D) Yard access limited by local institution/facility security needs. No access to any other recreational or entertainment activities.

(E) No inmate packages. Inmates may receive special purchases, as provided in subsections 3190(j) and (k).

(g) Privilege Group D:

(1) Criteria: Any inmate, with the exception of validated STG affiliates participating in the SDP or designated NDS inmates, housed in a special segregation unit, voluntarily or under the provisions of sections 3335–3345 of these regulations who is not assigned to either a full-time or half-time assignment.

Inmates assigned to steps 1 through 4 of the SDP while completing the interview phase of the debriefing process, are entitled to privileges and non-privileges commensurate with the SDP step to which the offender is currently assigned, in accordance with Section 3044(i).

(2) Any inmate removed from the general population due to disciplinary or administrative reasons, shall forfeit their privileges

within their general population privilege group pending review by a classification committee.

(3) Privileges and non-privileges for Privilege Group D, other than those listed above, are as follows:

(A) No family visits.

(B) Twenty-five percent (25%) of the maximum monthly canteen draw as authorized by the secretary.

(C) Telephone calls on an emergency basis only as determined by institution/facility staff.

(D) Yard access limited by local institution/facility security needs. No access to any other recreational or entertainment activities.

(E) The receipt of one inmate package, 30 pounds maximum weight each, per year. Inmates shall be eligible to acquire an inmate package after completion of one year of Privilege Group D assignment. Inmates may also receive special purchases, as provided in subsections 3190(j) and (k).

(h) Privilege Group U:

(1) Criteria: Reception center inmates under processing.

(2) Privileges and non-privileges for Privilege Group U are:

(A) No family visits.

(B) Canteen Purchases. One-half of the maximum monthly canteen draw as authorized by the secretary.

(C) Telephone calls on an emergency basis only as determined by institution/facility staff.

(D) Yard access, recreation, and entertainment limited by local institution/facility security needs.

(E) Excused time off as described in section 3045.2.

(F) No inmate packages. Inmates may receive special purchases, as provided in subsections 3190(j) and (k).

(i) Privilege Group S1 through S4:

(1) Criteria: Participation in the STG SDP.

(2) Privileges and non-privileges for Privilege Groups S1 through S4 are:

(A) S1 for Step 1.

1. No Family Visits.

2. Visiting during non-work/training hours, limited by available space within facility non-contact visiting room.

3. Twenty-five percent (25%) of the maximum monthly canteen draw as authorized by the secretary.

4. Telephone calls on an emergency basis only as determined by institution/facility staff. At the 180-day Institution Classification Committee (ICC) review, if the inmate has met program expectations and has not been found guilty of STG related behavior, ICC shall authorize one (1) telephone call.

5. Yard access in accordance with Section 3343(h).

6. The receipt of one inmate package, 30 pounds maximum weight, per year, exclusive of special purchases as provided in Section 3190. Inmates shall be eligible to acquire an inmate package after completion of one year of Privilege Group D or SDP assignment.

7. One photograph - upon completion of 1 year free of serious disciplinary behavior while in SHU.

8. Electrical appliances are allowed in accordance with the Authorized Personal Property Schedule for SHU/PSU inmates, as described in Section 3190(b)(4).

(B) S2 for Step 2.

1. No Family Visits.

2. Visiting during non-work/training hours, limited by available space within facility non-contact visiting room.

3. Thirty-five percent (35%) of the maximum monthly canteen draw as authorized by the secretary.

4. One telephone call upon transition to Step 2.

5. Yard access in accordance with Section 3343(h).

6. The receipt of one inmate package, 30 pounds maximum weight, per year, exclusive of special purchases as provided in Section 3190. Inmates shall be eligible to acquire an inmate package after completion of one year of an SDP assignment.

7. One photograph - upon completion of 1 year free of serious disciplinary behavior while in SHU.

8. Electrical appliances are allowed in accordance with the Authorized Personal Property Schedule for SHU/PSU inmates, as described in Section 3190(b)(4).

(C) S3 for Step 3.

1. No Family Visits.

2. Visiting during non-work/training hours, limited by available space within facility non-contact visiting room.

3. Forty-five percent (45%) of the maximum monthly canteen draw as authorized by the secretary.

4. One telephone call upon transition to Step 3 and one additional telephone call upon review and approval of ICC at the 180 day review.

5. Yard access in accordance with Section 3343(h).

6. The receipt of two inmate packages, 30 pounds maximum weight, per year, exclusive of special purchases as provided in Section 3190.

7. One photograph upon transition to Step 3 and one additional photograph upon review and approval of ICC at the 180 day review.

8. Electrical appliances are allowed in accordance with the Authorized Personal Property Schedule for SHU/PSU inmates, as described in Section 3190(b)(4).

(D) S4 for Step 4.

1. No Family Visits.

2. Visiting during non-work/training hours, limited by available space within facility non-contact visiting room.

3. Fifty percent (50%) of the maximum monthly canteen draw as authorized by the secretary.

4. One telephone call upon transition to Step 4 and one additional telephone call after review and approval of ICC at each 90 day review.

5. Yard access in accordance with Section 3343(h). Yard activities will include interaction with inmates of diverse affiliations after 6 months of programming within Step 4.

