

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

TODD ASHKER, et al.,

Plaintiffs,

v.

GOVERNOR OF THE STATE OF  
CALIFORNIA, et. al.,

Defendants.

Case No.: 4:09-cv-05796-CW

CLASS ACTION

Judge: Honorable Claudia Wilken

**EXPERT REPORT OF DR. JAMES AUSTIN, Ph.D.**

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## **I. BACKGROUND**

1. I have been asked by counsel for Plaintiffs to review and comment on the California Department of Corrections and Rehabilitation's (CDCR) use of the Special Housing Units (SHU) in general and specifically the one at the Pelican Bay State Prison (PBSP).

2. To undertake this task I reviewed CDCR's current SHU policies, the disciplinary, classification and risk assessment records of randomly selected inmates housed in the PBSP SHU, CDCR Department Review Board (DRB) Documents, Security Threat Group Regulations, CDCR Staff Orientation Booklet-Security Threat Group Step Down Program, and other relevant materials. A complete list of the materials I reviewed is attached as Exhibit A. In addition to the documents reviewed, I conducted a site visit to the PBSP and toured parts of the prison on January 14, 2015.

3. In terms of my credentials, I received my Ph.D. in sociology from the University of California at Davis in 1980. I am currently the President of JFA Institute, a corrections consulting firm. Prior to that, I was the Director of the Institute of Crime, Justice and Corrections at the George Washington University, and Executive Vice President for the National Council on Crime and Delinquency. I began my career in corrections with the Illinois Department of Corrections in 1970 at Statesville Penitentiary. A complete description of my education and experience, along with a list of all the cases in which I have testified and all my publications, is contained in my curriculum vitae, which is attached hereto as Exhibit B.

4. I have over 40 years of experience in correctional planning and research. I was appointed to the California Department of Corrections and Rehabilitation Expert Panel on Adult Offender Recidivism Reduction Programs. I am serving or have recently

served as director for several large research and evaluation programs, most notably: the Correctional Options Evaluation and Justice Reinvestment programs. I have served as the Chair of the National Policy Council for the American Society of Criminology.

5. I have worked in the states of Ohio, Mississippi, Colorado, Oklahoma, Kentucky, Maryland, Illinois, Indiana and the Federal Bureau of Prisons to evaluate their use of administrative segregation. I am currently retained by the Georgia Department of Corrections and the New York State Attorney General's Office and New York Department of Corrections and Community Supervision as its consultant/expert witness in the use of administrative segregation.

6. I have been a consultant for the National Institute of Corrections on jail and prison classification systems. In that capacity I have assisted over 25 states and numerous jail systems develop and implement objective prisoner classification systems.

7. I was named by the American Correctional Association as its recipient of the Peter P. Lejin's Research Award in 1991, and I received the Western Society of Criminology Paul Tappin award for outstanding contributions in the field of criminology in 1999. I am a member of the CDCR's Expert Panel on Adult Offender Recidivism Reduction Programs and was a key author of the Panel's recommendations on reducing the CDCR prison population.

8. I am being compensated by Plaintiffs in the amount of \$150 per hour for my work in this matter.

9. Based on my substantial experience and on my review of this matter, I intend to offer the following opinions if called to testify at trial: first, the Plaintiff class has been placed in SHU status for an excessive period of time based on incorrect or

inappropriate classification criteria and should be released to an appropriate Level IV or Level III general population housing unit or a protective custody unit; second, CDCR's old procedures (which are still in use for hundreds of inmates) for reviewing and retaining inmates in the SHU are grossly inadequate and do not meet the recommended best practices articulated by the Association of State Correctional Administrators and followed in a number of major state systems (Ohio, Mississippi, Colorado, New York, Washington and the Federal Bureau of Prisons); third, the recently implemented SHU step down program is flawed in its basic structure and needs to be significantly revised so that it consists of only three steps or phases, with each phase lasting approximately six months, assuming the prisoner conforms to the program behavioral requirements such as participating in programs and positive disciplinary behavior.

10. These opinions are based on statistical analysis and comparison of CDCR's policies and practices with other state and federal administrative segregation policies and practices. Below, I present some background information on the use of segregation, some of my own prior research and then a more specific analysis of the CDCR Special Housing Unit program as it has functioned within the CDCR.

## **II. THE PURPOSES OF ADMINISTRATIVE SEGREGATION**

11. The removal of disruptive and violent inmates from the "general population" and their placement in separate housing units has been a common practice in prison systems since their inception.<sup>1</sup> The modern use of segregation and solitary confinement within specialized units and facilities began to emerge in the 1970s as prison populations began to rise, spurring a series of highly publicized riots along with increased

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<sup>1</sup> C. Riveland. *Supermax Prisons: Overview and General Considerations*. National Institute of Corrections Technical Assistance Number 98P4002. Jan. 1999.

prison violence and crowding.<sup>2</sup> It was hoped that segregating the most disruptive inmates for extensive periods of time under extreme forms of security would serve both as a deterrent to some inmates who might become highly disruptive, and, more importantly, would incapacitate those who disrupted prison security.

12. When implemented successfully, the practice of centralized and specialized administrative segregation units allows the vast majority of inmates who are conforming to the prison system's rules and regulations to carry out their daily routines of work, recreation and program participation without the fear of violence or intimidation by more aggressive inmates. It also allows these other prisoners to avoid lengthy periods of "lockdowns" or major disturbances.<sup>3</sup>

13. Nationally, and in California, three major factors influenced the rise of segregated housing: 1) the significant increases in the nation's state and federal prison populations; 2) the attendant level of prison crowding; and 3) the increased presence of organized street and prison gangs.<sup>4</sup> More recently, the Federal Government and many state systems have begun to move away from prolonged solitary confinement. Reflecting this growing trend away from segregation, in 2013 the Association of State Correctional

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<sup>2</sup> J. Wooldrege. "Research Note: A State Level Analysis of Sentencing Policies and Inmate Crowding in State Prison." *Journal of Crime and Delinquency* 42, no. 3, Jul. 1996: 456-466.

