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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ERNESTO LIRA, Plaintiff, v. DIRECTOR OF CORRECTIONS, et al. Defendants.	No. C-00-0905 SI (pr) PLAINTIFF'S POST-TRIAL BRIEF Closing Arg.: Feb. 12, 2009 Time: 10:00 a.m. Courtroom: 10 Judge: The Honorable Susan Illston Trial Date: Jan. 12, 2009 Complaint Filed: March 14, 2000

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I. INTRODUCTION

Almost nine years ago now, in March 2000, Ernesto Lira sat in his solitary confinement cell in Pelican Bay SHU and wrote out in his own hand the complaint that began this prison-inmate §1983 civil rights action. Mr. Lira grieved many things, but the thrust of his complaint was that he had been improperly validated by the California Department of Corrections and Rehabilitation (CDCR) as a prison gang associate and on that basis had been wrongfully committed to indefinite SHU confinement. Mr. Lira alleged that his confinement imposed severe hardship in deprivation of his liberty interest under the Fourteenth Amendment, without affording him constitutionally required due process and without a reliable evidentiary basis. Mr. Lira sought release from Pelican Bay SHU, damages, and expungement of the validation from CDCR records.

By March 2000, Mr. Lira already had spent four and a half years in DVI Ad-Seg and Pelican Bay SHU, and had spent all of those same years fruitlessly seeking basic information on what had been his secret validation at Sierra Conservation Center (SCC) in 1993. Before ICC hearing panels and in 602 appeals, Mr. Lira had repeatedly requested access to and investigation of the validation evidence and a hearing to reevaluate his continued validation status.

Mr. Lira at that time had been in and out of prison several times over the past 15 years, but his criminal history included only a series of theft offenses and drug possession. His entire criminal and prison disciplinary record showed no violence or gang activity. Mr. Lira had never been a member of any gang, including any prison gang, nor an associate of one.

Mr. Lira's most recent prison term had been spent at Sierra Conservation Center in 1992-1993, a two-year sentence for shoplifting. He was assigned to the Calaveras yard at this Level I facility, which had security much like a military base, including regular jobs for inmates in and out of the facility, ample recreation and visitation privileges, and dormitory living.

When Mr. Lira returned to the system in 1995 on parole violation for drug possession, he was processed through DVI and expected to return to SCC or some similar Level I facility. Instead, Mr. Lira was confined to DVI's Ad-Seg on a lock-up order in December 1995, based on a record

report that he was a validated Northern Structure associate and pending further investigation of his status. As Mr. Lira only learned in the months following, he had been secretly validated by SSU in July 1993, based on three evidence items collected by the IGI's office at SCC. Those items consisted of a drawing with attributed gang symbols, a Merced County Jail yard incident report, and a laundry-list debriefing report. They were collected in a proactive gang investigation of Mr. Lira that was initiated for reasons no one could explain and involved no real investigation of anything, including the evidence items themselves, despite obvious and significant ambiguities and reliability concerns with each of them.

Following the December 1995 lock-up order, Mr. Lira remained in DVI Ad-Seg for nine months while ICC officials confirmed his validation through his C-file, which finally arrived, and had the validation redocumented by SSU with a new 128B-2 chrono. Then, in September 1996, Mr. Lira was transferred to Pelican Bay SHU for indefinite confinement.

Pelican Bay SHU conditions have been the subject of prior civil rights litigation in this District, and those conditions are well known, if not notorious. *Madrid,* 889 F.Supp. 1146, 1228-37 (N.D. Cal. 1995). Mr. Lira suffered from the extreme confinement, isolation and deprivation of SHU imprisonment for eight years, finally paroling in April 2004. His experience there included not only all of the hardships institutionally imposed, but also special hardships, both from the anguish of his wrongful confinement and from the danger of violent Northern Structure reprisal he constantly faced as a "no good" inmate who refused to affiliate with the gang.

Mr. Lira's SHU experience has caused him mental disorders since his release, and he has suffered from their often disabling effects. Mr. Lira has been diagnosed with depression and PTSD, and since 2005 has been under prescribed medication and treatment by CDCR mental health staff and, more recently, by a private psychiatrist. Nevertheless, during the several times that Mr. Lira came back into the system for parole violation during 2005-2007, his continued gang validation status returned him each time to either DVI Ad-Seg or Corcoran SHU.