6. The receipt of two inmate packages, 30 pounds maximum weight each, per year, exclusive of special purchases as provided in Section 3190. In addition, receipt of one inmate package, non-food only, 15 pounds maximum weight, per year.

7. One photograph upon transition to Step 4 and one additional photograph upon review and approval of ICC at the third 90 day review.

8. Electrical appliances are allowed in accordance with the Authorized Personal Property Schedule for SHU/PSU inmates, as described in Section 3190(b)(4).

(j) Privilege Group S5:

(1) Criteria: Any offender in SHU for non-disciplinary reasons including a validated affiliate who has completed the SDP and is being retained in SHU for non-disciplinary reasons.

(2) Privileges and non-privileges for Privilege Groups S5 are:

(A) No Family Visits.

(B) Visiting during non-work/training hours, limited by available space within facility non-contact visiting room.

(C) Seventy Five percent (75%) of the maximum monthly canteen draw as authorized by the secretary.

(D) One telephone call per month.

(E) Yard access in accordance with Section 3343(h).

(F) The receipt of four inmate packages, 30 pounds maximum weight each, per year. Offenders may also receive special purchases, as provided in subsections 3190(j) and (k).

(G) One photograph upon completion of each 180-day ICC review.

(H) Electrical appliances are allowed in accordance with the Authorized Personal Property Schedule for SHU/PSU inmates, as described in Section 3190(b)(4).

(3) The local Inter-Disciplinary Treatment Team may further restrict or allow additional authorized personal property, in accordance with the Institution's Psychiatric Services Unit operational procedure, on a case-by-case basis above that allowed by the inmate's assigned Privilege Group.

NOTE: Authority cited: Sections 2700, 2701 and 5058, Penal Code. Reference: Sections 2932, 2933, 2933.05, 2933.3, 2933.6, 2935, 5005, 5054 and 5068, Penal Code; and *In re Monigold*, 205 Cal.App.3d 1224 (1988).

HISTORY:

