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

No. 4:09-cv-05796 CW (RMI)
The Honorable Claudia Wilken, Judge

DEFENDANTS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

Plaintiffs brought this class action to change how the California Department of Corrections and Rehabilitation (CDCR) used Security Housing Units (SHUs) to house inmates affiliated with prison gangs. They achieved that objective when CDCR entered into a Settlement Agreement, under which it changed its SHU practices on the condition that court supervision would automatically terminate in two years, and the case would be dismissed, unless Plaintiffs met specific requirements to extend the life of the case. CDCR complied with all terms of the Agreement, yet the district court mistakenly found that CDCR breached two of those terms and issued remedies that prolonged the life of the case.

As required by the Agreement, CDCR ended its policy of housing inmates in the SHU indefinitely based solely on gang status by implementing a behavioral approach to gang management, and placing inmates in the SHU only for violating specific prison rules and only for fixed periods. It then reviewed the files of approximately 1,600 gang-affiliated inmates and transferred eligible inmates—94% of those reviewed—from the SHU to the general population. These fulfilled promises caused an 85% drop in the SHU population.

The Agreement also recognizes that some class members have substantial threats to their safety and cannot be housed in a traditional general-population setting. Under the Agreement, CDCR created a Restricted Custody General Population (RCGP) housing unit, which is designed to give inmates there more opportunities for positive social interaction than they received in the SHU. But some RCGP inmates have such extreme safety issues that CDCR must, to uphold its duty to protect, keep them on "walk-alone" status until prison officials determine they can safely program with a compatible group of RCGP inmates. While on walk-alone status, inmates receive comparable opportunities for social interaction, but without the risks accompanying physical contact with other inmates.

Against that backdrop, the district court found CDCR breached the Agreement in two ways. The first alleged breach was based on complaints from some class members about inadequate out-of-cell time in maximum-security general population for a period of one month. But the Agreement does not govern out-of-cell time in the general population because this case is not about the general population. It is about the SHU. Moreover, even if the Agreement governed out-of-cell time in the general population, the meager evidence on which the district court relied—anonymous surveys

from roughly 2% of class members and a handful of declarations—was insufficient to justify relief.

The second alleged breach was based on CDCR's failure to provide group activities to RCGP inmates on walk-alone status. But the Agreement does not guarantee group activities to *all* RCGP inmates, regardless of any threat it presents to their safety. The district court's contrary interpretation would require CDCR to violate its constitutional duty to protect inmates.

The district court's construction of the Agreement, and its findings that CDCR materially breached or substantially failed to comply with the Agreement, were both erroneous. The court then compounded those errors by issuing remedial plans that are not authorized under the Agreement or by the Prison Litigation Reform Act (PLRA). This Court should reverse and vacate the district court's orders.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. (Court Docket (CD) 136, Defendants-Appellants' Excerpts of Record (ER) 583.) This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). The district court entered two of the challenged orders on July 3, 2018. (CD 1028; CD 1029.) Defendants timely appealed those orders four weeks later. (CD 1053, ER 99.) The district court entered the remaining

three challenged orders on December 7 (CD 1113, 1114, 1115), and Defendants appealed those orders twelve days later (CD 1117, ER 90–91).

STATEMENT OF ISSUES

1. Paragraph 25 of the Agreement requires Defendants to transfer eligible inmates out of the SHU and into "a General Population level IV 180-design facility, or other general population institution consistent with [their] case factors," but does not describe general-population conditions or protect class members from conditions other general-population inmates experience. Does paragraph 25 require CDCR to provide class members with a certain quantity of out-of-cell time, as the district court held?

2. Paragraph 28 requires that RCGP inmates receive "increased opportunities for positive social interaction," and lists examples of such opportunities, including yard time "commensurate with [general-population units] in small group yards" and "leisure time activity groups." The district court construed this term as mandating group activity and thus found that placing RCGP inmates with extreme safety issues on walk-alone status breached it, even if placing them with other inmates would likely result in serious physical harm. Was the district court's interpretation erroneous?

3. The Agreement authorizes relief only if Plaintiffs prove that a breach is "material" or "substantially non-compliant" with the Agreement.

California courts apply a multi-factor test to assess materiality, and a substantial-benefit test for substantial compliance. Did the district court err in granting relief for the alleged breaches of paragraphs 25 and 28?

4. Absent a violation of a federal right, 18 U.S.C. § 3626(a)(1) bars district courts from granting prospective relief, such as a remedial plan, in prisoner-rights cases. Paragraph 52 of the Agreement states that a finding of material noncompliance will be deemed "a violation of a federal right." Paragraph 53, however, contains no such language. Did the district court err in issuing an extensive remedial plan based on a finding of substantial noncompliance under paragraph 53?

5. Paragraph 41 states that the court's supervisory jurisdiction will automatically terminate after 24 months from the date of the Agreement's preliminary approval, and the case will be dismissed, unless Plaintiffs prove a "current and ongoing systemic" constitutional violation exists. Did the district court exceed its authority under the Agreement by issuing remedial orders and extending supervisory jurisdiction based solely on purported contract breaches?

6. Federal Rule of Civil Procedure 65 states that injunctive orders must describe the acts they require with reasonable detail. Without defining the term, the district court ordered Defendants to provide class members

with out-of-cell time that is "meaningfully greater" than what they received in the SHU. Was the district court's injunctive order impermissibly vague?

ADDENDUM

In compliance with Ninth Circuit Rule 28-2.7, the addendum to this brief contains copies of the following regulations, in effect at the relevant time: Cal. Code Regs. tit. 15 (Title 15), §§ 3000, 3341.5, 3375.1 (2014).

STATEMENT OF THE CASE

I. PLAINTIFFS' LAWSUIT CHALLENGED CONDITIONS IN PELICAN BAY'S SHU AND THE POLICY OF HOUSING INMATES THERE BASED SOLELY ON GANG STATUS.

In response to dangerous illicit activities of gangs in CDCR prisons, CDCR previously had a policy of housing inmates in the SHU through its gang-validation process based solely on evidence that they were gang members or associates.[1] *See Griffin v. Gomez*, 741 F.3d 10, 12 (9th Cir. 2014); *see also* Title 15, § 3341.5(c)(2)(A) (2014). Validated gang members or associates could be released from the SHU if they had not participated in gang activity for six years, or if they "debriefed" by dropping out of their gang and providing information about their former gang to prison officials. *See* Title 15, §§ 3341.5(c)(4), (c)(5).

[1] CDCR defines "prison gangs" as gangs that originated in prison. Title 15, § 3000 (2014). This brief refers to prison gangs simply as "gangs."

In December 2009, Plaintiffs Todd Ashker and Danny Troxell brought, in pro se, a prisoner-civil-rights action challenging the living conditions in Pelican Bay's SHU and the statewide policy of housing inmates there based solely on gang status. (CD 1, ER 630–31.) In September 2012, after obtaining counsel, Plaintiffs filed a second amended complaint that raised putative class claims. (CD 94, 98, 136.)

In June 2014, the district court certified two inmate classes: (1) a "Due Process Class" comprising "all inmates who are assigned to an indeterminate term at the Pelican Bay SHU on the basis of gang validation" under existing policy; and (2) an "Eighth Amendment Class" comprising "all inmates who are now, or will be in the future, assigned to the Pelican Bay SHU for a period of more than ten continuous years." (CD 317, ER 88.) In March 2015, Plaintiffs filed a supplemental complaint adding allegations about SHU facilities at prisons other than Pelican Bay. (CD 388, ER 530–32.)

In short, Plaintiffs challenged the statewide policy of housing inmates in the SHU (particularly at Pelican Bay) based solely on gang status (*see* CD 136, ER 598–605; CD 388, ER 495–502), and SHU conditions, including complaints about the remoteness of Pelican Bay's SHU, the food and healthcare services, and the denial of various privileges (*see* CD 388 ¶¶ 3, 30–31, 39–40, 45, 48, 51–55, 62, 64–67, 71, 82–87).

Plaintiffs never raised claims about conditions in CDCR's general-population units. Nor did the district court's class-certification order recognize any such claims. (*See* CD 317, ER 69–70, 88 (focusing only on current and future SHU inmates).)

II. THE PARTIES SETTLED THE CASE, ENDING CDCR'S POLICY OF SEGREGATED HOUSING BASED ON GANG STATUS ALONE.

The parties settled this case in August 2015 "without any admission or concession . . . of any current and ongoing violations of a federal right." (CD 424-2 (Agreement), ER 446.) The district court preliminarily approved the Agreement in October 2015. (CD 445, ER 48–50; CD 477, ER 66.) After taking comments and objections, and holding a fairness hearing, the district court approved the Agreement in January 2016. (CD 488, ER 38.)

The Agreement aimed to decrease CDCR's use of the SHU by moving most gang members and associates to the general population. Consistent with the focus of the pleadings, the Agreement did not address conditions in CDCR's general-population units. (*See generally* Agreement.) Class counsel admitted this during a hearing: "Defendants are right," the parties "didn't negotiate about level 4 [general population] in general"; they only agreed that inmates would "be taken out of restricted population [SHU] and put into general population." (CD 981, ER 160.)

The district court found that the Agreement was "fair, adequate, and reasonable" to resolve Plaintiffs' claims, and also called it "remarkable," "extremely fair, extremely humane, and extremely innovative." (CD 488, ER 38; CD 493, ER 44–45.)

A. CDCR Transferred Over Ninety-Four Percent of Validated Gang Affiliates Out of the SHU and into the General Population.

The Agreement focuses on why and how CDCR can house inmates in the SHU. (*See, e.g.*, CD 424, ER 432–33 (describing the case as relating to "gang management policies and practices and [CDCR's] use of segregated housing, including Pelican Bay's SHU").) As Plaintiffs sought, CDCR adopted a behavioral approach to dealing with gangs and ended its policy of indefinitely housing inmates in the SHU based on gang status alone. (Agreement ¶¶ 13–17; CD 985-4, ER 117, ¶¶ 2, 4.) CDCR reviewed the files of approximately 1,600 validated gang affiliates housed in SHU and moved eligible inmates (*i.e.*, those who had not recently engaged in gang activity) into suitable general-population facilities consistent with their individual circumstances. (Agreement ¶ 25; CD 985-4, ER 117, ¶¶ 2–4.) Those inmates now live with other general-population inmates, are treated the same as those inmates, and are subject to the same rules and policies governing the

general population. (CD 985-4, ER 117–18, ¶¶ 4, 7; *see also* CD 981, ER 174–75.)

As a result of these reforms, over ninety-four percent of gang-validated inmates were transferred out of SHUs and into general-population facilities. (CD 985-4, ER 117, ¶ 2.) CDCR's SHU population shrank from roughly 2,900 to 420 inmates, almost all of whom are (or were) serving fixed terms for disciplinary infractions. (*Id.*, ER 117–18, ¶¶ 3, 5.)[2] The population reduction led CDCR to shut down SHU housing units in two prisons and re-purpose several SHU units at other prisons. (*Id.*, ER 118, ¶ 6.)

B. Inmates with Safety Concerns Are Housed in the Newly Created and Agreed-Upon Restricted Custody General Population Housing Unit.

The Agreement recognizes that not all class members can safely be placed in the general population. Inmates whose safety concerns made general-population placement too dangerous would be housed in the newly created Restricted Custody General Population (RCGP) unit. (Agreement ¶ 28; *see also* CD 985-5, ER 110, ¶ 3.) There are roughly sixty[3] inmates

[2] These numbers are as of March 8, 2018. At that time, only four inmates were not serving fixed SHU terms, and each was on "Administrative SHU" status consistent with the Agreement. (CD 985-4, ER 117–18, ¶ 5.)

[3] The RCGP population fluctuates. Numbers herein relating to the RCGP are as of March 2018 unless otherwise noted. (CD 985-5, ER 115.)

presently in the RCGP. (CD 927-8, ER 370, ¶ 3; CD 985-4, ER 118–19, ¶ 8; CD 985-5. ER 110, ¶ 4.)

1. CDCR cautiously assigns new arrivals to groups.

The RCGP is intended to provide inmates with living conditions similar to those in the general population, but in a more secure environment to address the inmates' safety concerns. (Agreement ¶ 28.) The Agreement states that RCGP inmates' programming, *i.e.*, their activities and privileges, "will be designed to provide increased opportunities for positive social interaction with other prisoners and staff." (*Id.*)

For safety reasons, CDCR places new arrivals on "walk-alone" status for an observation period. (CD 927-8, ER 370–71, ¶ 4.) During that time, the new arrivals are kept physically separate from other RCGP inmates, but still receive opportunities for interaction with other inmates and staff, such as during yard and dayroom time. (CD 927-8, ER 370–72, ¶¶ 3–10; *see also* pp. 14–15, *infra*.) Staff observes the new arrivals' behavior and evaluates them for placement into one of several RCGP groups. (CD 927-8, ER 370–71, ¶ 4; *see also* CD 985-5, ER 110–11, ¶¶ 5, 7 (describing groups).)[4] When

[4] The RCGP had three groups as of March 2018, but CDCR is continuously evaluating the population for additional group placement and programming. (CD 985-5, ER 111–12, ¶¶ 6–8.) At the time of drafting,

staff identifies a potentially compatible group, the new arrival and the existing group members are asked to sign a form affirming their belief that they can safely interact with each other. (CD 927-8, ER 370–71, ¶ 4.) If staff concludes that the new arrival is a suitable fit for the group, the inmate is taken off walk-alone and added to the group.

2. Pervasive safety issues require some RCGP inmates to be kept on walk-alone status.

Some RCGP inmates have such pervasive safety issues that CDCR has not yet found a group in which they can safely be placed. (CD 927-8, ER 370–72, ¶¶ 2–9.) These inmates stay on walk-alone status until CDCR identifies a suitable group. (CD 999-5, ER 103, ¶ 3; CD 927-8, ER 370, ¶ 4.)

With this subset of RCGP inmates, CDCR proceeds with more caution because of the extreme risk of harm presented if these inmates are placed in a group. Inmates placed in an unsuitable group can be victims of violence. For example, one RCGP inmate was taken off walk-alone status in 2018. (SEALED ER 814, ¶ 4.) Five days later, he was assaulted on an exercise yard by members of his new group, who had previously signed forms agreeing they could safely program with him. (*Id.*)

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counsel is informed there are presently five RCGP groups. (*See id.* ¶ 8 (noting that "staff constantly evaluates the changing population to determine how to assign inmates to groups safely....").)

Other times, placing a walk-alone inmate in a group endangers the existing group members. For example, one RCGP inmate on walk-alone status convinced staff that he could safely be placed in a group. (SEALED ER 820, ¶ 11.) Soon after his group placement, the inmate tried to kill another group member by stabbing him with a metal weapon. (*Id.*) He received a rules violation for attempted murder. (*Id.*) That inmate has since received multiple rules violations for conspiring to murder other RCGP inmates. (*Id.*)

Another RCGP inmate was on walk-alone status for about two months before being assigned to a group. (SEALED ER 821, ¶ 14.) Months later, he stabbed another group member. (*Id.*) After serving a SHU term for that stabbing, the inmate was placed on walk-alone status because CDCR learned he was trying to manipulate his housing assignment to get into a particular RCGP group so he could attack one of its members. (*Id.*)

The above examples are not isolated incidents. Between January 2016 (when the RCGP first opened) and April 2018, there were more than fifty documented incidents involving violence, conspiracy to commit violence, or weapons possession in the RCGP. (CD 999-5, ER 103, ¶ 3; *see also* CD 927-8, ER 374, ¶ 15; SEALED ER 820, ¶¶ 12–13.) The frequency of violent incidents among this inmate population requires CDCR, in ensuring inmate

safety, to use extra caution before taking RCGP inmates off walk-alone status.

3. Walk-alone inmates receive significant opportunities for positive social interaction.

Though not in groups, walk-alone inmates still receive increased opportunities for social interaction. As the Agreement provides, they receive educational programming, out-of-cell time (including yard) commensurate with the general population, job assignments, religious services, leisure activities, and privileges such as contact visits, non-contact visit, and telephone calls. (CD 927-8, ER 371, ¶ 5.)

Walk-alone inmates can socialize during yard time, which is generally ten or more hours per week. (*Id.* ¶ 6.) Their yard time occurs outdoors in individual, fenced exercise yards that each measure 20 feet long, 10 feet wide, and 10 feet high. (*Id.*) The fencing prevents inmates from physically harming each other, but the yards are adjacent to each other, so inmates regularly socialize while they walk, jog, or perform other exercises. (*Id.*)

Walk-alone inmates also have other opportunities for social interaction. During dayroom time, walk-alone inmates can walk up to other inmates' cell-fronts and speak with them face to face through the cell door. (*Id.* ¶ 8.) They can make phone calls to family and friends, or have contact visits

during visiting hours. (*Id.*) They meet with their assigned teachers at least two afternoons per week at their cell-fronts to discuss their educational or programming coursework. (*Id.* ¶ 10.) And even when in their cells, walk-alone inmates can speak with other RCGP inmates in nearby cells. (CD 985-5, ER 113, ¶ 11.)[5]

C. The Agreement Has Terms for Dispute Resolution and Automatic Termination.

The Agreement is twenty-three pages long and addresses CDCR's policies and practices concerning gang management and SHU housing, as well as non-substantive obligations such as extensive reporting, record-keeping, and document-production requirements (¶ 37); and class counsel's access to class members and to CDCR training (¶¶ 35, 40). Because not all contract disputes are equal, the Agreement has two dispute-resolution paragraphs: 52 and 53.

Paragraph 52 allows Plaintiffs to seek relief for what they contend are "current and ongoing" constitutional violations that "exist on a systemic basis as alleged in the" complaints. (Agreement ¶ 52.) To obtain relief, Plaintiffs must "demonstrate by a preponderance of the evidence that CDCR

[5] The RCGP program is still developing, and CDCR continues to seek new ways to provide social interaction to RCGP inmates, including those on walk-alone status. (CD 927-8, ER 371–72, ¶¶ 7–8.)

is in material breach of its obligations under [the] Agreement." (*Id.*) If they do so, the breach may be treated as "a violation of a federal right" and the court can order enforcement under 18 U.S.C. § 3626(a)(1)(A). (*Id.*)

Paragraph 53 allows Plaintiffs to seek relief for an alleged failure to "substantially compl[y]" with the Agreement in a way that *is not* "a current, ongoing, systemic violation[] as alleged in" the complaints. (*Id.* ¶ 53.) For instance, if the parties dispute whether Defendants' record-keeping practices are adequate, then Plaintiffs should seek relief under this paragraph and not under paragraph 52. To obtain relief under paragraph 53, Plaintiffs must prove "by a preponderance of the evidence that Defendants have not substantially complied" with the Agreement. (*Id.*) If successful, Plaintiffs may obtain "an order to achieve substantial compliance with the Agreement's terms." (*Id.*)

The Agreement automatically terminates this case after 24 months. (*Id.* ¶ 41.) Plaintiffs can move for an extension of up to twelve months under paragraph 41, but they must prove, by a preponderance of the evidence, "that current and ongoing systemic" constitutional violations exist as alleged in Plaintiffs' complaints or as a result of CDCR's policy changes under the Agreement. (*Id.*) "Brief or isolated constitutional violations" will not suffice. (*Id.* ¶ 42.) Absent a successful extension motion, the "Agreement and the

Court's jurisdiction over this matter shall automatically terminate, and the case shall be dismissed." (*Id.* ¶ 41.) If enforcement motions under paragraph 52 or 53 are pending at the time for termination, the district court may retain "limited jurisdiction to resolve the motion[s]." (*Id.* ¶ 46.)

III. PLAINTIFFS MOVED TO FIND A BREACH OF THE SETTLEMENT AGREEMENT.

Near the end of the 24-month supervision period, Plaintiffs filed several motions alleging breaches of the Agreement, two of which are relevant here: (1) Plaintiffs' Corrected Enforcement Motion Regarding Violation of Settlement Agreement Provision Requiring Release of Class Members to General Population (the General-Population Motion) (CD 930); and (2) Plaintiffs' Enforcement Motion Regarding RCGP Prisoners on Walk-Alone Status (the Walk-Alone Motion) (CD 844).[6]

The General-Population Motion, though claiming to ask that class members be "released" to the general population, actually challenged the conditions in the general population. (*See* CD 930, ER 189.) The motion alleged non-compliance with paragraph 25 of the Agreement, which states

[6] Plaintiffs also filed an extension motion under paragraph 41, based on alleged due-process violations in CDCR's procedures for placing inmates in the RCGP, its use of confidential information, and its reliance on prior gang validations. (CD 898-3, ER 380.) The district court granted that motion (CD 1122), and Defendants have separately appealed that order (CD 1130).

that class members eligible for release from the SHU shall be "transferred to a General Population level IV 180-design facility, or other general population institution consistent with [their] case factors." (Agreement ¶ 25.) Plaintiffs argued that paragraph 25 required CDCR to provide more out-of-cell time than the inmates received in SHU. (CD 930, ER 190–91.) Because roughly 30 class members—less than 2% of the class—reported inadequate out-of-cell time over a one-month period in the general population, Plaintiffs alleged that Defendants breached paragraph 25. (*Id.*)

In the Walk-Alone Motion, Plaintiffs argued that paragraph 28 required that all RCGP inmates receive opportunities for group programming, and that Defendants breached that paragraph by placing inmates on walk-alone status. (CD 844 at 1–2, ER 383–84.)