Mr. Lira's civil action has outlasted his Pelican Bay SHU imprisonment, and even his discharge of sentence in March 2008. He has had to wage a litigation battle over many years just to secure a trial, as CDCR has defended with serial motions for dismissal and serial motions for summary judgment. Mr. Lira has even endured two prior appeals, one lasting three and a half years.

Along the way, Mr. Lira's release from custody has foreclosed his standing to seek institution-wide injunctive relief as originally requested, and he was compelled to abandon his claim for damages and dismiss all of the CDCR personnel originally joined as individual defendants in order to moot CDCR's most recent interim appeal. The remedies he seeks now by way of individualized injunctive and declaratory relief are limited but important: specifically, a declaration that his validation and SHU/Ad-Seg confinement violated his Fourteenth Amendment rights, and an expungement of the validation from CDCR records.

II. LEGAL TEMPLATE

It is now well established that prison inmates have a liberty interest under the Fourteenth Amendment in avoiding the "significant and atypical hardship" of SHU confinement, that accords them both substantive and procedural protections. *Hewitt v. Helms*, 459 U.S. 460, 473-76 (1983), rejected on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995); *Touissant v. McCarthy (Toussaint IV)*, 801 F.2d 1080, 1099 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). This liberty interest derives in part from California state law and regulation that substantively limits CDCR authority to impose administrative segregation, including such confinement based on prison-gang affiliation. *Toussaint IV*, 801 F.2d at 1097-98; (finding such limitation in 15 Cal. Code Regs. §§ 3335(a), 3336 and 3339(a)); *Madrid*, 889 F. Supp. at 1271 (finding such limitation also in 15 Cal. Code Regs. § 3341.5(c)(3)).

A. The Procedural Component

The procedural component of protection for this constitutional liberty interest has been held to require that prison officials "provide the inmate with some notice of the charges against him and an opportunity to present [the inmate's] view to the prison official charged with deciding whether to

transfer [the inmate] to administrative segregation." *Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir. 1994). As applied to CDCR's gang validation process, these procedural protections have been construed to specifically mandate the following:

(1) the inmate must be afforded the opportunity to present his views to the IGI prior to any validation decision to commit him to Ad-Seg or SHU for an indeterminate period;

(2) the IGI must designate the inmate as being a current active member or associate of a prison gang prior to any ICC decision to transfer or retain the inmate in Ad-Seg or SHU indefinitely; and

(3) the validation and indefinite confinement must be re-evaluated periodically thereafter through the annual ICC panel hearing process.

Toussaint v. McCarthy (Toussaint V), 711 F.Supp. 536, 540, 541-42, fn. 15, 543 (N.D. Cal.1984), *aff'd. in pt., rev'd. in pt. on other gds.*, 926 F.2d 801 (9th Cir. 1990); *Madrid*, 889 F. Supp. at 1273; *Jackson v. Carrey*, 2006 WL 2827319, at *8 (E.D. Cal.)

B. The Substantive Component

The substantive component of protection for an inmate's liberty interest involved in indefinite Ad-Seg/SHU confinement addresses the quantum and quality of gang validation evidence relied on to support the confinement. *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455 (1985). Specifically, the standard requires that any gang validation be supported by "some evidence." *Id.*. Although this standard has been recognized as only "minimally stringent," *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987), the evidence relied on must be sufficiently unambiguous and meaningful to legitimately support the determination to validate. *Toussaint IV*, 801 F.2d at 1103-06; *Lenea v. Lane*, 882 F.2d 1171, 1175 (7th Cir. 1989) ("Although 'some evidence' is not much ... it still must point to the accused's guilt."); *Zavaro v. Coughlin*, 970 F.2d 1148, 1152 (2d Cir. 1992) ("Notwithstanding such deference to the institutional needs of prison officials, the Supreme Court has made it clear that those officials may not infringe on

prisoners' protected liberty interests through disciplinary proceedings without a certain quantum of evidence to support their determinations.").

