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12
13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15

16 JERRY VALDIVIA, ALFRED YANCY,
HOSSIE WELCH, NGHIA BUCKIUS,
17 MARIO CARILLO, PHILLIP CASTILLO,
18 GEORGE CORTES, FRANCIS CULOTTA,
DAVID DIXON, KARL HORNE, SCOTT
19 IROFF, WALTER JONES, MUSTAFA
KHALIL, RAYMOND LATIMORE,
20 ANDRE LYONS, CLAUDE McDANIEL,
NATHAN MORRIS, EDWARD
21 NAVARRO, STEVEN O'DONOHUE,
22 OGWUOBU OJOIR, WILLIE PATTON,
JAMES ROBINSON, TROY SCURRY,
23 MARK ST. JOHN, GREGORY STRONG,
ALFRED TAYLOR, CHRISTOPHER
24 THOMAS, JIMMY WATSON, and CURTIS
WILLIAMS (now known as CHARLES
25 JOHNSON), on their own behalf and on
26 behalf of the class of all persons similarly
situated;

27 Plaintiffs,
28

No. Civ. S-94-0671 LKK/GGH

FIFTH AMENDED
CIVIL CLASS ACTION COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF
42 U.S.C. sec. 1983 and 28 U.S.C.
sec. 1343(a)

1 v.

2 PETE WILSON, Governor of the State of
3 California; QUINTIN L. VILLANUEVA,
4 JR., Secretary of the Youth and Adult
5 Correctional Agency; CAL TERHUNE,
6 Director of the California Department of
7 Corrections; MARISELA MONTES, Deputy
8 Director of the California Department of
9 Corrections for Parole and Community
10 Services; JAMES W. NIELSEN,
11 Commissioner and Chairman, Board of
12 Prison Terms of the State of California;
13 CAROL J. BENTLEY, THOMAS J.
14 GIAQUINTO, JOHN W. GILLIS,
15 MANUEL C. GUADERRAMA, RON E.
16 KOENIG, ARTHUR F. VAN COURT,
17 Commissioners of the Board of Prison Terms
18 of the State of California; and MICHAEL
19 CONNOLLY and EDWARD MCNAIR,
20 Acting Chief Deputy Commissioners of the
21 Board of Prison Terms of the State of
22 California,

23 Defendants.

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1 3. Prompt and preliminary hearings regarding the cause of a parolee's
2 detention or the standard leading to a parolee's arrest are not being conducted in California. In
3 almost all cases, no hearing is held, whether on the basis for the detention or on the charges
4 themselves, until the final revocation hearing, which may not be scheduled until 45 days to
5 months after the arrest.

6 4. Many parolees never receive a final revocation hearing, because they are
7 routinely given an offer of custody in lieu of a revocation hearing. At the time this "screening"
8 offer is made, the parolee is almost always in custody. Parolees are not represented by counsel
9 during the "screening" process, and they are not properly and promptly advised about their
10 constitutional rights to counsel and to due process, including notice of charges and a hearing at
11 which they may present witnesses and evidence. Defendants thereby render invalid any
12 purported express or implied waiver of these rights.

13 5. Upon information and belief, Defendants' policy is to determine a
14 parolee's entitlement to counsel only if the parolee affirmatively requests counsel. In the event a
15 parolee fails to waive his right to hearing and counsel, and rather, presses for the right to counsel
16 and a hearing, it is the pattern or practice of the Defendants to deny the request for counsel in
17 virtually all such cases on constitutionally invalid grounds. Upon information and belief, in the
18 unusual case where a parolee is advised of the denial of his request for counsel, he or she is not
19 routinely and timely advised of the right to appeal that decision, and there is no mechanism for
20 prompt, fair and adequate presentation of such an appeal.

21 6. In those rare cases when counsel is appointed, the pay scale and criteria
22 for attorney representation, set by the Defendants, renders any right to counsel that is afforded
23 meaningless, by making unduly burdensome or impossible the fair, full and reasonable
24 representation of parolees. Upon information and belief, the hourly rate of pay (\$23.75) and
25 limit on hours (generally 6 hours) for representation of parolees is intended to and does
26 discourage competent representation of parolees. Moreover, reasonable and supplemental legal
27 services, such as the perfecting of administrative and judicial review, are not compensated by the
28 Board of Prison Terms.

7. The final revocation hearings do not afford due process to parolees.

Witnesses who are and should be notified of the proposed hearing and should be allowed and required to testify at the hearing are frequently neither notified of the hearing, nor allowed to testify. In violation of due process, only adverse witnesses are generally compelled to attend such hearings by subpoena. Witnesses identified by the parolee are not subpoenaed unless the parolee requests the issuance of subpoenas, rather than the attendance of witnesses. Even then, witnesses favorable to the parolee are rarely compelled to attend, and are often not permitted to testify.

