RETHINKING PAROLE FOR LONG-TERM SHU PRISONERS

I. Major changes are taking place in California corrections[1], mirroring trends elsewhere. The Board of Parole Hearings (BPH) will want to ensure that its policies and practices are also aligned with these changing trends.

A. One sweeping change in state prison operations is the end of CDCR's indeterminate gang lockup program. After 30 years of trying to address the issue of prison gangs by locking prisoners up indefinitely unless and until they "debrief" (inform on other prisoners), the Department has implemented a significant shift in policy and practice:

1. Thousands of prisoners have been transferred to general population after years, in some cases decades, in SHU.[2]

2. For the most part, long-term indefinite SHU terms can no longer be imposed in California.[3]

3. SHU terms must now be based on behavior, not on perceived status.[4]

4. Prisoners no longer have to become informants to get out of SHU.[5]

5. CDCR is joining many other states in greatly reducing its use of solitary confinement.

B. We are concerned that BPH policies which developed to align with CDCR's discontinued policies have not changed to reflect and support the State's current direction. Prisoners who were in SHU under these discontinued policies find that:

1. Parole panels and Forensic Assessment Division (FAD) staff are still telling them they must debrief to be found suitable, (despite no connection to SHU confinement or suitability criteria).[6]
2. Parole panels and FAD staff are penalizing them for long SHU terms almost universally condemned as unconscionable or even unconstitutional, while discounting the accomplishments and progress prisoners achieved while in SHU. [7]
3. Parole panels and FAD staff are penalizing prisoners for participation in peaceful hunger strikes that led to CDCR's dramatic policy changes.[8]

C. What are the specific concerns with these BPH practices?

1. The CDCR policies they were based on were a failure by every reasonable measurement.
2. They do not reflect the Board's own standards of suitability.
3. They are out of step with societal and community standards, and with the State of California's direction.

II. How Did We Get Here?

A. The Incremental Development of BPH Policies

1. SHU Housing:
   a. The Board traditionally viewed SHU time as a meaningful reflection of bad behavior. Before CDCR's mass gang lockup policy, even administrative SHU was tied to behavior.
   b. Before 1985, SHU terms were determinate or limited in time. With a few rare exceptions, no one stayed in SHU for many years, and certainly not decades.
   c. When CDCR initiated its gang lockup policies in 1985, it imposed a new meaning and a new set of facts on SHU time – it became a permanent fact of life for thousands of prisoners, many with no disciplinary issues. However, the Board continued to view it as it always had – a meaningful reason to find unsuitability.[9]
   d. Prior to the gang lockup program, the lack of programming, loss of good time and other disabilities of SHU time were temporary (and less onerous – family contact was rarely restricted for SHU prisoners). Within a reasonable time, the prisoner had another opportunity to demonstrate progress. Under CDCR's gang lockup policies, these disabilities were allowed to accumulate for an unconscionable period of time for reasons often beyond the control of the individual prisoner.[10]

2. Debriefing:
   a. CDCR developed its "debrief or die" policy in the mid-1980s. Unless a prisoner debriefed, he could not get out of SHU.[11] As a result, the unwillingness to debrief became synonymous with long-term SHU housing.
   b. Because of the historical tie between SHU and bad behavior, as described above, the Board wanted prisoners to get out of SHU before being found suitable; thus, the Board started advising prisoners to debrief so they could get out of SHU.[12]
   c. While CDCR viewed the unwillingness to debrief as evidence of continued gang activity, in many cases Board panels conceded there was no evidence of gang activity, yet still counseled prisoners to debrief to get out of SHU.[13]
   d. Before 1990, the Board never asked anyone to become an informant in order to be suitable for parole. Today, the Board is asking prisoners, even those designated "inactive" (and in some cases, even non-validated prisoners) to inform and go into protective custody in order to be suitable for parole.[14]

3. Participation in the hunger strikes:
   a. The hunger strikes carried out by thousands of CDCR prisoners in 2011 and 2013 were instrumental in leading to reform of failed policies that were grossly out of step with traditional correctional philosophy and with current ways of thinking about corrections.[15]
   b. The issue raised by the Board about prisoner participation generally relates to rule violations issued by CDCR for participation in the hunger strikes, but also has been viewed as indicative of gang affiliation or sympathy.[16] This may align with CDCR's media posture about the hunger strikes, but is inconsistent with its view of the 115s in making custody decisions, and with recent case law addressing the legality of the 115s.[17]

B. Why did CDCR's policy of indeterminate lockup and debriefing fail?

1. It was a system that operated, contrary to accepted correctional philosophy, without regard to individual behavior.

    a. Prisoners who debriefed progressed to the highest privilege level regardless of how bad their behavior was before debriefing;[18] they remained there regardless of bad behavior after debriefing.[19] They remained classified as "dropouts" regardless of new gang-related behavior.[20]
    b. Prisoners who did not debrief remained in SHU at the lowest privilege level regardless of significant clean time and efforts to program within the confines of SHU.[21] They remained gang validated in spite of no meaningful evidence of gang or criminal activity.[22]

2. The lack of a behavioral-based reward system resulted in a system plagued by increased management problems, recidivism and the growth of new gangs.
    a. Violence in California prisons has increased over the course of this program, as has the recidivism rate[23];
    b. Widespread media reports (L.A Times, major network news and others) now describe the growth of gangs in CDCR as unchecked, with the greatest expansion occurring in the SNYs (Special Needs Yards, formed by CDCR to house "gang dropouts" – those who got out of SHU by debriefing). According to the FBI and other sources, gang activity and violence is bleeding out from these yards onto the streets.[24] According to news reports and correctional sources, the SNYs have experienced unprecedented numbers of riots and injuries over the last decade or two.[25]
    c. CDCR housing is a growing patchwork of protective yards, with growing numbers of potential enemies who have to be separated for safety.[26]

3. As a result of its flawed gang validation and debriefing policies, CDCR vastly overused expensive security housing by wrongly tagging hundreds of prisoners as security threats, and obtained virtually no reliable or usable intelligence on prison gangs and criminal activity.

    a. Validations were based largely on the unverified allegations of prison informants fueled by an intense desire to escape the SHU, unrelenting pressure from gang investigators and, in many cases, more questionable motives.[27]
    b. Informant allegations are notoriously unreliable and the use of them in many contexts has been greatly limited by law, policy and practice.[28]
    c. The forms of information and evidentiary standards used by CDCR to validate prisoners have been widely criticized and found wanting by the courts and others.[29] CDCR's gang investigators have foregone real investigative work for decades.
    d. The flawed processes of CDCR provide a strong incentive to lie, and in many cases require prisoners to commit felony perjury.[30]

4. CDCR can produce no evidence supporting the effectiveness of its three-decade experiment with gang lockup.[31]

5. CDCR has been inundated with litigation over its use of solitary confinement. The litigation has not only cost the state millions, but has opened CDCR to continuing civil liability for erroneous and unsupported gang identification and validation, and for the unconstitutional practice of imposing long SHU terms based on the refusal to debrief.[32]

6. The cost of corrections escalated greatly, based in part on the gross overuse of solitary confinement, which adds at least $20,000 a year per prisoner. This contributed significantly to the state's budgetary problems.[33]

7. Long term isolation in SHU inflicted well-documented psychological pressure on prisoners, leading to increased anxiety, panic, paranoia, memory and concentration problems, agitation, suicidal thoughts, mounting anger and sleep disruption. Prisoners in SHU for more than a decade experienced additional symptoms of self-isolation, emotional numbing and despair.[34] Some prisoners were unable to withstand these pressures and experienced irreversible psychological damage.[35]

8. The use of long-term SHU confinement has come under almost universal condemnation as both inhumane and counterproductive – from Supreme Court justices, the President, the United Nations and the Pope;[36] from the courts,[37] professional organizations such as architects, psychologists and health care workers;[38] and from the legislative branch, which called it "aberrant."[39]

9. Other major states were far ahead of California in discontinuing similar failed policies.[40] California's policies were generally viewed as more extreme and harsh than other states.[41] CDCR's debriefing policy was always out of step with the majority of states and the federal system.[42]

C. What is the effect of CDCR's change in policy?

1. Some in CDCR warned that the release of so many prisoners from long-term SHU would result in a "bloodbath" in the general population;[43] what has actually happened?

    a. At the time of the *Ashker* settlement, CDCR Secretary Jeffrey Beard reported that 1100 prisoners had already been released from SHU in a pilot program "and there have been minimal problems."[44] This success paved the way for the settlement.
    b. Over 1400 more have been released since then; by all reports, large numbers of them are adjusting, programming, following the rules, and enjoying the fresh air and their first real human contact in years or decades.
    c. Significantly, many are exerting a calming influence on previously tense general population yards, adhering to the Agreement to End Hostilities developed after the first hunger strikes.[45]

d. Preliminary reports indicate disruptive incidents have decreased in general population yards where these prisoners are placed.[46]

2. CDCR operations are gradually returning to a more rational behavior-based system of rewards and privileges, with more emphasis on opportunities for positive programming. While problems remain, and some elements resist change, the state's clear direction is to move toward these more tried and true correctional practices.

III. How Should BPH Practices Change to Re-align with Changes in State Corrections?

A. Long-Term SHU Housing

1. The Board needs to develop an alternative framework for reviewing prisoners who have been subject to long-term SHU under CDCR's misguided policies. Judging them through the same lens as the average prisoner is inappropriate for many reasons:

   a. As stated above, long-term SHU under CDCR's gang-lockup/debriefing policies was not a traditional behavior-based punishment, and did not correlate with an individual's behavior and rehabilitation.[47]
   b. Long-term SHU for these prisoners resulted from widely condemned and discredited policies that were found by at least one court to be unconstitutional.[48]
   c. Many of these prisoners have been incarcerated far beyond any reasonable base term under the Board's matrix; many are far beyond the age that is considered an important determinant of suitability under accepted correctional theory. Many have developed health problems that will cost the state millions of dollars over time. Requiring them to demonstrate many more years of progress to make up for lost time is in essence a sentence of life without parole.
   d. Many of them have made extraordinary efforts to maintain a positive direction and influence within the confines of long-term SHU, overcoming formidable state-created obstacles:
      (i) They obtained and completed some form of programming within a system designed to prevent it;
      (ii) They remained disciplinary-free in a system providing no incentive or reward for it;
      (iii) They maintained strong family support in a system designed to destroy family ties;
      (iv) They remained psychologically stable and resilient in spite of a system known to inflict psychological damage.
   e. CDCR policies prevented SHU prisoners from receiving laudatory chronos and other positive documentation, while maximizing negative paperwork.

2. In addition to taking into account the special circumstances of these prisoners' long SHU terms, the Board needs to ensure they are reviewed based on individual factors rather than broad general assumptions about the long-term SHU experience. These assumptions can

create an unfair bias that leads to determinations of unsuitability unsupported by the facts. For example, panels are:

a. Assuming prisoners had no programming in SHU despite the fact that many engaged in forms of programming available to them in the restricted SHU environment;[49]
b. Assuming family support was inevitably eroded, despite evidence of strong current family support;[50]
c. Discounting discipline-free time in SHU based on the assumption that the restrictive environment somehow prevented misconduct, despite clear evidence to the contrary;[51]
d. Assuming a lack of positive documentation is evidence of a lack of positive behavior, given CDCR's manipulation of file documentation;[52] and
e. Assuming psychological fragility where it is not warranted. [53]

B. Debriefing

The BPH should discontinue any consideration of debriefing, not only as a factor in determining suitability but as the basis for any negative implications regarding a prisoner.

1. Debriefing and questionable gang validations no longer determine the long-term static custody – SHU housing – that automatically led to continuous parole denials.

2. Debriefing itself does not have any rational relation to statutory suitability factors.

   a. As noted above, debriefing is not tied to any record of positive change prior to debriefing, or improvement in behavior after debriefing; SNYs, where prisoners who debrief are housed, have become significant management problems, spawning new violent gangs.[54]

   b. Debriefing may be inversely related to the development of insight into prior criminality; it is a sanctioned way to avoid accepting responsibility and understanding past wrongs, and encourages rationalization of personal actions.[55]

   c. As noted above, debriefers were and are often under pressure from corrections and law enforcement for perjured testimony. The faulty debriefing process creates an incentive to lie in order to successfully debrief.

   d. Because CDCR takes the position that debriefers are under threat of violence from those they inform on, traditional sources of support on parole may be fearful and hesitant.[56]

   e. As noted above, the unwillingness to debrief does not correlate with negative behavior or attitude. Many long-term SHU prisoners have many years of discipline-free behavior with no evidence of any gang or criminal involvement, and have had a positive impact on general population yards.

