03-56712

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

JAMES ALLEN HYDRICK, et al., Plaintiffs-Appellees, v. GRAY DAVIS, et al., Defendants-Appellants.	Case No. 03-56712 (D.C. Case No.: CV 98-7167 TJH (RNB) Central California (Los Angeles))

APPELLANTS' OPENING BRIEF

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SUBJECT MATTER AND APPELLATE JURISDICTION

This case involves an action for damages and other relief brought by a class of approximately 600 Sexually Violent Predators (SVP's) confined at Atascadero State Hospital (ASH) pursuant to California's Sexually Violent Predator Act (SVPA) Welfare & Institutions Code (Welf. & Inst.) §§ 6600-6609. The SVPs allege numerous violations of their constitutional rights pursuant to 42 U.S.C. §1983.

The district court had jurisdiction of this action pursuant to 28 U.S.C. §1343. This Court has jurisdiction of the appeal pursuant to 28 U.S.C. §1291 and the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (jurisdiction of appeals from final decisions of the district courts).

The order appealed from was entered on August 26, 2003. Appellants filed their Notice of Appeal on or about September 22, 2003. The appeal was timely pursuant to Federal Rules of Appellate Procedure, Rule 4(a)(1)(A).

REVIEWABILITY

Defendants Jon DeMorales, Grenda Ernst, Craig Nelson and Melvin Hunter (Defendants) appeal from the summary denial of Defendants' Motion to Dismiss parts of Plaintiffs' Second Amended Complaint (SAC) based on Qualified Immunity and the Eleventh Amendment. Defendants' Motion to Dismiss was brought under Federal Rules of Civil Procedure, Rules 12(b)(1), and 12(b)(6). This Court's Order to Show Cause re Jurisdiction to hear the appeal was discharged and jurisdiction taken on

November 25, 2003.

STATEMENT OF ISSUES ON APPEAL

1. Should the claims for monetary damages brought under 42 U.S.C. section 1983 against Defendants in their official capacities have been dismissed based on the Eleventh Amendment?

2. Should the claims alleging violations of the California Constitution be dismissed based on the Eleventh Amendment to the United States Constitution and the abstention doctrine?

3. Are Defendants entitled to qualified immunity for Plaintiffs' damages claims since those claims are brought under criminal law theories that are not clearly established to be applicable to civil detainees?

4. Are Defendants entitled to qualified immunity when a complaint fails to allege facts showing violations of clearly established constitutional rights of which reasonable officials in Defendants' positions would have known?

STATE APPELLEES' CONTENTIONS ON APPEAL

1. The Court of Appeals should reverse the district court order denying Defendants' Motion to Dismiss Plaintiffs' 42 U.S.C. §1983 claim for damages from Defendants in their official capacities. Under the Eleventh Amendment a state official cannot be sued in his official capacity for damages under 42 U.S.C. § 1983.

2. The Court of Appeals should reverse the district court order denying

Defendants' Motion to Dismiss Plaintiffs 42 U.S.C. § 1983 claims based on the California Constitution because Under the Eleventh Amendment federal courts must abstain from establishing new rights under a state constitution.

3. The Court of Appeals should reverse the district court's denial of Defendants' Motion to Dismiss Plaintiffs' alleged claims under the Fourth, Sixth and Eighth Amendments, and the Double Jeopardy Clause , and the *Ex Post Facto* Clause based on qualified immunity. Those claims are based on an "as applied" application of criminal law jurisprudence to the civilly committed and reasonable officials in Defendants' positions would not have known that such jurisprudence was applicable.

4. The Court of Appeals should reverse the district court's denial of qualified immunity because Plaintiffs fail to allege specific constitutional violations by specific Defendants as required.

5. The Court of Appeals should reverse the district court's denial of qualified immunity because Plaintiffs fail to allege violations of clearly established constitutional law by Defendants.

6. The Court of Appeals should reverse the district court's denial of qualified immunity because Plaintiffs allegations are such that reasonable officials in Defendants' positions would believe their conduct lawful.

PROCEDURAL POSTURE OF THE CASE

This action was filed by a class of SVPs confined at Atascadero State Hospital

(ASH) on or about September 2, 1998. (Excerpts of Record (ER) 1)[1] The SVPs filed a First Amended Complaint on or about August 31, 1999, (ER 0094) and a Second Amended Complaint on or about August 14, 2002 (ER 0462). Defendants filed a Motion to Dismiss Plaintiffs' Second Amended Complaint raising Eleventh Amendment and qualified immunity defenses on or about February 21, 2003. (ER 0489) Judge Hatter denied the Motion on or about August 26, 2003. (ER 0804) Defendants filed a Notice of Appeal of September 23, 2003. (ER 0806)

I.

THE ELEVENTH AMENDMENT BARS PLAINTIFFS' CLAIMS FOR DAMAGES AND PLAINTIFFS' CALIFORNIA CONSTITUTIONAL CLAIMS

A. The Eleventh Amendment Immunizes a State and its Subdivisions from Damages Under Section 1983.

The State and its subdivisions cannot be sued for damages under section 1983 because the Eleventh Amendment immunizes the state from suit for damages in federal court and because a state official, acting in his official capacity, is not a "person" within the meaning of section 1983.

Section 1983, provides in relevant part:

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[1] All subsequent references to the Excerpts of Record will be designated by "ER" followed by the relevant page number(s).

> Every person who . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Neither a state nor its officials acting in their official capacities are "persons" within the meaning of section 1983 and, thus, are not subject to suit for money damages under section 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 70-71 (1989); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1327 (9th Cir. 1991).

Plaintiffs' prayer seeking money damages against all Defendants in their official capacities, as set forth in the SAC (ER 0485-0486), is barred due to a lack of jurisdiction.

B. The Eleventh Amendment Bars Federal Courts from Determining Heretofore Unknown Rights in State Constitutions.

1. The Eleventh Amendment bars state law claims against state officials in federal court.

In the First, Second and Tenth claims Plaintiffs allege that Defendants violated the California Constitution and seek relief under section 1983. As the Supreme Court has explained, these types of cases are disfavored:

> a federal suit against state officials on the basis of state law contravenes

> the Eleventh Amendment when -- as here -- the relief sought and ordered has an impact directly on the State itself.
>
> . . .
>
> As noted, the implicit view of these [prior cases where pendant jurisdiction was permitted] seems to have been that once jurisdiction is established on the basis of a federal question, no further Eleventh Amendment inquiry is necessary with respect to other claims raised in the case. This is an erroneous view and contrary to the principles established in our Eleventh Amendment decisions. "The Eleventh Amendment is an explicit limitation of the judicial power of the United States." It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 118 (1984)(citations omitted).