<sup>3</sup> It should be noted at the outset that administrative segregation is not to be confused with disciplinary segregation. The latter is used to simply punish prisoners for violations of serious rules infractions like fighting/assaults, possession of weapons, drugs and contraband. The former is an indeterminate placement in segregation, frequently due to the potential threat the inmate poses to the overall safety of the prison system. CDCR's STG SHU program is purportedly an administrative segregation scheme, because it involves an indeterminate SHU sentence not explicitly imposed as a disciplinary measure. Of course, the CDCR also places inmates in SHU for disciplinary segregation.

<sup>4</sup> Mears, Daniel P. 2013. "Supermax Prisons: The Policy and the Evidence." *Criminology & Public Policy* V. 12, (4): 681-720. Riveland. Chase. *Supermax Prisons: Overview and General Considerations*. National Institute of Corrections Technical Assistance Number 98P4002. Jan. 1999. D.P. Mears and J. Watson. "Towards a Fair and Balanced Assessment of Supermax Prisons." *Justice Quarterly* 23, no. 2, Jun. 2006: 232-270.

Administrators (ASCA) Administrative Segregation Sub-Committee examined the issues surrounding segregation and provided recommendations regarding the use of restrictive housing.<sup>5</sup> The sub-committee's final recommendations to correctional systems and administrators on the use of administrative segregation (as opposed to disciplinary segregation) were published as follows:

1. Provide a process, a separate review for decisions to place an offender in restrictive status housing;
2. Provide periodic classification reviews of offenders in restrictive status housing every 180 days or less;
3. Provide in-person mental health assessments, by trained personnel within 72 hours of an offender being placed in restrictive status housing and periodic mental health assessments thereafter including an appropriate mental health treatment plan;
4. Provide structured and progressive levels that include increased privileges as an incentive for positive behavior and/or program participation;
5. Determine an offender's length of stay in restrictive status housing on the nature and level of threat to the safe and orderly operation of general population as well as program participation, rule compliance and the recommendation of the person(s) assigned to conduct the classification review as opposed to strictly held time periods;
6. Provide appropriate access to medical and mental health staff and services;
7. Provide access to visiting opportunities;
8. Provide appropriate exercise opportunities;
9. Provide the ability to maintain proper hygiene;
10. Provide program opportunities appropriate to support transition back to a general population setting or to the community;
11. Collect sufficient data to assess the effectiveness of implementation of these guiding principles;
12. Conduct an objective review of all offenders in restrictive status housing by persons independent of the placement authority to determine the offenders' need for continued placement in restrictive status housing; and,
13. Require all staff assigned to work in restrictive status housing units receive appropriate training in managing offenders on restrictive status housing status.

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<sup>5</sup> Association of State Correctional Administrators, Administrative Segregation Sub-Committee. *Final Restrictive Status Housing Policy Guidelines*. Aug. 9, 2013. Secretary of the CDCR, Dr. Jeffery Beard, is a member of ASCA.

### **III. TRENDS IN THE USE OF SHU WITHIN THE CDCR**

14. California opened its first stand-alone SHU at the Corcoran State Prison in 1988. This was followed by the opening of Pelican Bay in 1989. Along with these two facilities, currently there is one other major male CDCR facility that operates a SHU program - California Correctional Institution in Tehachapi. I have reviewed data on the number of inmates assigned to all California SHU programs (male and female) from 1989 to 2014.

15. Table 1 shows the rise of the California SHU population from 1989 through 2014. The bulk of these figures are for December 31<sup>st</sup> of each year as reported on the CDCR website which recorded the SHU populations via its monthly population reports up through 2011.<sup>6</sup> As Table 1 shows, both the CDCR and SHU populations rose steadily, with a peak SHU population of approximately 3,000 by 1997. The SHU population remained fairly stable until 2006 when it began to increase again despite significant reductions in the CDCR population due to realignment and other legislative initiatives to reduce the prison population and relieve excessive crowding. According to the CDCR COMPSTAT report, by December 2014 there were approximately 3,500 inmates in the California SHU facilities.

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<sup>6</sup> CDCR does not have available on its website monthly reports prior to 1990. Therefore, the SHU population for 1989 is derived from the Weekly Report of Population as of December 24, 1989. As of July 2011, CDCR stopped publishing SHU specific population figures in its monthly population reports. Therefore, the above 2013 and 2014 SHU populations are derived from the current COMPSTAT DAI Statistical Report - 13 Month (generated Feb. 12, 2015). The 2012 SHU population is derived from the Average Daily Prison Population Report for Calendar Year 2012 and reflects the average daily SHU population from October through December of that year. The SHU population for 2011 is derived from the CDCR Weekly Report of Population as of July 27, 2011, which is the most recent report in which CDCR provides SHU populations.



**Table 1. CDCR and SHU Populations 1990-2014**

<b>Year</b>	<b>Inmate Population</b>	<b>SHU Population</b>	<b>% of CDCR Population</b>
1989	87,409	1,312	2%
1990	97,309	1,958	2%
1991	101,808	1,940	2%
1992	109,496	2,279	2%
1993	119,951	2,427	2%
1994	125,605	2,290	2%
1995	135,133	2,796	2%
1996	145,565	2,880	2%
1997	155,276	2,994	2%
1998	159,563	2,648	2%
1999	160,687	2,422	2%
2000	160,655	2,769	2%
2001	157,142	2,936	2%
2002	159,695	2,903	2%
2003	161,785	2,956	2%
2004	163,939	2,916	2%
2005	168,035	2,986	2%
2006	172,528	3,160	2%
2007	171,444	3,152	2%
2008	171,085	3,325	2%
2009	168,830	3,368	2%
2010	162,821	3,295	2%
2011	147,578	3,211	2%
2012	133,285	3,104	3%
2013	134,249	3,906	3%
2014	134,433	3,626	3%

**IV. CALIFORNIA’S OLD REGULATIONS FOR PLACEMENT OF GANG AFFILIATES IN THE SHU**

16. California initiated a pilot program to change their gang affiliation system in 2012.<sup>7</sup> While there are significant problems with this new system, described below, it is an improvement from CDCR’s old gang regulations, which allowed for the incorrect

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<sup>7</sup> California Department of Corrections and Rehabilitation. March 1, 2012. *Security Threat Group Prevention, Identification and Management Strategy*. Sacramento, CA: CDCR.

placement of a significant population of inmates in the SHU for excessive periods of time.