3. The more recent Board position (since release of *Ashker* class members from SHU to general population) that success on an SNY is preferable to success in general population is contrary to all historical precedent and lacks any convincing rationale. [57]

4. The debriefing requirement is cruel and callous and shows a deliberate indifference by the BPH to known safety risks, psychological issues and corruption, including forced perjury.[58]

5. Sadly, the BPH and the FAD are both relying on the questionable and discredited confidential information disclosure forms previously produced by CDCR's gang staff to validate and retain prisoners in SHU, to assign risk ratings and deny parole to the same prisoners.[59]

C. Participation in the Hunger Strikes

1. The Board should not penalize prisoners for their participation in the hunger strikes leading to CDCR's reform of its gang lockup policies.

2. Rule violations for participation should not be considered equivalent to other rule violations; participation is not evidence of gang ties or activity.

    a. In reviewing prisoners for release from SHU after the *Ashker* settlement, the state did not use CDCR 115s issued for participation in the hunger strikes against prisoners in determining their eligibility for release to general population.
    b. A court recently ruled that a prisoner's participation in the hunger strikes was not disruptive to the institution and its essential functions, and therefore was not an adequate basis for a CDCR 115.[60]
    c. Since over 30,000 prisoners participated in the hunger strikes at one time or another, it cannot be reliable evidence of gang affiliation or activity.

3. The hunger strikes were in the time-honored tradition of peaceful, non-violent protest that is the hallmark of great political and social movements throughout American and world history.[61]
    a. The goal of these strikes was to end a practice that has been roundly condemned (see section II.B.8 above) and which CDCR has now abandoned. As former Secretary Beard himself said, the resulting settlement "moved California more into the mainstream of what other states are doing," adding that "[w]e don't believe that its good for anybody to keep them locked up for 10, 20, 30 years."[62]
    b. The hunger strikes were initiated as a last resort, after years of filing 602s and appeals to the courts, and after appeals to lawyers, the legislature and the media were unsuccessful in drawing attention to the issue of indeterminate SHU confinement.

D. Continuation by the Board of practices that align with and support policies and practices now abandoned by the CDCR exposes the Board to the same liabilities, discredit and condemnation that the CDCR has experienced.

IV. How does BPH Psychological Staff (FAD) improperly contribute to and support these BPH policies?

A. By improperly using them as indications of a "criminal mindset" and as the basis for a diagnosis of personality disorder or psycho-pathology.[63]

B. By improperly using them as evidence of continuing violence potential.[64]

C. By improperly assuming a prisoner's psychological development, maturity and insight remained frozen in time for the duration of his indeterminate SHU term.[65]

D. By using CDCR confidential informant reports for risk assessment without disclosing this fact, or without disclosing the content, date and other relevant information to the prisoner with an opportunity to respond.[66]

E. FAD evaluators' practice of using their professional status to support the CDCR's former gang lockup and debriefing policies runs against the tide of many psychiatric and health care professional organizations that have taken stands against just such practices.

F. Template language for Comprehensive Risk Assessments needs to be changed; Forensic Assessment Division staff needs to be educated on new standards.

This outline and the End Notes were prepared March 2017 by Pamela J. Griffin, Attorney at Law, on behalf of the Prison Hunger Strike Solidarity Coalition, a coalition of California prisoner rights organizations, family members and activists.

END NOTES

(Some notes below refer to CDCR prisoners with an alphabetical designation. Those with a plain alphabetical designation have provided materials to PHSS for use in this paper and other projects. References to prisoners with a letter followed by "-1" are from publicly available sources.)

[1] Cases challenging conditions and health care have resulted in policies intended to reduce California's prison population. *See Madrid v. Gomez*, 889 F.Supp. 1146 (1995) (health care in Pelican Bay SHU constitutionally inadequate; SHU conditions unconstitutional for mentally ill and mentally vulnerable prisoners); *Coleman v. Brown*, Civ No. S-90-0520-LKK-JFM (E.D.Cal. 1995) (CDCR delivery of mental health care violates the Eighth Amendment); *Plata v. Brown*, No. C01-1351 TEH (N.D. Cal. 2004) (CDCR medical care constitutionally deficient). The *Coleman/Plata* cases were combined under a three-judge panel that, in 2009, ordered reduction of the prison population to remedy these violations, as well as health care violations under *Madrid*. These cases also led to CDCR's Elder Parole policy. Various Supreme Court and California cases led to new policies and legislation for youth offender parole. *Graham v. Florida* (2010) 560 U.S. 48, *Miller v. Alabama* (2012) 567 U.S., *People v. Caballero* (2012) 55 Cal.4th 262, *People v. Gutierrez* (2014) 58 Cal.4th 1354. *See also In re Nunez* (2009) 173 Cal.App.4th 709.

Many cases have challenged various aspects of CDCR's gang lockup and debriefing policies. *See Castillo v. Alameida* No. C-94-2847-MJJ (N.D.Cal.) (litigation pressured CDCR to provide an "inactive" alternative to debriefing; 2004 settlement agreement set higher standards for information used in gang validation); *Griffin v. Gomez*, No. 98-21038, Slip Op. (N.D. Cal 2006) (prisoner's 20-year retention in SHU unless he debriefs violates the 8th Amendment); *Lira v. Cate*, No. C 00-905 SI (N.D. Cal 2009) (civil liability for gang validation which was not supported by accurate or reliable evidence and violated procedural due process rights). These and other challenges culminated with *Ashker v. Brown*, No. C-09-05796 (N.D. Cal.), a class action challenging all aspects of the policy, from the processes for validating prisoners as gang members and for active/inactive reviews, to the debriefing requirement and long-term SHU lockup. In September 2015, CDCR signed a settlement agreement with the *Ashker* plaintiffs, dramatically changing CDCR's use of solitary confinement and administrative segregation.

[2] In September 2015, then-Secretary Beard reported that in "the last two years, the state has removed about 1,100 inmates from solitary confinement who showed no evidence of gang activity" and "expects 1,800 of the 2,800 prisoners currently in long-term isolation to work their way into the general prison yard over the next two years." *See* St. John, "California Agrees to Move Thousands of Inmates Out of Solitary Confinement," *Los Angeles Times*, September 1, 2015. "Some of those inmates have been in isolation, without significant human contact, for more than three decades." Id. As of January 28, 2016, CDCR reported 2,211 people held in SHUs and 2,643 in ASUs; this is down over 50 percent since October 2012, when there were 3,923 individuals in SHU and 7,007 in ASUs. "California Prisons Release 'Gang Affiliates' From Solitary Confinement, Costs and Violence Levels Drop," *Solitary Watch*, February 29, 2016. As of June 2, 2016, CDCR reported that an additional 1300 prisoners have been transferred to general population. As of July 2013, the Office of the Inspector General reported that there were 23 prisoners who had served more than 25 years in Pelican Bay SHU, 84 who had served more than 20 years, 106 who had served more than 15 years, and 197 who had served more than 10 years. Another 574 had served more than 5 years in SHU. Testimony of Robert Barton, Inspector General, Joint Legislative Informational Hearing On Solitary Confinement, October 9, 2013.

[3] *See Ashker* Settlement Agreement, section III.F.32 ("Notwithstanding Paragraph 29 above, CDCR shall not house any inmate within the SHU at Pelican Bay State Prison for more than 5 continuous years"); section III.E.29 (extraordinary circumstances justifying indeterminate administrative SHU terms; CDCR expects only a small number of prisoners in this category).

[4] *See Ashker v. Brown* Settlement Agreement, section III.A.13. ("CDCR shall not place inmates into a SHU, Administrative Segregation, or Step Down Program solely on the basis of their validation status."); section III.A.18 ("CDCR shall modify its Step Down Program so that it is based on the individual accountability of each inmate for proven STG behavior, and not solely on the inmate's validation status or level of STG affiliation").

[5] *See* generally, Title 15 §3378.3, Security Threat Group Step Down Program. *See also, Ashker v. Brown* Settlement Agreement, section III.C.25 ("If an inmate has not been found guilty of a SHU-eligible rule violation with a proven STG 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"); and C.26 ("During the review described in Paragraph 25, any inmate housed in a SHU program for 10 or more continuous years who has committed a SHU-eligible offense with a nexus to an STG within the preceding 2 years, will be transferred into the RCGP for completion of Step Down Program requirements").

Although CDCR now offers alternatives to debriefing for getting out of SHU, debriefing is still the fastest and easiest way out of SHU regardless of behavior, and results in greater privileges than other statuses. *See* 15 CCR §3378(c) and (d) (debriefing prisoners automatically assigned to privilege group A1A). SNY prisoners get first priority for programs, jobs and other paths to parole. It remains the only realistic way for a prisoner to remove his gang validation. *See* Board of Prison Hearings meeting, December 10, 2012, statement of George Giurbino (the only way a prisoner can remove the "gang" label and validation is to debrief); *Cf.* Title 15 §3378.8 (validated gang member may have status terminated only after 11 consecutive years with no gang-related rule violations *and* no additional "source items" totaling 10 points).

[6] See examples below. FAD psychologists generally avoid using the term "debrief" in Comprehensive Risk Assessments (CRAs); instead they refer to an unwillingness to disassociate and similar terminology.

- Inmate A, Hearing 2015: "You've addressed the gang component of the life crime as you have debriefed."
- Inmate D, CRA 2016: [Prisoner] claims he wishes to disassociate, "but he has not made a strong statement that he is breaking all ties from his former gang" . . . . "He claims that he has dissociated from the gang although he has never made a compelling statement that he has cut ties with his group."
- Inmate E, CRA 2016: Deemed high risk, based on: "gang affiliation and an unwillingness to acknowledge that affiliation at this time."
- Inmate F, CRA 2015: Deemed high risk based on, among other things, "failure to acknowledge gang status."
- Inmate G, Hearing 2016: "You have a criminal and gang mentality. . . the Panel sees that this mentality that you have is you know what, . . . I'm not going to debrief because I don't want to be known as a snitch. These are all the same codes that demonstrate an allegiance to this behavior. . . . I tell you, you're going to die in prison with that mentality."

- Inmate H, CRA 2016: High Risk rating based "significantly on his current validation as a prison gang member and his reluctance, inability and unwillingness to disassociate." (Prisoner reported that in the interview, the psychologist "tells me that I have to debrief, the Board will not parole a non-SNY validated person.")
- Inmate H, Hearing 2016: "You haven't basically denounced the gang yet . . . There's nothing documented that you've been through any kind of debriefing process, or that you're no longer affiliated." "All this stuff [parole plans] globally is great, but if you haven't done the basic thing, then it really doesn't mean a whole bunch."
- Inmate I, Hearing 2016: This hearing "shows your criminal mindset . . . that you are unable or unwilling to disclose information about who you are, what you've been doing, what you're involved in in prison." Until you can show you have "rid yourself of gang ties, gang activity, that type of behavior and criminal mindset," you're still a danger and will continue to be "until all that information has been released."
- Inmate J, Hearing 2015: "He participated in the recent hunger strike and refuses to debrief which suggests that he continues to have a criminal mindset creating a connection to current dangerousness."
- Inmate M, Hearing 2016: "So it's really truly unclear whether you have disassociated with gangs or not because there's nothing that shows in the file that you've done any kind of disassociation, debriefing." "You still have a criminal mentality. You had it then and you have it today because you don't want to be a rat, because it's part of your moral makeup that you not debrief."
- Inmate N, Hearing 2016: "You could have fast-tracked this a long time ago. .. There was a way for you to do that. Why didn't you debrief?" Prisoner: "Because I didn't want to do it. And I didn't have to do that. The courts say you don't have to do that." Commr: "You don't have to do that. . . . That's more criminal thinking, that's why." "You didn't make that choice. You made a choice to stay where you were. And so the consequence is that you stayed longer and longer in prison."
- Inmate O, CRA 2016: "[Prisoner] has universally declined to discuss with evaluators his status as a gang member or his relationship to the [gang], as he did during the current interview." Conclusion, High Risk. Although prisoner has made "notable progress in the last year or so since being released from the SHU," "his risk has not been ameliorated since 2009 since he continues to withhold valuable information such as his current/past ties to the [gang] and refuses to discuss how those relationships have impacted his risk for engaging in violence."
- Inmate P, Hearing 2016: "Is there a reason you didn't debrief? . . . . Because when you debrief, you can't go back." Prisoner: "Right, and I have no intention of going back to them or anything." Commr: "All right, you say that, but I'm just signaling to you . . . there's strength in actions that don't have the strength in words . . . You're telling me you're tired, but I don't see debriefing. I don't see finality to it." "Guys that want to fast track it, they SNY, they debrief, they SNY."