Penhurst addressees state law claims. The abstention rule is even more rigorous for state constitutional claims.

The abstention doctrine and Eleventh Amendment bars Plaintiffs' state law claims when state courts have not had an opportunity to determine the issues. These claims must be dismissed with prejudice as to all Defendants since they are both attacks upon the State itself and not cognizable under section 1983.

Plaintiffs may suggest that they do not intend to pursue damage claims against Defendants in their official capacities. However, Plaintiffs refused to remove the claim from the SAC or otherwise voluntarily dismiss the claim.

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2. Plaintiffs California Constitutional Claims are not Cognizable Under Section 1983 and their Consideration Violates the Eleventh Amendment and the Abstention Doctrine.

In order to state a claim under section 1983, a plaintiff must allege that the conduct deprived them of a right or privilege protected by federal law or the United States Constitution and that the conduct was committed by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

Section 1983 is a vehicle to bring actions alleging violations of federal law and the United States Constitution-not state constitutions or state laws. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The federal courts must abstain from addressing Plaintiffs' claims under the California Constitution pursuant to the Eleventh Amendment, because the state has not yet had an opportunity to determine these issues of state constitutional law. *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970). Neither is pendant jurisdiction appropriate. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1177 (3rd Cir. 1986).

28 U.S.C. section 1367(a) cannot bring California constitutional claims within the parameters of section 1983. The wording of 28 U.S.C. section 1367(a) specifically eliminates supplemental jurisdiction when a federal statute makes express provisions for its jurisdiction, as does section 1983. Section 1983 expressly limits its jurisdiction to federal constitutional claims and federal law claims.

Furthermore, The claims presented by Plaintiffs under the California Constitution are both novel and complex. Therefore, federal courts must decline jurisdiction under 28 U.S.C. section 1367(c) and the Eleventh Amendment.

II.

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY IN THEIR INDIVIDUAL CAPACITIES ON ALL ALLEGED CLAIMS

Qualified immunity "protects government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mitchell v. Forsyth*, 472 U.S. 511, 528, and n.9, (1985).

In raising a claim of qualified immunity in a suit against a state employee for an alleged violation of a constitutional right, the requisites of the defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Id.*, at 526, 411, 2806. The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Ibid.* As a result, Courts have stressed "the importance of

resolving immunity questions at the earliest possible stage in litigation." *Hunter* v. *Bryant,* 502 U.S. 224, 227 (1991) *(per curiam).*

A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the defendant's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). This threshold inquiry must by necessity include the corollary that the constitutional right is applicable to the party asserting the injury.

After consideration of the initial question an analysis of qualified immunity involves a two-step analysis: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed his conduct was lawful?" *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). "Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Sloman v. Tadlock*, 21 F.3d 1462, 1466-67 (9th Cir. 1994) (quoting *Malley v. Briggs*, 475 U.S. 335 (1986)). Once the defense is raised the burden is on Plaintiffs to show that *each* defendant violated clearly established rights. *Neely v. Feinstein*, 50 F.3d 1502, 1506 (9th Cir. 1995). Here, Plaintiffs have failed to meet this burden.

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A. Qualified Immunity Protects Defendants Against Plaintiffs Third, Fourth, Fifth and Ninth Alleged Claims Because Those Claims Are Based on Criminal Law Jurisprudence and Plaintiffs Are Civilly Committed.

In determining whether allegations constitute the violation of a constitutional right, a court might find it necessary to set forth principles which will become the basis for a holding that a right is or is not clearly established. This is the process for the law's elaboration from case to case, and it is one reason for a court's insisting upon turning to the existence of a constitutional right applicable to the plaintiff as the first inquiry.

If no constitutional right applicable to the party asserting the claim would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. Plaintiffs' Third, Fourth, Fifth and Ninth claims fail at this step. No constitutional right applicable to Plaintiffs is violated were the allegations accepted as true.

1. A civil statute cannot be divested of its civil nature by its application.

In a case involving Washington's SVP statute the Supreme Court held that "[t]he civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute." *Seling v. Young*, 531 U.S. 250 (2001).

In *Seling*, plaintiff did not attack the statute as unconstitutional according to its terms, but alleged the conditions of confinement in its application were unconstitutional. *Id.* at 264. However, the Court reasoned that the claims were an "as applied" attempt to remove an otherwise valid civil statute from an analysis based on its civil nature and place it into a criminal law analysis. It is that deviation from the appropriate analytical framework that was held to be unacceptable.

This Court is faced with the same theoretical argument as the *Seling* Court. Plaintiffs allege claims based on an "as applied" theory seeking money damages, as well as injunctive and declaratory relief.[2] Plaintiffs' alleged Eighth, and Sixth Amendment, and Double Jeopardy and *Ex Post Facto* claims fail to state a constitutional violation because they are inapplicable to the civilly committed. Accordingly, they fail to apply to Plaintiffs and Defendants are entitled to qualified immunity.

B. *Ex Post Facto* and Double Jeopardy Claims.

Plaintiffs allege that conditions at ASH violate both the *Ex Post Facto* and Double Jeopardy Clauses of the Constitution. (ER 0481-0482) Inasmuch as they are asserting a facial challenge to the statute on both grounds, the argument is precluded by *Kansas v. Hendricks*, 521 U.S. 346 (1997), where the Supreme Court rejected

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[2] *Ex post facto* and double jeopardy challenges appear to be directed toward release although such relief is unavailable through the section 1983 vehicle.

these exact claims with respect to a statute that is substantively identical to California's in all significant respects:[3]

> Hendricks argues that, as applied to him, the Act violates double jeopardy principles because his confinement under the Act, imposed after a conviction and a term of incarceration, amounted to both a second prosecution and a second punishment for the same offense. We disagree.
>
> Because we have determined that the Kansas Act is civil in nature, initiation of its commitment proceedings does not constitute a second prosecution. Moreover, as commitment under the Act is not tantamount to "punishment," Hendricks' involuntary detention does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term. Indeed, in *Baxstrom v. Herold*, 383 U.S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760 (1966), we expressly recognized that civil commitment could follow the expiration of a prison term without offending double jeopardy principles. We reasoned that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." Ibid, at 111-112. If an individual otherwise meets the requirements for involuntary civil commitment, the State is under no obligation to release that individual simply because the detention would follow a period of incarceration.