1. Change without regulatory effect of subsection (c)(1) and NOTE pursuant to section 100, title 1, California Code of Regulations filed 12-28-89 (Register 90, No. 1). For prior history, see Register 88, No. 50.
2. Relocation of (a) to section 3045, amendment of redesignated (c)(4)–(f), new subsections (c)(8)–(9) and (i) and subsection renumbering 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.
3. Editorial correction of printing errors (Register 92, No. 4).
4. Editorial correction of printing error in subsection (b)(1) (Register 92, No. 5).
5. Certificate of Compliance as to 12-20-91 order transmitted to OAL 4-20-92 and filed 5-28-92 (Register 92, No. 24).
6. Amendment of subsections (d)(3)(A) and (e)(3)(A) filed 2-27-95 as an emergency; operative 5-30-95 (Register 95, No. 9). A Certificate of Compliance must be transmitted to OAL by 11-6-95 or emergency language will be repealed by operation of law on the following day.
7. New subsections (f)(3)(H), (g)(4)(H) and (h)(3)(H) and amendment of Note filed 6-30-95 as an emergency; operative 7-1-95 (Register 95, No. 26). A Certificate of Compliance must be transmitted to OAL by 12-7-95 or emergency language will be repealed by operation of law on the following day.
8. Amendment of subsections (d)(3)(A) and (e)(3)(A) refiled 11-7-95 as an emergency; operative 11-6-95 (Register 95, No. 45). A Certificate of Compliance must be transmitted to OAL by 4-14-96 or emergency language will be repealed by operation of law on the following day.
9. Certificate of Compliance as to 6-30-95 order transmitted to OAL 11-22-95 and filed 1-8-96 (Register 96, No. 2).
10. Editorial correction of History 8 (Register 96, No. 21).
11. Reinstatement of subsections (d)(3)(A) and (e)(3)(A) as they existed prior to emergency amendment filed 5-30-95 pursuant to Government Code section 11349.6(d) (Register 96, No. 21).
12. Amendment of subsections (d)(3)(A) and (e)(3)(A) filed 6-7-96 as an emergency; operative 6-7-96 (Register 96, No. 23). A Certificate of Compliance must be transmitted to OAL by 10-7-96 or emergency language will be repealed by operation of law on the following day.
13. Change without regulatory effect amending subsection (e)(2) filed 7-16-96 pursuant to section 100, title 1, California Code of Regulations (Register 96, No. 29).
14. Certificate of Compliance as to 6-7-96 order transmitted to OAL 10-3-96 and filed 11-18-96 (Register 96, No. 47).
15. Repealer of subsections (f)(3)(H), (g)(4)(H) and (h)(3)(H) and amendment of Note filed 1-2-98 as an emergency; operative 1-2-98 (Register 98, No. 1). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 6-11-98 or emergency language will be repealed by operation of law on the following day.
16. Certificate of Compliance as to 1-2-98 order transmitted to OAL 6-9-98 and filed 7-21-98 (Register 98, No. 30).
17. Repealer of printed inmate time card, new subsection (b)(1), subsection renumbering and amendment of Note filed 10-23-2003 as an emergency; operative 10-23-2003 (Register 2003, No. 43). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-1-2004 or emergency language will be repealed by operation of law on the following day.
18. Change without regulatory effect amending subsections (d)(3)(A) and (e)(3)(A) filed 12-1-2003 pursuant to section 100, title 1, California Code of Regulations (Register 2003, No. 49).
19. Amendment of section and Note filed 12-30-2003 as an emergency; operative 1-1-2004 (Register 2004, No. 1). Pursuant to Penal Code section 5058.3(a)(1), a Certificate of Compliance must be transmitted to OAL by 6-9-2004 or emergency language will be repealed by operation of law on the following day.
20. Amendment filed 1-9-2004 as an emergency; operative 1-9-2004 (Register 2004, No. 2). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 6-17-2004 or emergency language will be repealed by operation of law on the following day.
21. Certificate of Compliance as to 10-23-2003 order transmitted to OAL 3-19-2004 and filed 5-3-2004 (Register 2004, No. 19).
22. Withdrawal and repeal of 12-30-2003 amendments filed 5-27-2004 as an emergency; operative 5-27-2004 (Register 2004, No. 22). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 9-24-2004 or emergency language will be repealed by operation of law on the following day.
23. Amendment of section and Note, including relocation of former subsection 3044(g)(4)(G) to new section 3190(i)(3), filed 5-27-2004 as an emergency; operative 5-27-2004 (Register 2004, No. 22). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-3-2004 or emergency language will be repealed by operation of law on the following day.
24. Amendment of section, including further amendments, refiled 6-17-2004 as an emergency; operative 6-17-2004 (Register 2004, No. 25). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-24-2004 or emergency language will be repealed by operation of law on the following day.
25. Certificate of Compliance as to 5-27-2004 order transmitted to OAL 10-28-2004 and filed 12-14-2004 (Register 2004, No. 51).
26. Certificate of Compliance as to 6-17-2004 order, including further amendment of subsection (b)(5)(B), transmitted to OAL 11-16-2004 and filed 12-29-2004 (Register 2004, No. 53).
27. Amendment filed 6-9-2006; operative 7-9-2006 (Register 2006, No. 23).
28. Amendment of section and Note filed 1-25-2010 as an emergency; operative 1-25-2010 (Register 2010, No. 5). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-6-2010 or emergency language will be repealed by operation of law on the following day.
29. Certificate of Compliance as to 1-25-2010 order transmitted to OAL 6-23-2010 and filed 8-4-2010 (Register 2010, No. 32).
30. Amendment of subsections (b)(5)(A) and (b)(7), new subsection (b)(7)(C), subsection relettering and amendment of subsection (d)(2) filed 12-20-2011; operative 1-19-2012 (Register 2011, No. 51).
31. Repealer of subsection (c)(6)(B), amendment of subsection (c)(8)(B), repealer of subsections (d)(2), (e)(2), (f)(2), (g)(2) and (h)(2), subsection renumbering, amendment of newly designated subsection (g)(2) and repealer of subsection (i) filed 10-22-2012; operative 11-21-2012 (Register 2012, No. 43).
32. New subsection (b)(6)(D) and amendment of subsections (c)(6)(A), (d)(2)(B), (d)(2)(D), (e)(2)(B), (e)(2)(D) and (g)(1) filed 9-24-2013 as an emergency; operative 9-24-2013 (Register 2013, No. 39). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 3-3-2014 or emergency language will be repealed by operation of law on the following day.
33. Amendment of subsections (b)(2)(A), (b)(2)(C) and (c)(7) filed 10-29-2013 as an emergency; operative 10-29-2013 (Register 2013, No. 44). A Certificate of Compliance must be transmitted to OAL by 4-7-2014 or emergency language will be repealed by operation of law on the following day.

34. Amendment of subsections (d)(2)(G), (e)(2)(G), (f)(2)(E), (g)(3)(E) and (h)(2)(F) filed 1-8-2014 as an emergency; operative 1-8-2014 (Register 2014, No. 2). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 6-17-2014 or emergency language will be repealed by operation of law on the following day.
35. Certificate of Compliance as to 9-24-2013 order transmitted to OAL 2-20-2014 and filed 3-24-2014 (Register 2014, No. 13).
36. Certificate of Compliance as to 10-29-2013 order, including amendment of subsection (b)(2)(A), transmitted to OAL 4-4-2014 and filed 5-14-2014; amendments effective 5-14-2014 pursuant to Government Code section 11343.4(b)(3) (Register 2014, No. 20).
37. Certificate of Compliance as to 1-8-2014 order transmitted to OAL 6-16-2014 and filed 7-22-2014 (Register 2014, No. 30).
38. Amendment filed 10-17-2014; operative 10-17-2014 pursuant to Government Code section 11343.4(b)(3) (Register 2014, No. 42).
39. Amendment of subsections (b)(5)(A) and (f)(1)(A) filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.23. Amendment of subsection (c)(5) filed 7-31-2015; operative 10-1-2015 (Register 2015, No. 31).
40. Amendment of subsections (b)(2)(A)–(B) filed 7-31-2015; operative 7-31-2015 pursuant to Government Code section 11343.4(b)(3) (Register 2015, No. 31).
41. Certificate of Compliance as to 6-1-2015 order transmitted to OAL 10-19-2015 and filed 12-3-2015 (Register 2015, No. 49).