[7] Examples:

- Inmate F, 2015 hearing: In hearing, DA focuses on lack of programming, understanding it's difficult if you're in SHU; in CRA, psychologist notes limited opportunity to program given SHU placement since 1998.
- Inmate G, 2016 hearing: ". . . you have a criminal and gang mentality. There's no other way around that. Part of it is institutional fault. When you place an individual in SHU for 5, 10, 15 years, it changes a man. It changes how that man thinks. And to a certain degree, you have to reprogram yourself. I understand that."

- Inmate C, 2016 hearing: "You have spent some 26 years in the SHU and you have been limited in the amount of programming you have engaged in."
- Inmate F, 2015 Hearing: "Although I know you have a – don't have a lot of opportunities here, but you could have done more work. You've been here for a long time. You could have read books. You could have done book reports."
- Inmate J, 2015 Hearing: Found unsuitable based on, among other things: "He was released from the SHU in May of 2014, 20 years after his SHU term began."
- Inmate K, CRA 2016: Diagnosis of antisocial personality disorder based on history of misconduct and "a lack of evidence of a sustained period of positive behaviors when not in a controlled setting." "Recent release to mainline may mark a positive change in the inmate's programming and general outlook."
- Inmate K, Hearing 2016: "Obviously, you don't have a lot of work history being in the SHU as long as you were. . . . Didn't see any vocational training, probably because of your custody level and where you've been. . . ." "You don't have a long history of positive rehabilitation at this time. I recognize the fact that you were in the SHU for a long period of time."
- Inmate N, Hearing 2014: [Despite extensive self-study and correspondence courses in SHU] "Now, the thing of it is, going through your paperwork and through your Board Report specifically, it is consistent that you've been in SHU. . . . I mean, you know, the programming we can all agree is limited in the SHU." "Well you've gotten older and you haven't done much in prison." Prisoner: "What about my education . . .?" Commr: "You can't do anything when you're in – when you're in SHU you can't program. You can't demonstrate that you can get along with other people, that you can mix among other races, that you --" Prisoner: "That's not my fault." Commr: "--that you can communicate, that you can solve problems without using violence, that you can – that you've changed, basically. There's no way to demonstrate that."
- Inmate O, CRA 2016: Being in groups like Criminon has been beneficial, "but his programming in such groups goes back only a couple of years, at most. Prior to that he was in SHU and was not involved in self-help or other programming."
- Inmate P, Hearing 2016: "Let's face it, you just got out of the SHU… Okay, so you have limited, and you've been doing some pretty good work here the last year, you know." Prisoner: "With the limited resources that I've had -- I think I've done pretty good." Commr: "Well that's fine, that's fine. But in the conditions in which you set the traffic lane you're traveling in – you've got a longer road than some people who have the fast track. They get a little pass that you don't."

[8] *See* the following examples:

- Inmate B, 2014: Petition to Advance denied based solely on rule violation for participation in hunger strike.
- Inmate E, CRA 2016: "In 2013 the inmate engaged in a hunger strike, demonstrating an ongoing willingness to disregard institution rules and engage in antisocial behavior as a means of trying to advance his cause or wishes."
- Inmate F, CRA 2014: No clear indications of improved behavior, given recent RVR for promoting gang activities [hunger strike – no other 115s since 2000]. "There is evidence [prisoner] continues to harbor violent ideation and intent as evidenced by a more recent disciplinary action for promoting gang activities." Found High Risk based on, among other things, "shows no interest in following a positive behavioral course . . . (continued accrual of disciplinary actions)."
- Inmate F, Hearing 2015: Commr: "You've already admitted you were involved in a hunger strike that you weren't written up for. So for you to say you've been good for five years is not

true." Prisoner: "That was a peaceful protest to begin with. I didn't hurt anybody." Commr: "That's prison politics, sir. That's prison politics." Decision: Mainly, the prisoner was not honest with the panel about in-prison behavior – "hunger strikes, we finally got you to admit they're involved in politics."

- Inmate G, Hearing 2016: Addressing misconduct in prison, Panel notes "although your last 115 is now 2013 but again, that shows allegiance to gangs. Hunger strike in 2013, hunger strikes in 2011."
- Inmate H, Hearing 2016: "You got a 115 for hunger strike in 2014, two years ago, still devoted to gang agenda, still deeply involved in prison politics, weren't you?" Prisoner: "The gang stuff is behind me." Commr: "Yeah, less than two years ago, you participated in a hunger strike."
- Inmate J, Hearing 2015: "He participated in the recent hunger strike and refuses to debrief which suggests that he continues to have a criminal mindset creating a connection to current dangerousness."
- Inmate K, CRA 2016*:* RVR in 2013 (hunger strike) "suggests some fairly recent behavioral instability."
- Inmate K, Hearing 2016: "Most recent 115 was in 2013 for hunger strike . . . The hunger strike was against the rules, it's breaking the law, right? So why'd you do it?" Prisoner: "Because it was the only means available." Commr: "So it was a means to an end?" Prisoner: "It was a peaceful means." Commr: "Okay. Well, you know, the ends justify the means and that's a justification that terrorists use, right?"
- Inmate O: CRA 2016: "Although his last act of violence may have been long ago (1996), ongoing gang involvement and activity (as evidenced by RVRs in 2012-2013) [hunger strikes] could certainly indicate an increased risk for future violence." Conclusion, High Risk.
- Inmate P, Hearing 2016: "You're still resorting to that criminal minded thinking, adhering to the gang rules about, you know, we're going to do this hunger strike or we're going to do this kind of thing, you know." Significant weight to serious misconduct in prison. Most recent was 2013 (hunger strike), with two elements: impulsivity and criminal-minded thinking – same elements we saw in the life crime. Here as late as 2013 you're still susceptible to peer pressure, this whole hunger strike thing. It's all supporting this criminal-minded thinking stuff that's going on and actually gives weight and actually gives, in their mind, validation in the prison gangs. . . . This is what makes you a current danger to society."

[9] For example:

(a) Inmate L, Hearing 1994: Commissioner goes through history of prison disciplinary infractions (none in eight years). "Now, all these incidents caused you to be locked up in the special housing unit, management control, because you present a risk to the inmate population. And that's the reason you haven't been able to parole, correct?" Attorney: "Well, now it's mainly for the last ten years solely because of his purported membership in the [gang] over that period of time that we're talking about." . . . "For the last several years, subsequent to [last 115], there's no allegation he's been involved with anything." Commr: But the question I asked him is that the reason for administration to place him – Prisoner: "I don't believe that's why they're doing it now. But early on, yes that's what it was. Now, it has nothing to do with that."

(b) Inmate L, Hearing 1996: "As far as your SHU term goes, that's just not something that the Board has anything to do with, really, and it's between you and the CDC and good luck to you to work it out." . . . "And we understand that you can't program the way we want you to when you're in SHU and you get into a Catch-22 situation, so whatever it's going to take for you to get out of SHU – that's up to you." Prisoner: "Is it even feasible that a person – let's say in my situation,

that I follow everything except that the SHU just is not something that CDC's going to allow me to get out, is it even possible for the Board to find me suitable while I'm in SHU?" Commr: "I can only speak for myself. I would have a serious problem letting anybody out of the SHU."

(c) Inmate L, Hearing 2001: "Nobody gets a date until they can be found suitable and it's extremely difficult to do the things you need to do to be found suitable from Pelican Bay."

(d) Standard Parole Board scripts used throughout the 90s and beyond consistently told SHU prisoners to reduce their custody "so that program opportunities will become more available."

[10] *See* the following:

(a) Davis Forsythe, "Gangs in California's Prison System: What Can Be Done?" January 27, 2006, p.9 ("Many are concerned, however, that this approach fails to take into account the fact that inmates housed in these high-end facilities are receiving little or no programming, and are accordingly unlikely to show improved behavior when they are transferred directly from SHU to freedom on completion of their sentences.")

(b) *CDCR's Proposed New Policies on Inmate Segregation: The Promise and Imperative of Real Reform*, Assembly and Senate Public Safety Committees Joint Informational Hearing, February 11, 2014: "Equally important of course in terms of outcomes is not just whether or not someone is violent, but whether they are able to flourish and become independent once they leave. So the fear is—one fear I've had—is even where outcomes don't show for example violence, is that person able to hold a job or are they now so debilitated that they are reduced to relying on state support once they leave prison?"

(c) Inmate L, parole hearing transcripts from 1991 through 2001:
- 1991: "Prisoner has not completed necessary programming which is essential to his adjustment and needs additional time to gain such programming."
- 1994: "SHU housing has made your program participation nonexistent." "So since the last hearing there's basically nothing that much changed in terms of your program status." … "No formal education classes since then." Prisoner: "No, they don't allow it in SHU." Commr: "Any evidence for participation in some kind of self-help program?" Atty: "Just that he tried to do that also by having his own program done in the prison. And he was refused that opportunity by the warden."
- 1996: "Has programmed in a limited manner and has not participated in sufficient beneficial self-help and therapy programming." Yet: "The prisoner should be commended for the programming he has been able to achieve and his disciplinary-free behavior." "Do you know anybody that's paroled from SHU in the last five years?" Prisoner: "No, I've – I'm under no illusion about the situation here. I know there are no paroles from Pelican Bay and I understand that in a sense, my parole is really controlled by committee because unless I get out of SHU I can't parole, and committee's not going to let me out of SHU… The only thing I can do is do as I've done here. I can continue to be clean. I can continue to work for my future. I can continue to stay out of prison intrigue and just hopefully at some point at some time somebody will take recognition of the advances I've made."
- 1997: "Has not completed necessary programming, no AA or NA completed." "So, you're attempting, because of your limited abilities to program in the SHU, you're trying to engage in whatever you can through correspondence?" . . . "And reading and things of that sort?"
- 2000: "Institutionally, you have done well, for the most part. The big issue for us, of course, is that you have been placed in special housing where programming is limited for you." "We

commend you for completing education, for completing the paralegal program, for being disciplinary free. For the next 12 months, continue doing the programming that you're doing." "Because of your SHU placement, you haven't participated in any – that I could see, in any work assignments." "I think that, obviously, it would be great if we could have you in some sort of NA, but the reality is, when you're in the SHU, I don't think that's available to you."

- 2001: Denial notes SHU housing, "where program participation is limited and the ability to demonstrate parole readiness has been hampered." "As we said before the confinement to SHU has greatly hindered your ability to program and demonstrate parole worthiness." "Nevertheless, the prisoner should be commended for receiving his GED . . . and completing the paralegal certificate, which he had to do through correspondence." "He's been participating as he can – in those programs. But you're not in a structured." Commissioner notes prior psych report recommended 12-step program: "Now, you've already covered the 12 Step. Your participation with the doctors and self-help study and that type of thing. But your problem is in the … part about 'in a progressively less restrictive setting." Prisoner: "So, all the things I've done, including the 15 years clean time, that I've been working on the educational, the getting along good with staff and inmates, the cooperation as far as they've ever required me to do, it means absolutely nothing as far as the report goes because it still says that I'm a risk because I'm in SHU. But I mean, I can't change that. That's something I can't change."

[11] *See Madrid v. Gomez*, 889 F.Supp at 1241 ("Inmates transferred to the SHU for prison gang affiliation are normally given an indeterminate term. This means that the inmate will remain in the SHU for the duration of his prison term unless the inmate 'drops out' of the prison gang by successfully completing what is referred to as a 'debriefing' process. As one inmate succinctly testified, 'the only way [a prison gang member] can get out of [the SHU] is to debrief, parole, or just die of old age.' Trujillo Tr. 9-1469."). *See also, Griffin v. Gomez,* No. 98-21038, Slip Op. at 8 (N.D.Cal 2006) ("Respondents' refusal to reconsider the classification of former gang members who are unwilling to risk retaliation [by debriefing] . . . renders those inmates' segregation not merely indeterminate, but effectively permanent.") *See Ashker v. Brown,* 09-cv-05796, Order Denying Motion to Dismiss, Dkt.160 (4/09/13) at 14 (Plaintiffs claim the only way prisoners can realistically secure release from the SHU is to debrief).