17. Under the old procedures, the CDCR validated inmates into two categories of prison gang affiliates – gang associates and gang members. *All* prison gang-affiliates were placed in the SHU for an indeterminate term.<sup>8</sup> This includes inmates who had not been involved in any rules violation (a 115).<sup>9</sup> CDCR did not place in SHU prisoners affiliated with street gangs.

18. This is known as a “status based” system. The underlying rationale behind such a system posits that there are certain gangs whose presence in the prison general population poses a considerable threat to staff and inmate safety. Consequently anyone who is a member of that gang poses the same threat of violence or disruption as posed by the gang itself, regardless of the prisoner’s actual behavior. This argument is known as the “ecological fallacy,” where inferences about the nature of individuals are deduced from facts or inferences about the group to which those individuals belong.<sup>10</sup> Status based systems are disfavored in prison management because they result in “false positives,” wrongly identifying inmates as high-risk even though their behavioral history proves they do not engage in violent behavior and are not high risk. Along with negative repercussions for the affected inmates, below I describe the way in which false positives also negate the potential effectiveness of the SHU program.

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<sup>8</sup> CAL. CODE REGS., tit. 15, § 3341.5(c)(2)(A)(2) (2012) (emphasis added) (“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.”)

<sup>9</sup> Guirbino Deposition, July 18, 2014, at p. 66.

<sup>10</sup> Freedman, D. A. (2001). Ecological inference and the ecological fallacy. *International Encyclopedia for the Social and Behavioral Sciences*, 6, 4027-30.

**A. Inadequate Checks And Balances in CDCR's Old Procedures**

19. As a threshold matter, and separate from the problem of California's erroneous reliance on a status-based SHU system, CDCR's old gang validation procedures are flawed because they involve insufficient levels of independent review. Under the old regulations, validation begins with an Institution Gang Investigator (IGI) who is located at major CDCR high security facilities. [REDACTED]

[REDACTED] Lieutenants, Sergeants, and (mostly) Correctional Officers who constitute the Security Threat Group (STG) Institutional Gang Investigator (IGI) team.<sup>11</sup> The IGI team is authorized to develop a validation packet for any inmate based on information from any number of sources that a particular inmate is either an associate or a member of one of the seven CDCR designated prison gangs. Validation requires three "source" documents including one that shows a "direct communication link" to one of the seven designated prison gangs.

20. After the IGI prepares the validation packet it is forwarded to the Central Office of Correctional Safety's (OCS) Special Services Unit (SSU), [REDACTED].<sup>12</sup> The OCS, a unique function within state correctional agencies, has overall responsibility for the gang validation program as articulated under Title 15. This is a validation system largely devoid of checks and balances, in which the IGI investigator responsible for developing evidence of gang affiliation also interviews the inmate in question, and review of the IGI validation recommendation is housed at OCS, within a linear chain of command. A special agent within the OCS reviews the validation packet

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<sup>11</sup> Ducart Deposition, Nov. 24, 2014, Exh. 13 at p. 5.

<sup>12</sup> Ducart Deposition, Nov. 24, 2014, Exh. 13 at p. 5.

and approves or denies validation, usually within a few months of it being received.<sup>13</sup>

21. At the OCS level, three staff must sign off on the validation assessment. Unsurprisingly, given this linear structure, it is extremely rare (not more than 5% of the time) that the OCS will disagree with an IGI source item for a Pelican Bay inmate.<sup>14</sup> The head IGI at Pelican Bay, Lt. Frisk, testified that he could not remember anyone at OCS ever following up with inmates themselves or asking IGI to do so to clarify information in the validation packet.<sup>15</sup> OCS decides whether or not to approve the IGI's validation recommendation under the old regulations without even seeing the inmate's disciplinary history or central file. Once OCS approves the gang validation, that decision is sent to the Institutional Classification Committee (ICC) which proceeds to notify the inmate of the OCS decision via the 128-B2 form. The ICC has no authority to overturn the OCS decision, which was largely determined by the IGI validation packet. The same problematic lack of checks and balances is replicated in the six-year inactive reviews, described below.

22. This system differs significantly from other states' validation systems. In my experience, generally SHU placement begins with an institutional classification committee that has access to complete information about the inmate, including his offense, his programming, and his disciplinary history. Information about gang affiliation is just one of many other pieces of the information considered. An initial recommendation for SHU placement by the classification committee is a group decision, not driven solely by IGI concerns. Once the classification committee makes its

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<sup>13</sup> Frisk Deposition, Sep. 12, 2014, at p. 124.

<sup>14</sup> Frisk Deposition, Sep. 12, 2014, at p. 127-28.

<sup>15</sup> Frisk Deposition, Sep. 12, 2014, at p. 125.

recommendation, generally the facility Warden (or his/her designee) will then approve or disapprove any recommendation to place an inmate in a SHU-type program. This is an independent review. Most systems I am familiar with also require review of potential SHU placement by the central office classification division, which reviews the recommendation and then makes its own recommendation, which is then signed off by the head of the correctional system or his/her designee. This type of system includes significant checks and balances, ensuring that the individual who has investigated gang involvement – who thus has a vested interest in SHU placement – does not drive the entire decision. I would expect that California’s old system, given its lack of checks and balances, would result in significant over-validation and over-placement of inmates in SHU.