3045. Timekeeping and Reporting.

(a) Inmate timekeeping logs. The attendance and/or participation of each assigned inmate shall be recorded on an approved timekeeping log. If the assignment began or ended during the reporting month, the date(s) of such activity shall be recorded on the timekeeping log. Only the symbols designated on the timekeeping log shall be used to document the inmate's attendance. The symbol(s) and applicable hours for each day shall be recorded in the space corresponding to the calendar day. This log shall be the reference for resolving complaints or appeals and shall be retained at a secure location designated by the facility management for a period of 4 years from the date of completion.

(1) Staff shall record the work or training time and absences of each inmate assigned to their supervision as they occur. At intervals designated by the institution head, the supervisor shall:

(A) Enter the totals, hours worked and ETO hours used in the designated columns of timekeeping log.

(B) Sign the log to authenticate the information.

(C) Forward the log to the division head for review and approval.

(2) Mismanagement or falsification of an inmate timekeeping log may result in adverse action and/or prosecution.

(b) Security of timekeeping logs. Inmates shall not have unauthorized access to any timekeeping logs.

NOTE: Authority cited: Sections 2700, 2701 and 5058, Penal Code. Reference: Sections 2932, 2933, 2933.05, 2933.6, 2935, 5005, 5054 and 5068, Penal Code; and *In re Monigold*, 205 Cal. App. 3d 1224.

HISTORY:

1. New section filed 8-18-78; effective thirtieth day thereafter (Register 78, No. 33).
2. Repealer and new section filed 2-16-83; effective thirtieth day thereafter (Register 83, No. 8).
3. Amendment of subsection (c), repealer and new subsection (e) and new subsection (i) 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.
4. Certificate of Compliance as to 8-7-87 ordered transmitted to OAL 12-4-87; disapproved by OAL (Register 88, No. 16).
5. Amendment of subsection (c), repealer and new subsection (e) and new subsection (i) 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.
6. Certificate of Compliance as to 1-4-88 order transmitted to OAL 5-3-88; disapproved by OAL (Register 88, No. 24).
7. Amendment of subsection (c), repealer and new subsection (e) and new subsection (i) 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.
8. Certificate of Compliance including amendment transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
9. Renumbering and amendment of former section 3045 to section 3045.2, relocation and amendment of former section 3044(a) and adoption of subsections (b) and (c) 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.
10. Certificate of Compliance as to 12-20-91 order transmitted to OAL 4-20-92 and filed 5-28-92 (Register 92, No. 24).
11. Editorial correction deleting language previously transferred to section 3045.2 (Register 93, No. 50).
12. Amendment filed 6-9-2006; operative 7-9-2006 (Register 2006, No. 23).
13. Amendment of subsections (a)–(a)(1) and Note filed 1-25-2010 as an emergency; operative 1-25-2010 (Register 2010, No. 5). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-6-2010 or emergency language will be repealed by operation of law on the following day.
14. Certificate of Compliance as to 1-25-2010 order transmitted to OAL 6-23-2010 and filed 8-4-2010 (Register 2010, No. 32).

3045.1. Timekeeping for Inmates in Administrative Segregation.

(a) A classification committee shall evaluate the reasons for an inmate's administrative segregation (ASU) placement to ensure appropriate credits are awarded the inmate. If the placement was for:

(1) A disciplinary infraction for which the finding was not guilty or pending an investigation where the inmate was released, the inmate shall retain their work group status at the time of their placement in ASU unless otherwise impacted by a classification or disciplinary action.

(2) A disciplinary infraction for misconduct described in section 3043.4 for which the finding was guilty, the inmate shall remain in Work Group D-2 for the period of the credit loss assessment effective the date of their placement in ASU, whether or not a SHU term was assessed.

NOTE: Authority cited:Sections 2700, 2701 and 5058, Penal Code. Reference: Sections 2932, 2933, 2933.05, 2933.6, 2935, 5005, 5054 and 5068, Penal Code; and *In re Monigold*, 205 Cal. App. 3d 1224.

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.

(11) Make reasonable effort to ensure the inmate understands and comprehends the decision reached.

(12) Perform the above duties for inmates in conjunction with all classification reviews.

(e) The SA assigned and assisting the inmate in the manner described above shall be the same staff member who appears with the inmate at the classification hearing.

(f) Assignment of a SA shall not preclude assignment of an IE.

(g) An IE may be assigned if:

(1) The reasoning for an inmate's placement in administrative segregation is for non-disciplinary reasons and the inmate requests in writing the presence of witnesses or submission of documentary evidence at a classification hearing on the reason or need for retention in segregated housing.

(A) When an inmate's administrative segregation placement is for non-disciplinary reasons, the Administrative Reviewer will consider all available evidence or information relating to the validity of the reasons documented for administrative segregation placement. Denial of an IE, witnesses or evidence requested by the inmate shall be on the basis of legitimate penalogical interest and documented on the CDC Form 114-D.

(B) The reason for an inmate's placement in administrative segregation is a serious disciplinary matter resulting in the issuance of a CDCR Form 115 Rules Violation Report (Rev. 07/88) and/or a referral to the district attorney for criminal prosecution, the classification committee will assume the alleged misconduct or criminal activity to be factual as documented. In such cases, the services of an IE, witnesses or additional evidence shall be reserved for the disciplinary hearing, but denied for purposes of the initial ICC.

(h) Based upon the findings of the investigative employee, the initial hearing shall permit the inmate to present witnesses and documentary evidence unless the chairperson of the committee determines in good faith that permitting such evidence will be unduly hazardous to the safety and/or security of the institution.