Although CDCR instituted a supposed alternative to debriefing in 2000 (the "inactive review process"), it was not a realistic alternative. *See* Assembly Committee on Public Safety, Hearing on SB 759, June 21, 2016 ("The six-year inactive standard was also very difficult to meet because any innocuous art work or communication could be interpreted as gang activity") ; *Griffin v. Gomez,* No. 98-21038, Slip Op. (N.D. Cal 2006) (CDCR did not "offer evidence that the [inactive review] is a true alternative to debriefing in practice . . . the evidence submitted by Petitioner demonstrates that inactive review is, at least for him, an illusory alternative to debriefing.")

[12] For example:

(a) The Board at first distanced itself from the debriefing requirement. Inmate L 1994 Hearing: Panel recommends: Remain discipline-free; continue self-study; attempt to get correspondence course in paralegal; "cooperate with CDC in their process of debriefing." [Prisoner shows CDC documents confirming no gang activity in past 7-8 years]. "Have you talked to [the Institutional Gang Investigator] about that?" ["Yes, several times."] "Now you understand that's their program, not the Board's." "That is not up to us. We're here to determine whether he's suitable." 2000 Hearing: "I can't respond to you relative to your debriefing. That's between you and CDC." [Following discussion of debriefing]: "Well let me stop you there. And I most certainly can appreciate your concerns. Obviously, we and CDC are two separate . . . entities, I should say. So,

our decisions are independent of whatever CDC may -- that really isn't the issue for us. The issue here is to define your suitability." 2001 Hearing: "The problems you've got are with CDC not with BPT in that area in terms of whether or not their investigations are appropriate or not."

(b) Over time, as SHU status became the only basis for denials, the Board became more direct with prisoners about debriefing. Inmate L, 1996 Hearing: "I have a problem with why you don't debrief. . . We see a lot of prisoners who debrief. First of all, why don't you debrief?" 1997 Hearing: "And the most important thing, and I do it with an exclamation mark after it, debrief!" "And I heartily recommend that you debrief." 2000 Hearing: "And the underlying thing continues to be . . . this issue with debriefing. [Panel] made a big issue of that in 1997. . . And he said, you know, the best thing for you to do is to debrief. . . . And you said 'yes, sir. Yes, sir. Yes, sir.'" 2001 Hearing : "It's mind boggling to me what somebody who has had no disciplinary in 16 years is doing in the SHU in Pelican Bay when a half day of debriefing gets you at least part way out." "But you have a significant problem until you can come to an agreement with CDC that you have debriefed and get that information so the Board can legitimately consider it. There's only one reason for us to believe that you're in Pelican Bay SHU and can't do anything to work your way out of prison." "I believe that you present yourself in an honest and sincere fashion and you have a giant hurdle in front of you and that's the conflict over the debrief issue. That's got to be resolved. I just cannot accept well I've done some other things when I read that you haven't debriefed."

(c) It was only later that the Board began to conflate debriefing with continuing gang affiliation or loyalty. Inmate L, Hearing 2001: "[O]ne reason gangs are so dangerous and they do so much destruction and damage to people is the loyalty that they instill in inmates that will never give up their homies. They will never debrief and lots of folks debrief." "Simply not having any verifiable gang activity will never outlive being a verified validated gang member without going through the debrief process." . . . "You cannot outlive it." . . . "That's the process to be validated as a debriefed nongang member."

[13] Transcript excerpts from a prisoner (Inmate L) repeatedly told by panels to debrief:

(a) 1994: "It does appear from our reading of the file that you have since decided not to continue your association with the gang."
(b) 2000: Board notes 1999 classification committee material where counselor said he had read every piece of paper in the confidential file and found no evidence of any activity by prisoner in last dozen years.
(c) 2001: "I think I understand pretty clearly that there's no doc – I don't see any documentation that you currently or for some time have participated in [gang] activities. I think that's pretty clear." "Everybody seems to be in agreement that you're not participating in gang activities."

[14] Examples:

(a) Inmate N, Hearing 2014: Prisoner states he has been designated by CDCR as "inactive" and is no longer a gang member. Commr: "You're not a dropout. You haven't dropped out. You haven't debriefed." Later, "Did you get out of gangs? I mean what proof do we have of that?" Prisoner: "I've been found inactive. I don't know how much more proof I need to show that I'm not a gang member." Commr: "Well, you're inactive. You're not a dropout. There's a difference." And "The Board told you to get out." Prisoner: "I am out." Commr: "The way to get out is to debrief."

(b) Inmate M (designated as "inactive"), Hearing 2016: "I have big problems with your story about disassociation because, quite frankly, again I don't believe you that you just told the guys, hey,

I'm now a Christian and I'm going to bow out, and they're like, okay cool, see you later. I really have a hard time believing that, sir." "I believe you haven't debriefed because even if you're not still active active, you're still associated."

(c) Inmate I, hearing 2016: "You say that you're – it says that you're inactive. They don't find any information about what you're doing as far as gang activity, but you present yourself as a gang member, and you go with it. You still associate . . . perhaps just pretending you're not."

[15] *See Solitary Watch*, February 29, 2016, "California Prisons Release 'Gang Affiliates' From Solitary Confinement, Costs and Violence Levels Drop" ("Due to prisoner-led hunger strikes and a federal lawsuit against the practice of isolating prisoners purely due to gang affiliation, California has since moved away from this, turning instead towards a system that reserves SHU terms for behavior rather than simple affiliation."); Erica Goode, "Fighting a Drawn-Out Battle Against Solitary Confinement" *New York Times*, March 30, 2012 ("prodded by two hunger strikes by inmates at Pelican Bay last year" CDCR proposed changes in the state's gang policy that could decrease the number of inmates in isolation.)

[16] *See* Note 8 above.

[17] In hearings releasing prisoners from SHU, CDCR did not count hunger strike 115s in determining prisoners had 12 months without a rule violation. *See also In re Gomez*, 246 Cal. App. 4th 1082, 201 Cal. Rptr. 3d 124 (Cal. App., 2016) (no evidence to support disciplinary violation for prisoner's hunger strike participation).

[18] Examples:

(a) Inmate C-1 debriefed in 1997. In the years between 1991 and the time he debriefed, he received additional convictions for two counts of assault and one attempted murder. His disciplinary record in that time span included rule violations for three other staff assaults, spearing a peace officer in the neck, three batteries on prisoners, a stabbing assault on a prisoner, numerous weapon possessions, spitting and kicking staff, and the murder of his cell mate. When faced with a 50-year three-strikes sentence, he decided to debrief. The DA, who had earlier presented his behavioral record as reason for him to be shackled during trial, now had to ask the court to reduce his sentence and remove the three-strikes charge. The court balked but ultimately approved it, and Inmate C-1 was in general population at the highest privilege level within a year. According to testimony of a former Institutional Gang Investigator (IGI), he was also known as "Lyin' Brian" by the IGIs in PBSP.

(b) Inmate D-1 debriefed in 2002. He had three prior prison terms plus one stint in county for assault with a deadly weapon. He had numerous disciplinary reports in prison, including one for stabbing a cellmate multiple times.

(c) Inmate E-1 received RVRs for staff assault/spitting, fighting, and assault and battery on another prisoner with a razor blade, and attempts to stab staff after refusing to surrender his food tray before he debriefed.

(d) Inmate F-1 was in federal custody on racketeering charges when he debriefed in 2004. Prior to that, he had attempted to strangle and murder an ex-sheriff in custody in 1986; stabbed a correctional officer and attempted to murder another prisoner in transportation in 1987, and

stabbed an attorney in the Sacramento County courthouse in 1990. In his debriefing he admitted planning several crimes on the streets through a girlfriend. During one such crime, she was with a parolee who murdered a Sonoma County deputy sheriff. Later, F-1 invested in a fighting dog enterprise aided by two attorneys until two of the dogs attacked and killed a San Francisco woman. The incident and ensuing media coverage put Inmate F-1 in hot water with fellow prisoners and ultimately led to his debriefing.

[19] Examples:

(a) Inmate G-1, who debriefed in the late 1990s, was later involved in an attempted homicide related to his drug smuggling and trafficking activities in general population. He also received an RVR for carrying heroin in his wristbands. He received an RVR for threatening to kill a correctional officer.

(b) Inmate D-1 debriefed in 2002 and later received a 115 for threatening to stab another prisoner; he was released from prison in 2005 and was back in court within a year for transporting methamphetamines.

(c) Inmate E-1, who debriefed in 2000, was later busted for weapons possession.

(d) *See* also Davis Forsythe, "Gangs in California's Prison System: What Can Be Done?", January 27, 2006, p.9 (Study of the Arizona DOC's STG program looked at STG affiliates who elected to renounce gang membership and debrief, and found that "their rates of violence remained significantly higher than rates found in the general population.")

[20] *See* Note 24, below.

[21] Examples, at the time of release from SHU:

(a) Inmate A-1, from *The Center for Constitutional Rights* Blog, August 23, 2016: "Inside of solitary confinement, I turned my focus towards education. Basically, I realized that I could not sit in that lifeless tomb and let myself be buried alive and rot away. So in 2010, I earned my G.E.D. and enrolled in a Bible college correspondence course, which I completed. I then enrolled in actual college at Feather River College to earn my A.A. degree. I completed programs such as: GOGI, A.A., N.A., Criminon, Love Lifted Me Recovery, Crossroad Bible Institute, College Guild, Saints Prison Ministry, Prep-Turning Point, Prep Anger Management, Finding The Way Publications, 12 Step Christian Ministry, New Jersey Bible Club, Jesuit Restorative Justice Initiative, TL4Ffcorp Affiliates; Defenders Recovery Program; Dismas Ministry, and Rock of Ages Ministry."

(b) Inmate L had 30 years without a disciplinary violation, completed a correspondence course for paralegal training in SHU and engaged in an exceptional amount of cell study; while in SHU he also requested and participated in 4-5 years of documented one-on-one anger management, substance abuse counseling and cognitive behavioral therapy work with CDCR psychologists. His CDCR psych reports were consistently and progressively positive.

(c) Inmate G completed a GED express writing course, earned a certificate through the Corrections Learning Network, took Victim Awareness and Stress Management courses, completed a Vital Issues course, was involved in NA and AA for several years, and completed several courses through Christian Studies by mail.

(d) Inmate J completed six courses from Criminon, a course on Restorative Justice, Anger Management, participated in GED grade courses and the Step Down program.

(e) Inmate N earned his GED, a paralegal degree and a general business diploma; completed Criminon courses, Bible courses, multiple college courses, self-help courses on drug addiction, handling suppression, personal integrity, conditions of life and communications tools; and CDCR's Step Down program.

[22] *See Griffin v. Gomez*, No. 98-21038, Slip Op. at 10 (N.D.Cal 2006) ("Respondents present no evidence that Petitioner has continued active participation while confined [for 20 years] in the SHU"). Exhibits from the case included a 1993 ICC chrono stating "no evidence of gang activity in the last 7 years;" 1993 appeal decision by PBSP warden stating the gang investigator and classification committee confirm there is no evidence of any gang activity; 1994 BPT hearing transcript stating that a file review indicates prisoner has not continued his association with the gang; 1994 District Court opinion stating it is apparent there's no evidence of specific conduct by prisoner over last 8 years in SHU; 1996 602 response by Associate Warden stating information used to retain him in SHU is dated and reflects his past behavior; separate 1996 602 response stating the most recent documents do not contain information that identifies him as active current participant in gang activities; 1997 investigative employee report with statements of staff and officers indicating they saw no evidence of gang activity; 2000 602 granting request for inactive review and referring it to the Institutional Gang Investigator; 2002 CDC 812-A showing no valid confidential reports in prior six years, clearing him for inactive status. An inactive package was submitted for approval by the Office of Correctional Safety in Sacramento, who refused to act on it. *See* BPH transcript excerpts in Note 13, above.

[23] *See* "The Cruelest Prison," *Los Angeles Times Magazine*, October 9, 2003, p.17 ("As of 2000, the inmate-on-inmate assault rate in California prisons was just as high as in the years before the opening of Pelican Bay, and the rate of armed assaults on staff was even higher"); Legislative Analyst Office report "CDC Disciplinary Confinement Practices Need Improvement," 2005 (" serious inmate incidents have increased significantly in recent years, and inmate violence appears to be far more prevalent in California than in any other large penal systems.") *See* CDCR Expert Panel on Adult Offender and Recidivism Reduction Programming, "Report to the California State Legislature: A Roadmap for Effective Offender Programming in California," June 29, 2007 (Historical recidivism chart shows that annual return-to-prison rate rose sharply after 1985 [the year CDCR began its gang lockup program] and generally stayed higher than in years before 1985).