8. Adverse witnesses' failure to attend the revocation hearing is routinely overlooked, or the hearing is continued so that adverse witnesses can be present without the advance knowledge or consent of the parolee or the parolee's witnesses. During such delays, the parolee remains in custody. Such continuances are unfairly burdensome for witnesses who are favorable to the parolee because they, unlike subpoenaed witnesses, receive no compensation for their attendance. Moreover, without subpoena authority over favorable witnesses, there is insufficient assurance that these witnesses can or will be able to attend a rescheduled revocation hearing.

9. At the revocation hearings, it is Defendants' pattern and practice to deny or illegally limit plaintiffs' right to have testimony adduced on their behalf from live, percipient witnesses. In addition, defendants limit or refuse live adverse testimony, thereby denying parolees their constitutional rights to confront and cross-examine the witnesses and evidence proffered against them.

B. JURISDICTION

10. Jurisdiction of this court is invoked pursuant to the provisions of Title 28 U.S.C. section 1343(3). The individual defendants are persons who have deprived and continue to deprive plaintiffs of their federally guaranteed constitutional and civil rights under color of state law, in violation of Title 42 U.S.C section 1983.

11. Declaratory judgment and prospective injunctive relief are sought under the terms of Title 28 U.S.C. sections 2201 and 2202. Members of plaintiff class, on an ongoing

1 basis, are being irreparably harmed by defendants' illegal actions, rules, practices and
2 procedures, and there is no sufficient alternative remedy to redress plaintiffs' complaint.

3 C. VENUE

4 12. Venue is properly in this court, pursuant to Title 28 U.S.C
5 section 1391(b)(1), in that this judicial district is the residence of one or all of the defendants in
6 this civil action, and all of the defendants are residents of the State of California.

7 D. PARTIES

8 13. PLAINTIFF JERRY VALDIVIA. Plaintiff Jerry Valdivia was paroled
9 from state prison in November of 1993, having been imprisoned, released from prison on parole,
10 and then reimprisoned after parole revocation on several prior occasions. In early 1995, Valdivia
11 was arrested on new criminal charges and sentenced to a term of 3 years in state prison. Valdivia
12 was again screened, found in violation of parole, and sentenced to a concurrent parole revocation
13 term of 11 months. At the time he was named as a plaintiff, Mr. Valdivia had never been to a
14 revocation hearing, because he has always, during the screening process, accepted a proffered
15 period of incarceration in state prison without the presence or advice of counsel, in violation of
16 due process of law and the right to counsel.

17 14. PLAINTIFF HOSSIE WELCH. At the time he was named as a plaintiff,
18 Plaintiff Hossie Welch was a parole violator incarcerated at the California Institution for Men at
19 Chino, California. Welch was arrested on or about December 28, 1993. Although he was found
20 not guilty of the criminal charges, a parole hold issued arising out of the same incidents. After
21 rejecting a screening offer, Welch was refused a lawyer to assist in his defense on the ground that
22 he was able to read. After one continuance necessitated when two police witnesses failed to
23 appear, Welch's parole was revoked. Welch submitted an administrative appeal from the
24 revocation, which was granted. Welch's request for counsel at his rehearing was denied. At the
25 rehearing, the violation and prison commitment were confirmed. In or about October, 1996,
26 Welch was re-arrested for alleged parole violations. Again, his request for counsel was denied.
27 He appealed the denial of counsel on the grounds that he was taking psychotropic medication
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1 and required the assistance of counsel to defend himself. Upon information and belief, the
2 appeal was not heard until after the revocation hearing.

3 15. PLAINTIFF ALFRED YANCY. At the time of the filing of the first
4 amended complaint, Plaintiff Alfred Yancy was a prisoner at the California State Prison at
5 Chino. Yancy was originally arrested on or about May 2, 1994. Although the District Attorney
6 rejected the criminal charges for prosecution, the parole revocation process was initiated. While
7 in custody, Yancy made repeated requests that his parole hold be discontinued, which his parole
8 officer rejected. On or about May 23, 1994, Yancy rejected a screening offer, and requested
9 counsel at his revocation hearing. Although Yancy was told that he would be informed by mail
10 whether he was to receive a lawyer, the screening agent indicated on a form that Yancy had
11 waived the right to a lawyer. Yancy's revocation hearing occurred on or about June 10, 1994.
12 Yancy renewed his request for a lawyer at the hearing, but was informed that he could represent
13 himself. Although he had requested the opportunity to present testimony from certain witnesses
14 at the hearing, those witnesses did not appear, not having been notified of the hearing.

15 16. PLAINTIFF NGHIA BUCKIUS. Plaintiff Nghia Buckius was born in
16 Vietnam and has difficulty communicating in English. He requires the assistance of an interpreter
17 at parole revocation proceedings. However, Buckius was not provided an interpreter at any of
18 his screenings or at his parole revocation hearing. Defendants failed to ensure that Buckius'
19 waivers of his constitutional rights in connection with the parole revocation process were
20 knowing, voluntary, and intelligent, in violation of due process of law. Defendants also failed to
21 provide Buckius with the minimum requirements of due process at his parole revocation hearing.