(i) Assignment of an IE shall not preclude assignment of a SA.

(j) The inmate may not select the investigative employee, but may object to the one assigned and provide, in writing to the Administrative Reviewer, the reasons for the objection. The Administrative Reviewer shall evaluate the inmate's objection(s) and, if determined to be reasonable, assign an alternate investigative employee to complete the investigation. If the Administrative Reviewer determines that the inmate's objections are not reasonable, the original investigative employee shall complete the investigation. The inmate's objection must be provided prior to the beginning of the investigation. The Administrative Reviewer shall note on the CDC Form 114-D the decision to deny or approve a request, and if denied, explain the reason(s) for denial.

(k) The assigned IE shall:

(1) If applicable, coordinate with the inmate's assigned SA to ensure the SA is present during any questioning by the IE.

(2) Document all effective communication efforts, as necessary; including the need for effective communication, how it was provided, how it was achieved and how they were satisfied effective communication was accomplished.

(3) Interview the inmate, to include the inmate's statement and any relevant questions for witnesses with first-hand knowledge of the circumstances warranting the inmate's segregation. An IE is not subject to the confidentiality provisions of the SA in accordance with subsection 3340(d)(6) and shall not withhold any information received from the inmate. The inmate's submission of questions for witnesses does not preclude the IE from asking other relevant questions of the witnesses that may be of assistance to the classification committee in making decisions regarding the reason(s) for segregation.

(4) It is the inmate's responsibility to provide information to the IE in order to assist in identifying any relevant witness(es) the inmate requests to be interviewed.

(5) Immediately document the investigative findings in a report, including the name of the SA and, if applicable, an interpreter present during interviews; and forward the completed report to the ICC.

(6) Provide the inmate a copy of the IE report, any non-confidential reports and information relevant to the segregation decision and/or administrative segregation placement, within 24 hours prior to the ICC.

(7) Witnesses and Evidence. The authority to grant or deny the appearance of witnesses shall be reserved for the ICC.

(8) When an IE provides assistance to an inmate, in lieu of or in addition to that provided by a SA the IE shall do so as a representative of the official who will conduct the classification hearing rather than as a representative of the inmate.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; *Coleman* v. *Wilson* 912 F. Supp. 1282 (E.D. Cal. 1995); and *Clark* v. *California* 123 F.3d 1267 (9th Cir. 1997).

HISTORY:

1. Renumbering of former section 3340 to section 3335.5 and new section 3340 filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-1-2015 order, including amendment of subsection (d)(2), transmitted to OAL 10-19-2015 and filed 12-3-2015; amendments effective 12-3-2015 pursuant to Government Code section 11343.4(b)(3) (Register 2015, No. 49).

3341. Segregated Program Housing Units.

(a) Segregated Program Housing Units (SPHU) are designated for extended term programming of inmates not suited for housing in the general population. They are specialized programming units with established placement criteria. Placement into these units requires approval by a Classification Staff Representative (CSR), on the basis of classification committee recommendations and referrals.

(b) With the exception of Protective Housing Unit (PHU) and as otherwise specified in subsections section 3378.3(b)(1) through 3378.3(b)(3), SPHU placement for administrative SHU purposes shall be reviewed by ICC at least every 180 days, or sooner as directed by a CSR. For determinate SHU inmates, ICC reviews shall be no less frequently than every 180 days following their initial SHU annual review, or sooner as directed by a CSR. The purpose of such reviews is to evaluate the inmate's case factors to determine if specialized housing continues to be the most appropriate and least restrictive placement option commensurate with any existing threat to institutional security or the safety of any person.

(c) Special circumstances or exceptions to the placement criteria for SPHU must be referred to and decided by the Departmental Review Board (DRB) in accordance with section 3376.1.

(d) The ICC may release an inmate from PSU/SHU to an available and appropriate bed pending CSR review for alternate placement consideration at another institution. Unless otherwise specified in this section, if the current institution has other available and appropriate non SPHU housing, the ICC may release the inmate to that program pending C&PR review who has local endorsement authority in this circumstance.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 5054 and 5068, Penal Code; *Sandin* v. *Connor* (1995) 515 U.S. 472; *Toussaint* v. *McCarthy* (9th Cir. 1990) 926 F.2d 800; and *Toussaint* v. *Yockey* (9th Cir. 1984) 722 F.2d 1490.

HISTORY:
1. Editorial correction removing extraneous text (Register 97, No. 5).
2. Change without regulatory effect amending section filed 1-29-97 pursuant to section 100, title 1, California Code of Regulations (Register 97, No. 5).
3. Repealer and new section filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
4. Certificate of Compliance as to 6-1-2015 order transmitted to OAL 10-19-2015 and filed 12-3-2015 (Register 2015, No. 49).

3341.1. Protective Housing Unit.

Protective Housing Unit (PHU). A PHU houses inmates whose safety would be endangered by general population inmates and provides secure housing and care for inmates with safety concerns of such magnitude, that no other viable housing options are available.

(a) An inmate may be placed in PHU in accordance with the following criteria:

(1) The inmate does not require segregated housing placement for reasons other than protection.

(2) The inmate is not documented as an affiliate of an STG-I.

(3) A classification committee has determined that the inmate does not pose a threat to the safety or security of other inmates similarly housed in the PHU.