IV. THE MAGISTRATE JUDGE FOUND NO BREACH, BUT THE DISTRICT COURT DISAGREED AND ORDERED THE PARTIES TO SUBMIT REMEDIAL PLANS.

The assigned magistrate judge denied Plaintiffs' motions. Regarding the General-Population Motion, the magistrate judge held that paragraph 25 made no promises about conditions for class members transferred to the general population, and thus complaints about out-of-cell time in the general population were beyond the Agreement's scope. (CD 986, ER 33–35.) In denying the Walk-Alone Motion, the magistrate judge recognized CDCR's

efforts to provide walk-alone inmates with exercise, social interaction, and education consistent with the Agreement. (CD 987, ER 29–30.) The magistrate judge held that the use of walk-alone status did not constitute "substantial noncompliance" with the Agreement when balanced against Defendants' constitutional duty to keep inmates safe from harm. (*Id.*)

Plaintiffs sought *de novo* review of those decisions. (CD 992, 993.) In a pair of orders that did not address Defendants' arguments or the magistrate judge's analysis, the district court granted Plaintiffs' motions. (CD 1028, 1029.) Both orders found that Defendants breached the Agreement without any specific finding of current, ongoing, and systemic constitutional violations. (CD 1028, ER 21–22; CD 1029, ER 19–20.) The orders also did not make any specific finding regarding whether Plaintiffs had satisfied their burden of proof under paragraph 52 or paragraph 53.

The order granting the General-Population Motion (the General-Population Order) granted the motion "to the extent that Plaintiffs must receive more out-of-cell time than they received in the Pelican Bay SHU." (CD 1028, ER 21.) The court made two apparent factual findings: (1) 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 (2) that "[t]his is substantially less than the amount of time a general

population inmate spends out-of-cell." (*Id.*, ER 22.) Based on those purported facts, the district court held that Defendants breached their promise to transfer eligible class members out of the SHU and into the general population. (*Id.*)

The order granting the Walk-Alone Motion (the Walk-Alone Order) required Defendants to "provide [RCGP inmates with] small group yards and leisure time activities in groups." (CD 1029, ER 19.) The district court found one fact: "a substantial percentage of Plaintiffs in RCGP are on 'walk-alone' status" and therefore cannot "exercise in small group yards or engage in group leisure activities." (*Id.*, ER 19–20.) The court thus concluded that using walk-alone status did not "comply with the terms of the Settlement Agreement." (*Id.*)

The General-Population and Walk-Alone Orders both required Defendants to "meet and confer . . . with the goal of presenting a proposed remedial plan for Court approval," and then to submit a remedial plan to the district court—jointly with Plaintiffs or separately—"within seven days after the meet and confer." (CD 1028, ER 22; CD 1029, ER 20.)

V. THE DISTRICT COURT DECLINED TO STAY ITS ORDERS AND ADOPTED REMEDIAL PLANS.

Defendants appealed the General-Population and Walk-Alone Orders, invoking this Court's jurisdiction over appeals from injunctions. (CD 1053.) Defendants also moved the district court to stay those Orders pending appeal, uncertain how they could meet and confer to craft a remedial plan when they disputed whether there was any breach. (CD 1054.) The court denied the motion and ordered the parties to proceed with the remedial process. (CD 1070.) The parties thus met and conferred several times (CD 1072, 1076, 1089, 1095.)

Plaintiffs meanwhile moved to dismiss the appeal, arguing that the Orders only required Defendants to participate in meet-and-confers. (Mot. Dismiss 6–7, ECF No. 6-1.) This Court denied Plaintiffs' motion without prejudice and referred the appeal to the merits panel. (Order, ECF No. 10.)

With this Court holding it would hear Defendants' appeal on the merits, Defendants again asked the district court to stay the remedial process until this Court resolved the appeal. (CD 1097.) The court denied that request in effect by refusing to extend the remedial process schedule. (CD 1102, 1113.)

Ultimately, the parties could not agree on remedial plans. So Plaintiffs submitted proposed remedial plans with broad changes to CDCR policy,

extensive documentation requirements, and wide-ranging monitoring by Plaintiffs' counsel, experts, and the district court. (CD 1106-3, ER 93–95; CD 1106-4, ER 96–98.) Defendants, maintaining that there was no breach and that the court lost jurisdiction once Defendants appealed, did not submit substantive remedial plans. (CD 1104, 1105.)

On December 7, 2018, the district court adopted remedial plans similar to what Plaintiffs proposed, but stayed their implementation pending the outcome of this appeal. (CD 1113, ER 12–18.) The court also identified the dispute-resolution terms under which it found Plaintiffs met their burdens to show breach—a fact it omitted from its previous orders. (*Id.*, ER 11.) The court found that Plaintiffs satisfied their burden of proof under paragraphs 52 and 53 with respect to the General-Population Motion, and satisfied only paragraph 53 with respect to the Walk-Alone Motion. (*Id.*)

The district court ordered CDCR to provide class members in the general population with out-of-cell time "that is meaningfully greater than [they received in SHU], consistent with [CDCR's] legitimate security needs" (the General-Population Remedial Plan). (CD 1114, ER 4.) The court did not define "meaningfully greater." (CD 1114.) And while the court gave CDCR discretion on how to implement the "meaningfully greater" requirement, it

ordered at least one year of extensive documentation and monitoring, including access by Plaintiffs' expert. (*Id.*, ER 4–6.)

In the Walk-Alone Order, the district court found that using walk-alone status breached the Agreement. (CD 1029, ER 19–20.) The court's remedial plan regarding walk-alone status (the Walk-Alone Remedial Plan), however, explicitly allows CDCR to use walk-alone status if it has "legitimate safety concerns" about placing a particular inmate in a group. (CD 1115, ER 1–2; *see also* CD 1113, ER 15–16.) The Walk-Alone Remedial Plan creates new criteria that CDCR must satisfy before keeping inmates on walk-alone status, increases the frequency with which CDCR must review walk-alone determinations, adds new documentation and monitoring requirements, and extends the court's jurisdiction for at least one year. (CD 1115, ER 1–3.)

On December 19, 2018, Defendants amended their notice of appeal to also challenge the district court's December 7 orders. (CD 1117.)

SUMMARY OF THE ARGUMENT

The district court found that Defendants breached the Agreement, but only because it misread the Agreement in the first place. That misreading led the court to commit other errors, including incorrectly weighing Plaintiffs' evidence of breach, issuing remedies not authorized by the Agreement or the

PLRA, and extending court supervision over this class action on grounds the Agreement does not permit. This Court should reverse.

Paragraph 25 requires CDCR to transfer eligible inmates out of the SHU and to "a General Population level IV 180-design facility, or other general population institution consistent with [their] case factors." CDCR fulfilled that promise by transferring eligible class members to existing general-population facilities of various security levels. Those class members are now treated the same as non-class members in general-population housing. Paragraph 25 does not speak to general-population conditions, does not guarantee a certain quantity of out-of-cell time each month regardless of institutional concerns, and does not entitle class members to special treatment relative to other inmates in general-population housing. The district court erred in construing paragraph 25 to include an out-of-cell-time requirement, or any other general-population requirements.

Even if the district court's construction of paragraph 25 is correct, the court erred by holding that Plaintiff's meager evidence proved "material breach" or "substantial noncompliance" with that term. The central goal of the Agreement is to remove eligible class members from the SHU and place them in suitable, safe general-population housing. Given the relatively minor alleged deviation from paragraph 25's terms, CDCR substantially performed

its obligations. Plaintiffs' anonymous survey responses show only that about 30 inmates—of a class of around 1,600—spent little time out of their cells during March 2017. And Plaintiffs' counsel admitted those responses were likely weighted in favor of inmates who were dissatisfied with their out-of-cell time. Moreover, Plaintiffs presented no evidence that these class members' experience was different from the experience of any other general-population inmate. And Plaintiffs' declarations, reflecting eight anecdotal experiences, do not meet their burden, either.

Paragraph 28 requires that CDCR provide "increased opportunities for positive social interaction" to RCGP inmates. CDCR has provided such opportunities in myriad ways, from yard time alongside other RCGP inmates to telephone calls and contact visits. As for the subset of RCGP inmates with unique security needs (*i.e.*, the walk-alone inmates), CDCR provides comparable opportunities for positive social interaction. But it cannot place walk-alone inmates in groups because doing so will likely result in violence. Despite that risk, the district court construed paragraph 28 to require that all RCGP inmates have recreation in "small group yards" and have access to "leisure time activity groups." The court thus held that CDCR's use of walk-alone status breached paragraph 28. That was error. Given the potentially lethal safety issues facing some RCGP inmates, this Court should construe

the Agreement to give CDCR discretion to keep RCGP inmates on walk-alone status until it can identify suitable groups into which the inmates can safely be placed, consistent with CDCR's constitutional duty to protect.

Even if the district court's construction of paragraph 28 is correct, its finding of substantial noncompliance under paragraph 53 was error. The Eighth Amendment requires prison officials to protect inmates from known risks of serious harm. If placing a particular inmate into a group setting would substantially endanger inmate health or safety, the Constitution prohibits it. And nothing in the Agreement sought to, or could, waive this Eighth Amendment duty. Defendants provide walk-alone inmates with programming that substantially complies with paragraph 28, in that it "provide[s] increased opportunities for positive social interaction." Given the inherent complexity in developing a new housing unit as paragraph 28 requires, the flexibility Defendants have under the Agreement to provide opportunities for social interaction, and the deference that courts must afford prison administrators on prison-management issues, the Court should find that CDCR has substantially performed under the Agreement.

Finally, the district court's remedial plans were erroneous for three reasons. First, the Walk-Alone Remedial Plan exceeds the court's authority under the Agreement and the PLRA. By invoking paragraph 53, the only

remedy the court could issue was an order to achieve substantial compliance. Instead, the court issued a far-reaching and burdensome injunction, which neither the Agreement nor the PLRA permit. Second, the court improperly extended its supervisory jurisdiction over this class action for an additional year or more, without first requiring Plaintiffs to satisfy their burden of establishing an ongoing, systemic constitutional violation. As Plaintiffs proved no constitutional violation, the remedial plans' extension of jurisdiction was improper. And third, the court's extra-textual requirement that CDCR provide class members with "meaningfully greater" out-of-cell time than they received in the SHU is unenforceably vague.

STANDARD OF REVIEW

The Agreement is a contract "governed by familiar principles of contract law." *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989). Its choice-of-law term states it will be "governed and construed according to California law." (Agreement ¶ 60.) This Court should honor the parties' choice of law because all of the underlying events occurred in California, and thus California has a substantial interest in the underlying dispute. *See Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997).

Under California law, contract-construction issues are reviewed de novo. *See Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865–66 (1965)

(holding appellate courts must interpret written instruments and independently assess the trial court's interpretation); *Freeman Invs., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110, 1115 n.4 (9th Cir. 2013). If there is a dispute as to the credibility of extrinsic evidence, however, that issue is subject to substantial-evidence review. *See id.* at 1115 n.4; *see also Med. Ops. Mgmt., Inc. v. Nat'l Health Labs., Inc.*, 176 Cal. App. 3d 886, 891 (1986). Whether a party has materially breached a contract, or substantially complied with one, is a question of fact reviewed for substantial evidence. *Ash v. N. Am. Title Co.*, 223 Cal. App. 4th 1258, 1268 (2014).

Separately, challenges to an injunction's compliance with Federal Rule of Civil Procedure 65(d), *see Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989), and whether a district court has correctly interpreted and applied the PLRA, *Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009), are both reviewed de novo.

ARGUMENT

In resolving Plaintiffs' motions, the district court rewrote the Agreement and, based on new extra-textual terms, ordered CDCR to do things it never agreed to do. Because the district court's enforcement and remedial orders are contrary to California and federal law, this Court should vacate them. *See Walnut Creek Pipe Distribs., Inc. v. Gates Rubber Co.*

Sales Div., 228 Cal. App. 2d 810, 815 (1964) ("The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably.").

I. THE DISTRICT COURT MISCONSTRUED THE TERMS THAT REQUIRE DEFENDANTS TO TRANSFER CLASS MEMBERS OUT OF THE SHU (PARAGRAPH 25) AND PROVIDE SAFE HOUSING TO INMATES WITH PERVASIVE SAFETY ISSUES (PARAGRAPH 28).

The district court erred by ordering Defendants to honor promises they did not make, and by affording no deference to prison officials' conclusions that placing certain walk-alone inmates in groups would endanger their lives or the lives of other inmates and prison staff. This Court should reject the district court's unreasonable constructions of the Agreement and reverse.

A. Defendants Complied with Paragraph 25 by Transferring Eligible Class Members into General-Population Units.

The district court found that Defendants breached paragraph 25 of the Agreement, which requires CDCR to transfer all eligible inmates from the SHU to "a General Population level IV 180-design facility, or other general population institution consistent with [their] case factors." (Agreement ¶ 25.) Plaintiffs concede that Defendants transferred all eligible inmates to existing general-population facilities. (*See, e.g.*, CD 930, ER 190; CD 985-4, ER 117–18, ¶¶ 2–7.) But they alleged, and the district court found, that

Defendants breached the Agreement because some inmates reported receiving little out-of-cell time during March 2017.

Paragraph 25 states, with emphases added, that if "an inmate has not been found guilty of a SHU-eligible rule violation with a proven [gang] nexus within the last 24 months, he shall be *released* from the SHU and *transferred* to a General Population level IV 180-design facility, or other general population institution consistent with his case factors." This provision's plain terms require CDCR to transfer eligible class members from the SHU to CDCR's existing general-population facilities. (Agreement ¶ 25.) CDCR did just that, reviewing the files of approximately 1,600 SHU-housed class members and moving the eligible ones—over 94%—to general-population facilities. (Agreement ¶ 25; CD 985-4, ER 117, ¶¶ 2–4.) Those class members now live alongside other general-population inmates, are treated the same as those inmates, and are subject to the rules and regulations governing the general population. (CD 985-4, ER 117–18, ¶¶ 4, 7; *see also* CD 981, ER 174–75.)

Contrary to the district court's interpretation, paragraph 25 says nothing about the amount of out-of-cell time class members will receive in general-population facilities; indeed, it says nothing at all about general-population conditions. (*Cf.* CD 617, ER 419–21 (magistrate judge rejecting Plaintiffs'

post-settlement document request because the subject—level IV housing conditions—was "way out of the purview of the *Ashker* agreement").) And CDCR's regulations likewise make no guarantees with respect to out-of-cell time for general-population inmates. (*E.g.*, CD 617, ER 411.) Thus, even if some class members received less out-of-cell time than they anticipated receiving in the general population, there was no breach of the Agreement.

The district court found that paragraph 25 contains an implicit promise that class members moved to "General Population level IV 180-design facilit[ies]" will, regardless of other circumstances, receive "more out-of-cell time than they received in the Pelican Bay SHU." (CD 1028, ER 21.) There is no support for that construction. Under California law, "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Cal. Civ. Code § 1647; *see also* Cal. Civ. Code § 1646 ("A contract is to be interpreted according to the law and usage of the place where it is to be performed; or . . . the place where it is made."). Here, when the parties agreed that CDCR would transfer eligible class members to "General Population level IV 180-design facilit[ies]," they were clearly referring to existing level IV facilities within California's prison system. *See* Title 15, § 3375.1 (2014) (listing the inmate custody scores associated with each level of facility, from levels I to IV). The Agreement

makes no promises regarding out-of-cell time in the general population. Nor does it suggest that CDCR would create new "general population" housing units for Plaintiffs, change the policies and practices under which CDCR manages its existing general-population facilities, or give class members special treatment within those existing facilities. Thus, like all inmates in the general population, Plaintiffs accepted the ordinary risks attendant upon living in the general population when they agreed to paragraph 25.

The district court's citation to two paragraphs of the second amended complaint does not rescue its flawed construction. (*See* CD 1028, ER 21–22 (citing CD 136, ¶¶ 3 (alleging harsh conditions in the SHU), 63 (alleging SHU-housed inmates spend 22 hours or more each day in their cells).) If anything, it shows the court rewrote the Agreement. Paragraph 25 is unambiguous; it requires only that eligible inmates be transferred to a general-population facility. It does not purport to incorporate paragraphs from the second amended complaint. *Cf. R.W.L. Enters. v. Oldcastle, Inc.*, 17 Cal. App. 5th 1019, 1027–28 (2017) (noting the intent to incorporate the contents of a document into a contract must be "clear and unequivocal").

Under the circumstances, California law dictates that paragraph 25 should be construed as CDCR reasonably believed Plaintiffs understood it—and that would be as referring to existing general-population facilities, as

they were being operated at that time. *See* Cal. Civ. Code § 1649 (requiring that ambiguous terms "be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."); *Granger v. New Jersey Ins. Co.*, 108 Cal. App. 290, 293 (1930) (a contract's "language is to be given the meaning which the one using it apprehended or should have apprehended that the other party would give to it.").

If the parties wanted paragraph 25 to include a requirement relating to conditions in the general population, they would have done so explicitly. The Agreement describes at least two forms of housing other than paragraph 25's "General Population level IV 180-design facility": the RCGP and Administrative SHU (Ad-SHU). (Agreement ¶¶ 28, 29.) The paragraphs governing the RCGP and Ad-SHU explicitly require certain conditions. (*Id.*) RCGP inmates must receive programming that is "designed to provide increased opportunities for positive social interaction." (*Id.* ¶ 28.) And Ad-SHU inmates must receive "out of cell recreation and programming of a combined total of 20 hours per week." (*Id.* ¶ 29.) Paragraph 25, by contrast, has no explicit term requiring certain conditions for inmates transferred to the general population—out-of-cell time or otherwise. That the parties knew how to include terms requiring certain conditions, but elected not to do so in paragraph 25, shows that no such term was intended. *See Pardee Const. Co.*

v. Ins. Co. of W., 77 Cal. App. 4th 1340, 1352–60 (2000) ("the insurers' failure to use available language expressly excluding completed operations coverage implies a manifested intent not to do so"); *see also Stephenson v. Drever*, 16 Cal. 4th 1167, 1174–76 (1997) (holding, where a contract states that the employee's stock will be sold upon termination, one cannot infer that other events, not expressly mentioned, also must occur on termination).

This Court should reverse and vacate the General-Population Order.

B. Defendants Have Complied with Paragraph 28 by Providing RCGP Inmates with Increased Opportunities for Positive Social Interaction.

Contrary to the district court's finding (CD 1029), Defendants did not breach the Agreement's paragraph 28, which created the RCGP. The parties designed the RCGP for a subset of class members who, because of safety reasons, could not be housed in CDCR's general population. (Agreement ¶ 28.) Relevant here, paragraph 28 states:

> Programming for [RCGP inmates] will be designed to provide 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.

The above language—particularly that Defendants will provide "increased opportunities" for social interaction, "including but not limited to" the subsequent list of activities and programs—can be interpreted multiple ways. Is the list of benefits mandatory, such that all RCGP inmates must receive each benefit, even if they are not, for example, interested in educational opportunities, religious services, or job assignments? Or is the list illustrative, such that CDCR can provide "increased opportunities for positive social interaction" in various ways, even if some inmates do not receive all listed benefits?

The district court interpreted paragraph 28 in two inconsistent ways. In its Walk-Alone Order, the court found the list was mandatory, finding that the use of walk-alone status, under which class members "are not permitted to exercise in small group yards or engage in group leisure activities," breached paragraph 28. (CD 1029, ER 20.) In adopting remedial plans, however, the district court explicitly allowed CDCR to use walk-alone status when safety and security concerns require it—applying a construction under which CDCR never breached the Agreement. (CD 1113, ER 16; *see also* CD 1115, ER 1.) The latter construction, in which the list is illustrative and allows CDCR to use walk-alone status to protect at-risk RCGP inmates, is both correct and sensible. Under that construction, there is no evidence

supporting the finding that Defendants breached paragraph 28, making both the Walk-Alone Order and the Walk-Alone Remedial Plan erroneous.[7]

When construing a contract under California law, a court must give it "an interpretation [that] will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." Cal. Civ. Code § 1643; *see also* Cal. Civ. Code § 3541 ("An interpretation which gives effect is preferred to one which makes void."). If one interpretation would render the contract unenforceable and another would not, the court must favor the latter.