**B. Over-Reliance on Gang Affiliation for SHU Placement**

23. While CDCR’s lack of checks and balances in validation is extremely troubling, and has almost certainly resulted in erroneous validation decisions, the central attribute of California’s old gang management approach is its total reliance on gang status over behavior. The CDCR explicitly states that inmates who have been “validated” as prison gang affiliates shall be placed in the SHU and remain there for at least six years, unless they renounce their gang affiliation. But there is no scientific basis for CDCR’s practices with respect to determining gang affiliation and the level of the affiliation (associate or member). In other words, the gang validation and SHU confinement policy has never undergone an independent reliability or validity test.

24. Reliability tests function to determine whether CDCR would get the same validation result if multiple IGI staff were asked to conduct blind and independent assessments of the same inmate. Related to reliability is the question of whether the IGIs

are missing some unknown number of prison gang members by their designation process. If this is occurring, efforts to reduce prison violence would be significantly weakened by such a “measurement” error in the identification process.

25. A validation test provides a distinct measure of functionality, determining whether the largely IGI driven process actually correctly identifies prisoners who, by virtue of their gang-affiliated status are likely to become involved in prison violence (either directly or indirectly), as compared to other prisoners. In other words, even if the CDCR is accurately identifying and incapacitating all CDCR prison gang affiliates, are these the prisoners who would commit or direct acts of prison violence or otherwise cause serious disruption to prison security and functioning?

26. Absent any test of CDCR’s gang identification process, one simply does not know if it works and it therefore does not qualify as an evidence-based practice.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>16</sup>

27. Gang validation under CDCR’s old regulations is based on source items like self-admission, tattoos, suspicious artwork, suspicious correspondence, confidential identification by other inmates (informants), and association with known gang members. Yet there is no CDCR research that supports that such attributes are related to gang violence or serious gang misconduct.

28. Predicting future behavior based on a status that has never been shown to

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<sup>16</sup> Ducart Deposition, Nov. 24, 2014, Exh. 13, 15.

correlate with prison violence or serious misconduct creates a very high risk of false positives in the SHU placement process. (A false positive is an inmate who has been predicted to be a management problem but actually does not present such a problem.)

29. CDCR's high false positive effect is illustrated in Table 2, which shows that of the inmates identified as prison or street gang members in a 2011 CDCR classification system evaluation,<sup>17</sup> only 30% received one or more rules violation report ("RVR"). Of the 30%, the vast majority had only a single RVR. The rates for gang-affiliated prisoners are higher than for non-gang affiliates, but only by 10%. RVRs are *the single most important measure* of whether an inmate poses a management problem, and for this reason all prison classification systems rely heavily upon them when classifying inmates. By this measure, the vast majority of prisoners identified by the CDCR as prison gang affiliates do not present a significant management problem beyond their affiliation with a prison gang. Consequently, policies that rely exclusively on gang affiliation will produce a large number of false positives (prisoners admitted and retained in SHU for gang-affiliation who do not require such housing). Indeed the CDCR has not only explicitly acknowledged that its pre 2012 policies "overclassified" inmates for SHU placement,<sup>18</sup> but the results of the post-2012 Departmental Review Board hearings unequivocally bear this out.

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<sup>17</sup> California Department of Corrections. December 2011. *Expert Panel Study Of The Inmate Classification Score System*. Sacramento, CA: CDCR, Office of Research and Evaluation.

<sup>18</sup> Giurbino Deposition, July 18, 2014, at p. 74.

**Table 2. Misconduct Rates for Gang and Non-Gang Identified Inmates**

RVRs	Non-Gang		Gang	
	Inmates	%	Inmates	%
NONE	36,455	79%	13,543	69%
ONE	7,057	15%	4,367	22%
MULTIPLE	2,496	5%	1,617	8%
Total	46,008	100%	19,527	100%

Source: CDCR Classification System Evaluation data set

30. The disconnect between gang affiliation and actual prison misbehavior is further demonstrated by the classification and disciplinary history of the Plaintiff class. Specifically, I reviewed the initial classification scores (documented in CDCR’s form 839) for 59 members of the due process class.<sup>19</sup>

31. Most of these inmates have very high classification scores (which will ensure they will remain in the highest level (IV) that is allowed by the CDCR system). The high number of points is reflective of their long sentence length and a number of serious misconduct reports they received during the first few years of their prison terms.

32. Under the CDCR classification system there is no “forgiveness” for those early years of disruptive behavior. Consequently it can take many years of conforming conduct to be considered for Level III or lower custody levels. This lack of “forgiveness” is unique to California. State systems that use the National Institute of Corrections (NIC) objective classification system generally forgive non-violent rule violations after 12-24 months. The very serious ones that reflect violence are forgiven after 5-10 years.<sup>20</sup> By

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<sup>19</sup> These 59 inmates included the ten named plaintiffs, 42 randomly selected Pelican Bay prisoners and 7 prisoners selected by Plaintiffs’ counsel. While all of these prisoners were initially due process class members, some of them are no longer members of the due process class by virtue of being transferred after a DRB.

<sup>20</sup> Austin, James and Patricia L. Hardyman. July 2004. *Objective Prison Classification Systems: A Guide for Correctional Agencies*. Washington, DC: U.S. Department of Justice, National Institute



not allowing past behaviors to be minimized or downgraded over time, inmates will be over-classified for a substantial period of time.

33. Table 3 shows Plaintiffs' disciplinary histories.<sup>21</sup> In this table only the rules violations that have occurred over the past 10 ten years are reported. A total of 41 violations have occurred over this ten year period with only five being for potentially violent offenses. This is an *exceptionally* low rate of disciplinary infractions for a ten-year period for a high security population. And importantly, the vast majority are minor, non-violent rules violations like participation in the 2013 hunger strike (12%), promotion of gang activities (17%), unauthorized talking (24%) and disobeying a direct order (10%). A system that places such inmates in SHU for over a decade defies all logic. These are rules violations that occur in all prisons and in no way necessitate or deserve a SHU term. Of all these violations, only the very few, potentially violent offenses highlighted below would result in possibly being placed in a SHU or step down program in the other State systems with which I am familiar.