(4) The inmate has specific, documented and verified safety and/or enemy concerns, likely to and capable of causing the inmate great bodily injury if placed in the general population.

(5) The inmate has notoriety likely to result in great bodily injury to the inmate if placed in general population.

(6) There is no alternative placement available that can both ensure the inmate's safety and provide the level of custody required for the appropriate control of the inmate's movement.

(b) The inmate's uncorroborated personal report, the nature of their commitment offense or a record of prior protective custody shall not be the sole basis for protective housing unit placement.

(c) The DRB shall retain sole authority for the placement and removal of inmates from PHU.

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

HISTORY:
1. New section filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-1-2015 order transmitted to OAL 10-19-2015 and filed 12-3-2015 (Register 2015, No. 49).

3341.2. Psychiatric Services Unit.

Psychiatric Services Unit (PSU). A PSU provides secure housing and care for inmates with diagnosed psychiatric disorders not requiring inpatient hospital care, but who require placement in housing equivalent to Security Housing Unit (SHU), as described in section 3341.3.

(a) An inmate shall be housed in a Psychiatric Services Unit (PSU), if:

(1) The inmate is included in the MHSDS at the Enhanced Outpatient Program (EOP) level of care and the inmate's conduct has resulted in either a determinate or administrative SHU term.

(2) The inmate is included in the Developmental Disability Program at DD3 and the inmate's conduct has resulted in either a determinate or administrative SHU term.

(b) Staff shall not postpone a CSR referral for any inmate requiring placement in a PSU.

(c) The CSR shall document any pending issues, such as disciplinary matters, DA referrals or investigations, on the CDC Form 128-G (Rev. 10/89) identifying the sending institutions responsibility for resolving any outstanding concerns.

(d) Inmates assigned to PSU shall be classified pursuant to section 3341.8.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 2933.6, 5054 and 5068, Penal Code; *Madrid* v. *Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1278; *Coleman* v. *Wilson* 912 F. Supp. 1282 (E.D. Cal. 1995); and *Clark* v. *California* 123 F.3d 1267 (9th Cir. 1997).

HISTORY:
1. New section filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-1-2015 order, including amendment of subsection (c), transmitted to OAL 10-19-2015 and filed 12-3-2015; amendments effective 12-3-2015 pursuant to Government Code section 11343.4(b)(3) (Register 2015, No. 49).

3341.3. Security Housing Unit.

An inmate whose conduct endangers the safety of others or the security of the institution shall be housed in a Security Housing Unit (SHU) for administrative reasons or for a determinate period of time if found guilty for serious misconduct pursuant to section 3341.9(e).

(a) Placement in SHU shall be based on the following criteria:

(1) Administrative SHU. An inmate may be assessed an administrative SHU term when:

(A) At a pre-MERD review, ICC identifies an inmate with a substantial disciplinary history, consisting of no less than three SHU terms within the past five years, which demonstrates an unwillingness to comply with departmental rules and behavior. ICC shall articulate substantive justification for the need of continued SHU placement due to the inmate's ongoing threat to the safety and security of the institution and/or others.

(B) The inmate's case factors are such that overwhelming evidence exists supporting an immediate threat to the security of the institution or the safety of others, where ICC shall articulate substantive justification for the need for SHU placement.

(C) The inmate has voluntarily requested continued retention in segregation, where ICC has carefully articulated and substantively justified support for retention and the inmate does not qualify for housing within the Protective Housing Unit.

(D) The inmate is a validated STG affiliate and placed in the Step Down Program by ICC or DRB in accordance with section:

1. STG-I Member: upon initial validation and Institutional Classification Committee Confirmation.

2. STG-I Associate: as part of initial validation, source items include serious documented STG behavior or activity as listed in section 3378.4(a) STG Disciplinary Matrix and which is also identified in Section 3341.9(e) SHU Term Assessment Chart.

3. STG-II Member or Associate: as part of initial validation, source items include two occurrences, both of which have occurred within four years of the validation date, of serious documented STG behavior or activity, as listed in section 3378.4(a) STG Disciplinary Matrix which are also identified in CCR Section 3341.9(e) SHU Term Assessment Chart.

(E) As provided in Section 3378.4(c), a validated STG affiliate shall be considered by ICC for initial placement in a SHU. ICC maintains discretion in evaluating an affiliate's overall disciplinary record and case factors in determining the need for placement in a SHU/Step Down Program (SDP) for an administrative term when the following criteria are met:

(f) Staff shall apply the appropriate amount of time to calculate the maximum and minimum eligible release date of the SHU term, pursuant to subsection 3341.9(e). Both the maximum and minimum eligible release dates from SHU shall be established by assessing the appropriate number of months, followed by any remaining calendar days.

(1) SHU MOS refers to the maximum number of months assessed for a specific determinate term pursuant to subsection 3341.9(e).

(2) MERD TERM means a combination of months, followed by days which represent the minimum amount of time that must pass before a SHU term expires and is also referred to as the MERD. The MERD initially represents 50% or one-half of the maximum SHU term, as it incorporates 50% or one-half clean conduct credit. The MERD may be adjusted based upon subsequent serious misconduct.

(A) Unless previously suspended, the established MERD is the date the SHU term ends and the date on which the inmate is no longer on SHU status. When multiple MERD's exist, the most distant MERD shall be the controlling MERD.