22 17. PLAINTIFF MARIO CARILLO. Defendants failed to provide Plaintiff
23 Mario Carillo with the minimum requirements of due process at his parole revocation hearing.
24 Among other things, Carillo was denied the opportunity to present witnesses and documentary
25 evidence at his parole revocation hearing, in violation of due process of law. Carillo was also
26 not afforded a meaningful opportunity to appeal his parole revocation decision. Carillo had no
27 adequate remedy at law to address these due process violations, because the appellate procedures
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1 available to him do not provide a prompt and adequate resolution of appeals of parole revocation
2 decisions. Carillo's appeal was improperly denied.

3 18. PLAINTIFF PHILLIP CASTILLO. Defendants failed to ensure that
4 Plaintiff Phillip Castillo's waivers of his constitutional rights in connection with the parole
5 revocation process were knowing, voluntary, and intelligent, in violation of due process of law.
6 Castillo was not provided with an attorney or other assistance during the parole revocation
7 process when fundamental fairness required it, in violation of due process. Castillo's due
8 process rights were also violated by Defendants' failure to afford him a meaningful opportunity
9 to appeal the denial of counsel and his parole revocation decision. Castillo had no adequate
10 remedy at law to address these due process violations, because the appellate procedures available
11 to him do not provide for resolution of appeals of denials of counsel prior to the final revocation
12 determination and do not provide for a prompt and adequate resolution of appeals of parole
13 revocation decisions. Castillo's appeal was improperly denied.

14 19. PLAINTIFF GEORGE CORTES. Plaintiff George Cortes was not
15 provided a prompt preliminary hearing at or reasonably near the place of his alleged parole
16 violation or arrest at which he could challenge the existence of probable cause for his detention,
17 in violation of due process of law. In addition, Cortes' final revocation hearing was not held
18 promptly enough after his parole hold was imposed to afford him with due process.

19 20. PLAINTIFF FRANCIS CULOTTA. Plaintiff Francis Culotta was not
20 provided a prompt preliminary hearing at or reasonably near the place of his alleged parole
21 violation or arrest at which he could challenge the existence of probable cause for his detention,
22 in violation of due process of law. In addition, Culotta's final revocation hearing was not held
23 promptly enough after his parole hold was imposed to afford him with due process.

24 21. PLAINTIFF DAVID DIXON. Defendants failed to ensure that Plaintiff
25 David Dixon's waivers of his constitutional rights in connection with the parole revocation
26 process were knowing, voluntary, and intelligent, in violation of due process of law. Dixon was
27 not provided with an attorney or other assistance during the parole revocation process when
28 fundamental fairness required it, in violation of due process. Dixon's due process rights were

1 also violated by Defendants' failure to afford him a meaningful opportunity to appeal his parole
2 revocation decision. Dixon had no adequate remedy at law to address these due process
3 violations, because the appellate procedures available to him do not provide for a prompt and
4 adequate resolution of appeals of parole revocation decisions. Dixon's appeal was improperly
5 denied.

6 22. PLAINTIFF KARL HORNE. Defendants failed to provide Plaintiff Karl
7 Horne with the minimum requirements of due process at his parole revocation hearing. Among
8 other things, Karl Horne was improperly denied his right to present witnesses and to confront
9 and cross-examine adverse witnesses.

10 23. PLAINTIFF SCOTT IROFF. Plaintiff Scott Iroff was not provided with
11 an attorney or other assistance during the parole revocation process when fundamental fairness
12 required it, in violation of due process of law.

13 24. PLAINTIFF WALTER JONES. Plaintiff Walter Jones was not provided a
14 prompt preliminary hearing at or reasonably near the place of his alleged parole violation or
15 arrest at which he could challenge the existence of probable cause for his detention, in violation
16 of due process of law. In addition, Jones' final revocation hearing was not held promptly enough
17 after his parole hold was imposed to afford him with due process.

18 25. PLAINTIFF MUSTAFA KHALIL. Plaintiff Mustafa Khalil was not
19 provided a prompt preliminary hearing at or reasonably near the place of his alleged parole
20 violation or arrest at which he could challenge the existence of probable cause for his detention.
21 In addition, Khalil's final revocation hearing was not held promptly enough after his parole hold
22 was imposed to afford him with due process. Khalil was also not provided with an attorney or
23 other assistance during the parole revocation process when fundamental fairness required it, in
24 violation of due process. Defendants failed to provide Khalil with the minimum requirements of
25 due process at his parole revocation hearing. Among other things, Khalil was denied the
26 opportunity to present witnesses and documentary evidence and to confront and cross-examine
27 adverse witnesses, in violation of due process of law. Khalil's due process rights were also
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1 violated by Defendants' failure to afford him a meaningful opportunity to appeal the denial of
2 counsel. Khalil's appeal was improperly denied.

3 26. PLAINTIFF RAYMOND LATIMORE. Defendants failed to ensure that
4 Plaintiff Raymond Latimore's waivers of his constitutional rights in connection with the parole
5 revocation process were knowing, voluntary, and intelligent, in violation of due process of law.
6 Latimore was not provided with an attorney or other assistance during the parole revocation
7 process when fundamental fairness required it, in violation of due process.