CDCR has not yet identified groups with which certain RCGP inmates can safely interact, which is why those inmates are not yet in groups. (CD 927-8, ER 370–71, ¶¶ 3–4.) CDCR tracks which inmates pose a significant threat to other inmates, and uses that information to help find compatible groups for RCGP inmates. (CD 927-8, ER 370–71, ¶ 4; CD 999-5, ER 103, ¶ 3; CD 985-5, ER 111, ¶ 6.) As of March 2018, roughly 30 RCGP inmates were on walk-alone status because CDCR had not yet found groups into

[7] Although the Walk-Alone Remedial Plan permits CDCR to use walk-alone, it includes onerous procedures, reporting requirements, and another year of district-court supervision. *See* p. 23, *supra*. Defendants thus challenge it and the district court's finding of breach.

which they could safely be placed. (CD 927-8, ER 370–71, ¶¶ 3–4; CD 985-5, ER 111, ¶¶ 6–7.)

The threat to these inmates is substantial and possibly lethal. There have been several incidents in which RCGP inmates stabbed someone else, or were stabbed themselves, shortly after being taken off walk-alone status, notwithstanding the inmates' written promises that they could all safely interact. *See* pp. 12–14, *supra*. In all, the RCGP inmates racked up over fifty rules violations for violence or weapons possession in just over two years. *See* pp. 13, *supra*. And those incidents occurred notwithstanding CDCR's efforts to keep warring inmates separated, using walk-alone status when necessary. If the Court interprets paragraph 28 to require that all RCGP inmates be in groups, regardless of safety concerns, such incidents will be even more frequent, with the potential to endanger inmates and staff alike. The law gives CDCR discretion to control the danger that group placement would pose to individual inmates, and limiting the use of walk-alone status would dramatically hinder that ability, with potentially catastrophic results.

A construction that burdens CDCR with an absolute obligation to put RCGP inmates in groups—as the district court used to find CDCR breached the Agreement—would force CDCR to violate its Eighth Amendment duty to keep inmates safe from avoidable harms, including harm at the hands of

other inmates. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) ("[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." (internal quotation marks omitted)); *see also Griffin v. Gomez*, 741 F.3d 10, 20–22 (9th Cir. 2014) (stating that California's prison officials have an Eighth Amendment duty to keep both the plaintiff and other inmates safe). The Court should avoid such a construction. *See* Cal. Civ. Code § 3513 ("a law established for a public reason cannot be contravened by a private agreement"); *Keehn v. Lucas*, No. CIV.A. 09-16, 2012 WL 269632, at *9 (W.D. Pa. Jan. 30, 2012) ("The notion that an inmate in the custody of the state can consent or waive the right to be safe from certain gratuitous physical harm is inimical to Defendants' duty to protect him."); *League of Residential Neighborhood Advocs. v. City of L.A.*, 498 F.3d 1052, 1056–57 (9th Cir. 2007) (noting that municipalities may not contractually "waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public" (internal citations omitted)). The district court tacitly recognized the problem with prohibiting walk-alone status by expressly allowing its use in the Walk-Alone Remedial Plan, albeit with onerous procedural requirements not found in the Agreement. (CD 1115, ER 1–3.)

Paragraph 28 and the benefits available to RCGP inmates support a construction in which the enumerated list of programming and privileges is illustrative, not mandatory, for two reasons. First, as shown above, paragraph 28 is flexible on purpose because, as the parties acknowledged, the RCGP inmates in general, and the walk-alone inmates in particular, have unique safety concerns that warrant special adjustments to their housing to keep them safe. Given the unique safety concerns those inmates have and the special accommodations CDCR must provide to keep them and other inmates safe, CDCR could comply with paragraph 28 by providing RCGP inmates with some privileges if those privileges, in the aggregate, amounted to "increased opportunities for positive social interaction." Second, and from a practical standpoint, paragraph 28 includes items that many inmates may decline, such as "religious services" and "support services job assignments." Inmates who do not practice a religion or are ineligible for support services jobs would not use those benefits. And the fact that dayroom time is not listed, but is provided as another opportunity for social interaction (CD 927-8, ER 372, ¶ 8), shows that the enumerated list simply illustrates ways in which CDCR can provide RCGP inmates with "increased opportunities for positive social interaction" (Agreement ¶ 28).

Under a construction that accounts for CDCR's constitutional duty to protect inmates from known risks, and thus allows CDCR to use walk-alone status if necessary to ensure inmate safety, Plaintiffs have no evidence of substantial noncompliance with paragraph 28. The Court should reverse the Walk-Alone Order and Walk-Alone Remedial Plan.

II. EVEN UNDER THE DISTRICT COURT'S CONSTRUCTIONS, ANY BREACH OF PARAGRAPH 25 OR 28 IS IMMATERIAL AND INSUBSTANTIAL.

If the Court finds that the district court's construction of paragraphs 25 and 28 is correct, it should still reverse the district court's enforcement and remedial orders on the ground that Plaintiffs failed to prove material breach or substantial noncompliance by a preponderance of the evidence.

The Agreement has two dispute-resolution provisions. Under paragraph 52, Plaintiffs may allege a "current and ongoing" constitutional violation that "exist[s] on a systemic basis," and must prove Defendants materially breached the Agreement. (Agreement ¶ 52.) Under paragraph 53, Plaintiffs may allege that Defendants failed to "substantially compl[y]" with the Agreement in a way "that do[es] not amount to a current, ongoing, systemic violation." (*Id.* ¶ 53.) Under both paragraphs, Plaintiffs must prove noncompliance by a preponderance of the evidence. (*Id.* ¶¶ 52–53.)

While ordering remedial plans, the district court clarified that, as to the General-Population Motion, it found Plaintiffs proved both material breach under paragraph 52 and substantial noncompliance under paragraph 53. (CD 1113, ER 11.) As to the Walk-Alone Motion, the court found that Plaintiffs proved only substantial noncompliance under paragraph 53. (*Id.*) But because Plaintiffs did not provide substantial evidence of a material breach or substantial noncompliance, the district court's General-Population and Walk-Alone Orders were both erroneous.

A. California Courts Examine Many Factors to Determine Whether a Breach Was Material or Whether There Was Substantial Noncompliance, and Afford, When Appropriate, Deference to Prison Officials' Expertise.

In analyzing whether a contract breach is material, California courts consider many factors, including: (1) the extent to which the injured party will obtain the substantial benefit it could have reasonably anticipated; (2) whether the injured party may be compensated in damages; (3) the extent to which the alleged breaching party has already partly performed or made preparations to do so; (4) the potential hardship on the alleged breaching party if the contract were terminated; (5) whether the alleged failure to perform is willful, negligent, or innocent; (6) the likelihood that the alleged breaching party will perform the remainder of the contract; and (7) the

timing of the alleged breach. *See Sackett v. Spindler*, 248 Cal. App. 2d 220, 229 (1967); *Whitney Inv. Co. v. Westview Dev. Co.*, 273 Cal. App. 2d 594, 602 (1969); *see also* 14A Cal. Jur. 3d Contracts § 382 (Aug. 2018); Restatement (First) of Contracts § 275 & cmt. a (1932).

The substantial-compliance standard is similar. Its focus is "primarily on whether the [party alleging breach] realized the contemplated benefit" of the contract. *See Cline v. Yamaga*, 97 Cal. App. 3d 239, 247 (1979); *Joseph Musto Sons-Keenan Co. v. Pac. States Corp.*, 48 Cal. App. 452, 459 (1920) (finding substantial performance of a construction contract, notwithstanding cosmetic deviations from the promised performance, by weighing the defects against the duration and complexity of performance). Whether compliance is substantial is "a matter of degree," and "must be determined relatively to all the other complex factors that exist in every" case. *Tolstoy Constr. Co. v. Minter*, 78 Cal. App. 3d 665, 672 (1978) (finding no substantial compliance where what was agreed to and what was delivered "were two entirely different things"); *Pac. States Corp.*, 48 Cal. App. at 458 (noting "what constitutes substantial performance is . . . to be determined in each case, having regard to the circumstances and facts thereof.").

In assessing a prison system's contract compliance, courts should also weigh the deference afforded to prison officials on prison-management

issues. *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010) ("It is well established that judges and juries must defer to prison officials' expert judgments."); *see also Griffin*, 741 F.3d at 20–22 (holding the district court erred in issuing injunctions regarding inmate housing because it failed to give deference to security decisions of prison administrators). California's courts have expressed similar views. *See In re Collins*, 86 Cal. App. 4th 1176, 1182 (2001) (recognizing "that courts are ill equipped to deal with the complex and difficult problems of prison administration and reform, which are not readily susceptible to resolution by court decree"); *In re Johnson*, 176 Cal. App. 4th 290, 298 (2009) (cautioning against second-guessing prison decisions regarding inmate discipline). Deference is warranted because prison administration is "an extraordinarily difficulty undertaking," *Hewitt v. Helms*, 459 U.S. 460, 467 (1983), because prisons are, "at best, tense," "sometimes explosive, and always potentially dangerous," *Berg v. Kincheloe*, 794 F.2d 457, 461 (9th Cir. 1986). That Defendants appealed from an order resolving the parties' contract disputes should not matter for the purpose of deference, because the district court's adverse findings and remedial plans affect Defendants' core responsibility to "adopt[] and execut[e] policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *See Bell*

v. Wolfish, 441 U.S. 520, 547 (1979). Nothing in the Agreement gave Plaintiffs or the court veto power over that responsibility.

California appellate courts review factual issues, such as whether a contract breach is material, under a "substantial evidence" standard. *Ash v. N. Am. Title Co.*, 223 Cal. App. 4th 1258, 1268 (2014). Under this standard, a reviewing court assesses whether the fact-finder's ruling was reasonable in light of the whole record. *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 651–56 (1996) ("The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.")). The reviewing court must consider all evidence, including evidence undermining the persuasiveness of evidence supporting the fact-finder's ruling. *Id.* at 652.

B. Plaintiffs Failed to Prove Material Breach of, or Substantial Noncompliance with, Paragraph 25.

Even if the Agreement required CDCR to provide transferred inmates with more out-of-cell time than what they received in SHU, this Court should still reverse because Plaintiffs' meager evidence did not prove material breach or substantial noncompliance with the Agreement.

1. Plaintiffs' evidence shows only that a subset of class members received little out-of-cell time for a single month.

Under the substantial-evidence standard, this Court must assess all evidence in reviewing the district court's material-breach and substantial-noncompliance findings, including evidence unfavorable to those findings. *Roddenberry*, 44 Cal. App. 4th at 651–56. Here, Plaintiffs' evidence does not show any significant deviation from paragraph 25 of the Agreement. That evidence consists of: (1) fifty-five anonymous survey responses that purport to reflect the amount of out-of-cell time the responders received during a single month in 2017; (2) eight declarations by inmates who were moved from the SHU to the general population; and (3) an expert declaration analyzing the survey results and opining on how other prison systems use the phrase "general population." (CD 930-3, ER 355–61.)[8]

Taken together, Plaintiffs' evidence shows that about 2% of class members—roughly 30 from a class of around 1,600—reported receiving little out-of-cell time for one month. (CD 930, ER 191; CD 930-2, ER 306–11 (summarizing data).) Plaintiffs' expert declaration insists the survey

[8] Defendants objected to much of Plaintiffs' evidence, but the district court did not address those objections. (CD 998, ER 107 & n.4; CD 1028, ER 21–22.)

results are representative of the broader class (CD 930-3, ER 355, ¶ 15); but Plaintiffs' counsel admitted that the survey responses are likely biased in favor of those inclined to complain about their confinement conditions (CD 981, ER 178).

The survey responses, even when reflecting little out-of-cell time, favor reversal. While the responses often fail to explain why there was not more out-of-cell time that month (*e.g.*, CD 930-2, ER 227–28, 235–36, 287–88), when reasons are provided, they generally reflect appropriate justifications related to institutional needs, such as safety, security, and staffing (*e.g.*, *id.*, ER 212 (noting "LOCKDOWN THREAT ON STAFF" as the reason), 222 ("no yard because of 'staff training'"), 241 ("Lock down search for missing metal").) And given the "wide-ranging deference" that courts afford prison administrators "to preserve internal order and discipline," a court should not conclude that prisoners' out-of-cell time was inconsistent with legitimate penal justifications, absent compelling evidence. *See Wolfish*, 441 U.S. at 547. Plaintiffs provided no such compelling evidence.

Moreover, because Plaintiffs did not provide the identity of the survey responders, Defendants could not verify the responses or assess why the particular inmates did not spend more time out of their cells. (*See* CD 981, ER 168.) Defendants could not, for example, inquire whether the inmates

were offered opportunities for out-of-cell time that they declined. *See Parsons v. Ryan*, 912 F.3d 486, 503–05 (9th Cir. 2018) (for purposes of defining the plaintiff class, "out-of-cell" time means the amount of time offered, not the amount taken advantage of by the particular inmate).

Separately, the district court relied on one out-of-context statement by a CDCR attorney to find that general-population inmates all receive "a minimum of ten hours a week" of out-of-cell time. (CD 617, ER 411–12 (comment about a group of 51 debriefing inmates in a specialized housing unit); CD 1028, ER 22 (using comment to support broader proposition).) In context, that statement referred to CDCR's goal of getting all general-population inmates at least ten hours of out-of-cell time per week, and not a representation that all inmates unerringly receive it. It did not purport to be a guarantee, nor did it address the plethora of known circumstances, such as riots, modified programming, lockdowns, staff trainings, and staff shortages, which can necessitate decreasing out-of-cell time temporarily for some inmates. To misuse the statement as the district court did was not reasonable.

This evidence does not amount to "substantial evidence" of a "material breach" of, or "substantial noncompliance" with, the Agreement. (Agreement ¶¶ 52, 53.) It shows only that a small number of class members,

for one month, was disappointed with their out-of-cell time in the general population.

2. All of the relevant factors favor finding the alleged breach was immaterial.

Even accepting Plaintiffs' evidence at face value, the overwhelming weight of the factors used to analyze the materiality of an alleged breach weighs against finding material breach of paragraph 25. *See Sackett*, 248 Cal. App. 2d at 229. The factors regarding whether Plaintiffs will obtain the benefits they could reasonably have anticipated, the extent to which Defendants have partially performed, and the likelihood Defendants will perform the remainder of the contract, all weigh in Defendants' favor. Inmates are no longer housed in SHU based solely on gang validation. That was the key reform Plaintiffs sought and obtained. Defendants made sweeping, system-wide changes to implement the Agreement, and the deficiencies Plaintiffs allege are slight compared to the successful large-scale reforms. (*See, e.g.*, CD 617, ER 406–08 (magistrate judge noting the difficulty of the underlying task and finding Defendants substantially complying as of July 20, 2016).) Only a small percentage of class members reported temporarily having little out-of-cell time after their move. Defendants have otherwise fully performed.

Moreover, out-of-cell time was not a specific term of the Agreement. It is just one of the many SHU conditions—albeit a significant one—about which Plaintiffs complained. Plaintiffs' complaints about the SHU ranged from the quality of the food to the lack of cell windows, limits on mail privileges and personal property, denial of contact visits, and more. *See* p. 7, *supra*. Most of those issues were remedied simply by being housed in general-population facilities. Plaintiffs do not allege, or provide evidence showing, that they did not get those benefits of general-population housing while out-of-cell time was temporarily curtailed.

The factor concerning whether the injured party can be compensated in damages weighs in Defendants' favor as well. *See Sackett*, 248 Cal. App. 2d at 229; *Norwood*, 591 F.3d at 1077–78. While class members cannot sue for breach of the Agreement based on the out-of-cell time they receive over a given period in the general population, they are not without recourse. They can pursue individual claims under 42 U.S.C. § 1983, alleging an Eighth Amendment violation. The potential existence of such individual claims should not drag this resource-intensive class action out any further.

The factor concerning hardship on Defendants if the Agreement were terminated, *Sackett*, 248 Cal. App. 2d at 229—to the extent it applies in this case—also favors Defendants. Plaintiffs promised to dismiss this lawsuit in

exchange for massive changes in CDCR policies and practices that had not been found to violate inmates' rights. In performing its obligations under the Agreement, CDCR revised governing regulations; repurposed housing units and created new ones; and spent incalculable man-hours reviewing files, collating data, collecting and producing documents, and re-housing approximately 1,600 class members. That time, expense, and man-power cannot be returned to CDCR, nor can the policy changes be undone without similar expense all over again, yet CDCR would be denied the sole benefit that Plaintiffs promised under the Agreement—dismissal of this lawsuit.

The remaining factors—whether the breach was innocent and the timing of the breach itself—both favor Defendants. Plaintiffs' own evidence reveals that the out-of-cell time of which Plaintiffs complain was often necessitated by circumstances outside CDCR's control, such as violent incidents or staff shortages. (*E.g.*, CD 930-2, ER 195–304.) And while Defendants' actions were not inadvertent, if paragraph 25 has an out-of-cell-time component, it is an implicit term of which Defendants were unaware. So, Defendants' conduct—even if a contractual breach—was innocent. Moreover, the alleged breach occurred over the month of March 2017, more than a year and a half after the parties signed the Agreement, and after Defendants performed most of their other obligations. The late timing of the

breach should weigh in favor of finding it immaterial. *Whitney Inv. Co.*, 273 Cal. App. 2d at 602 ("a slight breach at the outset may justify termination whereas a like breach later in performance may be deemed insubstantial").

Considering all of the relevant factors, there is no substantial evidence showing that Defendants materially breached paragraph 25.

3. Plaintiffs' evidence does not show substantial noncompliance with paragraph 25.

The outcome is the same under the substantial-compliance standard. For the same reasons noted above, Plaintiffs have "realized the contemplated benefit" of the Agreement, and any deficiency in Defendants' performance regarding out-of-cell time is slight relative to the Agreement's overall complexity. *See Tolstoy Constr. Co.*, 78 Cal. App. 3d at 672; *Cline*, 97 Cal. App. 3d at 247. As promised, CDCR adopted a behavioral approach to dealing with gangs. It changed relevant regulations, created new housing units, reviewed relevant files, and moved eligible SHU inmates to appropriate general-population facilities. These reforms provided Plaintiffs the substantial benefit they could reasonably have contemplated when they executed the Agreement.

As there was no material breach or substantial noncompliance with paragraph 25 of the Agreement, the Court should reverse.

C. Plaintiffs Failed to Prove Substantial Noncompliance with Paragraph 28.

If paragraph 28 requires that every RCGP inmate receive every listed program and service—including "small group yards" and "leisure time activity groups"—the Court should nevertheless hold that Defendants substantially complied with that term.[9]

The primary benefit of paragraph 28 is that inmates who could not safely be placed in the general population were nevertheless moved out of the SHU to a less restrictive environment, with privileges commensurate with those in the general population. The privileges included programming "designed to provide increased opportunities for positive social interaction." (Agreement ¶ 28.)

RCGP inmates generally have programming in groups. But walk-alone inmates cannot safely program in any of the RCGP groups. CDCR has information indicating that, if placed in a group, they (or another member of the group) will likely be attacked, potentially causing serious injury or death. (CD 927-8, ER 370–71, ¶ 4; CD 985-5, ER 111, ¶ 6; CD 617, ER 416–17; *see also id.*, ER 413 ("THE COURT: . . . So they are in RCGP for personal

[9] In finding Defendants noncompliant with paragraph 28, the district court explicitly relied on paragraph 53. (CD 1113, ER 11.) Defendants, therefore, do not address the material-breach standard under paragraph 52.

safety reasons; in other words, they got a hit out on them? MS. LEE: Or the like."); SEALED ER 820–21, ¶¶ 11–14 (providing examples of the type of safety issues with which CDCR is concerned); SEALED ER 814, ¶ 4 (same); *see also* SEALED ER 823, ¶ 4.) Faced with that reality, CDCR gives walk-alone inmates alternative programming that provides the promised "opportunities for positive social interaction." (CD 927-8, ER 371–73, ¶¶ 5–10; CD 985-5, ER 113, ¶ 11.)

In implementing the Agreement, CDCR has ensured that walk-alone inmates now have opportunities for yard and out-of-cell time commensurate with the general population, educational programs, religious services, leisure activities, job assignments, and privileges such as visits (contact and non-contact) and telephone calls. (CD 927-8, ER 371, ¶ 5.) These opportunities include ten or more hours of yard time per week using individual, fenced exercise yards, during which the walk-alone inmates regularly socialize. (*Id.* ¶ 6.) They also include dayroom time, during which the walk-alone inmates may speak face-to-face with other inmates, who remain in their cells. (*Id.* ¶ 8.) And while the educational and self-help programs are in self-study format, they include twice weekly opportunities to talk with the teacher about assignments. (*Id.* ¶ 10.) Moreover, inmates in their cells can always socialize with other inmates in nearby cells. (CD 985-5, ER 113, ¶ 11.)