[24] *See:*

(a) In 2008, the FBI reported that two new gangs formed by dropouts on SNY yards were gaining influence in prison and posed new threats on the streets. The growth in these gangs coincided with increasing numbers of debriefers being sent to SNYs. Sgt. Silva of CDCR stated, "They still want to gang-bang. They still have the same gang mentality." A Salinas police supervisor said "We have to remember that they're criminals. Just because they [debriefed] doesn't mean they're going to become Boy Scouts." M. Zamudio, "FBI: Gang 'Dropouts' Pose Threat," *The Salinas Californian*, May 21, 2008.

(b) On Officer.Com, a private forum for law enforcement, a May 2008 posting read: "Most of us that work in California Pens know that the new breed of inmates are SNY/PC inmates we all know

they have been forming their own gangs for a few years already and being disruptive in prison and on the streets." … "We still have inmates getting jumped, stabbed, raped, pressured and extorted for money just like a GP yard."

(c) According to a March 2012 Fox 11 News Report: More than two dozen new gangs have formed on SNYs, turning SNYs into a "den of predators." SNY prisoners are asking to be moved back to general population to get away from the new gangs. A gang investigator says there are dropout gangs all over the state (in 22 prisons), for every ethnic and territorial group. Another gang investigator says "Just because you're a dropout, you haven't lost that mentality." The 25s, the largest SNY gang, now has around 1500 members. Another gang investigator says "You can't take the gangster out of the gangster lifestyle." More frightening, the influence and violence of the SNY gangs is already bleeding out onto the streets.

(d) Board of Parole Hearings meeting, December 10, 2012, Statements of George Giurbino, then Director of the Division of Adult Institutions, speaking about new STG rules: "Under the new policy, new STGs can be identified. CDCR has seen the development of new prison gangs arising in Sensitive Needs Yards, such as New Riders, Independent Riders, which are at least as violent as previously identified gangs."

[25] March 2012 Fox 11 News Report ("30,000 inmates dropped out of prison gangs over the last 12 years, leading to an unprecedented number of riots and injuries on the supposedly safer SNY.")

[26] (a) March 2012 Fox 11 News Report: Robert Clayton, Institutional Gang Investigator, said, "I've had inmates request to go back to the mainline, because they're more afraid of these SNY gangs than they were of the gang they left before. We have guys that ask for protection all the time, off of a protection yard."

(b) Sam Quinones, "Easing the Hard Time," *Los Angeles Times*, September 16, 2005: "Inmates on SNYs inform easily on one another," resulting in need for separation.

(c) Inmate B-1, who debriefed and spent time on a SNY, in a letter to Clanton & Associates, January 2003: "They would form little cliques in the debriefing block and drop notes on each other claiming the other is an active gang member who is just debriefing to carry out some super secret gang contract. As hard as it might be for you to believe, that kind of thing was so common it was comical in its absurdity and … not only did staff know it was going on, they encouraged it."

[27] *See Griffin v. Gomez*, No. 98-21038, (N.D. Cal 2006) Slip Op. at 8: "The crushing conditions of the SHU present an overwhelming incentive for an inmate to embrace the risk of debriefing." Aside from conditions, pressure from Institutional Gang Investigators to debrief was incessant, and included active interference with family relationships. Some examples of the circumstances driving prisoners to debrief:

(a) Inmate A, BPH hearing November 2015, when asked about why he debriefed: ". . . the officer that was always on me was – he was always reading my letters, interrupting my visits. He basically made my life a living hell and pretty much everybody else in there. . . . [T]he reality was that it angered me as an individual because I really had no connection to society no more. It was – all my family ties were disappearing and I felt like I was doing nothing to help, you know, foster them anymore, right? . . . My mother and father passed away while I was in there. And the whole

time I could never hug them. I could never kiss them, you know, and those were the things that really mattered to me. . .”

(b) Inmate B-1, who debriefed in 2002, talked about different reasons for debriefing: Some people like him “were just doing whatever it took to get what they wanted, which in most cases seemed to be to get to a prison closer to home or to a so-called ‘soft yard.” Others “were kids who had been wrongly labeled to begin with and who thus had no choice but to make stuff up if they wanted to successfully debrief.” He named one young prisoner who tried to debrief but was rejected because he didn’t have any information to give. When the warden asked two older prisoners to go around and talk to everyone to settle racial tensions, “the kid saw it as an opportunity” and told the Institutional Gang Investigators they had tried to recruit him, “even though they hadn’t said anything more than hi, how are you doing?” The kid’s view was that the process was “just a twisted game of tag” he was playing, and “from his perspective he had been wrongly tagged so he just passed that unwelcome favor along to the next guy who could then do what he had to do.” There were other people who were “just blatantly using the debriefing process to settle scores, even against one another. . . . [many] treated their debriefing as just joining another gang and changing tactics.”

(c) Testimony of D-1, 2006: “Q: And where were you when you dropped out? A: Pelican Bay. Q: So you were in the SHU at that time? A: Yes. . . . Q: When you were debriefing, you were asked to tell everything you know, right? A: Yes. Q: So that's what you wanted to do, right? A: Actually, yeah, I wanted to get out of the SHU. Q: You wanted to get out of the SHU, right? A: Yes.”

(d) Because debriefing is sometimes the only way to get out, critics say, the information it yields is often tainted. Erica Goode, “Fighting a Drawn-Out Battle Against Solitary Confinement**,”** *New York Times*, March 30, 2012.

28 Informant testimony is considered one of the lowest and least reliable forms of evidence.

(a) Ray Procunier, former Director of CDCR, testified in 1987 that only about 10 percent of such information is reliable because "in many cases it is not based on personal knowledge, but on rumor. Many times the inmates' perception of events is distorted and is based on unfounded assumptions. In addition, because real names are seldom used in prison and identification between inmates occurs through gang nicknames and sight, verbal or written communication on identities very often is not accurate." Furthermore, prisoners often become informants "in order to curry favor or good will from an officer, or in exchange for material gain. In many cases inmates provide information because they want to increase their self-esteem." *In re Jackson,* 43 Cal.3d 503, 511 n.9 (1987).

(b) *See* latimes.com – *L.A.Now*, 8/1/2011, “Gov. Brown Signs Law Weakening Testimony Of Jailhouse Snitches” (“Dozens of Los Angeles County criminal convictions based on the testimony of jailhouse informants have been overturned over the last quarter-century because appeals courts found the key witnesses to be unreliable or self-serving.”). California and 17 other states have restricted the use of prisoner informant testimony in court; California’s law requires prosecutors to present independent evidence of guilt to corroborate a prisoner's testimony that the defendant confessed to a crime. Bill sponsor Sen. Mark Leno said studies have shown perjured testimony is a common cause of wrongful convictions in California; the Los Angeles District Attorney said his county has restricted informant testimony for years, a policy that has made testimony more reliable without preventing convictions. California state law already requires the judge to tell jurors to consider such testimony with caution, and requires the prosecution to disclose any

promises of leniency it has made to the informant. *Id*. *See* also Judicial Council of California Criminal Jury Instructions, No. 336.

(c) A 2005 report by the Center on Wrongful Convictions at Northwestern University School of Law found that snitch-dependent prosecutions are a leading cause of wrongful convictions in capital cases. *See* Center on Wrongful Convictions, Northwestern University School of Law, *The Snitch System: How Snitch Testimony Sent Innocent Americans to Death Row*, 2005, available at http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf. A comprehensive study of the nation's first 200 exonerations proven through DNA testing concluded that 18% were convicted, at least in part, on the basis of informant, jailhouse informant or cooperating alleged co-perpetrator testimony. Brandon L. Garrett, *Judging Innocence*. 108 Colum. L. Rev. 55, 62 (2008).

(d) The Innocence Project reports that testifying falsely in exchange for an incentive – either money or a sentence reduction – is often the last resort for a desperate prisoner. *See* http://www.innocenceproject.org/causes-wrongful-conviction/informants#sthash.Jt4IA2RY.dpuf. This is a perfect description of someone validated under CDCR's system, where there was no way out of SHU except for debriefing.

[29] The subjective and questionable nature of "evidence" used by CDCR to retain prisoners in SHU for years is addressed in the following materials, among many others:

(a) *Lira v. Cate*, No. C 00-905 SI, (N.D. Cal, 2009) (Lira's gang validation was not supported by accurate or reliable evidence and was implemented in violation of his procedural due process rights). *See* also *In re Cabrera*, 216 Cal.App.4th 1522, 158 Cal.Rptr.3d 121 (2013) (no rational nexus between gang investigator's evidence and conclusion of gang affiliation); *In re Martinez*, 242 Cal.App.4th 299, 195 Cal.Rptr.3d 94 (2015) (no evidence supporting "direct link" used to validate prisoner).

(b) *Ashker v. Brown*, No. 09-cv-05796 (N.D. Cal) expert reports:
- Expert Report of Dr. James Austin, Ph.D. (plaintiff class has been placed in SHU status based on incorrect or inappropriate classification criteria, and CDCR's procedures for reviewing and retaining prisoners in 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).
- Expert Report of Emmitt L. Sparkman (The CDCR reliance on confidential information under previous and current regulations creates a significant risk of over classification and/or inappropriate placement of offenders in SHU Units).

(c) Brian Parry, former Deputy Director of CDCR, said he is uncomfortable with the kind of indirect evidence used to validate many prisoners. "As many as 70 percent of the inmates in the SHUs, he says, were sent there through evidence of this kind." Erica Goode, "Fighting a Drawn-Out Battle Against Solitary Confinement," *New York Times*, March 30, 2012.

(d) *Griffin v. Gomez*, No. C-98-21038 (N.D. Cal): Report and Recommendation Re: Respondents Compliance with Order Granting Writ of Habeas Corpus, 12/02/08 Dkt. #158 (Magistrate found CDCR conducted "a perfunctory review process"). Evidentiary hearing testimony in this case showed:

- CDCR relied, contrary to its own regulations, on material with no explicit or coded content related to gangs, material outside a 6-year period, and material based solely on hearsay; investigator "corroborated" an informant's statement with earlier statement by the same informant.
- Memos summarizing confidential material misrepresented the content of the source documents and the date of the information; failed to allege any conduct or activity by the subject prisoner; and were contradicted by undisclosed reports.
- In defining "activity" or "conduct," the gang investigator testified we are "not following Webster's dictionary;" any validated prisoner mentioning the subject's name constitutes evidence of "activity" by the subject.
- Gang investigator carefully selected only materials supporting a claim of affiliation and actively disregarded numerous more credible and persuasive materials supporting inactivity.
- Gang investigator found evidence of non-affiliation "very thorough, convincing evidence," but found prisoner active anyway; his personal belief prisoner was "retired" is not recognized under CDCR policy.

See Petitioner's Findings of Fact and Conclusions of Law, October 20, 2008, Dkt #157, including transcript references.

[30] *See* the following examples:

(a) "Prison Gang Drop-Outs Being Threatened … If They Refuse To Snitch," BlackCommentator.com: A prisoner who debriefed and dropped out 12 years ago complains that gang investigators constantly threaten to rescind his drop-out status if he doesn't agree to provide false testimony in criminal cases. "What I didn't realize was that the same system that advocated anti-gang living would be using my drop-out status as a weapon to force me into a position of admitting something of which I'm innocent, perjure myself in a court of law, and ultimately become a jailhouse snitch!"

(b) InmateB-1, who debriefed in 2002, later reported his experience in a letter to a law firm. He stated he went through a preliminary interview where the gang investigator told him he would have to label suspected people as gang members, provide at least one new name and provide new information on the gang. B-1 asked who he had to implicate, and the investigator gave him several names he would need to include. B-1 wrote that he came to conclude "successful debriefing" was different than just debriefing, "because to successfully debrief, you had to tell them what they wanted to hear." After the preliminary interview but before the formal debriefing interview, B-1 was interviewed on separate occasions by the FBI, the Santa Rosa Police Department and the Del Norte County District Attorney's Office. The interview with the Del Norte D.A. was in the presence of a CDCR Special Services Unit Agent who told B-1 that his "successful debriefing" depended on him corroborating a story the agent presented, that in 1994 B-1 had conspired with two correctional officers to kill sex offenders. Attempting to cooperate, B-1 told him "I had memory of that" and the agent proceeded to tell B-1 "the when, the who, the how etc. which [the D.A.] was asking me to testify." Then the D.A. "asked me what I knew about the Boyd murder and [Prisoner] and I told him that I had heard that Boyd had been killed in a personal dispute having nothing to do with the AB and that I had never even heard [Prisoner]'s name before as being AB or connected to the AB. [The D.A.] then told me that [Prisoner] was AB and asked me if I could testify [to a complicated story line leading to the conclusion Boyd's murder was a gang hit]." B-1 agreed to testify, even though "I had no knowledge of that prior to my meeting with [the D.A.]" The officer assigned to do his official debriefing afterward told him he would need to agree to provide that testimony in order to "successfully debrief." Letter, Inmate B-1 to Clanton & Associates, January 2003.

