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*Via electronic submission*

Committee on Public Safety  
California State Assembly

Re: SB 1064 - **SUPPORT**

Dear Committee Members,

We write to share the Center for Constitutional Rights' strong support for SB 1064, to limit the use of confidential information inside the California Department of Corrections and Rehabilitation (CDCR). As counsel for the *Ashker v. Governor* plaintiff class, we have documented a pattern of misuse of confidential information by CDCR, including fabrication of corroborating sources and inaccurate disclosure of informant testimony, described below. SB 1064 is an essential measure to limit this serious and far-reaching constitutional violation.

The *Ashker* class action lawsuit was filed in 2012 to challenge the prolonged solitary confinement of hundreds of people in CDCR custody who were validated as "gang affiliates." One of Plaintiffs' concerns, reflected in the *Ashker* class's due process claim, was CDCR's use of unreliable confidential information in the gang validation process, which led to the class's indefinite solitary confinement. When the *Ashker* case settled in 2015, the Settlement not only ended solitary confinement based on gang validation across the State, but also required CDCR to train its staff on the proper use and disclosure of confidential information and allowed for 24 months of monitoring by the legal team. In connection with this monitoring, my colleagues and I had the opportunity to review hundreds of rule violation reports (RVRs) in which information from confidential informants was used to send California prisoners back to solitary confinement. CDCR staff document their interviews with confidential informants in confidential memoranda, which are generally not disclosed to people in prison facing RVRs, nor their attorneys. Under the terms of the Settlement Agreement, CDCR agreed to produce to the *Ashker* legal team all SHU-eligible RVRs with a gang nexus, *as well as* a representative sample of the underlying confidential memoranda themselves. The legal team's review of this material uncovered systemic misuse of confidential information used to send California prisoners to solitary confinement.

In 2017, we presented evidence of more than 80 instances in which CDCR relied on fabricated, inadequately disclosed or unreliable confidential information to the federal Magistrate Judge responsible

**JUSTICE TAKES A FIGHT.**

for overseeing the *Ashker* settlement, and he found by a preponderance of the evidence that CDCR is systemically violating due process throughout California prisons through its use of confidential information. Specifically, Magistrate Judge Illman held that “time and again, the shield of confidentiality for informants and their confidential accounts is used to effectively deny class members any meaningful opportunity to participate in their disciplinary hearings” and that “CDCR systemically relies on confidential information without ensuring its reliability, thus, improperly returning class members to solitary confinement.” CDCR appealed this ruling to the Ninth Circuit Court of Appeals; that appeal remains pending.

Importantly, while Magistrate Judge Illman found a systemic due process violation, he did not order a remedy; rather, he extended the *Ashker* Settlement Agreement for an additional 12-month monitoring period. Thus, SB 1064, which would significantly diminish the risk of further Constitutional violations, could not be more important. A federal judge has identified wide-reaching due process violations, but no steps have been taken to remedy those violations. The Center for Constitutional Rights welcomes SB 1064 as an essential first step. To underscore the urgency of this legislation, we provide below a sampling of the evidence uncovered by the *Ashker* legal team regarding CDCR’s use of unreliable confidential information, and how that use would be limited by SB 1064.<sup>1</sup>

### **1. The Importance of Requiring Detailed & Accurate Confidential Disclosures**

SB 1064 would require disclosure of a detailed description of the information provided by any confidential source, including the date it is provided. This is essential, as the *Ashker* legal team uncovered dozens of RVRs in which confidential information was inaccurately or inadequately disclosed. For example, in the case of three prisoners found guilty of attempted murder with a gang nexus, CDCR’s confidential disclosure stated that a confidential source identified the three by picking them out of a photographic line-up. The lack of detail in the disclosure (including the lack of detail about dates) hid the fact that only one of the three individuals was positively identified in the photographic line-up that was conducted the day after the incident. A second prisoner was positively identified in a second line-up, conducted two weeks later. This second prisoner was never informed that his positive identification followed a negative identification two-weeks earlier. The third prisoner, who was never identified *at all*, was led to believe otherwise.

Another prisoner was told that a confidential source indicated that he had conspired with another prisoner to commit a murder on behalf of a gang. Because the suspect did not receive a detailed confidential disclosure, he did not know that the only evidence provided by the source against him was that the suspect told others information about the purported victim. Contrary to what was written in the confidential disclosure, no evidence tied the prisoner to the alleged conspiracy.

The *Ashker* legal team also found several examples of exculpatory evidence from confidential sources being withheld, with CDCR systemically disclosing only information that tended to inculcate the prisoners. For example, when a prisoner was accused of participating in a gang-related fight, CDCR failed to disclose confidential information corroborating his defense that the fight was not gang-related.