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of Corrections.

<sup>21</sup> I compiled Tables 3 and 4 based on a spreadsheet created by Plaintiffs' counsel of all Rules Violations Reports identified in Defendants' productions. Given the voluminous nature of this material, it is possible that my RVR analysis could be slightly over or under inclusive, in comparison to what a formal audit would reveal.

**Table 3. Disciplinary Reports  
Past Ten Years for Ten Plaintiffs**

Violation	Frequency	%
Total	41	100%
Unauthorized Talking	10	24%
Promotion of Gang Activity	7	17%
Hunger Strike	5	12%
Disobeying a Direct Order	4	10%
Disrespect w/o Potential for Violence (profanity)	3	7%
Dangerous Contraband	2	5%
Inciting a Riot	2	5%
Mail Violation with No Security Threat	2	5%
Unauthorized Business Dealings	2	5%
Assault on Staff	1	2%
Plans to Disrupt Order (tries to slip letter to attorney)	1	2%
Recurring Failure to Meet Program Expectations	1	2%
Willfully Delaying a Peace Officer	1	2%

34. Table 4 repeats the analysis for 49 due process class members. These inmates have produced slightly more than 200 rule violations over the past ten years. The same pattern emerges here with most of these violations being for the hunger strikes, promoting gang activity, and disobeying a direct order. There were 26 violations involving weapons possession, assault and battery usually with no bodily injury, and attempted murder. Again, over a ten year period, this is a *remarkably* low number of rules violations and reflects a population of inmates who, with some very limited possible exceptions, should not be in SHU.

**Table 4. Disciplinary Reports Past Ten Years  
Pelican Bay Class – 49 Supplemental Inmates**

Violation	Frequency	%
Willfully Delaying a P/O (hunger strike)	33	16%
Promoting Gang Activities	30	14%
Participating in Mass Disturbance (Hunger Strike)	21	10%
Participation in a Mass Disturbance	14	7%
Willfully Delaying a P.O. of Duties/During Emergency Count	14	7%
Disobeying a Direct Order	13	6%
Refusal to Obey Orders	13	6%
Assault or Battery	12	6%
Possession of Deadly Weapon	11	5%
Possession of Alcohol/Controlled Substance	9	4%
Comm. Between Offenders Evidencing STG Behavior/Act	8	4%
Unauthorized Talking	7	3%
Failure to Meet Program Expectations	5	2%
Unauthorized Business Dealings	5	2%
Possession of Contraband	4	2%
Attempted Murder	3	1%
Indecent Exposure	3	1%
Mail Violations	3	1%
Personal Possession of STG Related Material	1	0%
Misc. Other Non-Violent	16	8%
Total	211	100%

35. Finally Table 5 lists the 840 scores for this same set of 59 Pelican Bay inmates.<sup>22</sup> Here you can see the very large total score figure recognizing that in order to be placed in Level III, the score must be lower than 52 points. All but seven inmates have received “favorable” points meaning that since the last annual report the inmate has not been involved in any serious misconduct. Most of the unfavorable points are for the non-violent behavior and participation in the 2013 hunger strike.

<sup>22</sup> I created this table through review of the most recent form 840 identified in Defendants’ production for each of the 59 inmates I considered in this report. A key indicating the identify of each inmate is attached as Exhibit C.

**Table 5. Current 840 Classification Points for Plaintiffs and Class Members**

<b>Name</b>	<b>Current Age</b>	<b>Total 840 Pts</b>	<b>Favorable Pts</b>	<b>Unfavorable Pts</b>
Prisoner 1	50	45	2	6
Prisoner 2	39	52	2	6
Prisoner 3	51	334	0	18
Prisoner 4	53	105	4	0
Prisoner 5	39	229	4	0
Prisoner 6	42	189	2	6
Prisoner 7	41	131	4	0
Prisoner 8	59	112	2	6
Prisoner 9	42	73	4	0
Prisoner 10	44	136	4	0
Prisoner 11	37	73	4	0
Prisoner 12	58	173	2	12
Prisoner 13	56	95	2	10
Prisoner 14	46	119	2	0
Prisoner 15	49	42	0	14
Prisoner 16	55	169	2	0
Prisoner 17	51	143	0	10
Prisoner 18	59	170	2	6
Prisoner 19	52	107	2	6
Prisoner 20	41	157	2	6
Prisoner 21	46	126	4	0
Prisoner 22	57	125	2	14
Prisoner 23	46	112	4	10
Prisoner 24	46	141	2	6
Prisoner 25	50	127	0	10
Prisoner 26	42	256	2	6
Prisoner 27	49	115	4	0
Prisoner 28	42	253	0	0
Prisoner 29	56	197	0	0
Prisoner 30	51	155	4	0
Prisoner 31	63	19	2	0
Prisoner 32	66	72	2	6
Prisoner 33	55	19	4	0
Prisoner 34	66	77	2	0
Prisoner 35	41	93	4	0
Prisoner 36	37	268	2	0
Prisoner 37	45	199	2	10
Prisoner 38	41	137	2	10
Prisoner 39	65	46	4	6
Prisoner 40	62	252	2	6

Prisoner 41	42	319	2	0
Prisoner 42	48	187	2	6
Prisoner 43	58	105	4	0
Prisoner 44	44	170	2	6
Prisoner 45	49	84	2	6
Prisoner 46	37	61	2	6
Prisoner 47	49	37	2	6
Prisoner 48	72	19	4	0
Prisoner 49	47	85	0	30
Prisoner 50	50	76	4	0
Prisoner 51	63	19	4	0
Prisoner 52	41	106	2	6
Prisoner 53	50	317	2	10
Prisoner 54	43	81	2	6
Prisoner 55	61	127	4	0
Prisoner 56	43	93	2	0
Prisoner 57	37	237	4	0
Prisoner 58	57	195	4	0
Prisoner 59	45	73	2	10

36. The inmate classification and disciplinary conduct data all suggest that these inmates, in general, do not require SHU placement. With only a few possible exceptions that would have to be demonstrated to the author, their conduct over the past many years suggests that at a maximum they should be assigned to either a Level IV general population unit or a Level IV special needs unit, not a SHU. It is puzzling that these inmates who have been discipline free for many years or have been involved in relatively minor rules violations are placed in such restrictive units.