(c) Inmate D-1 testified that he submitted a long handwritten history of everything he knew about the prison gang to the Institutional Gang Investigator (IGI). The IGI, he said, never interviewed him; he just called him in and "chewed me out" because he had not included anything about another prisoner the IGI had a particular interest in. The IGI told him he was "going to sit in the SHU and rot" if he wasn't "forthcoming" about that prisoner. D-1 later turned in a report that mildly implicated the other prisoner, and had further enhanced his story against the prisoner when he testified against him a few years later in order to get his new criminal charges reduced. *United States v. Stinson et al.*, CR-02938, Reporter's Transcript Vol 21, December 14, 2006.

[31] *See*:

(a) Transcript, Joint Legislative Hearing on Solitary Confinement, October 9, 2013: Assembly member Nancy Skinner Q&A with CDCR officials Michael Stainer and Kelly Harrington. (Note: this is after the gang lockup policy had been in place for 28 years.)

> Ms. Skinner: "… I wonder if there's been any look at whether you had any reduction in gang membership as a result of putting so many people in SHU?"
>
> Mr. Stainer: "I don't know whether that's the case at all. . . . Quite honestly we don't have the database to do that. We've put in a special request for funding for that. We need this informational gathering system to judge whether or not these policies are, to measure the effectiveness of these policies."

(b) Davis Forsythe, "Gangs in California's Prison System: What Can Be Done?" January 27, 2006 at 13. (As to California's gang lockup programs, "…their impact on prison gang membership levels has not been studied…." Given the great cost, "a fuller understanding of the benefits would be necessary to determine whether SHUs are, in fact, worthwhile. There is simply not enough data to make an informed determination.")

(c) Legislative Analyst's Office report "CDC Disciplinary Confinement Practices Need Improvement," 2005 ("CDC is spending significant resources for disciplinary confinement, yet the department is unable to provide evidence that its current policies and procedures are effective at reducing prison violence and result in the most efficient use of General Fund dollars").

(d) "Little to no empirical evidence supports California's policy to place prisoners in segregated housing units for mere gang membership." Center for Human Rights and Constitutional Law, Memo to Governor Brown and the California Legislature Re: Justifications for Legislative Proposals Reforming California's Policies on Solitary Confinement, March 17, 2014, citing United States Government Accountability Office, *Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing*, GAO-13-429, May 2013 at 34.

(e) SB 759, considered in 2015, would have required CDCR to collect a variety of data relating to the security threat group validation process and the SHU, and the OIG to prepare, starting in 2018, a biennial report utilizing the information collected by CDCR. Senate Committee on Public Safety, April 14, 2015 hearing.

[32] *See, e.g.*, *Lira v. Cate*, No. C 00-905 SI (N.D. Cal 2009) (CDCR liable for gang validation unsupported by evidence and violation of due process rights); *Griffin v. Gomez*, No. 98-21038, Slip

Op. (N.D. Cal 2006) (indeterminate retention of prisoner in SHU until he debriefs violates the Eighth Amendment); *See* also, *Ashker v. Brown*, N.D. California No. C-09-5796, Order Denying Motion to Dismiss, Dkt #191 (plaintiffs adequately pled the elements of an Eighth Amendment claim based on prolonged exposure to the conditions of SHU, and stated a valid due process claim based on minimal procedural safeguards).

[33] The sources below address the high cost of building and operating SHUs. They don't, however, account for the exponential increase in personnel devoted to "gang management" in CDCR the last few decades. Not only have the numbers of Institutional Gang Investigators and IGI offices in prisons greatly increased (the PBSP IGI office grew from about 5 persons in the mid-1990s to more than 30 in the early 2000s), but a whole new top-heavy OCS apparatus has ballooned in Sacramento. Gang investigators are given automatic promotions to Lieutenant and paid higher salaries than other COs.

(a) *See* Transcript, Joint Legislative Hearing on Solitary Confinement, October 9, 2013 – Assembly member Nancy Skinner Q&A with CDCR officials: "The other piece of data that I would like to see is the growth in numbers of inmates in SHU over . . . the last 20 years. . . because it seems to me it's clearly grown and has made our prisons – it certainly caused the state to bear a larger cost because it's quite expensive, but is there any associated benefit to us?"

(b) *See* also, Legislative Analyst's Office Report on the 2016-17 Budget, p.19: "Segregated housing units are typically more expensive to operate than general population housing units. . . . The Governor's budget proposes to reduce General Fund support for CDCR by $16 million in 2015-16 and by $28 million in 2016-17 to account for savings from a reduction in the number of inmates housed in segregated housing units."

(c) "In addition, due to personnel and infrastructure costs SHUs are vastly more expensive to operate than standard maximum security prisons." Davis Forsythe, "Gangs in California's Prison System: What Can Be Done?" January 27, 2006 at 9. SHUs "have two significant costs: first, because of elevated staffing and special infrastructure requirements they are much more expensive to build and operate than standard maximum security prisons, and second, because they offer minimal programming and place already dangerous inmates in conditions that do little to improve their stability, SHUs do not adequately prepare those inmates for release into the community." *Id*. at 13.

(d) Building solitary confinement units costs two to three times more than conventional prisons. Daniel P. Mears, Urban Inst., Evaluating the Effectiveness of Supermax Prisons 2 (2006).

(e) Other states have demonstrated similar unjustifiable cost disparities in managing SHUs (citing Arizona, Texas, Illinois). Center for Human Rights and Constitutional Law, Memo to Governor Brown and the California Legislature Re: Justifications for Legislative Proposals Reforming California's Policies on Solitary Confinement, March 17, 2014.

[34] *Ashker v. Brown*, Expert Report of Dr. Terry Kupers; *See* also Sharon Shalev, LLM, PhD, "Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis," *Journal of Forensic Psychology Practice* 11:151–183, 2011.

[35] *See*, *e.g.*, Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L.& Pol'y 325 (2006) (common side-effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors); Kupers, T., "The SHU Syndrome and Community

Mental Health," *American Association of Community Psychiatrists Newsletter*, Vol.12, No.3 1998 ("I've seen many prisoners with no history of mental illness who after some time in the SHU started cutting themselves. I've almost never seen self-mutilation among adult males anywhere else, but it's very common in SHUs.")

[36] *See*:

(a) *Davis v. Ayala* (2015) 576 U.S.__, 135 S.Ct. 2187, 2210 (conc. opn. of Kennedy, J.): "Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price. . . . Over 150 years ago, Dostoyevsky wrote, 'The degree of civilization in a society can be judged by entering its prisons.' The Yale Book of Quotations 210 (F. Shapiro ed. 2006). There is truth to this in our own time."

(b) Baker and Goode, "Critics of Solitary Confinement Are Buoyed as Obama Embraces Their Cause," *New York Times*, July 21, 2015: "Do we really think it makes sense to lock so many people alone in tiny cells for 23 hours a day, sometimes for months or even years at a time?" Mr. Obama asked in a speech at a convention of the NAACP in Philadelphia, where he called for an overhaul of the criminal justice system. "That is not going to make us safer. That's not going to make us stronger. And if those individuals are ultimately released, how are they ever going to adapt? It's not smart."

(c) The United Nations Convention Against Torture (CAT) is monitored by the Committee for Human Rights (CHR), which has found violations of the Convention in several cases involving solitary confinement. *See* Shalev, *Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis*, Journal of Forensic Psychology Practice, 11:151,172, 2011. Considering a U.S. report to the committee in 1995, the CHR noted that "conditions of detention in certain maximum security prisons are incompatible with Article 10 of the Covenant and run counter to international human rights standards." Considering the second and third U.S. Reports in 2006 (seven years overdue), the CHR was "particularly concerned by the practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment." *Id*. at 173. From 1996 forward, successive Special Rapporteurs to the committee have addressed the use of solitary confinement, specifically citing Pelican Bay SHU. *Id*. In a report to the UN General Assembly in 2008, the Special Rapporteur on Torture devoted a special section to the use of solitary confinement, stating it should be used "only in exceptional cases, for as short a time as possible, and only as a last resort." Further, those using it must raise the level of social contacts for prisoners with prison staff, other prisoners and outside visitors. UN General Assembly, 2008, ¶ 83. In 1957, the UN Economic and Social Council produced the Standard Minimum Rules for the Treatment of Prisoners, which address solitary confinement directly and emphasize the importance of contact with the outside world and of educational and other activities. These rules have been cited by U.S. courts as evidence of "contemporary standards of decency" relevant to the Eighth Amendment. Shalev, *supra*, at 172. These rules were revised in 2015 and renamed the "Nelson Mandela Rules." Rule 43 of the Mandela Rules specifically prohibits both indefinite solitary confinement and prolonged solitary confinement. "Prolonged solitary confinement" is defined as solitary confinement for a "period in excess of 15 consecutive days."

(d) E.g., J. Casella, "Pope Francis Denounces Solitary Confinement," *Solitary Watch*, October 26, 2014: In a speech at the Vatican the Pope said, "One form of torture is sometimes applied by imprisonment in maximum security prisons. With the motive of providing greater security to the community or special treatment for certain categories of prisoners, its main feature is none other than isolation. As demonstrated by studies carried out by different human rights bodies, the lack of sensory stimuli, the complete lack of communication and the lack of contact with other human beings, causes physical and emotional suffering such as paranoia, anxiety, depression, and weight loss, and significantly increases the chances of suicide. . . . These tortures are now administered as a means to achieve a particular purpose, such as confession or denunciation, in the name of national security. They are a genuine surplus of pain that is added to the suffering of detention."

[37] *Griffin v. Gomez*, No. 98-21038, Slip Opin. at (N.D.Cal. 2006) – "The duration of his retention in the SHU for 20 years is a shockingly long period of time. . . . when the psychological harm being inflicted on Petitioner by the 20-year segregation is compared to the otherwise legitimate interest of prison officials in controlling prison gang activity, further confinement is tantamount to indefinite administrative segregation for silence – an intolerable practice in modern society." *See* also, *In re Gomez* (2016) 246 Cal. App. 4th 1082, 201 Cal. Rptr. 3d 124, n.3 (noting that "such practices have come under increasing scrutiny by legal scholars in recent years," citing Justice Kennedy in *Ayala* and Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment* (2015) 90 Ind. L.J. 741; Shaiq, *More Restrictive Than Necessary: A Policy Review of Secure Housing Units* (2013) 10 Hastings Race & Poverty L.J. 327.")

[38] The National Commission on Correctional Health Care recently issued a Position Statement on Solitary Confinement, including the following principles (among others) to guide correctional health professionals in addressing issues about solitary confinement: "Prolonged (greater than 15 consecutive days) solitary confinement is cruel, inhumane, and degrading treatment, and harmful to an individual's health; and "Correctional health professionals should not condone or participate in cruel, inhumane, or degrading treatment of adults or juveniles in custody." *See* Shalev, *Solitary Confinement and Supermax Prisons: A Human Rights and Ethical Analysis*, Journal of Forensic Psychology Practice, 11:151 2011 ("Some of the routine practices in supermax prisons are, quite simply, in direct violation of basic principles of medical ethics."). *See also*, Statement for the Record from Physicians for Human Rights, Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Human Rights, "Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences" (June 19, 2012) ("PHR firmly believes that the well-documented psychological and physiological effects of even a brief period spent in solitary confinement are so detrimental that the practice must be prohibited, except when it is absolutely necessary to protect the lives or safety of others. . . . Solitary confinement also results in a number of serious and well-documented physiological effects as a result of both the physical manifestations of psychological problems, as well as common features of solitary confinement such as lack of access to fresh air and sunlight, and long periods of inactivity.") Policy Statement 201310 of the American Public Health Association addresses Solitary Confinement as a Public Health Issue, calling on federal, state, and local correctional authorities to eliminate solitary confinement as a means of punishing prisoners and to develop alternative disciplinary sanctions and processes that accommodate prisoners with serious mental illnesses and chronic illnesses. In 2014, Architects, Designers and Planners for Social Responsibility petitioned the American Institute of Architects to amend its Code of Ethics and Professional Conduct to prohibit the design of spaces for killing, torture, and cruel, inhuman or degrading treatment, including supermax prisons and other solitary confinement facilities. Although the AIA originally rejected the petition, they announced in February, 2016 that they intend to reconsider it.