Hendricks at 369-370(citations partially omitted).

In *Seling* the Court reinforced its prior holding in *Hudson v. U.S.*, 522 U.S. 93 (1997). 531 U.S. at 262. *Hudson* disavowed the Court's decision in *United States v. Halper*, 490 U.S. 435 (1989) which had allowed consideration of "the sanction as applied" for double jeopardy purposes. Calling the "as applied" approach "an ill

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[3] In his dissent in *Hendricks* Justice Breyer noted that California's statute did not suffer the same flaws which he argued made Kansas' statute dubious. *Hendricks* at 388-389; dis. opn. of Breyer, J.

considered and unworkable" deviation, the Court set the stage for its later decision in *Seling*.

The Supreme Court has clearly repudiated the "as applied" approach to move civil actions into a criminal law analytical framework.[4] In *Seling* the Court held that "[t]he civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute." *Seling* 531 U.S. at 735. The states are allowed wide latitude in determining how to apply their statutory schemes. *Hendricks*, 521 U.S. at 372. Thus, Plaintiffs fail to state a constitutional violation applicable to Plaintiffs under the *Hendricks* guidelines. Defendants are entitled to qualified immunity on those alleged claims.

C. **Eighth Amendment Claims.**

In *Bell v. Wolfish*, the Supreme Court specified that the Eighth Amendment precludes "cruel and unusual punishment" for "sentenced inmates" for whom there has previously been a "formal adjudication of guilt . . . . Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979).

The SVP class falls into this categorization - no formal adjudication of guilt has

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[4] At the time the First Amended Complaint (ER 0094) was filed, the Supreme Court had yet to address the propriety of "as applied"challenges.

occurred vis-a-vis the SVP. SVPs are not sentenced inmates as required for application of Eighth Amendment analysis. Thus, the Eighth Amendment in inapplicable.

Plaintiffs herein are akin to the civilly committed Plaintiffs in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg* the Supreme Court cited the Third Circuit's determination that the Due Process Clause, not the Eighth Amendment, was the appropriate constitutional vehicle for determining the rights of individuals subject to civil commitment. *Id.* at 312.

Thus, as a matter of law, conditions of confinement claims raised by detainees who are not adjudicated criminals at the time of their complaint are analyzed under the Fourteenth Amendment substantive Due Process Clause, rather than the Eighth Amendment. *Bell*, 441 U.S at 535 n.16; *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998). By extension from the SAC's internal incorporations, this analytical approach also applies to Plaintiffs' First Amendment, Fourth Amendment, Fifth Amendment, Sixth Amendment, *ex post facto* and double jeopardy claims.

1. Defendants are Not Prison Officials.

In addition to applicability only in the criminal law context, the Eighth Amendment imposes a duty upon prison officials to protect prisoners and to provide humane conditions of confinement. *Farmer v. Brennen*, 511 U.S.825 (1994). Defendants are not prison officials. (ER 0466.) The Eighth Amendment imposes no

duty upon Defendants, and they cannot violate the Amendment. Therefore, they are entitled to qualified immunity.

D. Plaintiffs' Sixth Amendment Allegations Fail.

Because *Seling* precludes a finding that the SVPA is punitive as applied, Plaintiffs' Sixth Amendment claim fails to allege a constitutional violation *vis-a-vis* Defendants. The Sixth Amendment goes to criminal proceedings and is inapplicable to the civilly committed.

The Sixth Amendment guarantees the right to counsel in all *criminal* prosecutions. It says nothing whatsoever about counsel rights in civil proceedings. In *United States v. Sahhar*, the Court held that because civil commitment serves a "regulatory," as opposed to a "punitive," purpose, the Sixth Amendment's jury trial provision did not apply. *United States v. Sahhar*, 917 F.2d 1197, 1206 (9th Cir. 1990) It would be extraordinary, and inconsistent with the spirit of *Sahhar*, to suggest that the portion of the Sixth Amendment dealing with the right to counsel applies to civil commitments while the jury trial requirement does not.

Plaintiffs allege that their Sixth Amendment right to access the courts has been violated. (ER 0484-0485) The right of civilly committed individuals to access the courts is found in the Due Process and Equal Protection Clauses. *Cornett v. Donovan*, 51 F.3d 894, 897 (9th Cir. 1995). Because these are civil committees, Plaintiffs have failed to allege a constitutional violation under the Sixth Amendment

and Defendants are entitled to qualified immunity because no constitutional violation has been alleged.

Plaintiffs' burden has not been met for the Third, Fourth, Fifth and Ninth alleged claims. No constitutional right applicable to Plaintiffs has been violated and there is no necessity for further inquiry concerning qualified immunity as to those claims. No constitutional violation has occurred because the alleged claims are based on the application of criminal law jurisprudence to the civilly committed. A state employee cannot be held individually liable for alleged violations of constitutional rights not applicable to those bringing suit.

III.

QUALIFIED IMMUNITY PROTECTS STATE OFFICIALS FROM CLAIMS BASED ON RESPONDEAT SUPERIOR

The doctrine of respondeat superior is inapplicable in actions based upon allegations of civil rights violations. *Polk County v. Dodson*, 454 U.S. 312 (1981). Unless they play an affirmative part in the alleged deprivation of constitutional rights, supervisory officials cannot be held liable under section 1983. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Johnson v. Duffy*, 588 F.2d 740, 743-744 (9th Cir. 1978).

The SVPs fail to allege which defendants violated which constitutional rights. Qualified immunity is appropriate because there is no allegation that a clearly established right was violated by a specific Defendant. Plaintiffs are attempting to

plead respondeat superior theories and avoid a qualified immunity defense.