37. The CDCR also has its own risk assessment instrument that has been validated by the University of California at Irvine.<sup>23</sup> Inmates are separated into the

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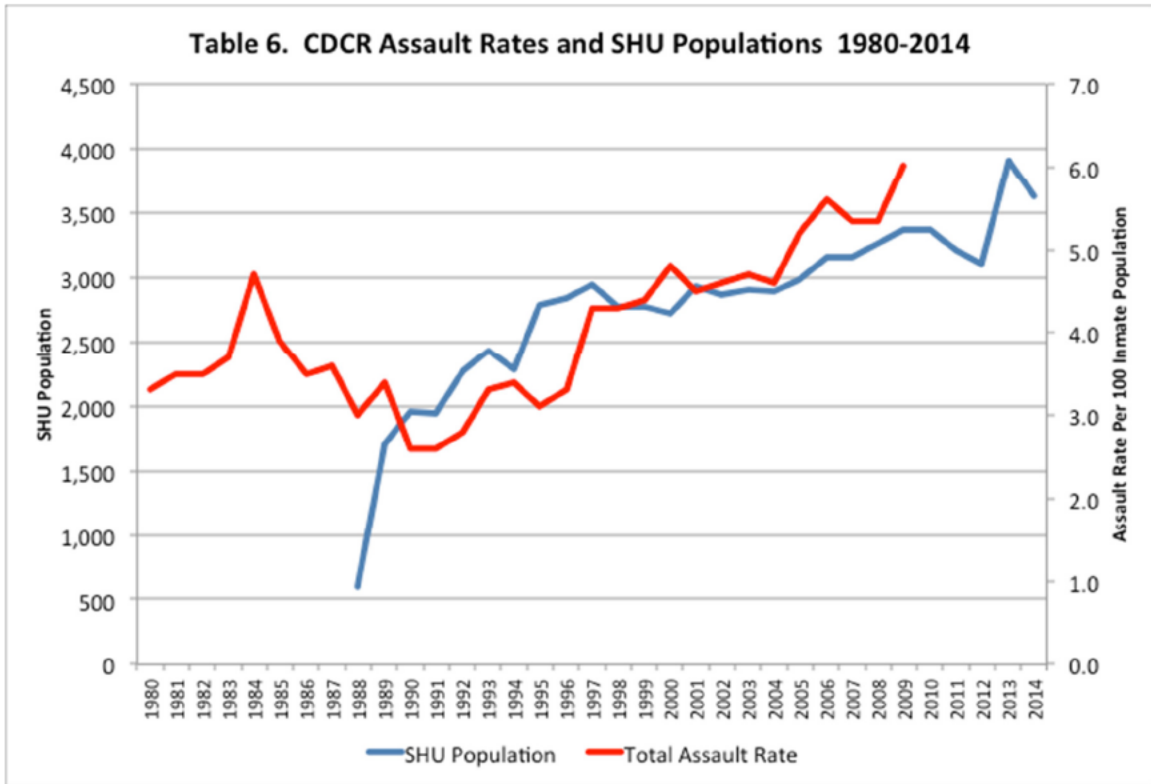
<sup>23</sup> Turner, Susan, James Hess, Charlotte Bradstreet, Steven Chapman, Ann Murphy. September 2013. *Development of the California Static Risk Assessment (CSRA): Recidivism Risk Prediction in the California Department of Corrections and Rehabilitation*. Irvine, CA: University of California, Irvine, Center for

following risk levels:

1. Low
2. Moderate
3. High Property
4. High Drug
5. High Violent

38. My review of the records of 41 class members (including Plaintiffs) found that over 70% were assessed by the CDCR as “low risk” meaning that they are highly unlikely to be re-arrested for a violent crime upon release and have low re-incarceration rates. Two of the key reasons why so many of these inmates are assessed as low risk are their age and lack of prior criminal record.

39. Finally, CDCR’s high false positive effect is also evidenced by the failure of CDCR’s use of administrative segregation to reduce prison violence. While it does not appear that CDCR itself has examined whether or not SHU placement of gang-affiliated inmates impacts prison violence, I undertook that review myself. Table 6 shows the relationship between the increased use of the CDCR SHU program and rates of assault on staff and inmates. Clearly, the increased use of SHU, which began in 1988, has not produced lower assault rates in the CDCR. In fact, the rate of assault has been increasing as the SHU populations have increased. The reasons for this trend have been established in this report. The CDCR is incorrectly identifying high risk inmates who require placement in the SHU and the periods of SHU confinement are excessive and non-productive. Obviously the CDCR is “missing” a large number of other inmates and/or gangs who are engaged in assaultive behavior and are not being properly identified by the current or past CDCR SHU selection process.



40. By comparison, states that do not rely exclusively on gang affiliation have shown more positive results. For example, in New York [REDACTED]

[REDACTED] <sup>24</sup> Rather the inmate can only be placed in a SHU due to serious misconduct and for a very limited period of time. Specifically, rule violation 105.13, as described below, only allows for a maximum of 90 days in the SHU for the first offense, 6 months for the second offense and a maximum of 12 months for the third offense. Even more significantly [REDACTED]

<sup>24</sup> Ducart Deposition, Nov. 24, 2014, Exh. 13, Appendix 3 at p. 21.