The evidence before the district court showed that Plaintiffs "realized the contemplated benefit" of paragraph 28 because inmates—even those with pervasive security concerns—were moved out of the SHU and now enjoy conditions more akin to the general population. *See Cline*, 97 Cal. App. 3d at 247. The inmates receive "increased opportunities for positive social interaction." (Agreement ¶ 28.) Any deficiency in Defendants' performance was slight relative to the complexities of their performance, which involved creating and staffing a new housing unit for inmates with special security needs. *See Tolstoy Constr. Co.*, 78 Cal. App. 3d at 672.

Further weighing in Defendants' favor is the deference that courts afford prison administrators on prison-management issues. *See Wolfish*, 441 U.S. at 547. The Court has recognized that managing a prison system is a uniquely difficult task. *Berg*, 794 F.2d at 461. Prison administrators must balance competing concerns of inmates, staff, and the public, and must also balance the need to keep their institutions secure and safe with the need to provide inmates constitutionally adequate services and living conditions. Particularly where, as here, the relevant factors do not weigh sharply in favor of finding substantial noncompliance, the Court should allow prison administrators some leeway in implementing their contractual obligations in a way that is consistent with their constitutional obligations.

Ultimately, Defendants' use of walk-alone status is, at most, an insubstantial deviation from the Agreement and therefore not actionable under paragraph 53. This Court should thus reverse the district court's Walk-Alone Order and Walk-Alone Remedial Plan.

III. THE DISTRICT COURT'S INJUNCTIVE REMEDIES ARE NOT PERMISSIBLE UNDER THE AGREEMENT.

Even if the Court finds in Plaintiffs' favor, it should reverse because the district court exceeded its authority to craft a remedy in three ways. First, the Walk-Alone Remedial Plan violates the PLRA by imposing an elaborate injunctive remedy based only on finding a breach under paragraph 53. Second, both remedial plans effectively grant an extension of the Agreement, even though Plaintiffs have not proved a current and ongoing systemic constitutional violation, as paragraph 41 requires. Third, the General-Population Remedial Plan is impermissibly vague and unenforceable under Federal Rule of Civil Procedure 65.

As noted above, the Agreement has two dispute-resolution provisions. The first, paragraph 52, applies where Plaintiffs allege that "current and ongoing" constitutional violations "exist on a systemic basis as alleged in the" operative complaints. (Agreement ¶ 52.) If Plaintiffs meet their burden to prove "material breach" under this provision, the parties agree that, "for

the purposes of Plaintiffs' enforcement motion only, . . . Plaintiffs will have also demonstrated a violation of a federal right." (*Id.*) At that point, the district court "may order enforcement consistent with the requirements of 18 U.S.C. § 3626(a)(1)(A)." (*Id.*)

The second dispute-resolution provision, paragraph 53, applies where Plaintiffs allege "substantial noncompliance" with the Agreement, but in a way that is not a "current, ongoing, systemic" constitutional violation. (*Id.* ¶ 53.) If Plaintiffs meet their burden under paragraph 53, the district court "may issue an order to achieve substantial compliance with the Agreement's terms." (*Id.*) Unlike paragraph 52, however, a finding of substantial noncompliance under paragraph 53 is not treated as "demonstrat[ing] a violation of a federal right." (*Compare id.* ¶ 52 *with id.* ¶ 53.)

A. The District Court Erred by Granting Extensive Injunctive Relief Based on Paragraph 53.

The district court's adoption of the Walk-Alone Remedial Plan violated the PLRA and exceeded its authority under the Agreement. The PLRA "establishe[d] a comprehensive set of standards to govern prospective relief in prison conditions cases." *Gilmore v. California*, 220 F.3d 987, 998 (9th Cir. 2000). And it continues to apply even when the litigation was resolved by settlement. *See Parsons v. Ryan*, 912 F.3d 486, 501 (9th Cir. 2018). The

PLRA made clear that district courts cannot impose prospective relief against state prison systems unless the plaintiff proves that the prison was violating inmates' federal rights. *Gilmore*, 220 F.3d at 999 ("no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum"). Even then, the prospective relief may reach no further than needed to remedy the violation. *Id.*; *see also* 18 U.S.C. § 3626(a)(1). No violation of a federal right; no prospective relief.

The Agreement's dispute-resolution terms do not require the parties to prove, or the district court to find, violation of a federal right. (Agreement ¶¶ 52, 53.) Paragraph 52 deems a "material noncompliance" finding to be a violation of a federal right "for purposes of Plaintiffs' enforcement motion only," and thus empowers the court to craft an injunctive remedy without offending the PLRA. (*Id.* ¶ 52.). Paragraph 53, by contrast, does not deem "substantial noncompliance" to be a violation of a federal right, and thus limits the court to ordering substantial compliance with the acts Defendants have already agreed to take. (*Id.* ¶ 53.)

Here, Plaintiffs did not allege a violation of a federal right. In filing the Walk-Alone Motion, Plaintiffs explicitly invoked paragraph 53 (CD 844, ER 382), which alleges noncompliance that "*do[es] not* amount to a current, ongoing, systemic" constitutional violation. (Agreement ¶ 53 (emphasis

added).) As a result, the district court's Walk-Alone Order, also based on paragraph 53, did not find a violation of a federal right. (CD 1029, ER 19–20.) Neither did the order adopting remedial plans (CD 1113) or the Walk-Alone Remedial Plan (CD 1115). Nevertheless, the Walk-Alone Remedial Plan grants prospective relief that goes beyond the Agreement's terms, for example by imposing new criteria for walk-alone status, increasing monitoring and documentation requirements, and extending district-court supervision. (CD 1115, ER 1–3.) The Walk-Alone Remedial Plan goes far beyond the "substantial compliance" that paragraph 53 authorizes the court to order, and thus violates the PLRA.

This Court's recent decision in *Parsons v. Ryan*, 912 F.3d 486 (9th Cir. 2018), does not compel a contrary conclusion. *Parsons* was a class action, like this one, in which inmate plaintiffs raised Eighth Amendment claims and the parties settled without a trial. *Id.* at 493. The parties appealed several orders issued during the enforcement phase of the case, including one order that required the defendants to use "all available community healthcare services" to meet certain healthcare-performance measures set out in the settlement stipulation. *Id.* at 499. Defendants argued that the order violated the PLRA because it issued prospective relief without an explicit finding that defendants violated a federal right. *Id.* at 501. The Court disagreed, noting

that the district court had previously held that the settlement stipulation was "necessary to correct the violation of the Federal right of the plaintiffs." *Id.* That initial finding, the Court held, was sufficient to justify later prospective relief under the PLRA. *Id.*

In this case, the district court never found a violation of a federal right relating to walk-alone status in the RCGP. The Agreement settled the litigation "without any admission . . . by Defendants of any current and ongoing violations of a federal right." (Agreement at 4.) That is why paragraph 52 needed to specify that a finding of material breach will, "for the purposes of Plaintiffs' enforcement motion only," be deemed a finding of "a violation of a federal right." (*Id.* ¶ 52.) In the absence of that agreed-to term, there would be no finding of a violation of a federal right, and prospective relief would be barred by the PLRA. *See, e.g.*, *Inmates of Suffolk Cty. Jail v. Rouse*, 129 F.3d 649, 657 (1st Cir. 1997) (describing Congress's intent in passing the PLRA as "to divest district courts of the ability to construct or perpetuate prospective relief when no violation of a federal right exists"); *see also* 18 U.S.C. § 3626(a)(1)(A).

Because the Walk-Alone Remedial Plan far exceeds what might be needed to "achieve substantial compliance" with paragraph 28, and there has

been no proven violation of a federal right to satisfy the PLRA, the Court must reverse and vacate the Walk-Alone Remedial Plan.

B. The District Court Erred by Extending the Agreement and Its Own Jurisdiction in the Absence of Any Adjudicated Constitutional Violation.

The district court also erred by effectively re-writing the Agreement's automatic-termination clause and extending the duration of the case without holding Plaintiffs to the appropriate burden of proof.

Paragraph 41—the Agreement's automatic-termination clause—states that, unless Plaintiffs file a successful extension motion within the applicable time period and prove there is a "current and ongoing systemic" constitutional violation, "this Agreement and the Court's jurisdiction over this matter shall automatically terminate, and the case shall be dismissed." The parties agreed that, unless Plaintiffs proved a "current and ongoing systemic" constitutional violation, the Agreement would terminate. (*Id*.)

The district court's remedial plans include a full year of extended documentation and monitoring requirements, including access by Plaintiffs' expert. (CD 1114, ER 5–6; CD 1115, ER 1–3.) They also purport to allow Plaintiffs to extend these monitoring periods, and the district court's "jurisdiction over this matter," for additional years simply by proving that

"substantial compliance with the Settlement Agreement's terms has not yet been achieved." (CD 1114, ER 5–6; CD 1115, ER 1–3.) This was error.

The only way to extend the Agreement's duration (other than for the time necessary to resolve a pending enforcement motion (Agreement ¶ 46)), is to satisfy paragraph 41—*i.e.*, for Plaintiffs to prove, by a preponderance of the evidence, that there is a "current and ongoing systemic" constitutional violation. (*See id.* ¶ 41.) Plaintiffs' enforcement motions did not ask the district court to find that Defendants violated the constitution. (CD 844, 930.) The Walk-Alone Motion, made under paragraph 53, implicitly admits that it is *not* directed to a constitutional violation. And the court's orders resolving those motions did not find a constitutional violation, either. (CD 1028, 1029.)[10] As such, granting relief that extends the duration of the Agreement, potentially for years into the future, based on a purported showing of substantial noncompliance, exceeds the district court's authority and contravenes the parties' express intent. The Court should therefore reverse and vacate the district court's remedial plans.

[10] An enforcement motion under paragraph 52 requires Plaintiffs to allege a constitutional violation, but only requires Plaintiffs to prove—and the district court to find—a material breach of contract. (Agreement ¶ 52.)

C. The District Court Erred by Issuing an Injunction that Is Unenforceably Vague Under Rule 65(d).

Finally, the district court's General-Population Remedial Plan must be vacated because it is unenforceably vague. "Rule 65(d) requires an injunction to 'state its terms specifically' and 'describe in reasonable detail . . . the act or acts restrained.'" *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1149–50 (9th Cir. 2011) (finding a general prohibition against using "illegal, unlicensed and false practices," including examples, is "too vague to be enforceable"). Injunctions are unenforceably vague if, in light of the surrounding circumstances, they are "susceptible to more than one interpretation." *Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1263–64 (9th Cir. 1989); *see also Schmidt v. Lessard*, 414 U.S. 473, 477 (1974); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 895 F.2d 659, 668–69 (10th Cir. 1990) ("An injunction 'too vague to be understood' violates the rule."). This requirement is "to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Furgatch*, 869 F.2d at 1263 (quoting *Schmidt*, 414 U.S. at 476) (injunction impermissibly vague where it prohibits defendant from committing "other similar [campaign finance] violations").

The primary directive in the General-Population Remedial Plan is for CDCR to provide class members out-of-cell time that is "meaningfully greater" than what they received in the SHU. This is too vague to satisfy the requirements of Rule 65. What does "meaningfully greater" mean? How is "meaningfully greater" to be determined? And meaningful to whom? The class includes approximately 1,600 inmates previously housed in the SHU. Each inmate might see a different amount of out-of-cell time in the general population as a "meaningful" improvement.

Courts have held that promising something will be "meaningful" is too vague to be enforced. *See Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 213–14 (1993), *as modified* (Oct. 6, 1993), *disapproved on other grounds in Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994) (holding a promise that plaintiff would have "active and meaningful" participation in creative decisions was "too vague and indefinite to be enforceable"); *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1026 (N.D. Cal. 2012) (holding that a representation that a service is provided "at meaningful level" is "vague and subjective," and thus not actionable under consumer-protection laws). Similarly, as used in General-Population Remedial Plan, "meaningfully greater" is too vague to be enforced.

Even if one could determine what "meaningfully greater" means in the context of the General-Population Remedial Plan, however, problems persist. Over what time period is "meaningfully greater" to be judged? Must the class members' out-of-cell time be "meaningfully greater" than in SHU every day of their incarceration? Or in the aggregate over each week? Or each month? Further, are there any circumstances under which inmates' out-of-cell time might be curtailed without running afoul of the "meaningfully greater" requirement, such as lockdowns, modified programs, or staff shortages? Without further clarity, Defendants could not implement the plan.

Worse yet, the General-Population Remedial Plan will lead to endless motion practice as Plaintiffs, their expert, and Defendants disagree about how much out-of-cell time is "meaningfully greater" than what class members received in the SHU, and what caveats must be recognized. The plan indicates that CDCR has discretion to implement this requirement. (CD 1114, ER 4.) But it imposes extensive documentation and monitoring requirements, gives Plaintiffs' expert near-unfettered access to the class members and CDCR's data, and effectively extends the Agreement indefinitely until either Plaintiffs or the district court is satisfied with the amount of out-of-cell time the class members receive. (*See id.*, ER 4–6.) It is almost certain that the General-Population Remedial Plan, if allowed to go

into effect, will yield further motion practice—and further appeals—just to resolve how much out-of-cell time it requires. Particularly given that out-of-cell time in the general population was never an explicit term of the Agreement, extending the Agreement in this way is untenable.

Because it is too vague to satisfy Rule 65, the Court should vacate the General-Population Remedial Plan and order the district court to craft a more specific remedy.

CONCLUSION

This Court should reverse the district court's enforcement and remedial orders, and instruct the district court to deny Plaintiffs' General-Population and Walk-Alone Motions, because Defendants have fully complied with paragraphs 25 and 28 of the Settlement Agreement. Paragraph 25 requires only that CDCR transfer eligible SHU-housed inmates to the general population, and CDCR did that. Paragraph 28 requires only that CDCR provide RCGP inmates with increased opportunities for positive social interaction, and CDCR did that as well.

If the Court accepts the district court's interpretation of paragraphs 25 or 28, it should nevertheless reverse the district court's orders because any breach was immaterial and insubstantial, and thus does not warrant a remedy

under the parties' Agreement. With no actionable breach, this Court should instruct the district court to deny Plaintiffs' motions.

Finally, even if Court accepts the district court's interpretations and findings of breach, it should still reverse and vacate the district court's remedial plans because they are fundamentally flawed, as discussed above.

Dated: March 1, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 18-16427

The undersigned attorney or self-represented party states the following:

○ I am unaware of any related cases currently pending in this court.

○ I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

◉ I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Related Cases
Ashker, et al. v. Newsom, et al., 19-15224; and its cross-appeal, Ashker, et al., v. Newsom, et al., 19-15359

Signature s/ Jeffrey T. Fisher **Date** Mar 1, 2019

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

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

No. 4:09-cv-05796 CW (RMI)
The Honorable Claudia Wilken, Judge

DEFENDANTS-APPELLANTS' ADDENDUM PER NINTH CIRCUIT RULE 28-2.7

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Information and updates available online at:
http://www.cdcr.ca.gov/regulations/adult_operations
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DIVISION 3. ADULT INSTITUTIONS, PROGRAMS AND PAROLE

CHAPTER 1. RULES AND REGULATIONS OF ADULT OPERATIONS AND PROGRAMS

HISTORY:

1. Change without regulatory effect repealing preface filed 10-29-90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No. 6).

Article 1. Behavior

3000. Definitions.

The following are definitions of terms as used in these regulations:

Accessory means a person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that the principal may avoid punishment, and has knowledge that said principal committed the felony.

Administrative Officer of the Day (AOD) means an administrative staff member possessing managerial or supervisory experience and authority to make decisions in the absence of an Institution Head or Region Parole Administrator.

Adverse Witness means a person who has given or will give information against a prisoner or parolee. For the purpose of conducting parole revocation hearings, adverse witness means a person whose expected testimony supports the violation charged.

Alternative Custody Program (ACP) means a voluntary program developed for female inmates whose current commitment offense is neither violent nor serious and whose prior or current commitment offense is not a registerable sex offense pursuant to PC section 1170.05 that allows eligible inmates committed to state prison to serve their sentence in the community in lieu of confinement in state prison. Provisions for ACP are located in Title 15, Division 3, Chapter 1, Article 6.8 commencing with section 3078.

Alternative Custody Program Participant means any offender who is approved for and placed in the Alternative Custody Program as defined in this section.

Appeal means a formal request for, or the act of requesting, an official change of a decision, action, or policy.

Architectural and Engineering Services means those services procured outside of the State's Civil Service procedures and which are rendered by an architect or engineer, but may include ancillary services logically or justifiably performed in connection therewith.

Arrest means the taking of a person into custody, in a case and in a manner authorized by law.

Asylum State means the state other than California in which a parolee-at-large is in custody.

Attempted Escape means an unsuccessful effort to breach a secured perimeter or the use of force against a person to attempt access into an unauthorized area. Some progress toward implementing an escape must be made to implement a plan. This includes, but is not limited to the following overt acts: acquiring unauthorized clothing or identification, preparing a hiding place in an unauthorized area, lying in wait for a potential hostage, attempting access to a perimeter that was unsupervised, unlawfully obtaining tools to aid in an escape, manufacturing a likeness of a person in order to substitute for the inmate's presence, or receiving assistance from other conspirators who acted upon an escape plan, e.g. a plan to escape uncovered from verbal, telephone or mail communication.

Automated Needs Assessment Tool means a systematic process which consists of a series of questions and a review of the inmate's criminal data in order to establish a baseline for the offender's criminogenic needs to assist in determining appropriate placement in a rehabilitative program.

Behavior Management Unit is alternate general population housing and programming which is designed to reduce inmate's continuing involvement in disruptive behavior, violence, or noncompliance with CDCR rules and regulations, allowing non-disruptive inmates in the general population the opportunity to program without continual interruption due to the behavior of a smaller, more disruptive segment of the inmate population.

Board of Parole Hearings (Board) means the state agency which is responsible for the administration of parole for those persons committed to the department under Penal Code section 1168 and those committed under Penal Code section 1170 who also meet the criteria found in Penal Code section 2962.

California Agency Parolee means a person released from department facility to parole supervision in a California community who subsequently is within the custody of any California agency, or subdivision thereof, except the department.

California Agency Prisoner means a prisoner who has been transferred from the custody of the department to the custody of any other California agency or subdivision thereof.

California Concurrent Parolee means a person on parole for a California sentence and a sentence of another jurisdiction who is being supervised in a California community pursuant to the Uniform Act for Out-of-State Parole Supervision (Penal Code sections 11175–11179).

California Law Enforcement Telecommunications System (CLETS) means a statewide telecommunications system for the use of law enforcement agencies maintained by the California Department of Justice.

California Out-of-State Correctional Facility (COCF). The COCF is a program through which male CDCR inmates are transferred to out-of-state correctional facilities that have contracted with the CDCR to provide housing, security, health care and rehabilitative programming services to CDCR inmates.

CalParole means a centralized statewide parolee information data system.

Case Conference means a documented communication between the parole agent and the parole unit supervisor concerning a parolee (i.e., placing a parole hold).

Case Conference Review means a documented review of the progress made in the Case Plan and the effectiveness of the current plan to determine necessary modifications. It will also include a review to determine if the parole supervision/case management expectations have been met.

Case records file means the file which contains the information concerning an inmate which is compiled by the department pursuant to Penal Code Section 2081.5 and includes such components as the central file, education file, visiting file and parole field file.

Central File (C-File) means a master file maintained by the department containing records regarding each person committed to its jurisdiction.

Central Office Calendar means the calendar which is composed of administrative hearing officers as designated by the deputy director, parole hearings division. They are authorized to make decisions regarding matters reported to the parole hearings division, including the decision to order a hearing scheduled.

Central Office Hearing Coordinator means the parole hearings division employee at headquarters who is responsible for hearing schedules, attorney appointments, and other hearing-related services.

Certification means that a business concern has obtained verification that it meets the definition of disabled veteran business

enterprise pursuant to Military and Veterans Code section 999(g) from an agency that has been authorized by law to issue such certification.

Chaplain means an individual duly designated by a religious denomination to discharge specified religious duties, including a native American Indian spiritual leader.

Child means a person under the age of 18 years.

Chronological History means a CDC Form 112 (Rev. 9/83), Chronological History, prepared for each inmate, upon which significant dates and commitment information affecting the inmate are logged.

Classification and Parole Representative (C&PR) means the department employee designated at each institution to be that institution's liaison with releasing boards and parole staff.

Cognitive Behavioral Therapy is evidence-based psychotherapeutic treatment which addresses dysfunctional emotions, maladaptive behaviors, and cognitive processes, using incremental monitoring and assessment of progress in all three areas to reach prescribed goals.

Collateral Contact means any communication between a Division of Adult Parole Operations staff and another person concerning a parolee.

Concurrent Parolee means a person on parole for a California sentence and a sentence of another jurisdiction who is being supervised in a state other than California pursuant to the Uniform Act for Out-of-State Parole Supervision (Penal Code sections 11175–11179).

Conditions of Parole mean the specific conditions under which a prisoner is released to parole supervision.