A supervisor making policy decisions that cause the alleged constitutional violations may be liable. *Ouzts v. Cummins*, 825 F.2d 1276, 1277 (8th Cir. 1987). However, a plaintiff must establish an essential link between the policy and the injury. *See Milton v. Nelson*, 527 F.2d 1158, 1159 (9th Cir. 1975). The claimed constitutional violation must then be specifically alleged. *Vayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Padway v. Palches*, 655 F.2d 965, 968 (9th Cir. 1982). Plaintiffs must set forth facts proximately connecting the individual Defendants to the loss Plaintiffs claim to have suffered. *Plamer v. Sanderson*, 9 F.3d 1433, 1438 (9th Cir. 1993); *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Plaintiffs herein fail to plead any of the nexus requirements with particularity or specificity. No linkage between alleged policy and alleged injury is established and no linkage between a Defendant and either is established. Neither is proximate causation alleged. If Plaintiffs allege that conditions at ASH are worse than those in prison in order to insert criminal law jurisprudence into a civil law framework, they need to allege with specificity those claims as to the individual Defendants. Plaintiffs have not done so. defendants are therefore entitled to qualified immunity.

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1. To Defeat Qualified Immunity More than General Allegations are Required.

The Supreme Court recognizes that maintenance of an action against government officials involves systemic social costs requiring pleadings containing more than a generalized approach. To avoid conversion of the clearly established law rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights, court's require that the constitutional violation must be clearly established in a more particularized, and hence more relevant sense. A generalized approach

> . . . would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." It should not be surprising, therefore, that our cases establish that "the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987)(citations omitted).

Plaintiffs' fail to allege that the rights Defendants allegedly violated are "clearly established" in a particularized, relevant sense. Thus, qualified immunity shields Defendants from liability in their individual capacities. For example, the SAC

adds Melvin Hunter as a Defendant in his individual capacity. (ER 0466) However, no facts indicate how he is specifically responsible, and when that responsibility arose.

The SAC makes general conclusory allegations against the Defendants as a group. No attempt is made to specify with particularity which policy or practice was specifically tied to any Defendant. The only policy Plaintiffs reference is Administrative Directive (AD) 602 (ER 0473-0475), which Plaintiffs do not allege was violated.

Plaintiffs' failure to identify specific wrongdoing by particular Defendants is all the more telling because this case has been in litigation for four years, and Defendants have produced over 270,000 pages of documents, responded to 375 interrogatories and 240 Requests for Admissions, and have participated in 34 depositions.[5]

"Individual capacity" liability hinges on pleading and proving raw abuse of power constituting arbitrary action. *Reed v. Philadelphia Housing Authority*, 372 F. Supp. 686, 692 (E.D. Pa. 1974). The SAC fails to meet this standard. (ER 0466, 0476-0485) Because the pleading does not properly allege Defendants violated a

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[5] Defendants have cooperated throughout the discovery process as evidenced by the need for the District court's intervention on only two occasions. Those occasions both involved Plaintiffs' requests to extend merit-based and expert discovery for the third time.

specific clearly established constitutional right applicable to Plaintiffs, Defendants are entitled to qualified immunity.

As discussed above, if a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow state officials to avoid the burden of trial if qualified immunity is applicable. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

In sum, the SAC fails to allege that Defendants violated a clearly established constitutional right applicable to SVPs of which a reasonable official would have been aware. According, Defendants are entitled to qualified immunity on Plaintiffs' alleged claims.

IV.

REASONABLE OFFICIALS IN DEFENDANTS' POSITIONS WOULD BELIEVE THEIR ALLEGED ACTIONS WERE CONSTITUTIONALLY PERMISSIBLE

A. Plaintiffs Fail to Establish Allegations Overcoming the Second Prong of the Qualified Immunity Test-That an Official Knew His Acts Violated the Law.

Defendants are entitled to qualified immunity under the second part of the

qualified immunity analysis because a reasonable official in Defendants' position reasonably could have believed that the alleged conduct was lawful. As the Court noted in *Crawford-el v. Britton*, 523 U.S. 574, 590 (1998):

> Focusing on "the objective legal reasonableness of an official's acts,", avoids the unfairness of imposing liability on a defendant who "could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to 'know' that the law forbade conduct not previously identified as unlawful," That unfairness may be present even when the official conduct is motivated, in part, by hostility to the plaintiff.

Defendants cannot be held liable for constitutional issues which are not applicable to the civilly committed. Under *Crawford-el* they are entitled to qualified immunity as a matter of law.

A review of the cases decided in the short period since 1996 confirms the unsettled nature of the constitutional requirements surrounding SVPs. A partial list of these cases include the following: *Kansas v. Hendricks*, 521 U.S. 346 (1997)(SVP statute civil not punitive); *Seling v. Young*, 531 U.S. 250 (2001)("as applied" criminal law claims disallowed for civil statute; criminal law constitutional claims not applicable to SVPs, treatment requirements punitive application of statute); *McKune v. Lile*, 536 U.S. 24, (2002)(no right to privileges if not participating in treatment); *Kulas v. Valdez*, 159 F.3d 453 (9th Cir. 1998), *cert. denied*, 120 S. Ct. 1187 (2000)(SVP treatment); *Thielman v. Leean*, 282 F.3d 478 (7th Cir. 2002)(due process and equal protection, conditions of confinement); *In re Matthews*, 345 S.C. 638, 550

S.E.2d 311 (2001)(statute tracks Kansas' statute and therefore no Double Jeopardy - conditions of confinement not punitive); *Page v. Torrey*, 201 F.3d 1136 (9th Cir. 2000)(person detained as SVP not subject to PLRA); *Munoz v. Kolender*, 208 F. Supp. 2d 1125 (S.D.CA 2002)(SVP confinement in jail while awaiting hearing not a constitutional violation): *Kansas v. Crane*, 534 U.S. 407 (2002)(serious difficulty controlling behavior required for SVP commitment); *Woodard v. Mayberg*, 242 F. Supp. 2d 695 (N.D.CA 2003)(California's SVP commitment scheme tracks Kansas and Washington's SVP commitment schemes and is civil, not punitive in nature - "as applied" challenge to statute inappropriate under *Seling*); *Hubbart v. Superior Court*, 19 Cal.4th 1138 [81 Cal.Rptr.2d 492] (1999)(SVPA tracks Kansas' statute as proper civil commitment scheme and does not violate *es post facto*, double jeopardy, due process, equal protection); *People v. Hurtado*, 124 Cal.Rptr.2d 186 [28 Cal.4th 1179] (2002)(SVPA not punitive); *(People v. Superior Court (Ghilotti)*, 27 Cal.4th 888 [119 Cal.Rptr.2d 1] (2002)(SVPA narrowly tailored to achieve compelling purpose of confining and treating extremely dangerous persons unable to control mental disorders); *In re Calhoun*, 112 Cal.App.4th 1262 [6 Cal Rptr.3d 34] (2003)(SVPs are committed for and may not refuse treatment).