[39] *See* Joint Legislative Informational Hearing On Solitary Confinement, Oct. 9, 2013, Assembly member Tom Ammiano: ". . . maybe working together we can come up with a solution to what I think has been a very, very aberrant policy attitude on the part of the CDCR."

[40] *See* information from the following sources:

(a) The Marshall Project, https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary provides the following list by year:

1998: West Virginia was the first state to pass a law banning solitary for juveniles.
2008: New York passed the first solitary confinement reform bill of its kind, the SHU Exclusion Law, requiring review of solitary confinement policies and removal of mentally ill prisoners from isolation.
2010: Maine's DOC revamped its SMU, cutting the number of prisoners in solitary confinement in half. Mississippi DOC shut down Parchman Farm's notorious solitary confinement unit, a "Step-Down" system was introduced and the number of prisoners in solitary dropped from 1300 to 300.
2012: Alaska's DOC implemented a regulation banning solitary confinement of juveniles for punitive reasons. Colorado DOC reclassified hundreds of prisoners from solitary confinement into the general population, changing standards for placement and removal. The state legislature closed a solitary confinement facility, citing excessive costs and reduced demand. Connecticut established a statutory ban on the solitary confinement of juveniles. Massachusetts DOC rewrote its policies to exclude mentally ill prisoners from solitary. Mississippi prohibited juveniles from being housed in solitary confinement. West Virginia Division of Juvenile Services announced an end to the practice of punishing juveniles with solitary confinement.
2013: U.S. Immigration and Customs Enforcement issued a directive limiting the solitary confinement of detainees to extreme circumstances. Illinois, following years of legislative debate on solitary housing practices, closed Tamms supermax facility. Nevada passed a bill restricting solitary confinement in juvenile facilities, and mandating comprehensive recordkeeping regarding use of solitary confinement. New York City Board of Corrections initiated rule-making on the issue of solitary confinement, and began reassigning mentally ill prisoners to facilities with therapeutic resources. Oklahoma established an apparent statutory ban on the solitary confinement of juveniles. Virginia reduced the number of prisoners in segregation by 62 percent since 2011, and implemented a "step-down" program allowing prisoners to earn their way out of solitary confinement.
2014: Arizona entered settlement agreement providing mentally ill prisoners in solitary confinement with more access to mental health treatment and time outside their cells. Colorado DOC reduced the number of prisoners in solitary confinement by two-thirds, from 1500 in 2011; the state limited reasons for placing prisoners in solitary confinement and banned solitary confinement of the seriously mentally ill among other reforms. Indiana reduced the number of juveniles in solitary confinement from 48 beds to 10, with a maximum stay of 24 hours. Since 2011, Michigan DOC had cut the number of "dedicated solitary" beds from 1400 to 1100; was expanding social programming for prisoners in solitary confinement as a way of encouraging positive behavior. Nebraska legislative commission made 16 recommendations to the DOC, including "significant reduction in the use of segregated confinement." New Mexico DOC committed to reduce reliance on solitary confinement, emphasizing alternative disciplinary measures, new GP

units, and social programming for prisoners in solitary. New York DOC banned solitary confinement of juveniles for disciplinary reasons, with protections for pregnant women and prisoners with developmental disabilities. Set maximum terms for solitary confinement, and committed to end solitary confinement at Riker's Island by end of year. Ohio DOC, under agreement with DOJ will reduce and ultimately eliminate solitary confinement for juveniles. Wisconsin Corrections Secretary sent memo to employees articulating vision for reforming the use of solitary confinement, with new rules to go into effect in January.

(b) KFGO AM Radio, Fargo/Moorhead, June 6, 2016: "Research leads North Dakota prison officials to change solitary policy."

(c) On June 19, 2012, Senator Dick Durbin chaired the first Congressional hearing on solitary confinement. Ridgeway and Casella, June 8, 2012. http://solitarywatch.com/2012/06/08.

41 *See* Erica Goode, "Fighting a Drawn-Out Battle Against Solitary Confinement," *New York Times*, March 30, 2012 (While many states identify and segregate some gang members, "California's policy has been among the most severe," sending not only members but prisoners who associate with them to super-max facilities, resulting in more than 3,000 prisoners in SHU indefinitely); Assembly Committee on Public Safety, hearings June 21, 2016 ("Both the large number of prisoners confined in these units and the length of time they spend there . . . demonstrate that our policies are much harsher than other states."); testimony of Keramet Reiter, Joint Legislative Hearing on Solitary Confinement, October 9, 2013 ("The indeterminate sentences are unusual. According to a recent survey by *Mother Jones*, fewer than half of all states allow indeterminate assignments to SHUs like Pelican Bay. And in many states, only a few prisoners at a time serve these long sentences of a decade or more, and California has a few hundred. And then again, in California, it's not just the average stays are long, the sheer number of people in solitary confinement is quite high in this state.")

42 *See* Riveland, *Supermax Prisons: Overview and General Considerations*, National Institute of Corrections, U.S. Dept. of Justice, 1999 (survey of federal and state practices for placing and retaining prisoners in SHU; most agencies use an "objective, behavior-based standard" for placement in, and release from, supermax facilities); G.W. Knox, Ph.D, *The Problem of Gangs and Security Threat Groups (STG's) in American Prisons Today: Recent Research Findings From the 2004 Prison Gang Survey*, National Gang Crime Research Center, 2005 (there has been no reliable research on effectiveness of "gang renunciation programs," and none has yielded reliable valid information about their ability to objectively achieve what they purport to achieve; author aware of no therapy program anywhere that is effective when coercive).

43 The state prison guards union, which was blocked by the court from intervening in the *Ashker* case, opposed the settlement, raising fears of a return to the prison violence of the 1980s that pushed the state to enlarge its use of solitary confinement. Paige St. John, "California agrees to move thousands of inmates out of solitary confinement," *Los Angeles Times*, September 1, 2015. *See* M. Montgomery, "Ex-Prisoner Sues California Over Years In Solitary" National Public Radio, *All Things Considered* , March 8, 2009 ("Some officials worry that letting possible gang members out of solitary could lead to a spike in violence on regular prison yards."); *See* http://www.sandiegouniontribune.com/news/2015/sep/01/advocates-hope-californias-solitary-settlement/#sthash.xGRy19A6.dpuf (" Beard said he will work to ease the unions' previously expressed concerns that guards could face additional danger.")

[44] S. Greenhut, "A Settlement That's Not for the Dogs" *San Diego Union Tribune*, September 2, 2015 **("**The prison-guards' union has criticized the deal — but Beard said 1,100 prisoners have already been let loose from these isolated cells and there have been minimal problems.")

[45] The "Agreement to End Hostilities" was a document produced by some *Ashker* plaintiffs and other prisoners in Pelican Bay SHU to promote collaboration and collective action among different racial and cultural groups on mutual causes such as ending solitary confinement and other needed changes in CDCR. It specifically called for prisoners to cease hostilities among racial groups in all segments of prison populations, and to do everything possible to resolve personal issues through diplomatic means so as to avoid group conflict.

[46] According to the Legislative Analyst's Office Report on the 2016-17 Budget, Governor's Criminal Justice Proposals at p. 20, the number of assaults on prisoners and staff has decreased from about 8,500 in 2012-13 to about 1,200 in 2014-15. *See also*, S. Rodriguez, "California Prisons Release 'Gang Affiliates' From Solitary Confinement, Costs and Violence Levels Drop," *Solitary Watch*, February 29, 2016 ("Contrary to warnings by Governor Jerry Brown and others, the reductions in isolation also appear to be coinciding with a measurable reduction in violence in California's prisons"). CDCR's use of segregation units is down by over 50 percent in the past three years. *Id.*

[47] *See* Notes 18 through 22.

[48] *See* Note 32 above.

[49] Panels either assume prisoners had no programming in SHU or simply discount any programming the prisoner achieved while in SHU.

(a) Inmate L, 2001 Hearing: Panel commended the prisoner for completing a correspondence course in paralegal studies in SHU, but then dismissed it as follows. Commr: "Most guys that have been in prison as long as you have – have got two or three good solid vocations and they actually have trades and several to choose from and so forth." Atty: "Do you regard the paralegal as not a trade?" Commr: "That's an education. I'm not sure – we'll discuss whether or not that's an actual trade. It is – " Atty: "A lot of paralegals would be surprised to find out if it's not." Commr: "I consider it more of an educational certificate much like a degree." . . . "It's a combination I guess, vocation and degree." . . . "But it's more bookwork. It's not something you can put into practical use outside of filling up boxes and boxes worth of prison records. But you know it's not something you get hands-on hours and so forth." Another panel member followed with: "The record shows you completed a paralegal program in 1995 . . . . You have not completed what I would consider to be a defined vocation within the institution. This is something that you've done on your own. . . . I think it's an interpretation on our part. I mean myself as an individual Board member whether or not I would think he would have marketable skills out there."

(b) Inmate G completed GED, express writing course, courses in victim awareness and stress management, had several certificates from the Corrections Learning Network, completed a Vital Issues course and other study through mail. Notwithstanding, the Panel concluded, "One primary area of concern is your limited self-help programming."

(c) Inmate L, 2000 Hearing contained this puzzling mix: "[T]hat is of concern to us that you've been unable to program for all these many years during the time that you've been in the SHU, which causes some problem. But just continue doing the good programming that you are." . . . "We can't make a recommendation on vocation or education, because I think you've done that." In another hearing, the prisoner explained he had ongoing one-on-one sessions on dependency counseling with psych staff at PBSP; the Commissioner responded, "So you're doing it institutionally but I mean as far as 12 Step in terms of participation on a regular basis, for instance 12 Step. You're not able to do that, right?" Answer: "They don't have that here."

(d) Inmate N, 2014 Hearing: Completed GED, two college diplomas, extensive self-help completion, and Step Down: "You haven't done much in prison. . . You can't do anything when you're in – when you're in SHU you can't program. You can't demonstrate that you can get along with other people, that you can mix among other races, that you -- that you can communicate, that you can solve problems without using violence, that you can – that you've changed, basically. There's no way to demonstrate that." "Yes, you have upgraded educationally…It's part of it. But I'm talking about programming, demonstrating – you've demonstrated evidence you can get along with other people . . . ."

[50] *See* Inmate L, CRA 2016: Psychologist notes the prisoner confirmed during the interview that he remains in touch with his mother, siblings and his wife of many years, and expressed a closeness to all of these individuals and regular contact with them. "However, the nature of these relationships is that they have been overshadowed by a lengthy SHU placement and limited contact during those times." Thus, "it is unclear how they are able to provide a consistent prosocial and transitional environment for him."

[51] Examples:

(a) Inmate L, 2001 hearing: "You are to be commended for disciplinary free behavior for quite some time, 15, 16 years. You're to be commended. However, you also know that you're in SHU. I mean it's pretty hard to get in trouble when you're basically in lockdown and you're in a facility that's on lockdown that doesn't let you program."

(b) Inmate J, 2015: Commr: "Okay, you don't have any 115s in 20 years. . . .You got that part figured out, how not to get a 115. But you've been in SHU for 20 years." Prisoner: "That don't mean nothing. You can get write-ups in the SHU." Commr: Okay, I understand that, but – you figured that out too, how not to get write-ups." Prisoner: "Yeah it's a choice. You stay out of trouble." Commr: "Okay, so that's your story." The decision section stated: "While it's positive to note that his last serious rules violation coincided with his segregated housing term many years ago . . . it is difficult to determine if his better behavioral compliance is a result of his age and his ensuing maturity or if his antisocial tendencies are merely suppressed in a restrictive environment." In the CRA, twenty years of sobriety was dismissed: "Although 20 years sobriety is typically commendable, his restricted SHU housing and movement prohibited access, suggesting abstinence was driven by external controls."

(c) Inmate I, 2016 Hearing: "You've had leadership roles, so it's not surprising you have no RVRs for a while…."

(d) Inmate C, 2015 Hearing: "And while it's not reflected in the 115s, quite often inmates can go for years without having any problems and then you may look at a confidential file and see there is a whole list of issues, but it never resulted in a 115."

(e) CDCR officials frequently characterize good behavior as a negative too. *See* Michael Montgomery, "Ex-Prisoner Sues State Over Years in Solitary," NPR All Things Considered, March 8, 2009 ("State experts also pointed to Lira's peaceful demeanor and record of good conduct in prison as further evidence of gang-inspired deception.")