In addition, the Ninth Circuit has held that the evidence relied upon must have at least "some indicia of reliability." *Cato*, 824 F.2d at 705. *Tapia v. Alameida*, 2006 WL 842470, at * 9 (E.D. Cal.) (to support gang validation, supporting evidence must constitute "'some evidence' *with an indicia of reliability*." (emphasis in original)). When the evidence derives from confidential informant reports, the record must contain "some factual information from which the committee can reasonably conclude that the information was reliable." *Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987), *cert denied*, 487 U.S. 1207 (1988); *Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir. 2001) (decision that prisoner was "safety threat" because of his association with prison gang was not supported by "some evidence" where hearing officer made no independent assessment of confidential informants' credibility). The importance of this specific protection was observed in *Madrid*:

> "[I]n a prison environment, where authorities must depend heavily upon informers to report violations of regulations, an inmate can seek to harm a disliked fellow inmate by accusing that inmate of wrongdoing. Since the accuser is usually protected by a veil of confidentiality that will not be pierced through confrontation or cross-examination, an accuser may easily concoct the allegations of wrongdoing. Without a bona fide evaluation of the credibility and reliability of the evidence presented, a prison committee's hearing would thus be reduced to a sham, which would improperly subject an inmate accused of wrongdoing to an arbitrary determination."

889 F.Supp. at 1274 (quoting *Kyle v. Hanberry*, 677 F.2d 1386, 1390 (11th Cir. 1982)).

III. THE VALIDATION EVIDENCE

A. The Drawing With Hidden Gang Symbols

This photocopy of a prison drawing was taken from Mr. Lira's locker at Sierra Conservation Center on December 11, 1992 by Officer Robert Gordon, at the request of Assistant IGI Milo Smith. (Ex. 9; Smith RT 225:6-226:7) It was one of a collection of photocopied drawings that Mr. Lira had. The 128 chrono for this validation item, however, was not done until five months later, on May 10, 1993. (Ex. 8) No one at trial, including Gordon and Smith, could explain the delay, or where the drawing was during those five months, or why no one documented the purported

gang significance of the drawing when originally confiscated. (Smith, RT 226:24-ss7:21, 228:18-229:10)

The chrono identifies only two gang symbols hidden in the drawing, the number "14" and the "Northern Star." (Ex. 8) The Department during discovery and trial testimony identified a third symbol, a Huelga bird. In addition, the chrono states that Mr. Lira "freely admitted" making the drawing himself at the time of the locker search, and that his nickname "Chino" appears in the drawing as well. (*Id.*)

1. The Obscurity of the Hidden Gang Symbols

There are obvious problems with the gang significance imputed to this drawing. Primary among them is the inscrutability of these hidden symbols. The Huelga bird is shown in only partial, fragmentary form, as what may be a stylized wing on the headband on one of the drawing's faces. The purported name "Chino" is depicted also in the most fragmentary form on part of another headband on a different face, showing what may be an "h," followed by an "i," followed by what may be an "n." And almost no one at trial could find the "Northern Star." The search for it, through a parade of CDCR witnesses, became increasingly creative, and even ludicrous, as trained prison-gang investigators searched over copies of the drawing, some of them billboard-sized enlargements, some of them shaded in advance to highlight the purported symbols, all in a vain effort to find this one. (Ruff, RT 1423:25-1425:7; Smith, RT 242:5-11, Covello, RT 146:12-147:10; Olson, 58:6-61:7. 89:5-(6)) This correctional version of Where's Waldo said much more about the obscurity of these alleged gang symbols, and about CDCR's institutional mindset in perceiving gang significance in cryptic, even impenetrable, validation items, than it said about anything else.

2. The Ambiguity of the Hidden Symbols

But the even larger problem with these imputed gang symbols is their thoroughly equivocal character. The Huelga bird was originally created by the United Farm Workers as their union symbol. (Smith, RT 236:24-237:1) It has become an icon in modern Hispanic American culture, with deeper roots in the Aztec eagle of Mexican culture. Its presence in the social life of agricultural

communities in California, including the Central Valley, has become familiar, even pervasive. (Vasquez, Rule 26 Rept. and Witness Stmt., 4:11-19)

Likewise, the number "14," according to a number of CDCR personnel, refers to the letter "N," the fourteenth letter of the alphabet, which in turn stands for "Norteno," or Northern California Hispanic. (Smith, RT 231:7-232:14) Both the number "14" and the term "Norteno" are commonly used for this general reference, with no necessary gang significance at all. (Vasquez, Rule 26 Rept. And Witness Stmt., 4:11-19) In addition, the number "14" is also used by innumerable *street* gangs in Northern California, which a number of CDCR witnesses also acknowledged.[1] (Smith, RT 233:15-19)