The SAC does not and cannot satisfy the *Crawford-el* requirements. Its conclusory allegations fall far short of establishing that reasonable officials in the Defendants' position would have known that their conduct was unlawful under the

current state of the law in this area. Accordingly, Defendants are entitled to qualified immunity.

B. Defendants' Claim of Qualified Immunity Is Consistent with the ASH Policy Cited by Plaintiffs in the SAC.

Plaintiffs quote ASH AD No. 602 in the SAC. (ER 0474, 0475) Plaintiffs do not dispute AD 602 and do not allege that it is not applied as policy at ASH.[6]

Assuming *arguendo* that the constitutional rights alleged by Plaintiffs to have been violated are applicable, it is clear from Plaintiffs' references to AD 602 in the SAC that Defendants cannot have knowingly violated Plaintiffs' constitutional rights. Defendants cannot have knowingly violated Plaintiffs' constitutional rights because AD 602 is the policy Plaintiffs' posit Defendants instituted. Defendants are therefore entitled to qualified immunity in their individual capacities.

Plaintiffs note that AD 602 lists the following rights of patients involuntarily detained at ASH:

> the right to treatment services that are provided in ways least restrictive to personal liberty; the right to dignity, privacy, and humane care; the right to be free from harm including excessive restraints, isolation, medication, abuse or neglect; the right to be free of medication as a form of punishment or for staff convenience; the right to prompt medical care; the right to religious freedom and practice; the right to participate in

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[6] If Plaintiffs are alleging that practice does not follow policy then Defendants are not be liable because there is no respondeat superior or vicarious liability under section 1983. *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991), *cert. denied*, 502 U.S. 1074 (1992).

> appropriate programs of publically supported education; the right to social interaction and physical exercise; and the right to be free from hazardous procedures.

(ER 0474)

Plaintiffs set forth ASH's governing policy, thereby establishing this policy as part of the factual allegations in the SAC which must be accepted as true. *Western Mining Counsel v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

1. Plaintiffs' Allegations in the First, Second, Third (and By Extension the Fourth), Fifth, Seventh, Eighth and Ninth Alleged Claims as to the Policy at ASH Are Contrary to the Policy described in the SAC.

Plaintiffs allege in the Tenth Alleged Claim that ASH policies deny SVPs privacy. (ER 0485) But AD 602 specifically states that as a matter of policy patients at ASH have the right to privacy. (ER 0473)

Plaintiffs allege in the Sixth and Seventh alleged claims that ASH policy permits an SVPA's loss of privileges without due process. (ER 0483) AD 602 states that a patient's rights may be denied for "good cause" and upon recommendation of the patient's "Interdisciplinary Team" and psychiatrist (ER 0474) and after review by the "Interdisciplinary Team" (ER 0475)

Plaintiffs cannot describe the policy establishing that patients are to be provided with due process under AD 602, and on the other hand allege that ASH policies fail to provide due process.

In short, Defendants' qualified immunity defense is supported by AD 602. Defendants reasonably believe AD 602's policies comply with constitutional requirements. Indeed, Plaintiffs do not dispute the constitutional integrity of AD 602's policies. Defendants are entitled to qualified.

C. Defendants Sued in their Individual Capacities Are Entitled to Qualified Immunity on Plaintiffs' First Alleged Claim.

Defendants are entitled to qualified immunity on Plaintiffs' First Alleged Claim. The allegations are not such that a reasonable official in Defendants' position would have known that their actions, even if all allegations are accepted as true, violated constitutional standards for treatment of SVPs in a maximum security mental hospital.

SVPs do not have a right to refuse mandated treatment. *In re Calhoun*, 112 Cal.App.4th 1262 [6 Cal.Rptr.3d 34] (2003). Certainly SVPs are not entitled to privileges if they choose not to participate in treatment while confined. *See McKune v. Lile*, 536 U.S. 24 (2002). Defendants cannot have violated a clearly established constitutional bar of which a reasonable official would have known.

The SAC fails to allege elements to defeat Defendants' claim of qualified immunity in the context of the SVP's current confined situation. As a matter of law "not every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory." *DiMeglio v. Haines*, 45 F.3d 790,

806 (4th Cir. 1995).

Plaintiffs claim that they are "punished"[7] for voicing opinions and refusing treatment. (ER 0480) No fact as to what constitutes "punishment" is alleged. The allegation is conclusory in that Plaintiffs conclude that any negative consequences for failure to adhere to the rules in a secure mental institution rises to the level of unconstitutional punishment.

1. Plaintiffs' allegations in the First Alleged Claim fail to allege violations of a clearly established constitutional right.

A First Amendment 1983 retaliation claim must plead three elements. First, the Plaintiffs must demonstrate that the speech was protected. *Huang v. Board of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990). Second, the Plaintiffs must demonstrate that the alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech. *ACLU v. Wicomico County, Md.*, 999 F.2d 780, 785 (4th Cir. 1993)(stating that "a showing of adversity is essential to any retaliation claim"). Third, the Plaintiffs must demonstrate that a causal relationship exists between the speech and the Defendants' retaliatory action. *Huang*, 902 F.2d at 1140.

Plaintiffs have not alleged facts to demonstrate these elements. Rather, Plaintiffs have set forth conclusory allegations such as SAC paragraph 70, which

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[7] Throughout the SAC the term "punishment" in various forms is used with no indication of what "punishment" means in this context.

states: "Defendants policies, practices and customs permit and encourage the punishment of members of the SVP Class for the mere expression of their beliefs, including, but not limited to, punishment for refusing treatment." (ER 0480)

Nothing in this allegation implies that the speech was protected and not all speech is protected. Failing to participate in treatment is not constitutionally protected speech. Furthermore, the allegation concludes in and of itself that Plaintiffs were "punished" solely for speech and Defendants caused the punishment. Defendants are entitled to qualified immunity under the allegations set forth in the SAC because no proximate causation is alleged. Furthermore, no allegation of violation of a clearly established right is present. Lastly, a reasonable official in Defendants' position would believe that limitations on SVPs confined in a maximum security mental institution are permissible.