Confinement to Quarters (CTQ) means an authorized disciplinary hearing action whereby an inmate is restricted to their assigned quarters for a period not to exceed five days for administrative rule violations and ten days for serious rule violations.

Contraband means anything which is not permitted, in excess of the maximum quantity permitted, or received or obtained from an unauthorized source.

Control Service means the middle supervision category of a person on parole.

Controlled Substance means any substance, drug, narcotic, opiate, hallucinogen, depressant, or stimulant as defined by California Health and Safety Code section 11007. Also included are prescribed medications containing any of the substances identified in the H&SC section above.

Cooperative Parolee means a person on parole for a California sentence who is under parole supervision in a state other than California pursuant to the Uniform Act for Out-of-State Parole Supervision (Penal Code sections 11175–11179).

Course of conduct means two or more acts over a period of time, however short, evidencing a continuity of purpose.

Court Order means a custody determination decree, judgment, or order issued by a court of competent jurisdiction, whether permanent or temporary, initial or modified, that affects the custody or visitation of a child, when issued in the context of a custody proceeding. An order, once made, shall continue in effect until it expires, is modified, is rescinded, or terminates by operation of law.

Criminal Identification and Investigation (CI&I) Report means the report defined by Penal Code section 11105, commonly referred to as "Rap Sheet".

Criminogenic Need means an attribute of the inmate that is directly linked to criminal behavior.

Cumulative Case Summary means the cumulative summary of specific portions of the record maintained by the department regarding each prisoner from reception to discharge.

Custody of the department means the inmate is in the physical custody of the department. The inmate would be considered out of the custody of the department when; out to court and housed in a County or Federal facility, escaped and not returned to departmental custody, in a non-departmental mental health facility, and in a medical facility under non-departmental supervision.

Dangerous contraband means materials or substances that could be used to facilitate a crime or could be used to aid an escape or that have been altered from their original manufactured state or purpose and which could be fashioned into a weapon. Examples would include, but not be limited to, metal, plastic, wood, or wire. Also included are: sharpened objects such as scissors or other tools not authorized to be in the inmate's possession, as well as poison, caustic substances, flame producing devices i.e. matches or lighters or cellular telephones or wireless commuication devices or any components thereof, including, but not limited to, a subscriber identity module (SIM card), memory storage device, cellular phone charger.

Deadly weapon means any weapon identified in Penal Code section 4502. Any item or substance not readily identified as a weapon becomes a deadly weapon when used in a manner that could reasonably result in serious bodily injury or death.

Department means the California Department of Corrections and Rehabilitation.

Deputy Regional Parole Administrator means the department's administrator within a Division of Adult Parole Operations region.

Detainer means a written document received from an official representing a district attorney office, court, or correctional or law enforcement agent which indicates that an inmate is wanted by that office and the basis for the detainer.

Determinate Sentencing Law (DSL) Prisoner means a person sentenced to prison under Penal Code section 1170 for a crime committed on or after July 1, 1977.

Direct and Constant Supervision means an inmate shall be monitored and observed by CDCR staff, either custody staff or work supervisor as indicated in these regulations, sufficiently to account for the specific whereabouts of the inmate at all times.

Disabled Veteran Business Enterprise means a business concern as defined in Military and Veterans Code section 999(g).

Disabled Veteran Business Enterprise focus paper means a publication that meets all of the following criteria: (1) has an orientation relating to the disabled veteran business enterprise; (2) is known and utilized by members of the disabled veteran business enterprise community; (3) primarily offers articles, editorials (if any), and advertisements of business opportunities aimed at disabled veteran business enterprises; and (4) is readily available within the geographical area for which the advertisement is placed and for which the services are to be performed.

Disabled Veteran Business Enterprise focus paper and trade paper means a publication that meets all of the criteria of a disabled veteran business enterprise focus paper and all of the criteria of a trade paper.

Disciplinary Detention means a temporary housing status which confines inmates so assigned to designated rooms or cells for prescribed periods of time as punishment for serious rule violations.

Disciplinary Free means without any finding of guilt of a disciplinary infraction filed on a CDC Form 115, Rule Violation Report, classified as either administrative or serious.

Disciplinary Free Period means the period that commences immediately following the date and time an inmate is identified (date of discovery of information leading to the charge) as committing a rules violation classified as serious.

Disruptive Behavior means behavior which might disrupt orderly operations within the institutions, which could lead to violence or

disorder, or otherwise endangers facility, outside community or another person as defined in sections 3004(b), 3005(a) and 3023(a).

Disruptive Group 1—means any gang, other than a prison gang.

Distribution means the sale or unlawful dispersing, by an inmate or parolee, of any controlled substance; or the solicitation of or conspiring with others in arranging for, the introduction of controlled substances into any institution, camp, contract health facility, or community correctional facility for the purpose of sales or distribution.

District Administrator means the department's administrator of a Division of Adult Parole Operations unit, district, or geographical area.

Drug paraphernalia means any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming into the human body a controlled substance as identified in Health and Safety Code section 11007.

Drugs means substances intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease, and as defined in Health and Safety Code section 11014.

Effective communication means providing the inmate, to the extent possible, the means to understand and participate in the disciplinary process to the best of their ability. This may be accomplished through reasonable accommodation or assignment of a staff assistant. If the inmate's Test of Adult Basic Education (TABE) score is 4.0 or lower, employees are required to query the inmate to determine whether or not assistance is needed to achieve effective communication. The employee is required to document on appropriate CDCR forms his/her determination of whether the inmate appeared to understand, the basis for that determination and how it was made. For contacts involving due process, employees shall give priority to the inmate's primary means of communication, which may include but is not limited to; auxiliary communication aids, sign language interpreter, and bilingual interpreter.

Escape History refers to any reliable information or inmate self-admission in the central file to an escape, attempted escape, walkaway, or plan to escape. The available information describing the circumstances of the escape or attempted escape shall be evaluated in determining the level of risk to correctional safety and security posed by the inmate.

Examinee means a person who voluntarily takes a polygraph examination.

Exceptional Circumstances means circumstances beyond the control of the department or the inmate that prevent the inmate or requested witnesses from participating in the disciplinary hearing within established time limitations. Examples of this as applied to an inmate would include a serious temporary mental or physical impairment verified in writing by a licensed clinical social worker, licensed psychologist, psychiatrist, or physician. Some examples of exceptional circumstances preventing staff witnesses, to include the reporting employee, from attending the disciplinary hearing would be extended sick leave, bereavement leave, personal emergency, or extended military duty. Exceptional circumstances, as described above, would allow for suspension of time limitations pending resolution of the instances.

Ex-Offender means a person previously convicted of a felony in California or any other state, or convicted of an offense in another state which would have been a felony if committed in California.

Face-to-Face Contact means an in-person contact with a parolee, or an Alternative Custody Program Participant, by a CDCR parole agent.

Facility means any institution; community-access facility or community correctional facility; or any camp or other subfacility of an institution under the jurisdiction of the department.

Facility Security Perimeter is any combination of living unit, work area and recreation area perimeters that is set aside to routinely restrict inmate movement based on custody level. This perimeter will contract and expand depending upon the weather, lighting conditions and hours of operation.

Federal Consecutive Prisoner means a California prisoner who is also under sentence of the United States and is confined in a federal correctional facility, and whose California term shall commence upon completion of the United States' sentence.

Felony means a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

Field Contact means face-to-face contact by Division of Adult Parole Operations staff with a parolee away from the parole office or office parking area.

Firm means any individual, firm, partnership, corporation, association, joint venture or other legal entity permitted by law to practice the professions of architecture, landscape architecture, engineering, environmental services, land surveying or construction project management.

Force, as applied to escape or attempted escape refers to physical contact or threat of physical harm against a person to enable or attempt the escape.

Frequent and Direct Supervision means that staff supervision of an inmate shall be sufficient to ensure that the inmate is present within the area permitted.

Friendly Witness means any witness who is not an adverse witness.

Gang means any ongoing formal or informal organization, association or group of three or more persons which has a common name or identifying sign or symbol whose members and/or associates, individually or collectively, engage or have engaged, on behalf of that organization, association or group, in two or more acts which include, planning, organizing threatening, financing, soliciting, or committing unlawful acts or acts of misconduct classified as serious pursuant to section 3315.

General Chrono means a CDC Form 128-B (Rev. 4-74) which is used to document information about inmates and inmate behavior. Such information may include, but is not limited to, documentation of enemies, records of disciplinary or classification matters, pay reductions or inability to satisfactorily perform a job, refusal to comply with grooming standards, removal from a program, records of parole or social service matters.

General Conditions of Parole mean general rules regarding behavior required or prohibited during parole for all parolees.

Goal means a numerically expressed disabled veteran business enterprise objective as set out in Public Contract Code section 10115(c), that awarding departments and contractors are required to make efforts to achieve.

Good Cause means a finding based upon a preponderance of the evidence that there is a factual basis and good reason for the decision made.

Good Faith Effort means a concerted effort on the part of a potential contractor to seek out and consider disabled veteran-owned and operated business enterprises as potential contractors, and/or subcontractors in order to meet the program participation goals.

Great bodily injury (GBI) means any bodily injury that creates a substantial risk of death.

Grievance means a complaint about a decision, action, or policy which an inmate, parolee or staff wish to have changed.

Harassment means a willful course of conduct directed at a specific person, group, or entity which seriously alarms, annoys, or

terrorizes that person, group, or entity and which serves no legitimate purpose.

Hearing Committee means a panel of three certified Senior Hearing Officers comprised of: one Correctional Lieutenant or Correctional Counselor II, one Facility/Correctional Captain or Correctional Counselor III, and one staff member at the level of Associate Warden or above, or any combination thereof.

High Control means the highest supervision category of a person on parole.

Hold means to retain an inmate or parolee, who is under the Secretary's jurisdiction, in custody at an institution or a local detention facility in response to the legal request of a law enforcement or correctional agency representative.

Immediate Family Members means legal spouse; registered domestic partner, natural parents; adoptive parents, if the adoption occurred and a family relationship existed prior to the inmate's incarceration; step-parents or foster parents; grandparents; natural, step, or foster brothers or sisters; the inmate's natural and adoptive children; grandchildren; and legal stepchildren of the inmate. Aunts, uncles and cousins are not immediate family members unless a verified foster relationship exists.

Incarcerating Jurisdiction means the jurisdiction where an Interstate or Western Interstate Corrections Compact, federal contract, federal concurrent, or concurrent prisoner is incarcerated.

Indecent Exposure means every person who willfully and lewdly, either: exposes his or her person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or, procures, counsels, or assists any person so to expose him or her self or take part in any model artist exhibition, or to make any other exhibition of him or her self to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts.

Indeterminate Sentence Law (ISL) means a person sentenced to prison for a crime committed on or before June 30, 1977, who would have been sentenced under Penal Code section 1170 if he/she had committed the crime on or after July 1, 1977.

Indigent Inmate means an inmate who is wholly without funds at the time they were eligible for withdrawal of funds for canteen purchases.

Inmate means a person under the jurisdiction of the Secretary and not paroled. Inmate and prisoner are synonymous terms.

Inmate Match means a one-on-one match of a citizen volunteer and an inmate who receives few or no visits to establish a relationship which encourages positive inmate behavior and programming.

Institution means a large facility or complex of subfacilities with a secure (fenced or walled) perimeter headed by a warden.

Institution Head means a warden, regional parole administrator, or designated manager of a facility housing inmates.

Intake Control Unit (ICU) means a unit that schedules and coordinates weekly movement of CDCR new commitment inmates from the counties to the CDCR Reception Centers. The ICU is also a liaison between the counties and CDCR in the event that CDCR is unable to accept delivery of its new commitment inmates and payments are due to the counties.

Interstate Unit means the Division of Adult Parole Operations which coordinates the supervision of California cooperative parolee and the return of parolees-at-large from asylum states. The unit is responsible for Interstate and Western Interstate Corrections Compacts, federal contrast, federal concurrent, and consecutive prisoners and multijurisdiction parolees incarcerated in the prison of another jurisdiction.

Intoxicant not identified as a controlled substance means toluene or any bi-product i.e. paint thinners, paint, fingernail polish, lacquers, gasoline, kerosene, adhesives or other substance that markedly diminishes physical and/or mental control.

Joint Venture Employer (JVE) means any public entity, nonprofit or for profit entity, organization, or business which contracts with the director for the purpose of employing inmate labor.

Joint Venture Program (JVP) means a contract entered into between the director and any public entity, nonprofit or for profit entity, organization, or business for the purpose of employing inmate labor.

Laboratory means any toxicological or forensic laboratory which has been recognized by the state, other certifying agency, or which is accepted by any local, county, or state prosecuting authority to provide evidence as to the presence of controlled substances in human body fluids or confirm that a substance is or contains any controlled substance.

Legal process means a writ, summons, warrant or mandate issued by a court.

Legal Status Sheet (LSS) means a CDC Form 188, Legal Status Summary, containing the commitment and release status of an inmate.

Life Prisoner means a prisoner whose sentence includes a term of life.

Lockdown means the restriction of all inmates to their cells/dormitory beds encompassing no less than a Facility. True lockdowns are rare occasions, generally following very serious threats to institutional security and the safety of staff and inmates. The movement of any inmate to an assignment or resumption of any program would change the lockdown status of the program, returning the institution/facility to a diminished level of modified program or to normal program.

Lockout means any refusal by an employer to permit any group of five or more employees to work as a result of a dispute with such employees affecting wages, hours or other terms or conditions of employment of such employees.

Manuscript means any written, typed or printed articles of fiction and nonfiction; poems; essays; gags; plays; skits; paintings; sketches; drawings; or musical compositions created by an inmate.

Material Evidence means evidence which has a substantial bearing on matters in dispute and legitimate and effective influence on the decision of a case.

Medical Parolee means a person released from confinement pursuant to Penal Code section 3550.

Minimum Eligible Parole Date (MEPD) means the earliest date on which an Indeterminate Sentence Law or life prisoner may legally be released on parole.

Modified Program means the suspension or restriction of inmate program activities and/or movement that impacts less than all programs or less than all inmates. A Modified Program may either occur independently in response to an incident or unusual occurrence or may occur as a facility transitions from a lockdown to regular programming. Imposed restrictions may fluctuate as circumstances dictate with the goal of resuming regular programming as soon as it is practical. Modified programming will last no longer than necessary to restore institutional safety and security or to investigate the triggering event, and shall not target a specific racial or ethnic group unless it is necessary and narrowly tailored to further a compelling government interest. For those inmates whose movement has been restricted, movement may be authorized on a case-by-case basis for essential or emergency services such as medical, dental, mental health or law library visits. The routine and/or temporary restrictions on inmate movement or yard activities, which do not last longer than 24 hours, are not considered a program modification.

Multijurisdiction Parolee means any concurrent, California concurrent, California agency, or cooperative parolee.

Multijurisdiction Prisoner means any federal contract, federal concurrent, federal consecutive, concurrent, consecutive, California agency, Interstate or Western Interstate Corrections Compact prisoner.

Non-Revocable Parole is a form of unsupervised community release pursuant to the provisions of Penal Code section 3000.03, wherein the parolee is not subject to placement of a parole hold, revocation, or referral to the Board of Parole Hearings for violation of any condition of parole.

Non-secure Facility means any of the following Departmental facilities: Minimum Support Facilities, Camps and Community Correctional Centers (i.e. Community Correctional Reentry Centers, Restitution Centers, Community Correctional Facilities, Drug Treatment Furlough, halfway back facilities, etc.); and comparable facilities in another law enforcement jurisdiction (i.e. county road camps, county detoxification center, etc.)

Our Hold Only (OHO) means a parolee is in custody under a Penal Code section 3056 parole hold and has no other charges or detainers pending.

Out-to-Court means an inmate is temporarily removed from a facility to be brought before a court to be tried for an offense, to be examined by a grand jury or magistrate, or for any other court proceedings.

Parole Administrator means the Department's administrator of a Division of Adult Parole Operations headquarters unit, district, program or geographic location.

Parole Agent means an employee and his/her supervisors in the department who are assigned to supervise those persons released from incarceration to the supervision of the Division of Adult Parole Operations.

Parolee Field File means a file maintained by a parole unit office containing information about a parolee and his or her current parole.

Parole Hearings Division means the division of the department which is responsible for the department's administration of paroles for those persons committed to the department under Penal Code section 1170, except those who also meet the criteria of Penal Code section 2962.

Parole Hold means authorization by a departmental employee to hold a parolee in custody pursuant to section 3056 of the Penal Code.

Parole Violation means conduct by a parolee which violates the conditions of parole or otherwise provides good cause for the modification or revocation of parole.

Parole Violation Disposition Tracking System (PVDTS) means an electronic database utilized by Division of Adult Parole Operations field staff to track all remedial sanctions, warrant requests, and petitions to the local court for revocation of parole.

Parole Violation Extension means an extension of return-to-custody time for a parolee in revoked status.

Parole Violator means a parolee who is found to have violated parole and who may be returned to custody pursuant to Penal Code section 3057.

Parolee means an offender placed on supervised or non-revocable parole by the department.

Parolee-at-Large means an absconder from parole supervision, who is declared a fugitive by releasing authority action suspending parole.

Polygraph Examination means the procedure by which a polygraph examiner renders an opinion as to the veracity of statements made by an examinee.

Polygraph Examiner means a person who purports to be able to determine the truthfulness of statements through the use of a polygraph instrument.

Possession is defined as either actual possession or constructive possession of an object. Actual possession exists when a person has physical custody or control of an object. Constructive Possession exists where a person has knowledge of an object and control of the object or the right to control the object, even if the person has no physical contact with it.

Postrelease Community Supervision is a form of supervision provided after a period of incarceration wherein the inmate is released to the jurisdiction of a county agency pursuant to the Postrelease Community Supervision Act of 2011.

Preprison Credit means credit for time in custody as certified by the court and provided for in Penal Code section 2900.5.

Principal means any person involved in the commission of a crime, felony or misdemeanor, whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission, or who, by threats, menaces, command or coercion, compel another to commit any crime.

Prison Gang means any gang which originated and has its roots within the department or any other prison system.

Prisoner means a person in custody of the Secretary and not paroled. Prisoner and inmate are synonymous terms.

Probation Officer's Report means a CDC Form 174 (Rev. 3/87), Probation Officer's Report, prepared by the probation officer in the county where the offense was committed.

Program failure means any inmate who generates a significant disciplinary history within the last 180 days from the current date. A guilty finding for two serious Rules Violation Reports or one serious and two administrative Rules Violation Reports within that 180 day time period is reasonable evidence of a significant disciplinary history and may be considered a program failure.

Project, as used in sections 3475 through 3478, means a proposal of something to be done for which a contract has not yet been awarded.

Public Interest Case describes an inmate whose crime/criminal history, public recognition, family ties, career or behavior in custody has resulted in extensive media coverage beyond the closest large city and its surrounding areas.

Public official means any person identified in Penal Code Section 76. CDCR staff are considered the staff of an exempt appointee of the Governor.

Received Date means the date an inmate is initially received into a facility of the department.

Receiving State means the state which supervises a cooperative parolee or a concurrent parolee.

Reentry Hubs are designated facilities within an institution which provide enhanced rehabilitative programs to inmates who meet Reentry Hub placement criteria.

Regional Parole Administrator means the department's administrator of a Division of Adult Parole Operations region.

Released on Parole means released from custody to a term of parole supervision and includes: initial releases from custody; parolees released after having served a period of parole revocation; parole violators with a new term; parolees released from any other jurisdiction, for example, federal custody; and offenders ordered directly to parole by a sentencing court, also referred to as "court walkovers."

Relevant Evidence means evidence which tends to prove or disprove an issue or fact in dispute.

Religious Item means any bag, cross, medallion, totem, pipe, or other item in which the possessor places religious or spiritual significance.

Religious Review Committee (RRC) means a committee formed and maintained at each institution that reviews and reaches a decision regarding requests for reasonable accommodation and/or access to religious services.

Residence means one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles.

Residential Facility means a property that is operated for the purpose of providing lodging and services for two or more persons. Residential facilities include sober living facilities and transitional housing facilities that provide services such as money management, substance abuse prevention, relationship and self-esteem workshops, skills for employment stability, job training, and referrals to local community, social, and health services.

Responsible Bidder means, in addition to other State contracting requirements, a bidder who has either met the disabled veteran business enterprise goal or who has demonstrated that a good faith effort was made to meet the goal.

Restricted or controlled inmate movement means that the affected inmates are not permitted normal release schedules and that all or specified movement may require a greater degree of supervision than normal. Such restriction may include, but is not limited to controlled feeding, a section at a time, rather than the entire unit or sub-facility being released. Such restrictions do not constitute a State of Emergency as determined in Section 3383.

Room and Board means all that the department provides for the inmate's care, housing and retention.

Screening means evaluation by staff to ascertain that specified requirements or criteria are met.

Secretary means the secretary of the Department of Corrections and Rehabilitation, who serves as the Chief Executive Officer.