(3) CLEAN CONDUCT CREDIT means a combination of months, followed by days which represent credits that shall be applied to the maximum determinate SHU term, as long as the inmate remains free of any subsequent serious misconduct through the MERD. Clean conduct credit is calculated as one-half or 50% of the assessed maximum SHU term.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 314, 530, 532, 646.9, 653m, 932, 2081, 2933.6, 5054 and 5068, Penal Code; *Sandin* v. *Connor* (1995) 515 U.S. 472; *Madrid* v. *Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146; *Toussaint* v. *McCarthy* (9th Cir. 1990) 926 F.2d 800; *Toussaint* v. *Yockey* (9th Cir. 1984) 722 F.2d 1490; *Castillo* v. *Alameida, et al.*, (N.D. Cal., No.C94-2847); *Coleman* v. *Wilson* 912 F. Supp. 1282 (E.D. Cal. 1995); and *Clark* v. *California* 123 F. 3d 1267 (9th Cir. 1997).

HISTORY:

1. New section filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-1-2015 order, including amendment of subsections (a)(2) and (b)(6), transmitted to OAL 10-19-2015 and filed 12-3-2015; amendments effective 12-3-2015 pursuant to Government Code section 11343.4(b)(3) (Register 2015, No. 49).

3342. Case Review.

(a) The case of every inmate assigned to a segregated housing unit will be continuously reviewed and evaluated by custodial and casework staff assigned to the unit. Staff will confer on each case no less frequently than once a week during the first two months of the inmate's segregated status. Such case reviews will not be necessary during any week in which the inmate's case is reviewed by a regular or special classification committee or by staff who are authorized to take classification actions. Any significant observations, determinations or recommendations, will be documented on the inmate's CDC Form 114-A, Detention/Segregation Record.

(b) Psychological Assessment. A psychological assessment of the inmate's mental health will be included in the case review and classification committee review of inmates assigned to segregated housing units. When any indication of psychiatric or psychological problems exists, the case will be referred to the institution's psychiatrist or psychologist for further evaluation and recommended classification committee actions, if any.

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

HISTORY:

1. Amendment of subsection (a) filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-1-2015 order, including further amendment of subsection (a), transmitted to OAL 10-19-2015 and filed 12-3-2015; amendments effective 12-3-2015 pursuant to Government Code section 11343.4(b)(3) (Register 2015, No. 49).

3343. Conditions of Segregated Housing.

For the purposes of this section, special purpose segregated housing includes, but is not limited to, Administrative Segregation Units (ASU) and Segregated Program Housing Units (SPHU).

(a) Living Conditions. In keeping with the special purpose of an Administrative Segregation Unit (ASU) or Segregated Program Housing Unit (SPHU), the physical conditions of special purpose segregated housing ASU and SPHU will approximate those of the general population, with the exception of the physical layout of the building itself and necessary security measures that must be enforced to provide the level of security, control, and supervision required to serve that special purpose.

(b) Restrictions. Whenever an inmate in ASU or SPHU is deprived of any usually authorized item or activity and the action and reason for that action is not otherwise documented and available for review by administrative and other concerned staff, a report of the action will be made and forwarded to the unit administrator as soon as possible.

(c) Clothing. No inmate in ASU or SPHU shall be required to wear clothing that significantly differs from that worn by other inmates in the unit, except that temporary adjustments may be made in an inmate's clothing as is necessary for security reasons or to protect the inmate from self-inflicted harm. No inmate shall be clothed in any manner intended to degrade the inmate.

(d) Meals. Inmates assigned to ASU or SPHU, shall be fed the same meal and ration as is provided for inmates of the general population, except that a sandwich meal may be served for lunch. Deprivation of food will not be used as punishment.

(e) Mail. Inmates assigned to ASU or SPHU, shall not be restricted in their sending and receiving of personal mail, except that incoming packages may be limited in number, and in content to that property permitted in the segregated unit to which an inmate is assigned.

(f) Visits. Inmates assigned to ASU, SHU and PSU shall be permitted non contact visits, unless otherwise specified in section 3170.1(f), General Visiting.

(g) Personal Cleanliness. Inmate's assigned to ASU or SPHU, shall be provided the means to keep themselves clean and well-groomed. Haircuts will be provided as needed. Showering and shaving shall be permitted at least three times a week. Clothing, bedding, linen and other laundry items shall be issued and exchanged no less often than is provided for general population inmates.

(h) Exercise. Inmates assigned to ASU or SPHU shall be permitted a minimum of one hour per day, five days a week, of exercise outside their rooms or cells unless security and safety considerations preclude such activity. When ASU or SPHU are equipped with their own recreation yard, the yard periods may substitute for other out of cell exercise periods, providing the opportunity for use of the yard is available at least three days per week for a total of not less than 10 hours a week.

(i) Reading Material. Inmates assigned to ASU or SPHU, shall be permitted to obtain and possess the same publications, books, magazines and newspapers as are inmates of the general population, except the quantity may be limited for safety and security

reasons. Library services shall be provided and will represent a cross-section of material available to the general population.

(j) Telephones. Institutions shall establish procedures for the making of outside telephone calls by inmates in ASU or SPHU. Such procedures will approximate those for the work/training incentive group to which the inmate is assigned, except that individual calls must be specifically approved by the supervisor in charge or the administrator of the unit before a call is made.