The qualified immunity defense is also supported by the language of the committing statute which states that the SVPs are committed for treatment. Welf. & Inst. Code section 6602. It is reasonable for the officials to believe that they must treat the SVPs and that the SVPs are not permitted to refuse treatment. *Calhoun,* 112 Cal.App.4th at 1291.

D. Defendants Are Entitled to Qualified Immunity on Plaintiffs' Second Alleged Claim.

Plaintiffs' Second Claim alleges violations of the Fourth and Fourteenth

Amendments and violations of Article 1, Section 13 of the California Constitution.[8] The claim also appears to implicate the Eighth Amendment in its conclusory allegation regarding the unreasonable use of force. (ER 0481).

A mental patient's rights are sometimes analogous to those of prisoners. *Bounds v. Smith*, 430 U.S. 817, 825 (1977). But, since confined mental institution patients are not held for punishment purposes they are similar to pretrial detainees in some ways as well. In *Bell v. Wolfish*, 441 U.S. at 534, the Court held that pretrial detainees were not held for punishment, but that restrictions on liberty reasonably related to legitimate government objectives were permissible. Defendants are reasonable in believing that the limitations and rights discussed in *Bell* and *Bounds* are applicable to SVPs.[9]

"The constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). By analogy the constitutional rights of confined mental

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[8] Claims arising under the California Constitution are addressed above.

[9] Although a person involuntarily confined to a secure mental institution is not confined for the purpose of punishment that does not mean they are free to do whatever they please while so confined. A secure hospital must maintain control of its population for the safety and security of the institution's patients as well as its staff. To that end, although a patient is not committed for punishment if a patient refuses to follow the rules of the institution negative consequences will follow. No case found by Defendants has suggested that reasonable restrictions on SVPs amount to a constitutional violation.

patients are also more limited than those held by individuals in society at large. The necessity to maintain the safety and security of an institution and operate a treatment program justifies some limits on patients' rights.

a. Searches.

The Ninth Circuit has held, "the reasonableness of a particular search is determined by reference to the prison context." *Michenfelder v. Summer*, 860 F.2d 328, 332 (9th Cir. 1988). In reaching the conclusion that strip searches were permissible in the context presented the court applied the *Bell v. Wolfish* balancing test which states:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

441 U.S. at 559.

Plaintiffs' allegations that they are subjected to inspections of their persons and their personal belongings fails to state a claim for a person committed to a secure mental institution. The searches at ASH as alleged in the SAC are reasonable in light of Plaintiffs' circumstances and the compelling need to maintain ASH's safety and security.

Plaintiffs have not alleged facts showing that Defendants violated clearly established law applicable to those confined in a mental institution. Furthermore, the

allegations contained in the SAC are not such that a reasonable official in Defendants' position would believe they had violated constitutional prohibitions by those acts. Thus, Defendants are entitled to qualified immunity as to the Second Alleged Claim.

E. Defendants Are Entitled to Qualified Immunity on the Fifth and First Amendment Claims Because Admission of Past Acts as Part of a Rehabilitation and Treatment Process Is Constitutionally Permissible.

Plaintiffs allege that in order to move up in Phase Treatment Levels at ASH they must sign a document admitting to, and taking responsibility for, past acts for which they have been convicted. (ER 0475) Thus Plaintiffs admit that this admission is part of the treatment process at ASH. Defendants assume this allegation is the gravamen of Plaintiffs' First Amendment claim in that only this allegation plausibly sounds in the First Amendment.[10] Plaintiffs appear to claim that the admission as a requirement of advancing through phases violates their Fifth Amendment privilege against self-incrimination.

In *McKune v. Lile* the Supreme Court reasoned, on the basis of both rehabilitation and treatment requirements, that admission as part of treatment does not amount to forced self-incrimination. 536 U.S. 24 (2002) The Court addressed itself

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[10] Defendants should not be required to guess which facts allegedly support which allegation.

beyond the prisoner context by stating that:[11]

> Prison context or not, respondent's choice is marked less by compulsion than by choices the Court has held give no rise to a self-incrimination claim. The "criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha v. California*, 402 U.S. 183, 213 (1971) (citation and internal quotation marks omitted). It is well settled that the government need not make the exercise of the Fifth Amendment privilege cost free.

Id. at 9. (emphasis added; some citations omitted).

The Court further stressed that taking responsibility for actions is an important component in a treatment program. *Id.*, at 5-6.

The SAC alleges that in the treatment program at ASH the SVP is required to sign a statement admitting to his past misdeeds. (ER 0475) The Court in *McKune* recognized that such an admission does not give rise to a Fifth Amendment claim. Nothing distinguishes Plaintiffs alleged claim from *McKune*.

SVPs are committed to ASH for treatment and participating patients are

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[11] In referring to rehabilitation the Court cited to several treatment treatises and manuals including U.S. Dept. of Justice, Nat. Institute of Corrections, A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii (1988); H. Barbaree, Denial and Minimization Among Sex Offenders: Assessment and Treatment Outcome, 3 Forum on Corrections Research, No. 4, p. 30 (1991); B. Maletzky & K. McGovern, Treating the Sexual Offender, 253—255 (1991). These cites indicate that the court's reasoning is applicable to sex offender treatment generally.

rewarded. Non participating patients are not rewarded. Thus, the lower level of privileges accorded those not participating in treatment is a direct result of the patient's choice. To paraphrase *McKune*, Plaintiffs' choice to admit to past acts and thus participate in treatment is a choice marked less by compulsion than by choices the Court has held do not amount to constitutional violations. Defendants are entitled to qualified immunity because no clearly established constitutional right has been violated and a reasonable official in Defendants' position would believe that the alleged conduct was lawful.

F. Plaintiffs Sixth Claim for Violations of Procedural Due Process Fails.

Defendants are entitled to qualified immunity on Plaintiffs' Sixth, Seventh and Eighth alleged claims. Plaintiffs' fail to allege a constitutional violation in these due process and equal protection claims. *Bounds* delineates the rights of confined persons to access the courts. 430 U.S. at 821 (1977). *Lewis v. Casey*, 518 U.S. 343 (1996) refined the *Bounds* holding to require evidence of some actual injury resulting from the conditions in question, i.e. evidence that the person had in fact been hindered in bringing a non-frivolous legal claim. *Lewis*, 518 U.S. at 353, n.3. Plaintiffs fail to allege any actual denial of access or claim of actual injury. Therefore, Defendants are entitled to qualified immunity because no constitutional violation has been alleged.