Secure Perimeter means the largest Security Perimeter that physically retains inmates in custody on facility property.

Security Concern means the inmate does not otherwise meet the Close Custody case factor criteria established in section 3377.2(b); however, based upon an Institution Classification Committee (ICC) review of all available case factors and disciplinary history, the inmate demonstrates an ongoing heightened security risk that potentially threatens institution safety and security and thereby warrants the direct and constant supervision provided by a Close Custody designation.

Security Perimeter means any unbroken physical barrier or combination of physical barriers that restricts inmate movement to a contained area without being processed through a door, gate, or sallyport.

Senate Bill (SB) 618 Participant means an adult inmate who is deemed eligible and agrees to participate in a SB 618 Program, as defined in section 3000, which includes that prior to reception by the California Department of Corrections and Rehabilitation, the inmate will be assessed and classified at the county in which he or she is adjudged to have committed his or her crime.

Senate Bill (SB) 618 Program means a program developed for nonviolent felony offenders pursuant to SB 618 (2005/2006 session), which added Penal Code section 1203.8, which provides in part that programs shall be available for inmates, including Career Technical Education programs and educational programs that are designed to prepare nonviolent felony offenders for successful reintegration back into the community.

Serious bodily injury (SBI) means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring suturing; and disfigurement.

Serious Offense, for the purpose of conducting parole revocation hearings, refers to any felony listed in section 1192.7(c) of the Penal Code.

Sexual Activity means any behavior of a sexual nature between an inmate and a visitor including, but not limited to:

(1) Sexual intercourse, oral copulation, or masturbation.

(2) The rubbing or touching of breast(s), buttock(s) or sexual organ(s) for the purpose of arousing, appealing to, or gratifying lust, passions, or sexual desires.

(3) Exposure of breast(s), buttocks or sexual organ(s) for the purpose of arousing, appealing to, or gratifying lust, passions, or sexual desires.

Sexual Disorderly Conduct means every person who touches, without exposing, his or her genitals, buttocks or breasts in a manner that demonstrates it is for the purpose of sexual arousal, gratification, annoyance, or offense, and that any reasonable person would consider this conduct offensive.

Single Family Dwelling means a real property improvement, such as a house, apartment, or mobile home that is used or is intended for use as a dwelling for one family.

Small Business Firm means a business in which the principal office is located in California and the officers of such business are domiciled in California which is independently owned and operated and which is not dominant in its field of operation. The maximum dollar volume that a small business may generate shall vary from industry to industry to the extent necessary to reflect differing characteristics of such industries.

Special Assignment means a departmentally-approved special program, temporary or short-term assignment for departmental convenience, or medical or psychiatric treatment category with exceptional credit-earning provisions.

Special Conditions of Parole means conditions of parole placed by the Board of Parole Hearings or Division of Adult Parole Operations and restricted to the individual.

Street gang refers to a gang as defined herein except that it is not a prison gang.

Strike means any concerted act of more than 50 percent of the bargaining unit employees in a lawful refusal of such employees under applicable state or federal law to perform work or services for an employer, other than work stoppages based on conflicting union jurisdictions or work stoppages unauthorized by the proper union governing body.

Subcontractor means any person or entity that enters into a subcontract with a prime contractor for work, materials, supplies and/or labor.

Sweat Lodge means a native American Indian ceremonial hut.

Terminal illness means an incurable disease process with progression unresponsive to medical intervention where a medical doctor estimates that death will occur within a six-month period.

Time Computation means the department's uniform method for calculating an inmate's term and minimum and maximum release dates as governed by law.

Time Served means that time an inmate is imprisoned with the department between their received date and a given date.

Trade Paper means a publication that meets all of the following criteria: (1) has a business orientation relating to the trade or industry for which the advertisement is being placed; (2) is known and utilized by members of that trade or industry; (3) primarily offers articles, editorials (if any), and advertisements of business oppor-

tunities aimed at that trade or industry; and (4) is readily available within the geographical area for which the advertisement is placed and for which the services are to be performed.

Transient Sex Offender means a parolee who has a statutory requirement to register as a sex offender and who has no residence.

Transitional Housing Unit is a general population program designated for the observation phase of the Prison Gang Debriefing process. This program houses those inmates that are in the second phase of the debriefing process.

Transitions Programs are employment training classes to assist inmates with job readiness and job seeking skills to overcome barriers to obtaining employment upon release from an institution.

Under the influence of alcohol, any drug, controlled substance, toluene or any combination thereof means being in a condition that he/she is unable to exercise care for his/her safety or the safety of others pursuant to Penal Code 647(f) and confirmed by a positive test from a departmentally approved testing method, to include field sobriety testing.

Unit Supervisor means a supervisor of case-carrying parole agents in the Division of Adult Parole Operations.

Vexatious Litigant means a person who does any of the following: (1) in the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (a) finally determined adversely to the person or; (b) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing; (2) after a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate in propria persona either; (a) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or; (b) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined; (3) in any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay; (4) has previously been declared to be a vexatious litigant by any state or federal court of record in any actions or proceeding based upon the same or substantially similar facts, transaction, or occurrence. Pursuant to In re Bittaker, Writs of Habeas Corpus are not included under vexatious litigation.

Violent Offense, for the purpose of conducting parole revocation hearings, refers to any felony listed in section 667.5(c) of the Penal Code.

Work Change Area means a portal controlled by staff and/or locking gates that is used to control access and includes the area where staff search inmates prior to permitting inmates in or out of adjacent areas such as Prison Industry Authority yards.

Worktime Credit means credit towards a prisoner's sentence for satisfactory performance in work, training or education programs.

Writ means a court order in writing, requiring the performance of a specified act, or giving authority to have it done.

NOTE: Authority cited: Sections 2717.3, 3000.03, 5058, 5058.3 and 1170.05, Penal Code; Section 10115.3(b), Public Contract Code; and Sections 4525(a), 4526 and 14837, Government Code. Reference: Sections 186.22, 243, 314, 530, 532, 646.9, 653m, 832.5, 1170.05, 1203.8, 1389, 2080, 2081.5, 2600, 2601, 2700, 2717.1, 2717.6, 2932.5, 3003.5(a), 3020, 3450, 3550, 4570, 4576, 5009, 5050, 5054, 5068, 7000 et seq. and 11191, Penal Code; Sections 1132.4 and 1132.8, Labor Code; Sections 10106, 10108, 10108.5, 10115, 10115.1, 10115.2, 10115.3 and 10127, Public Contract Code; and Section 999, Military and Veterans Code; Section 391, Code of Civil Procedure; Section 297.5, Family Code; Sections 8550, 8567, 12838 and 12838.7, Government Code; Governor's Prison Overcrowding State of Emergency Proclamation dated October 4, 2006; *In re Bittaker*, 55 Cal.App. 4th 1004, 64 Cal. Rptr. 2d 679; Section 11007, Health and Safety Code; and *Madrid* v. *Cate* (U.S.D.C. N.D. Cal. C90-3094 TEH).

HISTORY:

1. Amendment of subsection (a)(19) filed 12-1-78 as an emergency; designated effective 1-1-79 (Register 78, No. 48). For prior history, see Register 77, No. 40.
2. Certificate of Compliance filed 2-22-79 (Register 79, No. 8).
3. Amendment filed 11-20-79 as an emergency; designated effective 1-1-80 (Register 79, No. 47). A Certificate of Compliance must be filed within 120 days or emergency language will be repealed on 3-20-80.
4. Certificate of Compliance filed 2-15-80 (Register 80, No. 7).
5. Amendment filed 3-2-83: effective thirtieth day thereafter (Register 83, No. 12).
6. Change without regulatory effect repealing and adopting new section filed 10-29-90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No. 6).
7. Amendment filed 11-28-90 as an emergency; operative 11-28-90 (Register 91, No. 6). A Certificate of Compliance must be transmitted to OAL by 3-28-91 or emergency language will be repealed by operation of law on the following day.
8. Amendment adding definitions of "disruptive group," "gang," and "prison gang" filed 5-20-91; operative 6-19-91 (Register 91, No. 26).
9. Amendment adding definition for "Media representative" filed 12-19-91 as an emergency; operative 12-19-91 (Register 92, No. 4).
10. Amendment adding definitions for "Disciplinary Free," "Inmate Match," and "Special Assignment" and amending Note 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.
11. Amendment adding definition for "Case records file" and amendment of Note 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.
12. Amendment adding definition for "Detainer" and amendment of Note filed 12-19-91 as an emergency; operative 12-19-91 (Register 92, No. 4). A Certificate of Compliance must be transmitted to OAL 4-17-92 or emergency language will be repealed by operation of law on the following day.
13. Amendment adding definitions for "Received Date," "Time Computation," and "Time Served" 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.
14. Editorial correction of "Firm" and "Grievance" filed 12-20-91; operative 12-20-91 (Register 92, No. 4).
15. Amendment adding definition for "Terminal illness" filed 5-20-92; operative 5-20-92 (Register 92, No. 21). A Certificate of Compliance must be transmitted to OAL 9-17-92 or emergency language will be repealed by operation of law on the following day.
16. Editorial correction of printing error restoring inadvertently deleted definitions originally filed 12-20-91 (Register 92, No. 24).
17. Certificate of Compliance as to 12-20-91 order adding definition for "case records file" transmitted to OAL 4-15-92 and filed 5-27-92 (Register 92, No. 24).
18. Certificate of Compliance as to 12-29-91 order adding definitions for "Disciplinary Free," "Inmate Match," and "Special Assignment" transmitted to OAL 4-20-92 and filed 5-28-92 (Register 92, No. 24).
19. Certificate of Compliance as to 12-19-91 order adding definition of "Detainer" transmitted to OAL 4-20-92 and filed 5-28-92 (Register 92, No. 24).
20. Certificate of Compliance as to 12-19-91 order transmitted to OAL 4-17-92 and filed 6-1-92 (Register 92, No. 24).
21. Certificate of Compliance as to 12-20-91 order transmitted to OAL 4-20-92 and filed 6-2-92 (Register 92, No. 24).

22. Certificate of Compliance as to 5-20-92 order transmitted to OAL 9-9-92; disapproved by OAL and order of repeal of 5-20-92 order filed on 10-22-92 (Register 92, No. 43).
23. Amendment adding definition for "Terminal illness" refiled 10-23-92 as an emergency; operative 10-22-92 pursuant to Government Code section 11346.1(h) (Register 92, No. 43). A Certificate of Compliance must be transmitted to OAL 2-23-93 or emergency language will be repealed by operation of law on the following day.
24. Amendment adding "Cumulative case summary," "Chronological history," "Legal status sheet," "Probation officer's report" and "Criminal identification and investigation report" and amendment of Note filed 11-5-92; operative 12-7-92 (Register 92, No. 45).
25. Change without regulatory effect amending "Immediate Family Members" filed 1-26-93 pursuant to section 100, title 1, California Code of Regulations (Register 93, No. 5).
26. Certificate of Compliance as to 10-23-92 order transmitted to OAL 12-18-92 and filed 2-3-93 (Register 93, No. 6).
27. Amendment adding "Harassment" and amendment of Note filed 7-29-93 as an emergency; operative 7-29-93 (Register 93, No. 31). A Certificate of Compliance must be transmitted to OAL 11-26-93 or emergency language will be repealed by operation of law on the following day.
28. Amendment filed 9-3-93; operative 9-3-93 pursuant to Government Code section 11346.2(d) (Register 93, No. 36).
29. Amendment of "Good Faith Effort," "Minority Business Enterprise," "Responsible Bidder" and "Women Business Enterprise" and Note and new definitions "Disabled Veteran Business Enterprise," "Goal," "Minority and/or Women and/or Disabled Veteran Business Enterprise focus paper," "Minority and/or Women and/or Disabled Veteran Business Enterprise focus paper and trade paper," "Project," "Subcontractor," and "Trade Paper" filed 10-18-93 as an emergency; operative 10-18-93 (Register 93, No. 43). A Certificate of Compliance must be transmitted to OAL by 2-15-94 or emergency language will be repealed by operation of law on the following day.
30. Definitions added for "Chaplain," "Religious Artifact," and "Sweat Lodge" and amendment of Note filed 11-1-93; operative 12-13-93 (Register 93, No. 45).
31. Amendment adding "Ex-Offender" filed 11-30-93; operative 12-30-93 (Register 93, No. 49).
32. Certificate of Compliance as to 7-29-93 order transmitted to OAL 11-18-93 and filed 12-31-93 (Register 94, No. 1).
33. Certificate of Compliance as to 10-18-93 order transmitted to OAL 2-15-94 and filed 3-16-94 (Register 94, No. 11).
34. Amendment of "Inmate", new definition "Serious injury", and amendment of Note filed 5-5-95; operative 6-5-95 (Register 95, No. 18).
35. Amendment of "Institution Head" filed 9-13-96 as an emergency; operative 9-13-96. A Certificate of Compliance must be transmitted to OAL by 2-24-97 or emergency language will be repealed by operation of law on the following day.
36. Amendment adding definition of "Certification" filed 11-22-96 as an emergency; operative 11-22-96 (Register 96, No. 47). A Certificate of Compliance must be transmitted to OAL by 5-1-97 pursuant to Penal Code section 5058(e) or emergency language will be repealed by operation of law on the following day.
37. Certificate of Compliance as to 9-13-96 order transmitted to OAL 11-22-96 and filed 1-6-97 (Register 97, No. 2).
38. Certificate of Compliance as to 11-22-96 order, including amendment of definition of "Certification," transmitted to OAL 3-20-97 and filed 5-1-97 (Register 97, No. 18).
39. Amendment adding definitions of "Lockdown" and "Restricted or controlled inmate movement" filed 10-16-97; operative 11-15-97 (Register 97, No. 42).
40. Amendment adding definition of "Program failure" filed 10-16-97 as an emergency; operative 10-16-97 (Register 97, No. 42). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 3-25-98 or emergency language will be repealed by operation of law on the following day.
41. Amendment adding definition of "Vexatious Litigant" and amending Note filed 11-12-97 as an emergency; operative 11-12-97 (Register 97, No. 46). A Certificate of Compliance must be transmitted to OAL by 3-13-98 or emergency language will be repealed by operation of law on the following day.
42. Editorial correction of definition of "Vexatious Litigant" and Histories 40 and 41 (Register 98, No. 18).
43. Amendment adding definition of "Vexatious Litigant" and amending Note refiled 4-29-98 as an emergency; operative 4-29-98 (Register 98, No. 18). A Certificate of Compliance must be transmitted to OAL by 10-6-98 or emergency language will be repealed by operation of law on the following day.
44. Certificate of Compliance as to 10-16-97 order, including removal of definition of "Program failure" to section 3062(n), transmitted to OAL 3-23-98 and filed 5-4-98 (Register 98, No. 19).
45. Certificate of Compliance as to 4-29-98 order, including further amendment of definition of "Vexatious Litigant" and Note, transmitted to OAL 6-12-98 and filed 7-21-98 (Register 98, No. 30).
46. Amendment adding new definitions of "Controlled Medication," "Controlled Substance," "Distribution" and "Laboratory" and amendment of Note filed 8-27-98 as an emergency; operative 8-27-98 (Register 98, No. 35). A Certificate of Compliance must be transmitted to OAL by 2-3-99 or emergency language will be repealed by operation of law on the following day.
47. Amendment filed 11-13-98 as an emergency; operative 11-13-98 (Register 98, No. 46). A Certificate of Compliance must be transmitted to OAL by 3-15-99 or emergency language will be repealed by operation of law on the following day.
48. Amendment adding new definitions of "Controlled Medication," "Controlled Substance," "Distribution" and "Laboratory" and amendment of Note refiled 2-3-99 as an emergency; operative 2-3-99 (Register 99, No. 6). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 7-13-99 or emergency language will be repealed by operation of law on the following day.
49. Certificate of Compliance as to 11-13-98 order transmitted to OAL 2-10-99 and filed 3-8-99 (Register 99, No. 11).
50. Certificate of Compliance as to 2-3-99 order transmitted to OAL 5-12-99 and filed 6-24-99 (Register 99, No. 26).
51. Amendment filed 3-27-2000 as an emergency; operative 3-27-2000 (Register 2000, No. 13). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 9-5-2000 or emergency language will be repealed by operation of law on the following day.
52. Amendment of definition of "Chronological History" filed 8-28-2000; operative 9-27-2000 (Register 2000, No. 35).
53. Certificate of Compliance as to 3-27-2000 order transmitted to OAL 9-5-2000; disapproval and order of repeal and deletion reinstating section as it existed prior to emergency amendment by operation of Government Code 11346.1(f) filed 10-18-2000 (Register 2000, No. 42).
54. Amendment filed 10-19-2000 deemed an emergency pursuant to Penal Code section 5058(e); operative 10-19-2000 (Register 2000, No. 42). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 3-27-2001 or emergency language will be repealed by operation of law on the following day.
55. Amendment adding definition of "General Chrono" filed 11-16-2000; operative 12-16-2000 (Register 2000, No. 46).
56. Certificate of Compliance as to 10-19-2000 order, including further amendment of definitions of "Execution Type Murder," "High Notoriety" and "Public Interest Case," transmitted to OAL 3-27-2001 and filed 5-3-2001 (Register 2001, No. 18).
57. Amendment of definitions of "Firm" and "Small Business Firm" and amendment of Note filed 7-12-2002; operative 8-11-2002 (Register 2002, No. 28).
58. Amendment adding definition of "Street gang" and amendment of Note filed 8-27-2002 as an emergency; operative 8-27-2002 (Register 2002, No. 35). Pursuant to Penal Code section 5058.3 a Certificate of Compliance must be transmitted to OAL by 2-4-2003 or emergency language will be repealed by operation of law on the following day.
59. Certificate of Compliance as to 8-27-2002 order transmitted to OAL 1-21-2003 and filed 3-6-2003 (Register 2003, No. 10).