### New York Department of Corrections and Community Corrections SHU Guidelines

Offense Code	Offense Description	SHU term for first offense	SHU term for second offense	SHU term for third offense
105.13	An inmate shall not engage in or encourage others to engage in gang activities or meetings, or display, wear, possess, distribute or use gang insignia or materials including, but not limited to, printed or hand written gang or gang related material.	0-3 months	0-6 months	6-12 months

#### C. CDCR SHU Reviews

41. Under California's old policies, once a gang-validated inmate is placed in the SHU with an indeterminate sentence, retention in the SHU is still largely controlled by the OCS, but other committees do perform periodic reviews of the SHU inmates. These reviews are largely perfunctory and almost never result in releasing an inmate from SHU status.

42. The Unit Classification Committee (UCC) reviews the inmate's security or custody classification rating on an annual basis (the 839 and 840 forms). The Institutional Classification Committee (ICC) reviews the status of the SHU inmates every 180 days. The ICC is chaired by the Warden (or Associate Warden) and can reverse any decisions made by the UCC. The ICC then reports to the Classification Services Unit located at CDCR's central office in Sacramento. The IGIs can provide information to these two committees on specific cases at any time at their request.

<sup>25</sup> Ducart Deposition, Nov. 24, 2014, Exh. 13, Appendix 3 at p. 24.



43. The UCC and ICC that are responsible for the 180-day and annual reviews are not tasked with determining whether the inmate's past or current behavior indicates that he should remain in the SHU. CDCR's description of its new regulations makes this explicit, noting that the new regulations "will incorporate a 2-3 year reduction in the length of time served in SHU for an STG affiliate *who previously would only be considered for release during a 6 year revolving Departmental Review Board review process.*"<sup>26</sup>

44. Again, this process is unique compared to other state systems where the process for progressing out of a SHU type status lies with the local institution with a final review by the central office classification office. Proper review of SHU placement requires creation of an individualized plan once the inmate is placed in SHU. This plan must involve a clear explanation of why the inmate has been placed in SHU, and exactly what he needs to do, or refrain from doing, to gain release from SHU within a *set* period of time. The inmate should then be reviewed every 90 days to determine if he is meeting program goals. If he succeeds in modifying his behavior for three consecutive reviews, over a 9 month period, he should be released from SHU altogether, or in the case of a step down program for offenders with very serious histories of violence, progress to a step with increased benefits.

45. California's 180-day and annual review cannot be considered proper SHU reviews, because they appear largely *pro forma*, and seem to involve only an analysis of whether or not an inmate wishes to debrief. If not, he is considered to still be dangerous

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<sup>26</sup> See SDP Initial Statement of Reasons, at 6 (emphasis added).

and still belong in SHU. This is *not* a meaningful review of an inmate's behavior (especially given the information above, showing that gang affiliation does not correspond to prison violence), and indicates to me that California, under these old regulations, was not actually trying to help inmates modify their behavior to earn their way out of the SHU.

46. Because the 180-day and annual reviews do not actually involve a substantive analysis of the inmate's behavior, under the pre-2012 SHU system inmates were retained indefinitely until one of two conditions were met: 1) the inmate is found to be inactive at his six-year inactive review and/or 2) he agrees to debrief.

47. The quickest way for an inmate to be released from SHU is to renounce his gang affiliation and provide confidential information to the CDCR on other inmates via the debriefing process. This process takes at least 12 months and requires the inmate to be placed in a protective custody or special needs yard upon release from SHU. The only other way out of the SHU absent death, mental illness, or discharge, is to be declared "inactive."

48. This process is contradictory to "best correctional practices" on a number of fronts. First, I know of no state or federal prison system that places and retains so many inmates in long-term segregation solely due to their gang affiliation and activities. As shown in the New York state example, there must be some documented violent or potentially violent behavior that suggests an ongoing serious threat to the overall safety of the prison system to justify placement and retention in a SHU-like program.

49. Second, the delay of six years between inactive reviews is simply unheard of in other state and federal prison systems. The longest period between meaningful

reviews that I am aware of in other states is a year, and it is my informed opinion that 90 day reviews are essential to truly track inmate progress. There is no scientific basis for using a six-year review timeframe. [REDACTED]

[REDACTED]<sup>27</sup>

50. Besides occurring too rarely, the inactive review is faulty in itself, as the basis for retention in a SHU is not related to the risk of violence to staff and other inmates. Under the old regulations inmates are found “active” and thus retained in SHU for another six years for simply having possession of artwork that the IGI identifies as containing gang symbols.<sup>28</sup> Having artwork is not a “gang behavior” such that it could possibly justify retaining inmates in SHU for many years, even with no rules violations.

#### V. DEFICIENCIES IN THE STEP-DOWN PROGRAM

51. In October 2012, the CDCR implemented a Security Threat Group Management Policy that, among other things, created a SHU step-down program that allows for a different route out of the SHU.<sup>29</sup> That program has now been codified in Title 15.<sup>30</sup> Step-down programs for administrative segregation have been in place in many jurisdictions for a number of years, with the first one being implemented in Ohio, followed by Mississippi, Colorado, Virginia, Massachusetts, Indiana, Washington State, and the Federal Bureau of Prisons. What is quite unique to the CDCR step-down program is 1) the number of phases the inmate must complete (five) and 2) the overall length of the program (at least four years).

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<sup>27</sup> Ducart Deposition, Nov. 24, 2014, Exh. 13, Appendix 3.

<sup>28</sup> Lewis Deposition, Dec. 10, 2014 at p. 156-160.

<sup>29</sup> Giurbino Deposition, Dec. 18, 2014, at p. 41.