G. Procedural Due Process.

AD 602 refers to the possibility of a patients' rights being denied for "good

cause" upon recommendation of the patient's Interdisciplinary Review Team and psychiatrist. (ER 0474) This evidences a review process requiring good cause for a denial of privileges. This comports with constitutional requirements of procedural due process.

Plaintiffs have failed to allege that SVPs have a protected right triggering procedural due process scrutiny for a denial of institutional privileges.

To plead a procedural due process violation a plaintiff must allege that a life, liberty or property interest exists and has been interfered with by the state. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Only after a protected interest is established will a court consider the second prong; whether the procedures attendant upon the deprivation of an existing interest were constitutionally insufficient. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

Plaintiffs have not pled facts to establish that they have either a liberty or a property interest in the alleged Access Level reductions, restrictions on movement, treatment parameters, or confiscation of their "belongings." Neither have Plaintiffs alleged facts showing that the procedural due process admitted in the SAC is insufficient. (ER 0474-0475)

Defendants are entitled to qualified immunity because no constitutional right has been violated and, even if it were reasonable officials in Defendants' positions would believe that the alleged conduct was lawful.

1. Movement Within ASH.

As the Court in *Youngberg*, 457 U.S. at 319-320 noted, the liberty interests of patients in a state mental institution are not absolute and some restraints on residents may be necessary to protect them.

SVPs are, by statutory definition, dangerous felons with a history of violence and a current mental disorder. (ER 0464-0465; Welf. & Inst. Code Section 6600-6604.) Limitations on such individuals' rights while confined are constitutionally acceptable.

Sandin v. Connor, 515 U.S. 472 (1995), presented a procedural due process analysis concerning a prisoner's claim that he had been placed in a segregated cell without due process. The Court held that assignment to segregated housing was not such an "atypical" variant on normal prison life as to create a protected liberty interest. As in *Sandin*, restrictions placed on SVP movement (ER 0474) are not such an atypical variant on normal institutional life as to create a liberty interest.

Plaintiffs do not have a liberty interest in complete freedom of movement at ASH. At the very least the law is not so clearly established as to defeat a claim of qualified immunity. Furthermore, Defendants are entitled to qualified immunity because reasonable officials in Defendants' positions would believe that the alleged conduct was lawful.

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2. Treatment Requirements.

Plaintiffs appear to allege a denial of due process because they are required to participate in treatment. (ER 0475) Plaintiffs are confined for treatment. (ER 0465; Welf. & Inst. Section 6606.) Plaintiffs must make choices whether they will participate in treatment and be rewarded for that participation or whether they will not participate and be denied those rewards. This choice is not a constitutional violation. *McKune*, 536 U.S. at 9.

Defendants are entitled to qualified immunity because no constitutional violation has occurred. Furthermore, reasonable officials in Defendants' positions would believe that the alleged conduct was permissible. Under *McKune* Defendants are reasonable in believing that Plaintiffs cannot refuse treatment and expect the same privileges as those patients who participate in treatment.

3. Plaintiffs' "Belongings".

Plaintiffs allege that procedural due process attaches before their "belongings" may be confiscated. Even though the SAC includes no facts regarding the nature of the "belongings," it is clear that Defendants are entitled to qualified immunity. First, it is clear that an SVP does not have a protected property interest in contraband. *Kimble v. Department of Corrections*, 411 F.2d 90 (9th Cir. 1969); *Anderson v. Feidler*, 798 F.Supp. 544 (E.D. Wisc. 1992). Second, if Plaintiffs are alleging seizure of non-contraband personal property no claim is stated because the California Tort

Claims Act provides an adequate post-deprivation remedy. *Zinermon v. Burch*, 494 U.S. 113, 129-132 (1990); *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Plaintiffs do not allege that they have filed clams under the CTCA.

Thus, Defendants are entitled to qualified immunity because no constitutional right has been violated. Furthermore, even were a constitutional right violated reasonable officials in Defendants' positions would believe that the alleged conduct was lawful in the context of the allegations.

H. Defendants Are Entitled to Qualified Immunity on Plaintiffs' Seventh Claim of Violations of Substantive Due Process.

In determining whether constitutional rights have been violated a patients' liberty interests, as discussed in *Youngberg,* must be balanced against relevant state interests. 457 U.S. at 319-324. The standard for making the determination is whether professional judgment has been exercised. *Id.* at 322.

A professional decision is deemed "presumptively valid." Liability may only be imposed when the decision by the professional is such a substantial departure from accepted professional practice or standards as to demonstrate that the decision was not based on an exercise of professional judgment. *Id.* at 323.

Plaintiffs do not allege that any decision to withhold privileges or reduce a Patient's Access level in not based on an exercise of professional judgment. Clearly, isolated instances do not give rise to a constitutional violation claiming policy based

deprivations. *Doe v. Gaughen*, 808 F.2d 871, 880 (1st Cir. 1986.)

Plaintiffs admit that any reduction in privileges is reviewed by the patient's Interdisciplinary Review Team and psychiatrist. (ER 0474) No facts suggesting that these decisions are a substantial departure from accepted professional practice or standards are alleged. Thus, Defendants are entitled to qualified immunity because no constitutional right has been violated and reasonable officials in Defendants' positions would believe that the alleged conduct was lawful.

I. Plaintiffs Equal Protection Claim Fails to Allege Violation of a Constitutional Right Because the Constitution Permits Different Commitment Types to Be Treated Differently.

Plaintiffs allege an equal protection claim based on the allegation that the SVPs are treated differently than other civil commitments. (ER 0484) Assuming the allegation's truth it should be dismissed based on qualified immunity because the constitution permits different commitment types to be treated differently. Thus, no constitutional violation has been alleged.

No court has held that SVPs belong to a "suspect" classification creating a strict scrutiny analysis for equal protection purposes. Therefore, any difference in treatment will be upheld if it bears a reasonable relationship to a legitimate state purpose. *Phyler v. Doe*, 457 U.S. 202, 216, (1982).

The SVPA requires individualized treatment for SVPs. Welf. & Inst. Code

section 6606. Common sense tells us that treatment for different mental conditions will be different. Thus, it follows that a legitimate state interest is being advanced by treating SVPs differently than other civil commitments.