60. Amendment adding definitions of "Program failure" and "Significant work related disciplinary history" 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.
61. Amendment adding definitions of "Program failure" and "Significant work related disciplinary history" 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.
62. Certificate of Compliance as to 6-17-2004 order transmitted to OAL 11-16-2004 and filed 12-29-2004 (Register 2004, No. 53).
63. New definition of "Religious Review Committee (RRC)" filed 1-17-2006 as an emergency; operative 1-17-2006 (Register 2006, No. 3). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 6-26-2006 or emergency language will be repealed by operation of law on the following day.
64. Amendment of definition of "Program failure" filed 6-9-2006; operative 7-9-2006 (Register 2006, No. 23).
65. Certificate of Compliance as to 1-17-2006 order transmitted to OAL 6-22-2006 and filed 7-27-2006 (Register 2006, No. 30).
66. Change without regulatory effect amending division heading and chapter heading filed 12-4-2006 pursuant to section 100, title 1, California Code of Regulations (Register 2006, No. 49).
67. New definitions of "Indecent Exposure" and "Sexual Disorderly Conduct" and amendment of Note filed 2-23-2007 as an emergency; operative 2-23-2007 (Register 2007, No. 8). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 8-2-2007 or emergency language will be repealed by operation of law on the following day.
68. Certificate of Compliance as to 2-23-2007 order transmitted to OAL 7-27-2007 and filed 9-5-2007 (Register 2007, No. 36).
69. New definitions of "Non-serious offender" and "Non-violent offender" filed 10-1-2007 as an emergency; operative 10-1-2007 (Register 2007, No. 40). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 3-10-2008 or emergency language will be repealed by operation of law on the following day.
70. Amendment of definition of "Immediate Family Members" and amendment of Note filed 10-16-2007; operative 11-15-2007 (Register 2007, No. 42).
71. New definitions of "Non-serious offender" and "Non-violent offender" refiled 2-25-2008 as an emergency; operative 2-25-2008 (Register 2008, No. 9). A Certificate of Compliance must be transmitted to OAL by 5-26-2008 or emergency language will be repealed by operation of law on the following day.
72. Reinstatement of section as it existed prior to 10-1-2007 emergency amendment by operation of Government Code section 11346.1(f) (Register 2008, No. 22).
73. New definitions of "Behavior Management Unit" and "Disruptive Behavior" filed 7-8-2008 as an emergency; operative 7-8-2008 (Register 2008, No. 28). Pursuant to Penal Code section 5058.3(a)(1), a Certificate of Compliance must be transmitted to OAL by 12-15-2008 or emergency language will be repealed by operation of law on the following day.
74. Amendment filed 8-4-2008; operative 8-4-2008 pursuant to Government Code section 11343.4 (Register 2008, No. 32).
75. Repealer of definition of "Media representative" filed 8-29-2008; operative 9-28-2008 (Register 2008, No. 35).
76. New definition of "California Out-of-State Correctional Facility" and amendment of Note filed 10-30-2008 as an emergency; operative 10-30-2008 (Register 2008, No. 44). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-8-2009 or emergency language will be repealed by operation of law on the following day.
77. Amendment filed 12-9-2008; operative 1-8-2009 (Register 2008, No. 50).
78. New definitions of "Behavior Management Unit" and "Disruptive Behavior" refiled 12-15-2008 as an emergency; operative 12-15-2008 (Register 2008, No. 51). Pursuant to Penal Code section 5058.3(a)(1), a Certificate of Compliance must be transmitted to OAL by 3-16-2009 or emergency language will be repealed by operation of law on the following day.
79. New definitions of "Senate Bill (SB) 618 Participant" and "Senate Bill (SB) 618 Program" 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.
80. Certificate of Compliance as to 12-15-2008 order transmitted to OAL 2-23-2009 and filed 4-2-2009 (Register 2009, No. 14).
81. Certificate of Compliance as to 10-30-2008 order transmitted to OAL 4-1-2009 and filed 5-12-2009 (Register 2009, No. 20).
82. Certificate of Compliance as to 2-5-2009 order transmitted to OAL 6-25-2009 and filed 7-28-2009 (Register 2009, No. 31).
83. New definition of "Sexual Activity" filed 10-6-2009; operative 10-6-2009 pursuant to Government Code section 11343.4 (Register 2009, No. 41).
84. New definition of "Transitional Housing Unit" filed 12-29-2009; operative 1-28-2010 (Register 2010, No. 1).
85. New definition of "Non-Revocable Parole," amendment of definition of "Parolee" and amendment of Note filed 1-25-2010 as an emergency pursuant to Penal Code section 5058.3(a)(2); operative 1-25-2010 (Register 2010, No. 5). Pursuant to Penal Code section 5058.3(c), 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.
86. Certificate of Compliance as to 1-25-2010 order transmitted to OAL 6-17-2010 and filed 7-13-2010 (Register 2010, No. 29).
87. New definitions of "Administrative Officer of the Day," "Facility," "Great Bodily Harm" and "Institution" and amendment of definition of "Serious Bodily Injury" and Note filed 8-19-2010; operative 8-19-2010 pursuant to Government Code section 11343.4 (Register 2010, No. 34).
88. Repealer of definition of "Appeal Form" filed 12-13-2010 as an emergency; operative 1-28-2011 (Register 2010, No. 51). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-7-2011 or emergency language will be repealed by operation of law on the following day.
89. New definition of "Medical Parolee" and amendment of Note filed 4-29-2011 as an emergency pursuant to Penal Code section 5058.3(a)(2); operative 4-29-2011 (Register 2011, No. 17). Pursuant to Penal Code section 5058.3(a)(1), a Certificate of Compliance must be transmitted to OAL by 10-6-2011 or emergency language will be repealed by operation of law on the following day.
90. Repealer and new definition of "Lockdown" and new definition of "Modified Program" filed 6-14-2011; operative 7-14-2011 (Register 2011, No. 24).
91. New definitions of "Released on Parole," "Residential Facility," "Single Family Dwelling" and "Transient Sex Offender" and amendment of Note filed 6-15-2011 as an emergency; operative 6-15-2011 (Register 2011, No. 24). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-22-2011 or emergency language will be repealed by operation of law on the following day.
92. Certificate of Compliance as to 12-13-2010 order transmitted to OAL 6-15-2011 and filed 7-28-2011 (Register 2011, No. 30).
93. Change without regulatory effect amending definition of "Modified Program" filed 8-3-2011 pursuant to section 100, title 1, California Code of Regulations (Register 2011, No. 31).
94. New definitions of "Alternative Custody Program" and "Alternative Custody Program Participant" and amendment of definitions of "Case Conference Review" and "Face-to-Face Contact" and Note filed 9-27-2011 as an emergency; operative 9-27-2011 (Register 2011, No. 39). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 3-5-2012 or emergency language will be repealed by operation of law on the following day.

95. Certificate of Compliance as to 4-29-2011 order transmitted to OAL 10-5-2011 and filed 11-10-2011 (Register 2011, No. 45).
96. Reinstatement of section as it existed prior to 6-15-2011 emergency amendment by operation of Government Code section 11346.1(f) (Register 2011, No. 48).
97. New definitions of "Released on Parole," "Residential Facility," "Single Family Dwelling" and "Transient Sex Offender" and amendment of Note refiled 12-1-2011 as an emergency; operative 12-1-2011 (Register 2011, No. 48). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 2-29-2012 or emergency language will be repealed by operation of law on the following day.
98. Amendment of definition of "Dangerous Contraband," new definition of "Possession" and amendment of Note filed 12-9-2011 as an emergency; operative 12-9-2011 (Register 2011, No. 49). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 5-17-2012 or emergency language will be repealed by operation of law on the following day.
99. Certificate of Compliance as to 9-27-2011 order transmitted to OAL 2-3-2012; Certificate of Compliance withdrawn 3-19-2012 (Register 2012, No. 12).
100. New definitions of "Alternative Custody Program" and "Alternative Custody Program Participant" and amendment of definitions of "Case Conference Review" and "Face-to-Face Contact" and Note refiled 3-19-2012 as an emergency; operative 3-19-2012 (Register 2012, No. 12). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 6-18-2012 or emergency language will be repealed by operation of law on the following day.
101. Certificate of Compliance as to 12-1-2011 order transmitted to OAL 2-27-2012 and filed 4-2-2012 (Register 2012, No. 14).
102. New definitions of "Automated Needs Assessment Tool" and "Criminogenic Need" and amendment of Note filed 5-10-2012 as an emergency; operative 5-10-2012 (Register 2012, No. 19). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 10-17-2012 or emergency language will be repealed by operation of law on the following day.
103. Certificate of Compliance as to 12-9-2011 order, including further amendment of definition of "Possession," transmitted to OAL 5-3-2012 and filed 6-6-2012 (Register 2012, No. 23).
104. New definition of "Postrelease Community Supervision" filed 6-26-2012 as an emergency; operative 6-26-2012 (Register 2012, No. 26). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 12-3-2012 or emergency language will be repealed by operation of law on the following day.
105. Repealer of definitions of "Designated Level II Housing," "Execution Type Murder," "High Notoriety," "Management Concern," "Multiple Murders" and "Unusual Violence," amendment of definitions of "Force," "Life Prisoner" and "Public Interest Case" and new definitions of "Non-secure Facility" and "Security Concern" filed 6-26-2012 as an emergency; operative 7-1-2012 (Register 2012, No. 26). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 12-10-2012 or emergency language will be repealed by operation of law on the following day.
106. Reinstatement of section as it existed prior to 3-19-2012 emergency amendment by operation of Government Code section 11346.1(f) (Register 2012, No. 28).
107. New definitions of "Alternative Custody Program (ACP)" and "Alternative Custody Program Participant," amendment changing definition of "Case Conference" to " "Case Conference Review" (with further revisions), amendment of definition of "Face-to-Face Contact" and amendment of Note filed 9-13-2012 as an emergency; operative 9-13-2012 (Register 2012, No. 37). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 2-20-2013 or emergency language will be repealed by operation of law on the following day.
108. New definitions of "Automated Needs Assessment Tool" and "Criminogenic Need" and amendment of Note refiled 10-17-2012 as an emergency; operative 10-17-2012 (Register 2012, No. 42). A Certificate of Compliance must be transmitted to OAL by 1-15-2013 or emergency language will be repealed by operation of law on the following day.
109. Editorial correction of History 108 providing corrected Certificate of Compliance date (Register 2012, No. 44).
110. Certificate of Compliance as to 6-26-2012 order referenced in History 104 transmitted to OAL 11-5-2012 and filed 12-20-2012 (Register 2012, No. 51).
111. Editorial correction of History 110 (Register 2013, No. 3).
112. Certificate of Compliance as to 6-26-2012 order referenced in History 105 transmitted to OAL 12-5-2012 and filed 1-17-2013 (Register 2013, No. 3).
113. Amendment replacing and revising former definition of "Religious Artifact" with new definition of "Religious Item" filed 2-21-2013 as an emergency; operative 2-21-2013 (Register 2013, No. 8). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-31-2013 or emergency language will be repealed by operation of law on the following day.
114. Certificate of Compliance as to 10-17-2012 order transmitted to OAL 1-15-2013 and filed 2-25-2013 (Register 2013, No. 9).
115. Certificate of Compliance as to 9-13-2012 order transmitted to OAL 1-11-2013 and filed 2-25-2013 (Register 2013, No. 9).
116. Change without regulatory effect adding definition of "Secretary" and amending Note filed 3-11-2013 pursuant to section 100, title 1, California Code of Regulations (Register 2013, No. 11).
117. Amendment replacing and revising former definition of "Religious Artifact" with new definition of "Religious Item" refiled 7-29-2013 as an emergency; operative 7-29-2013 (Register 2013, No. 31). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 10-28-2013 or emergency language will be repealed by operation of law on the following day.
118. New definitions of "Cognitive Behavioral Therapy," "Reentry Hubs" and "Transitions Programs" and amendment of definition of "Senate Bill 618 Program" 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.
119. Certificate of Compliance as to 7-29-2013 order transmitted to OAL 10-24-2013 and filed 12-9-2013 (Register 2013, No. 50).
120. Change without regulatory effect amending definitions of "Direct and Constant Supervision" and "Interstate Unit" filed 1-8-2014 pursuant to section 100, title 1, California Code of Regulations (Register 2014, No. 2).
121. New definition of "Intake Control Unit (ICU)" filed 1-23-2014; operative 1-23-2014 pursuant to Government Code section 11343.4(b)(3) (Register 2014, No. 4).
122. Amendment of definition of "Administrative Officer of the Day" and new definitions of "California Law Enforcement Telecommunications System," "CalParole," "Case Conference," "Parole Administrator" and "Parole Violation Disposition Tracking System" filed 2-6-2014 as an emergency; operative 2-6-2014 (Register 2014, No. 6). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 7-16-2014 or emergency language will be repealed by operation of law on the following day.

3000.5. Rules of Construction.

The following rules of construction apply to these regulations, except where otherwise noted:

(a) The enumeration of some criteria for the making of discretionary decisions does not prohibit the application of other criteria reasonably related to the decision being made.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

(c) "Shall" is mandatory, "should" is advisory, and "may" is permissive.

(d) The past, present, or future tense includes the others.

(e) The masculine gender includes the feminine gender; the singular includes the plural.

3339. Release from Administrative Segregation and Retention in Administrative Segregation.

(a) Release: Release from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate's initial placement in administrative segregation. Nothing in this article shall prevent the official ordering an inmate's placement in administrative segregation, or a staff member of higher rank in the same chain of command, from withdrawing an administrative segregation order before it is acted upon or prior to a hearing on the order after consulting with and obtaining the concurrence of the administrator of the general population unit to which the inmate will be returned or assigned. Release from segregated housing after such placement shall be effected only upon the written order of an equal or higher authority.

(b) Retention: Subsections (b)(1)–(b)(5) set forth procedural safeguards. These procedural safeguards apply to inmates retained for administrative reasons after the expiration of a definite term or terms of confinement for disciplinary reasons. Definite terms of confinement shall be set or reduced by classification or administrative action.

(1) A segregated housing order, CDC Form 114-D, shall be initiated, giving written notice of the reasons for such retention in sufficient detail to enable the inmate to prepare a response or defense. Except in case of a genuine emergency, a copy of the order shall be given to the inmate prior to the expiration of the determinate term or terms of confinement. In no case shall notice be given later than 48 hours after the expiration of the determinate term or terms.

(2) A fair hearing before one or more classification officials shall be held not more than 96 hours after the inmate is given a copy of the segregated housing order, unless the inmate requests, in writing, and is granted additional time to prepare a defense.

(3) Representation by a staff assistant shall be provided if institution officials determine that the inmate is illiterate or that the complexity of the issues make it unlikely that the inmate can collect or present the evidence necessary for an adequate comprehension of the case. The determination and designation is to be made at the time the segregated housing order is prepared and shall be included on the copy of the order given the inmate.

(4) The inmate shall be given a reasonable opportunity to present witnesses and documentary evidence unless institution officials determine in good faith that presentation of the evidence would be unduly hazardous to institutional safety or correctional goals. The reason for disallowing designated evidence will be explained in writing by the hearing body on the segregated housing order.

(5) A copy of the completed segregated housing order containing a written decision, including references to the evidence relied upon and the reasons for retention in segregated housing beyond the expiration of the expired term of confinement, if so retained, shall be given the inmate upon completion of the hearing.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code; and *Taylor* v. *Rushen* (N.D. Cal.) L-80-0139 SAW.

HISTORY:

1. Repealer and new section filed 3-2-83; effective thirtieth day thereafter (Register 83, No. 12).
2. Editorial correction of printing error in subsection (b)(2) (Register 92, No. 5).

3340. Exclusions.

Separation from general population for the reasons and under the circumstances described in this section is not considered administrative segregation and is specifically excluded from the other provisions of this article.

(a) Medical. When an inmate is involuntarily removed from general inmate status for medical or psychiatric reasons by order of medical staff and the inmate's placement is in a hospital setting or in other housing as a medical quarantine, the inmate will not be deemed as segregated for the purpose of this article. When personnel other than medical staff order an inmate placed in administrative segregation for reasons related to apparent medical or psychiatric problems, that information will be immediately brought to the attention of medical staff. The appropriateness of administrative segregation or the need for movement to a hospital setting will be determined by medical staff. When medical and psychiatric reasons are involved, but are not the primary reasons for an inmate's placement in administrative segregation, administrative segregation status will be continued if the inmate is moved to a hospital setting and the requirements of this article will apply.

(b) Orientation and Lay-Over. Newly received inmates and inmates in transit or lay-over status may be restricted to assigned quarters for that purpose. Such restrictions should not be more confining than is required for institution security and the safety of persons, nor for a period longer than the minimum time required to evaluate the safety and security factors and reassignment to more appropriate housing.

(c) Disciplinary Detention. Placement in disciplinary detention as an ordered action of a disciplinary hearing is not subject to the provisions of this article except as provided in section 3338(a)(2) and (3).

(d) Confinement to Quarters. Confinement to quarters as an ordered action of a disciplinary hearing is not subject to the provisions of this article.

(e) Segregated Inmates. When an inmate has been classified for segregated housing in accordance with this article and commits a disciplinary offense while so confined, or is returned to segregated housing upon completion of a disciplinary detention sentence for an offense committed in a segregated unit, the provision of this article will not apply.

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

3341. Staff Assistance.

The duties and functions of a staff member assigned to assist an inmate in a classification hearing on a segregated housing order will be the same as described in section 3318 for a disciplinary hearing. When an inmate requests witnesses at a classification hearing on a segregation order and an investigative employee is assigned, the investigative employee's duties and functions will be essentially the same as described in section 3318 for predisciplinary hearing investigations. In screening prospective witnesses, the investigative employee will do so in accordance with the information to be considered in the classification hearing, as described in section 3338(e) and (f).

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

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).

3341.5. Segregated Program Housing Units.

Special housing units are designated for extended term programming of inmates not suited for general population. Placement into and release from these units requires approval by a classification staff representative (CSR).

(a) Protective Housing Unit (PHU). An inmate whose safety would be endangered by general population placement may be placed in the PHU providing the following criteria are met:

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

(2) The inmate does not have a serious psychiatric or medical condition requiring prompt access to hospital care.

(3) The inmate is not documented as a member or an affiliate of a prison gang.

(4) The inmate does not pose a threat to the safety or security of other inmates in the PHU.

(5) The inmate has specific, verified enemies identified on CDC Form 812 likely to and capable of causing the inmate great bodily harm if placed in general population.

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

(7) There is no alternative placement which can ensure the inmate's safety and provide the degree of control required for the inmate.

(8) It has been verified that the inmate is in present danger of great bodily harm. The inmate's uncorroborated personal report, the nature of the commitment offense or a record of prior protective custody housing shall not be the sole basis for protective housing unit placement.

(b) 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 subsection 3341.5(c), at the Enhanced Outpatient Program level of the mental health delivery system.

(c) Security Housing Unit (SHU). An inmate whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU.

(1) Assignment criteria. The inmate has been found guilty of an offense for which a determinate term of confinement has been assessed or is deemed to be a threat to the safety of others or the security of the institution.

(2) Length of SHU Confinement. Assignment to a SHU may be for an indeterminate or for a fixed period of time.

(A) Indeterminate SHU Segregation.

1. An inmate assigned to a security housing unit on an indeterminate SHU term shall be reviewed by a classification committee at least every 180 days for consideration of release to the general inmate population. An investigative employee shall not be assigned at these periodic classification committee reviews.

2. Except as provided at section 3335(a), section 3378(d) and subsection (c)(5), a validated prison gang member or associate is deemed to be a severe threat to the safety of others or the security of the institution and will be placed in a SHU for an indeterminate term.

3. Indeterminate SHU terms suspended based solely on the need for inpatient medical or mental health treatment may be reimposed without subsequent misbehavior if the inmate continues to pose a threat to the safety of others or the security of the institution.

(B) Determinate SHU Segregation.

1. A determinate period of confinement in SHU may be established for an inmate found guilty of a serious offense listed in section 3315 of these regulations. The term shall be established by the Institutional Classification Committee (ICC) using the standards in this section, including the SHU Term Assessment Chart (see section 3341.5(c)(9)), Factors in Mitigation or Aggravation (see section 3341.5(c)(10)), SHU Term Assessment Worksheet CDC Form 629-A, Rev. 3/96, Assessment of Subsequent SHU Term Worksheet CDC Form 629-B, Rev. 9/90, and SHU Time Computation Table (see CDC Form 629-D, Rev. 7/88).

2. The term shall be set at the expected term for the offense in the absence of mitigating or aggravating factors. Deviation from the expected term shall be supported by findings pursuant to subsection (c)(7).

3. The terms shall be recorded on CDC Form 629-A, SHU Term Assessment Worksheet, using the SHU Time Computation Table which incorporates one-fourth clean conduct credit in the term. The computation shall establish a maximum release date and a minimum eligible release date (MERD). A copy of the CDC Form 629-A shall be given to the inmate.

4. Serious misconduct while in SHU may result in loss of clean conduct credits or an additional determinate term for an inmate serving a determinate term. Such additional term may be concurrent or consecutive and shall be recorded on CDC Form 629-B with a copy given to the inmate. Such cases shall be referred to a CSR for approval; however, all release and retention requirements of section 3339 shall remain in effect pending CSR approval.

5. Up to 45 days of a SHU inmate's clean conduct credits may be forfeited for disciplinary infractions that are not serious enough to warrant the assessment of a subsequent or concurrent SHU term. Such forfeiture may be assessed against credits already earned or future credits.

6. Consecutive SHU terms shall be assessed only for offenses occurring after commencement of a prior determinate SHU term.

7. The ICC may commute or suspend any portion of a determinate term. Once commuted, the term shall not be reimposed. If suspended, the period of suspension shall not exceed the length of the original term imposed. When either action occurs, the case shall be referred to a classification staff representative (CSR) with a placement recommendation.

8. A SHU Term may be reimposed if an inmate placed in the Administrative Segregation Unit (ASU) is found guilty of a serious rule violation and the ICC concludes the inmate poses a threat to the safety of others or the security of the institution.

9. Determinate SHU terms suspended based solely on the need for inpatient medical or mental health treatment may be reimposed without subsequent misbehavior if the inmate continues to pose a threat to the safety of others or the security of the institution.

10. The Unit Classification Committee shall conduct hearings on all determinate cases at least 30 days prior to their MERD or during the eleventh month from the date of placement, whichever comes first.

(C) Anytime a SHU term is reimposed, ICC shall record the basis of their decision in the CDC Form 128-G, Classification Chrono (Rev. 10/89), which is incorporated by reference, clearly articulating the inmate's continued threat to the safety of others or the security of the institution.

(3) Release from SHU. An inmate shall not be retained in SHU beyond the expiration of a determinate term or beyond 11 months, unless the classification committee has determined before such time that continuance in the SHU is required for one of the following reasons:

(A) The inmate has an unexpired MERD from SHU.

(B) Release of the inmate would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct.

(C) The inmate has voluntarily requested continued retention in segregation.

(4) A validated prison gang member or associate shall be considered for release from a SHU, as provided above, after the inmate is verified as a gang dropout through a debriefing process.

(5) As provided at section 3378(e), the Departmental Review Board (DRB) may authorize SHU release for prison gang members or associates categorized as inactive. The term inactive means that the inmate has not been involved in gang activity for a minimum of six (6) years. Inmates categorized as inactive who are suitable for SHU release shall be transferred to the general population of a Level IV facility for a period of observation that shall be no greater than 12 months. Upon completion of the period of observation, the inmate shall be housed in a facility commensurate with his or her safety needs. In the absence of safety needs, the inmate shall be housed in a facility consistent with his or her classification score. The DRB is authorized to retain an inactive gang member or associate in a SHU based on the inmate's past or present level of influence in the gang, history of misconduct, history of criminal activity, or other factors indicating that the inmate poses a threat to other inmates or institutional security.