8 27. PLAINTIFF ANDRE LYONS. Defendants failed to ensure that Plaintiff
9 Andre Lyons' waivers of his constitutional rights in connection with the parole revocation
10 process were knowing, voluntary, and intelligent, in violation of due process of law. Lyons was
11 not provided with an attorney or other assistance during the parole revocation process when
12 fundamental fairness required it, in violation of due process. Lyons' due process rights were also
13 violated by Defendants' failure to afford him a meaningful opportunity to appeal the denial of
14 counsel and his parole revocation decisions. His appeals were improperly denied. Lyons had no
15 adequate remedy at law to address these due process violations, because the appellate procedures
16 available to him do not provide for resolution of appeals of denials of counsel prior to the final
17 revocation determination and do not provide for prompt and adequate resolution of appeals of
18 parole revocation decisions.

19 28. PLAINTIFF CLAUDE MCDANIEL. Plaintiff Claude McDaniel was not
20 afforded a prompt preliminary hearing at or reasonably near the place of his alleged parole
21 violation or arrest at which he could challenge the existence of probable cause for his detention,
22 in violation of due process of law. In addition, McDaniel's final revocation hearing was not held
23 promptly enough after his parole hold was imposed to afford him with due process. McDaniel
24 was not provided with an attorney or other assistance during the parole revocation process when
25 fundamental fairness required it, in violation of due process. McDaniel's due process rights were
26 also violated by Defendants' failure to afford him a meaningful opportunity to appeal the denial
27 of counsel.

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1 29. PLAINTIFF NATHAN MORRIS. Plaintiff Nathan Morris was not
2 afforded a prompt preliminary hearing at or reasonably near the place of his alleged parole
3 violation or arrest at which he could challenge the existence of probable cause for his detention,
4 in violation of due process of law. In addition, Morris' final revocation hearing was not held
5 promptly enough after his parole hold was imposed to afford him with due process. Morris was
6 improperly denied the opportunity to appeal his pre-hearing parole hold. Defendants also failed
7 to provide Morris with the minimum requirements of due process at his parole revocation
8 hearing. Among other things, Morris was not given adequate notice of the claimed parole
9 violations, the evidence against him was not disclosed, and he was not given the opportunity to
10 confront and cross-examine adverse witnesses, all in violation of due process of law. Morris had
11 no adequate remedy at law to address these due process violations, because the appellate
12 procedures available to him do not provide for prompt and adequate resolution of appeals of
13 parole revocation decisions.

14 30. PLAINTIFF EDWARD NAVARRO. Defendants failed to provide
15 Plaintiff Edward Navarro with the minimum requirements of due process at his parole revocation
16 hearing. Among other things, Navarro was denied the opportunity to present witnesses at his
17 parole revocation hearing. Navarro's due process rights were also violated by Defendants'
18 failure to afford him a meaningful opportunity to appeal the denial of counsel.

19 31. PLAINTIFF STEVEN O'DONOHUE. Plaintiff Steven O'Donohue was
20 not afforded a prompt preliminary hearing at or reasonably near the place of his alleged parole
21 violation or arrest at which he could challenge the existence of probable cause for his detention,
22 in violation of due process of law. In addition, O'Donohue's final revocation hearing was not
23 held promptly enough after his parole hold was imposed to afford him with due
24 process. O'Donohue's due process rights were also violated by Defendants' failure to afford him
25 a meaningful opportunity to appeal his parole revocation decision. Morris had no adequate
26 remedy at law to address these due process violations, because the appellate procedures available
27 to him do not provide for prompt and adequate resolution of appeals of parole revocation
28 decisions.

1 32. PLAINTIFF OGWUOBU OJOIR. Defendants failed to provide Plaintiff
2 Ogwuobu Ojoir with the minimum requirements of due process at his parole revocation hearing.
3 Among other things, Ojoir was not given adequate written notice of the claimed parole violations
4 and was denied the right to present witness and documentary evidence. Ojoir's due process
5 rights were also violated by Defendants' failure to afford him a meaningful opportunity to appeal
6 the parole revocation decision. Ojoir's appeal was improperly denied.

7 33. PLAINTIFF WILLIE PATTON. Plaintiff Willie Patton was not provided
8 with an attorney or other assistance during the parole revocation process when fundamental
9 fairness required it, in violation of due process of law. Patton's due process rights were also
10 violated by Defendants' failure to afford him a meaningful opportunity to appeal the denial of
11 counsel.

12 34. PLAINTIFF JAMES ROBINSON. Plaintiff James Robinson was not
13 afforded a prompt preliminary hearing at or reasonably near the place of his alleged parole
14 violation or arrest at which he could challenge the existence of probable cause for his detention,
15 in violation of due process of law. In addition, Robinson's final revocation hearing was not held
16 promptly enough after his parole hold was imposed to afford him with due process.