<sup>30</sup> [http://www.cdcr.ca.gov/Regulations/AdultOperations/docs/NCDR/2014NCR/14-02/Final\\_Text\\_of\\_Adopted\\_Regulations\\_STG.pdf](http://www.cdcr.ca.gov/Regulations/AdultOperations/docs/NCDR/2014NCR/14-02/Final_Text_of_Adopted_Regulations_STG.pdf) (State of California Office of Administrative Law, Notice of Approval of Regulatory Action: CAL. CODE REGS. tit. 15 (2014)).

52. For the plaintiff class, the CDCR step-down program actually consists of six steps, since these inmates were previously placed in the SHU for an indeterminate sentence and now must agree to participate in the step-down program. Until the inmate agrees to participate, he will remain in the SHU as a non-step-down participant. I know of no other step-down programs in other state correctional systems that require so many phases and such a long period of compliance. The typical step-down program consists of three to four phases with the opportunity to move to the next phase within 90 days. The longest step-down program I am aware of is operated by the BOP and consists of four phases that would require 18-24 months in total to complete.<sup>31</sup> There is no scientific evidence or best practices that support the CDCR model of five phases and a minimum of four years.<sup>32</sup> Implementation of such a program will ensure excessive and unwarranted periods of confinement within the SHU.

53. Another deficiency in the step-down program stems from the way it is being applied to SHU inmates who have already been discipline free for many years. To require them to complete a minimum of at least four more years in the SHU is unwarranted. Such inmates should be considered for immediate placement in Step 4 (the least restrictive SHU conditions) or the general population. It is recognized that some type of assistance will be required (counseling and special supervision) given the extraordinary time housed in the SHU program.

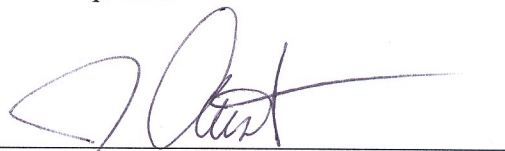
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<sup>31</sup> McGinnis, Kenneth, James Austin and Karl Becker. December 2014. *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*. Arlington, VA: CNA.

<sup>32</sup> For a review of segregation step-down programs see McGinnis, Kenneth, James Austin and Karl Becker. December 2014. *Federal Bureau of Prisons: Special Housing Unit Review and Assessment*. Arlington, VA: CNA.

## Summary Opinions

1. The sole use of gang affiliation for placement and retention in the SHU is a “status based” rather than “behavior based” system, that results in excessive false positives, whereby individuals who actually present no major management problem are retained in SHU for excessive periods of time.
2. The methods used by the CDCR for identifying inmates as having a gang affiliation to justify placement and/or retention in the SHU are inadequate and have not been scientifically validated.
3. The six-year inactive reviews to determine if SHU prisoners should be retained greatly exceed state and BOP practices and have not been validated.
4. Most of the class members should be reclassified as Level IV or Level III and placed in the General Population.
5. The SHU policy has not had a positive impact on the overall safety for inmates and staff within the CDCR.
6. The recently implemented step down program does not correct these problems. It requires inmates to spend excessive periods of time in each phase and in an excessive number of phases.



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James Austin, Ph.D.

Dated: March 13, 2015

# EXHIBIT A

## **List of Materials Reviewed**

1. Text of Proposed Regulations-Re-Notice; California Code of Regulations, Title 15, Division 3. Proposed Regulations issued in January 2014 and revised in June 2014. (June 20, 2014);
2. Initial Statement of Reasons for proposed changes to California Code of Regulations, Title 15, Division 3. Proposed Regulations issued in January 2014 (January 2014);
3. Notice of Change to California Code of Regulations, Title 15, Division 3 issued in January 2014 giving reasons for June 2014 revisions. (June 2014);
4. Chart serving as an index to Title 15 Gang Policies organized by policy area, key elements, and source references. Source references included Title 15 and CDCR Title 15 and Department Operations Manual Sections;
5. California Code of Regulations: Title 15, selected pages of Title 15 including all references to gang policies. (January 1, 2014);
6. CDCR Memorandum memo describing the Department Review Process (DRB). (August 9, 2013);
7. Letter from Defense including the results of the first 134 DRB reviews as of the date of the letter, showing step each prisoner was placed in. (February 14, 2014);
8. DRB documents for Plaintiffs Franklin, Johnson and Troxell;
9. Plaintiff' Second Amended Complaint. Case No: 4-09-cv-05796-CW;
10. California Code of Regulations, Title 15, Division 3 Endorsed Approved by Office of Administrative Law, October 17, 2014;
11. Plaintiff Digest of the Security Threat Group Regulations approved and adopted October 17, 2014;
12. California Department of Corrections and Rehabilitation. Staff Orientation Booklet. Step Down Program;
13. Form 839s and 840s for plaintiffs and 49 class members
14. A chart showing the dates of birth for plaintiffs and 49 class members
15. Defendants 2/11/15 Production, RUIZ 37518-37519
16. Pelican Bay Chronic Care List
17. Sample CDCR validation forms (CFILE003031, RUIZG013752)
18. Excel report on SHU populations between 1987 and 2014 (compiled from publicly available CDCR reports)
19. Excel chart of plaintiffs' and class members' disciplinary histories, compiled from C-Files produced by Defendants
20. STG Meeting Agenda (RUIZ037502-37511)
21. STG Survey Roll-up (RUIZ037512-37517)
22. Deposition Susan Hubbard, Oct. 29, 2014
23. Deposition of Clark Ducart, Nov. 24, 2014 & Exhibits 13, 15
24. Deposition of Greg Lewis, Dec. 10, 2014 & Exhibit 13
25. Deposition of George Guirbino, July 18, 2014
26. Deposition of George Guirbino, Dec. 18, 2014
27. Deposition of Jeremy Frisk, Sep. 12, 2014

# EXHIBIT C



**CONFIDENTIAL**

Exhibit C: Prisoner Pseudonyms