(6) As provided at section 3378(f), an inmate categorized as inactive or validated as a dropout of a prison gang and placed in the general population may be returned to segregation based upon one reliable source item identifying the inmate as a currently active gang member or associate of the prison gang with which the inmate was previously validated. Current activity is defined as, any documented gang activity within the past six (6) years. The procedures described in this Article shall be utilized for the removal of the inmate from the general population, the review of the initial segregation order, and all periodic reviews of the indeterminate SHU term.

(7) Determinate/Indeterminate SHU terms shall be served in a departmentally approved SHU or a facility specifically designated for that purpose, except under those circumstances where the term may be served in ASU. Determinate/Indeterminate SHU terms may also be served in secure inpatient medical or mental health settings, when deemed clinically necessary.

(8) When an inmate is paroled while serving a determinate term, the remaining time on the term is automatically suspended. When an inmate returns to prison, either as a parole violator or with a new prison commitment, ICC shall evaluate the case for reimposition of the suspended determinate term. If reimposed, the term shall not exceed the time remaining on the term at the time of parole.

(9) SHU Term Assessment Chart (fixing of determinate confinement to SHU).

	TYPICAL TERM (Mos)		
OFFENSE	*Low*	*Expected*	*High*
(A) Homicide:			
1. Murder, attempted murder, solicitation of murder, or voluntary manslaughter of a non-inmate.	(36	48	60)
2. Murder, attempted murder, solicitation of murder, or voluntary manslaughter of an inmate.	(15	26	36)
(B) Violence Against Persons:			
1. Assault on a non-inmate with a weapon or physical force capable of causing mortal or serious injury.	(09	28	48)
2. Assault on an inmate with a weapon or physical force capable of causing mortal or serious injury.	(06	15	24)
3. Assault on a non-inmate with physical force insufficient to cause serious injury.	(06	12	18)
4. Assault on an inmate with physical force insufficient to cause serious injury.	(02	03	06)
5. Throwing a caustic substance on a non-inmate.	(02	03	04)
(C) Threat to Kill or Assault Persons:			
1. Use of non-inmate as hostage.	(18	27	36)
2. Threat to a non-inmate.	(02	05	09)
3. Threat to an inmate.	(02	03	04)
(D) Possession of a Weapon:			
1. Possession of a firearm or explosive device.	(18	27	36)
2. Possession of a weapon, other than a firearm or explosive device which has been manufactured or modified so as to have the obvious intent or capability of inflicting traumatic injury, and which is under the immediate or identifiable control of the inmate.	(06	10	15)
(E) Trafficking in Drugs: Distributing controlled substances in an institution or camp or causing controlled substances to be brought into an institution or camp for the purpose of distribution.	(06	09	12)
(F) Escape with Force or Attempted Escape with Force.	(09	16	24)
(G) Disturbance, Riot, or Strike:			
1. Leading a disturbance, riot, or strike.	(06	12	18)
2. Active participation in, or attempting to cause conditions likely to threaten institution security.	(02	04	06)
(H) Harassment of another person, group, or entity either directly or indirectly through the use of the mail or other means.	(06	12	18)
(I) Arson, Theft, Destruction of Property: Theft or destruction of State property where the loss or potential loss exceeds $10,000 or threatens the safety of others.	(02	08	12)
(J) Extortion and Bribery: extortion or bribery of a non-inmate.	(02	06	09)
(K) Sexual Misconduct			
1. Indecent Exposure	(03	06	09)
2. Sexual Disorderly Conduct (two or more offenses within a twelve month period)	(03	06	09)
(L) Refusal to Accept Assigned Housing	(03	06	09)
(M) Except as otherwise specified in this section, proven attempts to commit any of the above listed offenses shall receive one-half (1/2) of the term specified for that offense.			
(N) Any inmate who conspires to commit any of the offenses above shall receive the term specified for that offense.			

(10) Factors in mitigation or aggravation of SHU term. The SHU term shall be set at the expected range unless a classification committee finds factors exist which warrant the imposition of a lesser or greater period of confinement. The total period of confinement assessed shall be no less than nor greater than the lowest or highest months listed for the offense in the SHU Term Assessment Chart. In setting the term, the committee shall determine the base offense. If the term being assessed includes multiple offenses, the offense which provides for the longest period of confinement shall be the base offense. Lesser offenses may be used to increase the period beyond expected term. After determining the base offense, the committee shall review the circumstances of the disciplinary

offense and the inmate's institutional behavior history using the factors below. The committee shall then determine that either no unusual factors exist or find that specific aggravating or mitigating factors do exist and specify a greater or lesser term. The reasons for deviation from the expected term shall be documented on a CDC 128-G, Classification Chrono, and SHU Term Assessment Worksheet, a copy of which shall be provided to the inmate.

(A) Factors in Mitigation.

1. The inmate has a minor or no prior disciplinary history.

2. The inmate has not been involved in prior acts of the same or of a similar nature.

3. The misconduct was situational and spontaneous as opposed to planned in nature.

4. The inmate was influenced by others to commit the offense.

5. The misconduct resulted, in part, from the inmate's fear for safety.

(B) Factors in Aggravation.

1. The inmate's prior disciplinary record includes acts of misconduct of the same or similar nature.

2. The misconduct was planned and executed as opposed to situational or spontaneous.

3. The misconduct for which a SHU term is being assessed resulted in a finding of guilty for more than one offense.

4. The inmate influenced others to commit serious disciplinary infractions during the time of the offense.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 314, 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; and *Castillo* v. *Alameida, et al.,* (N.D. Cal., No. C94-2847).

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. Amendment 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. Editorial correction of printing errors in subsection (c)(2)(B)1 and CDC Forms 629-B and 629-D (Register 92, No. 5).
8. New subsection (c)(6)(H), subsection relettering, and amendment of Note filed 7-29-93 as an emergency; operative 7-29-93 (Register 93, No. 31). A Certificate of Compliance must be transmitted to OAL 11-26-93, or emergency language will be repealed by operation of law on the following day.
9. Certificate of Compliance as to 7-29-93 order transmitted to OAL 11-18-93 and filed 12-31-93 (Register 94, No. 1).
10. Amendment of subsection (c)(2)(B)1. and 4., new subsection (c)(2)(B)5. and subsection renumbering, repealer of form CDC 629-A, and new form CDC 629-A filed 2-8-96 as an emergency per Penal Code section 5058(e); operative 2-8-96 (Register 96, No. 6). A Certificate of Compliance must be transmitted to OAL by 7-18-96 or emergency language will be repealed by operation of law on the following day.
11. Certificate of Compliance as to 2-8-96 order including amendment of form CDC 629-A transmitted to OAL 6-17-96 and filed 7-30-96 (Register 96, No. 31).
12. New subsection (c)(2)(A)1. designator, new subsections (c)(2)(A)2. and (c)(4) and subsection relettering filed 1-21-99 as an emergency; operative 1-21-99 (Register 99, No. 4). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 6-30-99 or emergency language will be repealed by operation of law on the following day.
13. Certificate of Compliance as to 1-21-99 order transmitted to OAL 6-30-99 and filed 8-12-99 (Register 99, No. 33).
14. Amendment of subsections (c)(2)(A)1. and 2. and (c)(4), new subsections (c)(5) and (c)(6), subsection renumbering, amendment of newly designated subsection (c)(10) and amendment of Note filed 8-30-99 as an emergency; operative 8-30-99 (Register 99, No. 36). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 2-8-2000 or emergency language will be repealed by operation of law on the following day.
15. Certificate of Compliance as to 8-30-99 order transmitted to OAL 2-7-2000 and filed 3-21-2000 (Register 2000, No. 12).
16. Change without regulatory effect amending subsection (c)(2)(B)1. filed 10-16-2001 pursuant to section 100, title 1, California Code of Regulations (Register 2001, No. 42).
17. Amendment of subsection (c)(6) and Note filed 5-25-2006; operative 5-25-2006 pursuant to Government Code section 11343.4 (Register 2006, No. 21).
18. Change without regulatory effect amending subsection (b) filed 6-27-2006 pursuant to section 100, title 1, California Code of Regulations (Register 2006, No. 26).
19. New subsections (c)(9)(K)–(c)(9)(K)2., subsection relettering and amendment of Note filed 2-23-2007 as an emergency; operative 2-23-2007 (Register 2007, No. 8). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 8-2-2007 or emergency language will be repealed by operation of law on the following day.
20. Certificate of Compliance as to 2-23-2007 order, including amendment of subsection (c)(9)(K)1.-2., transmitted to OAL 7-27-2007 and filed 9-5-2007 (Register 2007, No. 36).
21. New subsection (c)(9)(L) and subsection relettering filed 12-28-2007; operative 12-28-2007 pursuant to Government Code section 11343.4 (Register 2007, No. 52).
22. Amendment of subsection (b) filed 9-29-2009; operative 10-29-2009 (Register 2009, No. 40).
23. New subsections (c)(2)(A)3. and (c)(2)(B)8.-9., subsection renumbering, new subsection (c)(2)(C) and amendment of subsection (c)(7) filed 11-14-2011 as an emergency; operative 11-14-2011 (Register 2011, No. 46). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-23-2012 or emergency language will be repealed by operation of law on the following day.
24. Certificate of Compliance as to 11-14-2011 order transmitted to OAL 2-29-2012 and filed 4-5-2012 (Register 2012, No. 14).

7. Change without regulatory effect amending section filed 10-22-90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No. 4).
8. Editorial correction of typing errors in subsections (b) and (g) (Register 91, No. 11).
9. Editorial correction of printing errors (Register 92, No. 5).
10. New subsection (f)(1)(F) filed 1-16-92; operative 2-17-92 (Register 92, No. 13).
11. Amendment of subsection (c) filed 5-5-95; operative 6-5-95 (Register 95, No. 18).
12. Amendment filed 10-17-97; operative 11-16-97 (Register 97, No. 42).
13. Amendment of section and Note filed 8-27-2002 as an emergency; operative 8-27-2002 (Register 2002, No. 35). Pursuant to Penal Code section 5058.3 a Certificate of Compliance must be transmitted to OAL by 2-4-2003 or emergency language will be repealed by operation of law on the following day.
14. Certificate of Compliance as to 8-27-2002 order, including further amendment of section, transmitted to OAL 1-21-2003 and filed 3-6-2003 (Register 2003, No. 10).
15. Amendment of subsection (h) and Note filed 5-25-2006; operative 5-25-2006 pursuant to Government Code section 11343.4 (Register 2006, No. 21).
16. Change without regulatory effect amending Note filed 12-4-2006 pursuant to section 100, title 1, California Code of Regulations (Register 2006, No. 49).
17. New subsections (g)(6)–(g)(6)(B) and amendment of Note filed 10-30-2008 as an emergency; operative 10-30-2008 (Register 2008, No. 44). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 4-8-2009 or emergency language will be repealed by operation of law on the following day.
18. Amendment of subsection (a) and 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.
19. Certificate of Compliance as to 10-30-2008 order transmitted to OAL 4-1-2009 and filed 5-12-2009 (Register 2009, No. 20).
20. Certificate of Compliance as to 2-5-2009 order transmitted to OAL 6-25-2009 and filed 7-28-2009 (Register 2009, No. 31).
21. New subsection (*l*) and amendment of Note filed 5-10-2012 as an emergency; operative 5-10-2012 (Register 2012, No. 19). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 10-17-2012 or emergency language will be repealed by operation of law on the following day.
22. Amendment of subsections (a)–(c), (g)(1), (g)(2)(C), (g)(3), (g)(5)(A)–(B), (g)(5)(D), (g)(5)(F), (g)(5)(L), (g)(5)(N), (h)–(k)(1) and (k)(2) and new subsection (g)(5)(S) filed 6-26-2012 as an emergency; operative 7-1-2012 (Register 2012, No. 26). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 12-10-2012 or emergency language will be repealed by operation of law on the following day.
23. New subsection (*l*) and amendment of Note refiled 10-17-2012 as an emergency; operative 10-17-2012 (Register 2012, No. 42). A Certificate of Compliance must be transmitted to OAL by 1-15-2013 or emergency language will be repealed by operation of law on the following day.
24. Editorial correction of History 23 providing corrected Certificate of Compliance date (Register 2012, No. 44).
25. Certificate of Compliance as to 6-26-2012 order transmitted to OAL 12-5-2012 and filed 1-17-2013 (Register 2013, No. 3).
26. Certificate of Compliance as to 10-17-2012 order transmitted to OAL 1-15-2013 and filed 2-25-2013 (Register 2013, No. 9).

3375.1. Inmate Placement.

(a) Except as provided in section 3375.2, each inmate shall be assigned to a facility with a security level which corresponds to the following placement score ranges:

(1) An inmate with a placement score of 0 through 18 shall be placed in a Level I facility.

(2) An inmate with a placement score of 19 through 35 shall be placed in a Level II facility.

(3) An inmate with a placement score of 36 through 59 shall be placed in a Level III facility.

(4) An inmate with a placement score of 60 and above shall be placed in a Level IV facility.

(b) An inmate approved for transfer to a subfacility of a complex may be received and processed through a facility with a security level higher than that which is consistent with the inmate's placement score. Such cases shall be transferred to the subfacility when bed space allows or, when appropriate, recommended for an administrative determinant which prohibits movement to the lower security level facility.

(1) The case shall be presented to a classification staff representative (CSR) for evaluation within 30 days of receipt at the facility unless the inmate is on an approved waiting list maintained by the complex for placement of inmates at the approved subfacility.

(2) The transfer of an inmate for more than 30 days from one subfacility of a complex to another subfacility which has a different security level, shall require a CSR endorsement. When the subfacility's security level is consistent with the inmate's placement score, the classification and parole representative (C&PR) may act as a CSR.

NOTE: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections 3020, 5054 and 5068, Penal Code; *Wright* v. *Enomoto* (1976) 462 F Supp. 397 ; and; and *Stoneham* v. *Rushen* (1984) 156 Cal. App. 3d 302.

HISTORY:

1. Renumbering and amendment of section 3375(h) to section 3375.1 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. Renumbering and amendment of section 3375(h) to section 3375.1 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. Renumbering and amendment of section 3375(h) to section 3375.1 filed 6-2-88 as an emergency; operative 6-2-88 (Register 88, No. 24). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-30-88.
6. Certificate of Compliance transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
7. Change without regulatory effect pursuant to section 100, title 1, California Code of Regulations adopting sections 3375.1, 3375.2, 3375.3, 3375.4, amending sections 3375, 3376, 3377, 3377.1 and repealing section 3375.1, filed 10-22-90; operative 11-29-90 (Register 91, No. 4).
8. Editorial correction of printing error inadvertently omitting text in subsection (a) (Register 91, No. 11).
9. Editorial correction of printing errors in subsections (a) and (b)(2) and Note (Register 92, No. 5).
10. Amendment of section and Note filed 8-27-2002 as an emergency; operative 8-27-2002 (Register 2002, No. 35). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 2-4-2003 or emergency language will be repealed by operation of law on the following day.
11. Certificate of Compliance as to 8-27-2002 order transmitted to OAL 1-21-2003 and filed 3-6-2003 (Register 2003, No. 10).

12. Amendment of subsections (a)(1)–(4) and (b)(1)–(2) and Note filed 6-26-2012 as an emergency; operative 7-1-2012 (Register 2012, No. 26). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 12-10-2012 or emergency language will be repealed by operation of law on the following day.
13. Certificate of Compliance as to 6-26-2012 order transmitted to OAL 12-5-2012 and filed 1-17-2013 (Register 2013, No. 3).

3375.2. Administrative Determinants.

(a) An inmate meeting one or more of the following administrative or irregular placement conditions, known as administrative determinants, may be housed in a facility with a security level which is not consistent with the inmate's placement score:

(1) An inmate requires an outpatient or higher degree of medical or psychiatric care at a facility specifically staffed for the type of treatment necessary.

(2) An inmate with a history of sex crimes designated in section 3377.1(b) shall be housed in accordance with their placement score and shall not be assigned outside the security perimeter.

(3) An inmate with a history of arson shall not be housed in a facility constructed primarily of wood.

(4) An inmate with a felony hold, warrant, detainer, or the equivalent thereof filed with the Department who is likely to receive a significant period of consecutive incarceration or be deported shall not be housed in a Level I facility without perimeter gun towers.

(5) An inmate requires confidential placement in another correctional jurisdiction.

(6) An inmate serving a sentence of life without possibility of parole (LWOP) shall not be housed in a facility with a security level lower than Level III, except when authorized by the Departmental Review Board (DRB). When a Level III male inmate serving a sentence of LWOP is housed in a Level III institution, he shall be housed in a 270o-design facility (i.e., a facility allowing for a 270o field of view for control booth staff). Inmates serving LWOP in need of urgent or emergent medical or psychiatric care may be transferred to a celled in-patient medical or mental health bed pending DRB approval. The DRB shall review the case within 30 days of the transfer.

(7) An inmate identified as a serial killer shall be excluded from Level I or Level II placement even if his or her convictions for murders are prosecuted separately.

(8) An inmate serving a life term shall not be housed in a Level I facility nor assigned to a program outside a security perimeter. Exceptions may only occur when Board of Parole Hearings (BPH) grants parole, the release date is within 3 years, and the Governor's Office has completed its review and either formally approved parole or taken no action. When all three conditions are met and the inmate is otherwise eligible for a custody reduction, the inmate shall be evaluated by an ICC for the custody reduction.

(9) An inmate serving a life term whose placement score is not consistent with a Level I or II security level shall not be housed in a Level I or Level II facility except when approved by the Departmental Review Board.

(10) An inmate whose death sentence is commuted or modified shall be transferred to a reception center for processing after which the Departmental Review Board shall determine the inmate's initial facility placement.

(11) An inmate with a case factor described in sections 3377.2(b)(2)(A), 3377.2(b)(2)(B) or 3377.2(b)(2)(C), shall be ineligible for minimum custody. An inmate with a history of one or more walkaways from nonsecure settings, not to include Drug Treatment Furlough and Community Correctional Reentry Centers, shall not be placed in minimum custody settings for at least 10 years following the latest walkaway.

(b) The following three-letter codes are used to indicate those administrative or irregular placement conditions known as administrative determinants, which may be imposed by Departmental officials to override the placement of an inmate at a facility according to his/her placement score.

(1) AGE. Inmate's youthfulness, immaturity or advanced age.

(2) ARS. Current conviction, prior conviction, or a sustained juvenile adjudication, as defined in subdivision (b)(26)(A), for arson.

(3) BEH. Inmate's record of behavior indicates they are capable of successful placement at a facility with a security level lower than that which is consistent with his/her placement score. This factor shall not be used for an inmate who is currently housed at a facility with a security level higher than that which is consistent with his/her placement score.

(4) CAM. Placement is recommended due to a shortage of camp qualified inmates.

(5) DEA. Inmate was formerly or is currently sentenced to death.

(6) DEP. Special placement ordered by the Departmental Review Board.

(7) DIS. Inmate's disciplinary record indicates a history of serious problems or threatens the security of the facility.

(8) ENE. Inmate has one or more enemies under the Department's jurisdiction which have been documented on a CDC Form 812 (Rev. 8/01), Notice of Critical Case Information - Safety of Persons or on a CDC Form 812-C (Rev. 8/01), Notice of Critical Information - Confidential Enemies pursuant to section 3378. This should also be used when it is probable that the inmate may be victimized due to case factors; e.g., the nature of their offense is likely to create an enemy situation at certain facilities, current Protective Housing Unit case, and those who are natural victims because of their appearance.

(9) ESC. Unusual circumstances suggest the inmate is a much greater escape risk than indicated by his/her placement score; e.g., the inmate verbalized an intent to escape.

(10) FAM. Inmate has strong family ties to a particular area where other placement would cause an unusual hardship.

(11) GAN. Documentation establishes that the inmate's gang membership or association requires special attention or placement consideration.

(12) INA. Documentation establishes that the inmate's inactive gang status requires special attention or placement consideration.

(13) HOL. Hold, warrant or detainer is likely to be exercised.

(14) LIF. Inmate is serving a life sentence and requires placement in a facility with a security level higher than that indicated by his/her placement score.

(15) MED. Inmate's medical condition requires treatment or continuing medical attention not available at all facilities.

(16) OUT. Inmate requires placement at a specific facility for an out-to-court appearance. This factor shall also be used when a releasing authority appearance is nearing.

(17) POP. Shall be used only by a CSR to indicate that no beds presently exist at a facility with a security level that is consistent with the inmate's placement score.

(18) PRE. The short time remaining to serve limits or otherwise influences placement or program options for the inmate. This factor shall also be used for sending an inmate to a hub facility for their release to a community based correctional facility.

(19) PSY. Inmate's psychological condition requires special treatment or may severely limit placement options. This factor shall also be used for those inmates who are designated as Category B.

(20) PUB. Shall be used only by a CSR to indicate an inmate is identified as a Public Interest Case as defined in section 3000.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
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