(k) Institution Programs and Services. Inmates assigned to ASU or SPHU shall be permitted to participate and have access to such programs and services as can be reasonably provided within the unit without endangering security or the safety of persons. Such programs and services may include, but are not limited to: education, commissary, library services, social services, counseling, religious guidance and recreation.

(*l*) Visitation and Inspection. Inmates assigned to ASU or SPHU shall be seen daily by the custodial supervisor in charge of the unit and by a physician, registered nurse or medical technical assistant, and, by request, members of the program staff. A timely response should be given to such requests whenever reasonably possible. Any indication of medical or mental health distress, shall be immediately referred for further evaluation.

(m) Management Disruptive Cases. Inmates assigned to ASU or SPHU who persist in disruptive, destructive, or dangerous behavior and who will not heed or respond to orders and warnings to desist, are subject to placement in a management cell, as provided in Section 3332(f).

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 2601(d) and 5054, Penal Code.

HISTORY:

1. Amendment of subsections (e), (f) and (j) filed 2-16-83; effective thirtieth day thereafter (Register 83, No. 8).
2. Amendment of subsection (f) filed 8-15-89; operative 9-14-89 (Register 89, No. 33).
3. Amendment filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
4. Certificate of Compliance as to 6-1-2015 order transmitted to OAL 10-19-2015 and filed 12-3-2015 (Register 2015, No. 49).

3344. Administrative Segregation Records.

(a) A CDC Form 114, Isolation Log (rev: 3/03), shall be maintained in each ASU and SPHU. One Isolation Log may serve two or more special purpose units which are administered and supervised by the same staff members.

(b) A separate record shall be maintained for each inmate assigned to administrative segregation, including SHU and PSU. This record shall be compiled on CDC Form 114-A Detention/Segregation Record, including all identifying information required on the form. Additionally, all significant information relating to the inmate during the course of segregation, from reception to release, including, but not limited to, documentation of all programs, activities, and services afforded the inmate while segregated and note any significant staff observations, determinations or recommendations regarding unusual behavior displayed by the inmate during this period shall be entered in chronological order.

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

HISTORY:

1. Amendment filed 6-1-2015 as an emergency; operative 6-1-2015 (Register 2015, No. 23). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-9-2015 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 6-1-2015 order, including further amendment of subsection (b), transmitted to OAL 10-19-2015 and filed 12-3-2015; amendments effective 12-3-2015 pursuant to Government Code section 11343.4(b)(3) (Register 2015, No. 49).

Article 7.5. Administration of Death Penalty

3349. Method of Execution.

(a) Inmates sentenced to death shall have the opportunity to choose to have the punishment imposed by lethal gas or lethal injection. Upon being served with the warrant of execution, the inmate shall be served with California Department of Corrections and Rehabilitation (CDCR) Form 1801-B (Rev. 06/10), Service of Execution Warrant, Warden's Initial Interview, which is incorporated by reference. The completed CDCR Form 1801-B shall be transmitted to the Warden.

(b) The inmate shall be notified of the opportunity for such choice and that, if the inmate does not choose either lethal gas or lethal injection within ten days after being served with the execution warrant, the penalty of death shall be imposed by lethal injection. The inmate's attestation to this service and notification shall be made in writing and witnessed utilizing the CDCR Form 1801 (Rev. 01/09), Notification of Execution Date and Choice of Execution Method, which is incorporated by reference. The completed CDCR Form 1801 shall be transmitted to the Warden.

(c) The inmate's choice shall be made in writing and witnessed utilizing the CDCR Form 1801-A (Rev. 01/09), Choice of Execution Method, which is incorporated by reference. The completed CDCR Form 1801-A shall be transmitted to the Warden.

(d) The inmate's choice shall be irrevocable, with the exception that, if the inmate sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the inmate again shall have the opportunity to choose to have the punishment imposed by lethal gas or lethal injection, according to the procedures set forth in subsections (a), (b), and (c) of this section.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 190, 3603, 3604 and 5054, Penal Code.

HISTORY:

1. New article 7.5 and section filed 12-22-92 as an emergency; operative 1-1-93 (Register 93, No. 1). A Certificate of Compliance must be transmitted to OAL 4-22-92 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 1-22-92 order transmitted to OAL 4-9-93 and filed 4-29-93 (Register 93, No. 18).
3. Amendment of section and repealer and new form CDC 1801 filed 12-10-98; operative 1-9-99 (Register 98, No. 50).
4. Amendment of article heading and section, repealer and incorporation by reference of new form CDC 1801 and amendment of Note filed 7-30-2010; operative 8-29-2010 (Register 2010, No. 31).

3349.1.1. Definitions. [Repealed]

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 190, 3600, 3601, 3602, 3603, 3605, 3607, 3700, 3700.5, 3701, 3702, 3703, 3704 and 5054, Penal Code; and *Baze* v. *Rees* (2008) 553 U.S. 35.

HISTORY:

1. New section filed 7-30-2010; operative 8-29-2010 (Register 2010, No. 31).
2. Change without regulatory effect repealing section filed 11-5-2015 pursuant to section 100, title 1, California Code of Regulations (Register 2015, No. 45).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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