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<sup>1</sup> All confidential information produced by CDCR to the *Ashker* legal team is subject to a Protective Order. Thus, we can only share the evidence by describing it in general terms, as it was publicly described by Magistrate Judge Illman. Please note that every example is supported by detailed evidence submitted under seal to the Northern District of California Federal Court.

Other California prisoners were told they had been identified by confidential sources as committing misconduct, but the disclosure did not include the detail that they were identified by a nickname, rather than by name. Thinking they had been identified by name—when they were not—the prisoners could not adequately defend themselves.

The *Ashker* legal team also uncovered evidence of California prisoners receiving disclosures so vague as to be completely meaningless. One man faced a rule violation for attempted murder, and his confidential disclosure stated only that corroborated confidential information identified him as the assailant, without *any detail* about how, when, or where. The *Ashker* legal team provided the Court with evidence of nine different instances in which people in prison received confidential disclosures so general as to be completely useless in preparing a defense to the rule violation.

## **2. The Importance of Disclosing the Source & Nature of the Informant’s Knowledge**

SB 1064 requires that the detailed disclosure include the “source and nature of the informant’s personal knowledge,” and this too is key, as the *Ashker* legal team found multiple examples of RVRs in which confidential source information was made to seem firsthand when it was not. For example, one prisoner found guilty of ordering the murder of another prisoner was told that confidential sources said he ordered the murder. In fact, neither of the sources appear to have had personal knowledge of any such order, and one explicitly stated that he was *informed by someone else* that the suspect ordered the murder. Yet the disclosure received by the prisoner presented the information as if it were based on personal knowledge. Similarly, a prisoner found guilty of playing a leadership role in a gang was told there were two confidential sources who provided evidence against him, when in reality there was only one source, counted twice by CDCR investigators, and that single source did not witness the event in question.

Even more problematic, the *Ashker* legal team found evidence of a pattern of RVRs in which gang investigators portrayed their own investigative conclusions as statements by confidential informants. For example, one prisoner was told a confidential source identified him as carrying out a beating on behalf of a gang, but the confidential memorandum made it clear that the informant did not mention the suspect; instead the gang investigator’s own conclusion was the source of the identification. The legal team found evidence of this same trend in 15 other cases during the monitoring period.

## **3. The Importance of Corroboration**

SB 1064 requires corroboration of confidential information before it can be relied upon, and if it is corroborated by another confidential source, detailed information from the corroborating source must also be disclosed. This is essential because the *Ashker* team uncovered a pattern of fabrication of corroboration—instances where hearing officers found confidential information reliable because gang investigators stated that the same information was provided by another confidential source, when in fact, no second source existed. During the two-year monitoring period, the *Ashker* team found evidence of this in at least six different RVRs.

#### 4. The Importance of Tracking Informant Reliability

SB 1064 also requires that CDCR track an informant's previous record of reliability, including instances of information not meeting standards of reliability. This too is essential, as the *Ashker* legal team found at least one example where a confidential source found unreliable at one prisoner's RVR hearing was relied upon in a second prisoner's RVR hearing for the same information. When the second prisoner raised the first lack-of-reliability finding, he was ignored.

Based on all of this evidence, the Magistrate Judge held that "CDCR systemically relied on confidential information without ensuring its reliability" and "[i]n a number of cases, an informant had been determined to be reliable purportedly because his account had been independently corroborated by a second informant, except that there was no second informant, a fact that remained confidential." The Judge found this to be an ongoing and systemic violation of due process. *See Ashker v. Newsom*, No. 09-cv-05796-CW (RMI), 2019 WL 330461 (N.D. Ca. Jan. 25, 2019).

Despite finding a systemic constitutional violation, the Court did not order a remedy, and rather than attempting to create an internal fix for this problem, CDCR has appealed the decision to the Ninth Circuit. In the meantime, the *Ashker* legal team is continuing to monitoring the problem, and has uncovered evidence that these same problems of reliability and corroboration continue today.

Indeed, one of the starkest problems that persist to date is the way corroboration is approached. While we cannot share specific examples from the current monitoring period because they are subject to protective order, we can share general trends. For example, if a confidential source were to provide evidence that a fight occurred at a CDCR facility and name the prisoner who orchestrated the fight, CDCR would treat both pieces of information as corroborated if their own investigation uncovered the (obvious) fact that the fight did occur, without recognizing that the source's knowledge and testimony regarding this first (generally-known) fact sheds no light on his ability to reliably testify as to the second piece of information. The protections of SB 1064 would go far to prevent this type of wholesale and a-factual corroboration.

Thank you for considering this important legislation. The issue of CDCR's misuse of confidential information is a priority for the Center for Constitutional Rights, and we would be more than happy to discuss the issue further.

Respectfully,

*/s/Rachel Meeropol*

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