17 35. PLAINTIFF TROY SCURRY. Defendants failed to ensure that Plaintiff
18 Troy Scurry's waivers of his constitutional rights in connection with the parole revocation
19 process were knowing, voluntary, and intelligent, in violation of due process of law. Scurry was
20 not provided with an attorney or other assistance during the parole revocation process when
21 fundamental fairness required it, in violation of due process. Scurry's due process rights were
22 also violated by Defendants' failure to afford him a meaningful opportunity to appeal his parole
23 revocation decisions. Scurry had no adequate remedy at law to address these due process
24 violations, because the appellate procedures available to him do not provide for resolution of
25 appeals of denials of counsel prior to the final revocation determination and do not provide for
26 prompt and adequate resolution of appeals of parole revocation decisions.

27 36. PLAINTIFF MARK ST. JOHN. Plaintiff Mark St. John's due process
28 rights were violated by Defendants' failure to afford him a meaningful opportunity to appeal his

1 parole revocation decision. St. John had no adequate remedy at law to address these due process
2 violations, because the appellate procedures available to him do not provide for resolution of
3 appeals of denials of counsel prior to the final revocation determination and do not provide for
4 prompt and adequate resolution of appeals of parole revocation decisions.

5 37. PLAINTIFF GREGORY STRONG. Plaintiff Gregory Strong was not
6 afforded a prompt preliminary hearing at or reasonably near the place of his alleged parole
7 violation or arrest at which he could challenge the existence of probable cause for his detention,
8 in violation of due process of law. In addition, Strong's final revocation hearing was not held
9 promptly enough after his parole hold was imposed to afford him with due process.

10 38. PLAINTIFF ALFRED TAYLOR. Plaintiff Alfred Taylor was not
11 afforded a prompt preliminary hearing at or reasonably near the place of his alleged parole
12 violation or arrest at which he could challenge the existence of probable cause for his detention,
13 in violation of due process of law. In addition, Taylor's final revocation hearing was not held
14 promptly enough after his parole hold was imposed to afford him with due process.

15 39. PLAINTIFF CHRISTOPHER THOMAS. Defendants failed to ensure
16 that Plaintiff Christopher Thomas' waivers of his constitutional rights in connection with the
17 parole revocation process were knowing, voluntary, and intelligent, in violation of due process of
18 law. Thomas' due process rights were violated by Defendants' failure to afford him a
19 meaningful opportunity to appeal his parole revocation decision. Thomas had no adequate
20 remedy at law to address these due process violations, because the appellate procedures available
21 to him do not provide for resolution of appeals of denials of counsel prior to the final revocation
22 determination and do not provide for prompt and adequate resolution of appeals of parole
23 revocation decisions. Thomas' appeal was improperly denied.

24 40. PLAINTIFF JIMMY WATSON. Defendants failed to ensure that Plaintiff
25 Jimmy Watson's waivers of his constitutional rights in connection with the parole revocation
26 process were knowing, voluntary, and intelligent, in violation of due process of law. Watson
27 was not provided with an attorney or other assistance during the parole revocation process when
28 fundamental fairness required it, in violation of due process of law.

1 41. PLAINTIFF CURTIS WILLIAMS. Defendants failed to provide Plaintiff
2 Curtis Williams with the minimum requirements of due process at his parole revocation hearing.
3 Among other things, Williams was denied his right to present witnesses, in violation of due
4 process of law.

5 42. Each of the representative plaintiffs' constitutional rights to due process of
6 law and/or to counsel were violated by Defendants' patterns and practices, as alleged more fully
7 herein.

8 43. DEFENDANT PETE WILSON. Defendant Pete Wilson is Governor of
9 the State of California and the Chief Executive of the state government. He is sued herein in his
10 official capacity. As Governor, Mr. Wilson is responsible for the appointment of the Defendants
11 Secretary and Deputy Secretary of the Youth and Adult Corrections Agency, the Defendant
12 Director of Corrections, and, subject to State Senate confirmation, every member of the Board of
13 Prison Terms. The Governor also appoints the Chairman of the Board of Prison Terms. The
14 Governor, in union with those whom he appoints, and by and through those persons employed by
15 the other defendants, control and regulate the custody of the plaintiff class. Pursuant to
16 California Penal Code Section 3062, Defendant Wilson has power to revoke the parole of any
17 prisoner, just as the parole authority has such power, and the Governor's written authority is
18 sufficient to authorize any peace officer to arrest any prisoner. Upon information and belief,
19 Defendant Wilson is responsible for the creation and enforcement of policies and practices
20 whereby the rights, privileges and immunities of the plaintiff class are adversely affected, in
21 violation of the United States Constitution and of other laws.

22 44. DEFENDANT QUINTIN L. VILLANUEVA, JR. Defendant Quintin L.
23 Villanueva, Jr. is the Secretary to Defendant Wilson, in charge of the California Youth and Adult
24 Correctional Agency, which funds all costs and employs and directs all staff for executing all
25 actions complained of herein. Except as otherwise alleged herein, Mr. Villanueva is responsible
26 for the appointment and employment of necessary officers and employees of the Agency, with
27 the express or implied approval of the Defendant Governor Wilson. Defendant Villanueva is
28 appointed by Defendant Wilson, subject to Senate confirmation, and is entitled to exercise the

1 authority vested in the Governor in respect to the Youth and Adult Correctional Agency.
2 Defendant Villanueva is advisor to the governor and assists in establishing major policy and
3 program matters effecting the Youth and Adult Correctional Agency. Mr. Villanueva has
4 immediate supervisory authority over the Department of Corrections. Mr. Villanueva also has
5 immediate supervisory authority over the Board of Prison Terms, which is an executive agency
6 within the Youth and Adult Correctional Agency.