The Equal Protection Clause does not create any new rights, but requires that persons under like circumstances be given equal protections. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). A state legislature may make certain classes of persons subject to specific legislation as long as the classification is based upon some difference in the class reasonably relating to a legitimate government purpose. *Gulf C. & S. F. R. Co. v. Ellis*, 165 U.S. 150 (1896).

In *Baxtrom v. Herold*, 383 U.S. 107, 111 (1966) the Court held that treating separate classifications of patients differently based upon their degree of dangerousness was reasonable. The Court stated:

> Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, ...

Id. at 111.

Assuming Plaintiffs' allegations that they are treated differently than other patients at ASH are true, it remains also true that the legislature can determine that different commitment types can be treated differently at ASH and be subject to different rules of conduct.

Therefore, the law in the area is not so clearly established to overcome Defendants' defense of qualified immunity.

J. Defendants are Entitled to Qualified Immunity Because Plaintiffs Tenth Alleged Claim of a Violation of the Right to Privacy Fails to Allege Violation of a Clearly Established Constitutional Right.

The SAC admits that Plaintiffs are all confined to a secure mental institution. (ER 0463) As such, their privacy must be compromised for the orderly operation, and the safety and security of the institution. Plaintiffs have not alleged that any lack of privacy is unrelated to a compelling state interest in the operation of the institution. Thus, the allegations in the SAC fail to allege that a clearly established constitutional violation and defendants are entitled to qualified immunity.

For safety and security reasons patients at a maximum security state hospital cannot reasonably maintain an expectation of complete Fourth Amendment privacy during their confinement. In *Hudson v. Palmer*, a prison inmate case, the Court stated: "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." *Hudson v. Palmer*, 468 U.S. 517, 527 (1984).

In *Hudson* the privacy issue was not an issue of punishment, but one of institutional safety and security. The same issues are present at ASH. A claim that

rights are violated must include facts stating a claim under the circumstances of the confinement. Plaintiffs have failed to meet that test.

The Supreme Court has recognized that one aspect of the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." *Roe v. Wade*, 410 U.S. 113, 152 (1973).

However, the Supreme Court has not determined that a constitutional violation occurs when confined individuals are not provided complete privacy when showering, sleeping, using the toilets or participating in therapy sessions while confined in a maximum security mental institution.

Although the specific issues included in the Tenth Alleged Claim are unclear, it is clear that in the Ninth Circuit a person confined in a secure institution does not have a right to be free from observation while showering, in their room, or otherwise in the institution, based on the State's compelling need to maintain the security of the institution. *Grummett v. Rushen*, 779 F.2d 491, 494 (1985).

Plaintiffs have failed to allege a constitutional violation and Defendants' are entitled to qualified immunity for their reasonable belief that their alleged actions were appropriate under both the federal and state constitutions.

1. Defendants are Entitled to Qualified Immunity on Plaintiffs' California Constitutional Privacy Claims.

In addition to being barred by the Eleventh Amendment and not being

cognizable under section 1983 Defendants are entitled to qualified immunity on Plaintiffs' claim of a violation of a right to privacy under the California Constitution, Article 1, section 1.

The Court in this instance is bound to follow the California Supreme Court's interpretation of the California Constitution. *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1423 (E.D. Cal. 1990). A review of cases decided by the California Courts since 1972, when the privacy right was added to the California Constitution, reveals no cases that equate the right to privacy for persons properly confined to any of Plaintiffs' allegations in the SAC. Until the California Supreme Court finds such a right, federal courts must refrain from doing so. Stripping an official of their qualified immunity for an alleged violation of such undiscovered right would be tantamount to finding such a right.

In *Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1 [26 Cal.Rptr.2d 834] (1994) the California Supreme Court set out clear and detailed guidelines for courts to follow in addressing alleged violations of California's right to privacy. Under *Hill*, a privacy claim has three elements. "The first element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest." *Id.* at 654.

The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy on plaintiff's part. *Id.* at

655. The third element is that "actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Id.* at 655.

However, *Hill* goes on to say that if all three of those elements are established the plaintiff's privacy interest must still be balanced against countervailing interests. "Invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest." *Id.* at 655-56. "Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests." *Id.* at 656.

Plaintiffs have not alleged elements two and three of the *Hill* analysis. Neither have Plaintiffs alleged anything to overcome the countervailing state interest aspect of the *Hill* balancing test. Any right to privacy Plaintiffs have while confined in a secure mental institution is very limited. *Grummett,* 779 F.2d at 495; *People v. Martinez*, 88 Cal.App.4th 465 [105 Cal.Rptr.2d 841] (2001)(no right to privacy of SVP medical and therapy information due to compelling state interest in use of information for evaluation of individual).

Reasonable officials in Defendants' positions would believe that their actions as alleged in the SAC are acceptable practice in a secure mental institution and are protected by qualified immunity. Defendants would believe their alleged actions were appropriate because the state constitutional right to privacy does not prohibit the

actions alleged in the SAC.

Since no violation of a constitutional right has been alleged, even if the claims were cognizable under section 1983 and not barred by the Eleventh Amendment individual liability is precluded by qualified immunity.

CONCLUSION

The Eleventh Amendment bars damage claims against state officials in their official capacities. The Eleventh Amendment and doctrine of abstention precludes federal courts from discovering new rights under state constitutions. Defendants are entitled to qualified immunity on all of Plaintiffs' claims. Plaintiffs fail to allege violations of constitutional rights applicable to Plaintiffs and violations of clearly established constitutional rights. Reasonable officials in Defendants' positions would believe their actions, as alleged, were lawful.

DATED: February 9, 2004

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that:

1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is

❑ Proportionately spaced, has a typeface of 14 points or more and contains 982 words,

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❑ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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DATED: February 9, 2004

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DECLARATION OF SERVICE

Case Name: **JAMES HYDRICK, et al. v. GRAY DAVIS, et al.**

Case Nos.: **03-56712**

I am employed in the County of Los Angeles, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 300 S. Spring Street, Los Angeles, California 90013.

On February 9, 2004, I served the following documents described as: **APPELLANTS' OPENING BRIEF** on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

METHOD OF SERVICE:

[x] (**BY MAIL**) I caused such envelope(s) fully prepaid to be placed in the United States Mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence of mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Executed this 9th day of February, 2004, at Los Angeles, California.

Mélanie K. Foster

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