[52] Inmate L 2001Hearing: Commr: "Now I want to make sure, I didn't see any laudatories in there." Prisoner: "They don't do laudatory chronos any more in SHU." . . . . "I have tried to get staff to document the fact [they haven't seen any kind of suspicious, criminal or gang-related behavior in daily observations], "and they've agreed to do it but were told they couldn't. The fact that there is none from staff [essentially proves there was no such behavior] "and a lot of time that's not clear to people outside the institution."

[53] *See* Inmate G, 2016 Hearing: "[Y]ou have a criminal and gang mentality. There's no other way around that. Part of it is institutional fault. When you place an individual in SHU for 5, 10, 15 years, it changes a man. It changes how that man thinks. And to a certain degree, you have to reprogram yourself. I understand that." Another prisoner's 2016 Risk Assessment concluded that his long SHU term increased the likelihood of adjustment problems if returned to the community.

[54] Statements by the Board's panel members show their recognition of problems on the SNYs. Inmate M, 2016 Hearing: Panel member asks prisoner to "think long and hard about debriefing, because even though we know people debrief, they get on an SNY yard, they still are active, the majority don't." Inmate P, 2016 Hearing: Commissioner said "See when you're on the general population . . . you're still exposed to it [gang activity]. And on the SNY you're less likely. It's still there but it's different. We're totally aware that there are Two Five gangs and stuff. We're not stupid."

[55] *See* Note 26(b); Notes 17 and 18. See Inmate P, 2016 Hearing: Explaining why he never debriefed, "Just – taking responsibility for my own actions, personally." Other prisoners express essentially pro-social moral positions for not debriefing. Inmate H, in his psychological interview, states that he should not be given the power to sabotage someone else's mainline status or especially their parole date by debriefing. When she continues to pressure him to debrief, he responds, "If I debrief and give up information true or untrue on fifty other inmates, that's fifty families that will have to go through what my family is going through now." Inmate N, in his 2014 Hearing: "My reason was my kids. By me debriefing and telling on whatever they wanted to know about [the gang] would put not only me in deeper danger but my kids, my family, and I wasn't about to do that. . . . Well, I have to sacrifice myself to protect my family and that's the bottom line to that. I'm not going to debrief and put my family in jeopardy."

[56] *See Madrid v. Gomez*, 889 F. Supp. at 1241 ("Although no evidence of actual reprisals was introduced at trial, a number of prison staff agree that inmates who debrief and gain release from the SHU are considered 'snitches,' and thus face serious risks of being attacked or even killed by other inmates."); *Griffin v. Gomez*, No. 98-21038 (N.D. Cal), Response to Opening Brief on Remand, p.5 (CDCR states "the purpose of requiring a prisoner to debrief was to ensure his disassociation from the gang because a debriefing inmate would be considered a 'snitch' and thus subject to attack by his former gang associates."); "The Crime of Punishment; Pelican Bay Maximum Security Prison," C.

Weinstein and E. Cummins, from Criminal Injustice, South End Press, 1996 ("Inmates released from SHU are automatically assumed to have gotten out because they snitched.") *See also* Inmate A, 2015 Hearing: Commr: "After debriefing, any threats from [gang]?" Prisoner: "They sent death threats. They threatened my ex-fiancee, you know. It made – they made her life a living hell, and that put a strain on our relationship, and eventually we separated because of it. I felt, I feared for her life, you know."

[57] Any form of restricted custody, such as SNY, has traditionally been viewed as less indicative of a prisoner's ability to succeed in the uncontrolled environment outside. In urging prisoners in general population to go to SNY instead, Commissioners and FAD evaluators rely on uncertain and conflicting rationales. Inmate H, describing his 2016 interview with a FAD psychologist, said she described general population yards as gang yards, and said the SNY is closer to how the community exists, with drug users, bullies, road rage, and others who have no rules – "that's how we see SNY vs. GP." Contrast this discussion in Inmate P's 2016 Hearing: Commr: "Why is it so important to stay at GP?" Prisoner: "Because a [SNY] - It's not a general population and that shows that I can't function in a .." Commr: "That is absolutely -- . . . That's you. Your own mind is not helping you here." Prisoner: "But the reason why I'm bringing it up is because I'm trying to show you that I could function in a general population setting without being influenced by any other influences." Commr: "Well, we're just showing you the flip side of that coin . . . . A lot of guys do very well on the SNY and, you know, . . . Because that stops you being exposed to that . . . See when you're on the general population, because the flip side of this thing is you're still exposed to it. And on the SNY you're less likely."
A prisoner in RCGP (a modified general population for validated prisoners) solely for safety reasons was also told SNY would be better. Commr: "Well, okay, you're out of the SHU now . . . . But you're still in restricted custody, are you not?" "The concern we have is if you can't even live among a general population of inmates in a controlled environment, then how is it that you're going to live out on the streets in an uncontrolled environment?" Atty: "I want to object to that question. . . We have people who parole out of SNY every day." Commr: "Exactly." Atty: "And so your question is not relevant to [prisoner, whose housing is equivalent to SNY]. "You are saying that if he can't go into GP that he can't be successful on the street. And that is clearly not true. He can be in SNY and be successful on the street." Commr: "Exactly." Atty: "Then he can be in this program and be successful on the street. So the fact that he goes to GP or not is not relevant." Commr: "Okay. Well, we have a difference of opinion."

[58] *See* examples:

(a) Excerpt from 1994 hearing: Q: "Are you afraid to give information, afraid for your own self, to give information to prison authorities about other individuals? A: "Certainly I am, that was a consideration." Q:"You're afraid for your safety. Is that -- " A:"Sure. I think anybody would be." Q:"Can a person like you drop out without being a threat to your own safety?" A: "…no." In another hearing, a prisoner expressed his concern with informing, "because of the consequences that could become of it." The panel member responded, "Consequences to you, you mean?" The prisoner responded, "No, I don't, no, no sir. I can take care of myself. My family."

(b) *See* "Prison Gang Drop-Outs Being Threatened … If They Refuse To Snitch," BlackCommentator.com: A prisoner who debriefed says "all I'm able to convey to those who are considering the 'escape' that debriefing offers those sitting in super-max prisons like Pelican Bay and Corcoran SHU, whatever your reasons to retire & extricate yourself, please remain aware that these people are never going to stop attacking you, striving to break your will and seek your complete submission to assimilate your strength into the weak nature of the snitch mentality."

(c) During his debriefing process, Inmate B-1 requested to see a psych because of depression. He discussed "the guilt I was feeling over my decision to debrief and my feeling that I was being pressured into providing information I didn't have to offer." Shortly after he completed debriefing, he had an altercation with staff in the SNY unit and got kicked out. Not long after that, he slit his own throat and wrists in an attempt to commit suicide. He later wrote that "I'm kind of a man without a nation here, but that is of my own doing . . . . I feel like I jumped into a cesspool when I chose to debrief and I'm trying to wash some of the stench off by exposing the debriefing process for what it is." Letter, Inmate B-1 to Clanton & Associates, January 2003.

(d) There is no confidentiality about who has debriefed. *See Griffin v. Gomez*, slip opin. at 8 (No evidence CDCR has a policy of publicizing a prisoner's debriefing, but "it is troubling they create a strong inference of it by linking debriefing so closely to SHU.") Debriefing memos regularly circulated among prisoners in Pelican Bay SHU. The BPH perpetuates the problem by routinely discussing a prisoner's debriefing in his publicly available hearing transcript, and even revealing debriefers' names to other prisoners. *See* 1994 transcript: "Would you be able to be housed with any of those previous people who debriefed?" . . . "Would you be able to be housed with inmate B____, for example?"

[59] *See, e.g.*:

(a) Inmate L 2016 CRA: The evaluator raised the prisoner's risk rating from Moderate to High, although no facts had changed since the prior report, stating "great weight was given to the information in the inmate's Confidential File." The evaluator listed every confidential report since 1974 as the basis of her conclusions.

(b) Inmate C, 2015 Hearing: In the decision section, panel member states, "The reason we had a lengthy deliberation was to consider the lengthy documents contained in the confidential portion of the C-file and also the 1030 Disclosure Forms." . . . "There is an issue here with credibility. . . You claim to the panel here today that you disassociated totally from gangs in 1990. . . When we look at the records, when we look at documents presented of why you were revalidated in 2009, it becomes clear that your association with gangs has continued for a period of time after 1990, and this leaves the panel at a loss of who you are aligned with and who your allegiance lies with." . . . "When I look at the 1030 Forms, the 1030 Disclosure Forms, it seems apparent from so many sources that you had clear involvement."

(c) Inmate F, 2015 Hearing: 10-year denial expressly based in part on confidential reports.

(d) Inmate G, 2016 hearing: Commissioner states prisoner denies gang membership, but his confidential file is "tainted" with individuals saying he is a gang member.

(e) Inmate J, 2016 Hearing: Commissioner points to continuing 1030s as evidence of criminal mindset and continuing gang activity. Commissioner says the panel did not consider the confidential file, but expressly relies on confidential memos to conclude gang involvement.

(f) Inmate N, 2016 Hearing: Commr: "We reviewed your confidential file, and there are many many hundreds of pages in there. You probably know about that because you were there. You know what you were up to."

(g) Contrast the foregoing to the 2015 Hearing of Inmate A, who had debriefed. The prisoner seemed concerned to explain confidential memos in his file, but was stopped by a panel member who previously worked as an investigator in CDCR: "I've put a lot of stuff in people's confidential files over the past 30-something years . . .So let me just tell you this from a broad perspective. A lot – some – of the information that may go in your confidential section really doesn't tie you into anything involving major criminal behaviors or inappropriate behaviors or anything. . . .So getting hung up on confidential information in your C-file isn't the direction you really should be overly concerned about." If you can't remember anything specific from 2013, it could just be "your name came up." Could have been from an old report, or something from years ago.

[60] *In re Gomez*, 246 Cal. App. 4th 1082, 201 Cal. Rptr. 3d 124 (2016) (no evidence to support disciplinary violation for prisoner's hunger strike participation).

[61] *See* https://www.mtholyoke.edu/~kcomroe/precedent.htm ("Hunger striking dates back to pre-Christian times, when those who lacked power protested against the more powerful by fasting in order to call attention to an injustice. . . . Between 1972 and 1982, at least 200 hunger strikes took place in 52 countries."); Rabbi Dr. Shmuly Yanklowitz,"Why I Am Fasting Today" *Jewish Journal*, June 18, 2012 ("We use a hunger strike because it is a time-honored tradition among those seeking redress for social injustice," citing Gandhi, Benazir Bhutto, Aung Suu Kyi, Cesar Chavez and early American suffragists.)

[62] Paige St. John, "California agrees to move thousands of inmates out of solitary confinement," *Los Angeles Times*, September 1, 2015.

[63] *See, e.g.*, Inmate F CRA: Diagnosis of Antisocial Personality Disorder based in part on validation and corresponding placement in SHU for 15 years; notes no clear indication of improved behavior, given recent rules violation for hunger strike activity.

[64] *See, e.g.*, Inmate F CRA: Cites hunger strike 115 as "evidence [prisoner] continues to harbor violent ideation and intent." Concluded he presents a High Risk of violence, based on, among other things, "failure to acknowledge gang status." Inmate H CRA: High risk rating based "significantly on his current validation as a prison gang member and his reluctance, inability, and unwillingness to disassociate." Inmate D CRA: Has not made a "strong statement that he is breaking all ties from his former gang," which increases the risk of violent behavior.

[65] *See e.g.*, Inmate L CRA: The evaluator noted there is no evidence to suggest continued involvement in gang activity, or that he continues to use substances or has for many years, and has not engaged in violence or antisocial behavior in many years. "His conduct is not indicative of ongoing or intermittent impulsivity." The evaluator also takes note of 30 years of discipline-free behavior. She then ignores this observed 30 years of prosocial behavior to conclude that "the enduring nature of his antisocial behavior and criminogenic thinking" indicates a diagnosis of Antisocial Personality Disorder. The CRA describes a "pattern of negative behavior . . . since his incarceration," and "a pattern of recklessness, poor impulse control and a willingness to antagonize others" "throughout his lifetime (including throughout most of his incarceration)." His behavior is described as negative "until recently" and his prosocial behavior "more recent (relative to the length of his lifetime)."

[66] February 3, 2017 meeting of Dr. Terry Kupers with Dr. Cliff Kusaj, Chief Psychologist of the Forensic Assessment Division.