7 45. DEFENDANT CAL TERHUNE. Defendant Cal Terhune is Director of
8 the California Department of Corrections. Mr. Terhune is appointed by the Governor, with the
9 advice and consent of the Senate. Mr. Terhune is the chief administrative officer of the
10 Department of Corrections. In that capacity Mr. Terhune acts under the direction and control of
11 Defendants Wilson, Maddock, and others, and implements Agency policy by and through his
12 employees, and in union and in collaboration with other officers of the Agency, including the
13 Deputy Director of the Department of Corrections for the Parole and Community Services
14 Division. Defendant Terhune is also the custodian of all California state prisoners. Upon
15 information and belief, defendant Terhune bears ultimate supervisory responsibility over the
16 formulation and implementation of the California Department of Correction's rules, practices,
17 regulations and procedures concerning parole and parole revocation. Upon information and
18 belief, defendant Terhune also bears ultimate supervisory responsibility over the formulation,
19 implementation, and administration of departmental policy regarding the control, care and
20 treatment of parolees.

21 46. DEFENDANT MARISELA MONTES. Defendant Marisela Montes is
22 Deputy Director of the California Department of Corrections, Parole and Community Services
23 Division. Among other things, Ms. Montes is responsible for the statewide parole programming
24 of adult felons. Ms. Montes serves as liaison between the parole and community services
25 division of the Department of Corrections and the institutions division of the Department of
26 Corrections.

27 47. DEFENDANT JAMES W. NIELSEN. Defendant Neilsen is
28 Commissioner and Chairman of the Board of Prison Terms of the State of California. Upon

1 information and belief, Mr. Nielsen was nominated as Commissioner by Defendant Wilson, and
2 his nomination was confirmed by the Senate of the State of California. Upon information and
3 belief, Mr. Nielsen was appointed to his chairmanship of the Board of Prison Terms by
4 Defendant Wilson. Commissioner Nielsen has overall executive authority over the operation of
5 the Board of Prison Terms, which is currently the principal parole revocation authority of the
6 State of California. The Chairman is the administrative head of the Board and has the
7 responsibility to exercise all duties and functions necessary to insure that the responsibilities of
8 the Board are successfully discharged.

9 48. DEFENDANT JOHN W. GILLIS. Defendant John W. Gillis is a
10 Commissioner of the Board of Prison Terms. Mr. Gillis was nominated by Defendant Governor
11 Wilson, and was confirmed by the California Senate. Defendant Gillis is former Chairman of the
12 Board of Prison Terms, having been appointed to that office by Defendant Governor Wilson in
13 or about May 1991. On or about December 1, 1993, Commissioner Gillis was removed by
14 Governor Wilson from his chairmanship, and Commissioner Nielsen was appointed to the
15 Chairmanship in his place.

16 49. DEFENDANTS CAROL J. BENTLEY, THOMAS J. GIAQUINTO,
17 MANUEL C. GUADERRAMA, RON E. KOENIG, and ARTHUR F. VAN COURT.
18 Defendants Carol J. Bentley, Thomas J. Giaquinto, Manuel C. Guaderrama, Ron E. Koenig, And
19 Arthur F. Van Court are Commissioners of the Board of Prison Terms of the State of California.
20 As Commissioners, these Defendants are responsible for the operation and policy making of the
21 Board of Prison Terms, including the parole revocation function.

22 50. DEFENDANTS MICHAEL CONNOLLY and EDWARD MCNAIR.
23 Defendants Michael Connolly and Edward McNair, as Associate Chief Deputy Commissioners
24 of the Board of Prison Terms of the State of California, are acting in turn as Acting Chief Deputy
25 Commissioner of the Board of Prison Terms of California. Upon information and belief,
26 Mr. Connolly and Mr. McNair have oversight responsibility concerning the revocation of parole,
27 including responsibility for oversight of deputy commissioners in the Board of Prison Terms.

1 Upon information and belief, Mr. Connolly and Mr. McNair report directly or indirectly to the
2 Chairman of the Board of Prison Terms.

3 **E. CLASS ACTION ALLEGATIONS**

4 51. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, this suit is
5 brought on behalf of the named plaintiffs on their own behalf and on behalf of all other persons
6 similarly situated. On or about December 1, 1994, this court certified that the suit may proceed
7 as a class action.

8 52. This is a civil rights proceeding. The relief requested is declaratory and
9 injunctive; damages for individual plaintiffs are not sought in these proceedings.

10 53. The class is composed of the following persons, subject to Defendants'
11 dominion and control: (1) California parolees who are at large; (2) California parolees in
12 custody as alleged parole violators, and who are awaiting revocation of their state parole; and
13 (3) California parolees who are in custody, having been found in violation of parole and
14 sentenced to prison custody.

15 54. The members of the class are so numerous that joinder of all members is
16 impracticable. The size of the class is conservatively estimated to be at least 90,000 persons on
17 parole and not in custody; and at least 40,000 persons serving time as parole violators in custody.

18 55. The instant suit involves questions of law or fact common to all the
19 members of the class, and the relief sought will apply to all of them. The allegations made
20 herein are that the defendants, among other things, are engaged in a pattern and practice of
21 remanding parolees to prison without due consideration of the right to counsel, without affording
22 parolees a fair opportunity to present their position, and without due process of law, in violation
23 of the Sixth and Fourteenth Amendments to the United States Constitution. The Defendants'
24 alleged illegal pattern and practice of violation of law is generally applicable to all members of
25 the plaintiffs class.

26 56. The claims of the representative plaintiffs are typical of the claims of the
27 class.

1 57. The representative plaintiffs are capable, through counsel, of fairly and
2 adequately protecting and representing the interests of the class.

3 58. The common questions of law and fact generally described herein
4 predominate over questions affecting only individual members, and a class action is superior to
5 other methods for adjudicating the controversy. Upon information and belief, there are few or no
6 class members who have the financial means to fund litigation such as this. Moreover, there is a
7 risk of inconsistent or varying adjudications which might be obtained by individual members of
8 the class which would establish incompatible standards of conduct for the Defendants. Further,
9 the success of any individual litigant would not necessarily provide any relief to the thousands of
10 other members of the class who were similarly entitled to relief, but who are unable to seek such
11 redress. Finally, the equitable remedy available to any individual parolee presents the prospect
12 of mootness, because such a remedy (if afforded) would be granted, if at all, only after an
13 individual parolee had served most, if not all, of his illegal custody.

14 59. Defendants have acted or refused to act on grounds generally applicable to
15 the class, making appropriate injunctive and declaratory relief with respect to the class as a
16 whole. A declaration and a general, final injunction will serve to redress the claims of the
17 members of the class against the illegal actions of the Defendants.

18 60. The attorneys for plaintiffs in this proceeding are able to fairly and
19 adequately represent the plaintiff class, because they are experienced and knowledgeable
20 regarding criminal law and prisoners' rights and remedies.

21 **F. STATEMENT OF CLASS CLAIMS**

22 61. The named defendants, individually and/or in union, have control of
23 parolees while they are serving their initial term, while they are on parole after release from their
24 initial term, while charged with a violation of parole, during parole revocation proceedings, and
25 after any disposition is made returning the parolee to prison custody.

26 62. Pursuant to California Penal Code sec. 3000(g), the California Department
27 of Corrections is the governmental agency which has the immediate, day to day charge of
28

1 management and custody of adult parolees. The California Department of Corrections sets the
2 conditions of parole and, within limits, the length of parole.

3 63. Collectively, the Board of Prison Terms has the statutory power to
4 establish and enforce rules and regulations on the subject of parole (Cal. Pen. Code sec. 3052).

5 64. Since about November of 1994 (and for about 15 years prior to about
6 January 1, 1993), the Board of Prison Terms has had the exclusive power to conduct hearings on
7 revocation of parole and to order parolees returned to prison. Between January 1, 1993 and
8 November of 1994, that power was briefly vested in the Department of Corrections. At least
9 since 1984, the pattern and practice of the revocation function, whether in the Department of
10 Corrections or in the Board of Prison Terms, has been and is violative of constitutional due
11 process and the constitutional right to counsel, as articulated in this complaint.

12 65. The Board of Prison Terms employs deputy commissioners to whom the
13 Board may assign appropriate duties, including that of hearing cases and making decisions.
14 Deputy commissioners are appointed by Chairman of the Board of Prison Terms and answer to
15 the Chairman. Upon information and belief, most parole revocation proceedings are conducted
16 by deputy commissioners.

17 66. The members of the plaintiff class have been and are continually being
18 denied constitutional due process and the constitutional right to counsel. Examples of such
19 unconstitutional conduct include the following:

- 20 (a) prompt preliminary parole revocation hearings are not being conducted,
21 thereby denying parolees, among other things, a meaningful opportunity to
22 challenge the absence of constitutional standards leading to their arrest or
23 the right to appeal their detention;
- 24 (b) Notice of charges and the reasons for detention are not promptly given;
- 25 (c) reasonable opportunity for investigation is not afforded, a problem
26 exacerbated by the routine removal of parolees from their community of
27 residence;
- 28

- 1 (d) "screening" of parolees is fundamentally unfair, because, among other
2 things, parolees are unlawfully influenced to give up their constitutional
3 right to due process and other rights in the adjudication and disposition of
4 allegations of parole violation without full advance advisal of those rights;
5 (e) defendants are following a pattern and practice of denying counsel to
6 parolees in violation of existing constitutional standards in almost all cases
7 of parole revocation;
8 (f) purported "waivers" of counsel, of hearings, and other rights are not
9 knowing, voluntary and intelligent;
10 (g) where counsel is permitted, the right to meaningful representation is
11 denied by, among other things, the imposition of unfair and unreasonable
12 limits on counsel's time and fees;
13 (h) parole revocation hearings do not afford due process because, among other
14 things, they are held from 45 days to months after a parolee is arrested;
15 and parolees are denied a meaningful opportunity to appeal a denial of
16 counsel, to subpoena and present witnesses and evidence, or to confront
17 and cross-examine adverse witnesses.

18 67. Under California law, the constitutional questions raised by this suit
19 cannot be raised in California administrative proceedings. While there is a process of
20 administrative review from disposition of guilt and reincarceration after hearing, the
21 administrative review is neither prompt nor effectual. Defendants routinely fail to promptly
22 allow, consider and dispose of administrative appeals. Appointed counsel are not available to
23 assist parolees in the administrative process.

24 68. In those rare judicial challenges made to the parole revocation process, the
25 state attorney routinely claims that administrative appeal is an avenue of relief that must be
26 exhausted before a parolee is entitled to request judicial process.

27 69. The terms of incarceration imposed upon parolees, usually 6 months to 1
28 year, make it essentially impossible to file a state petition for habeas corpus to relieve the

1 unlawful confinements in individual cases, with or without first exhausting state remedies.
2 Moreover, California state habeas corpus is an extraordinary remedy, only available, in the
3 discretion of the superior court, to review an utterly baseless decision, and is not a process of
4 administrative review.

5 70. California state habeas corpus affords a hearing and counsel to a petitioner
6 if, but only if, he or she can adequately plead a prima facie case of jurisdictional magnitude. A
7 parolee who challenges Defendants' denial of his or her constitutional rights to counsel and/or
8 due process in the state courts therefore cannot secure any remedy, or any realistic remedy, as
9 non-compliance with these federal mandates are not deemed jurisdictional.

10 71. Pursuant to California Rules of Court, a petition for habeas corpus relief
11 will usually be pending at least 60 to 90 days before any relief will be granted. The relief
12 provided in state habeas corpus, if the petition does not first become moot while the case is
13 pending, is likely to be limited to a rehearing. Thus, any prior deprivation of a parolee's
14 constitutional rights may be "cured," even if egregious, without consequence to the parolee's
15 custody status.

1 **G. PRAYER FOR RELIEF**

2 WHEREFORE, PLAINTIFFS RESPECTFULLY PRAY THAT THIS COURT:

3 1. Continue to authorize that this matter may proceed as a class action.

4 2. Adjudge and declare that the policies, patterns, conduct and practices
5 described above are in violation of the rights of the plaintiffs and the class they represent under
6 the Sixth and/or Fourteenth Amendments to the United States Constitution;

7 3. Preliminarily and permanently enjoin defendants, their agents, employees
8 and all persons acting in concert with them, from subjecting plaintiffs and the class they
9 represent to the unconstitutional and illegal policies, patterns, conduct and practices described
10 above;

11 4. Order defendants to end their practices of denying plaintiffs and the class
12 they represent their constitutional right to due process of law;

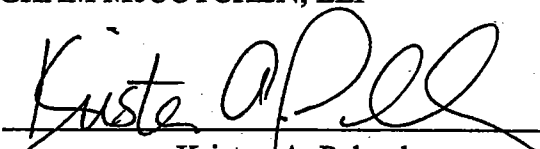
13 5. Award plaintiffs the costs of this suit and reasonable attorneys' fees and
14 litigation expenses;

15 6. Retain jurisdiction of this case until defendants have fully complied with
16 all orders of this Court, and there is a reasonable assurance that defendants will continue to
17 comply in the future absent continuing jurisdiction; and

18 7. Award such other and further relief as the Court deems just and proper.

19 DATED: September 13, 2002.

20 BINGHAM McCUTCHEN, LLP

21 By: 
22 _____

23 Kristen A. Palumbo
24 Attorneys for Plaintiffs
25
26
27
28

1 PROOF OF SERVICE

2 I am over 18 years of age, not a party to this action and employed in the County
3 of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-
4 4067.

5 On September 13, at 5:30 P.m., by use
6 DATE TIME

7 of facsimile machine telephone number (415) 393-2286 and by next business day delivery by
8 Federal Express, and correspondence is deposited with Federal Express that same day in the
9 ordinary course of business. Today, I served a copy of:

10 FIFTH AMENDED CIVIL CLASS ACTION COMPLAINT FOR
11 DECLARATORY AND INJUNCTIVE RELIEF
12 42 U.S.C. sec. 1983 AND 28 U.S.C. sec. 1343(a)

13 On the following parties by facsimile transmission and by causing a true and correct copy of the
14 above to be delivered by Federal Express from San Francisco, California in a sealed envelope
15 with all fees prepaid, addressed as follows:

16 William V. Cashdollar, Esq.
17 Office of the Attorney General
18 Department of Justice
19 1300 I Street
20 Sacramento, CA 95814
21 Phone: (916) 323-1942
22 Fax: (916) 324-5205

23 I declare that I am employed in the office of a member of the bar of this court at
24 whose direction the service was made and that this declaration was executed on September 13,
25 2002.

26 Lisa Large
27 Lisa Large
28