The Department repeatedly sought to support the gang significance of these perceived symbols with testimony that the Huelga bird, the number "14," and the "Northern Star" are all "associated with" the Northern Structure, since, despite their origination and continued currency in popular culture, they have been adopted by members of that gang as part of their insignia. (Ruff, RT 1425:9-17)

The problem with this analysis is that mere "association" between these symbols and Northern Structure affiliation is wholly insufficient to establish any meaningful gang significance to the drawing. CDCR's own regulations in effect in 1993, when this drawing was being evaluated by Smith and Covello at SCC, required that tattoos or other symbols, in order to be acceptable as validation items, had to be "used by and *unique to* specific prison gangs." 15 Cal. Code Regs. § 3378(c)(3)(B)(emphasis added). (Smith, RT 243:1-244:25) The symbols imputed to this drawing by CDCR unquestionably were not unique to the Northern Structure.

Despite this regulatory requirement, and relying solely on the drawing and accompanying chrono without any further investigation, Smith decided to make it a validation "point" against Mr.

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[1] The Court need look no further than Exhibit 1 for illustration. This original, handwritten version of the Merced County Jail yard incident report lists six different Nortenos as involved, including Mr. Lira, and records their street gang affiliations as: "Norte 14 " (Lira and Morales); "Visa 14 " (Hernandez); "NSW14 " (Rivera); and "M14 er West Side" (Duran).

Lira. (Smith, RT 240:5-22) Smith made no effort to confirm whether Mr. Lira had in fact made the drawing himself, or was even capable of making it, and made no effort to independently confirm that these hidden symbols really had the gang significance ascribed to them. (Smith, RT 252:3-16)

3. The Mistaken Imputation of the Drawing to Lira

The value of this drawing as a validation item is made even more problematic by the evidence at trial demonstrating that Mr. Lira did not draw it. It was drawn instead by another inmate and former acquaintance of Mr. Lira's, Freddie Leyba, currently confined at Corcoran State Prison. Leyba appeared and testified that he had made the drawing in the early 1990's and had given copies of it to a number of other inmates, including Mr. Lira. (Leyba, RT 314:19-315:21) Leyba further testified, consistent with his prior declaration from October 2007, that he had never intended to put any hidden gang symbols in the drawing and did not believe that he had, (RT 316:17-317:5) explaining that the drawing was "just a sketch of everything that I was thinking about at the time, you know, doing time, thinking about my freedom . . . getting out one day . . . just prison life." (RT 316:6-13) The number "14" in the lower middle of the drawing was "just intended to mean 'Norteno' a Northern Hispanic. (RT 317:6-25) Leyba also confirmed that there is no "Northern Star" in the drawing, (Ex. 113, ¶5), and that he made the drawing before he first met Mr. Lira, so that the letters on the headband on the left of the drawing, which do not say "Chino" in any event, could not refer to Mr. Lira.[2] (RT 318:2-9; Ex. 113, ¶7)

As this evidence was developed at trial, CDCR shifted position, arguing that although Mr. Lira's alleged creation of the drawing is noted as a point of special significance in the chrono, the drawing's actual creator – now that it is known to be Leyba's drawing – is entirely unimportant. As CDCR personnel testified, there is no difference for gang validation purposes between an inmate

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[2] Leyba also confirmed that "during the time that I knew Ernesto Lira at Sierra Camp and after, he was not, to my knowledge, a member or associate of any prison gang, including the Northern Structure." (Trial Ex. 113, ¶ 8) This confirmation of Mr. Lira's non-affiliation with the Northern Structure is made all the more significant by the disclosure through CDCR's defense counsel at trial that Leyba himself, in years following his confinement at SCC with Mr. Lira, became a validated member of the Northern Structure.

making the drawing and merely having the drawing in his possession. (Smith, RT 248:17-249:9, 253:19-254:14)

But of course that makes all the difference in the world, especially with a drawing as hopelessly ambiguous as this one. If Mr. Lira made the drawing, and if indeed these are hidden gang symbols, then he was the one who did the hiding. If not, then Mr. Lira was likely to have had the same difficulty as everyone else in this trial even discerning these hidden symbols, let alone regarding them as some cryptic prison-gang insignia.

CDCR's efforts to perceive validation significance in this drawing reached remarkable lengths during trial. The Department adduced testimony from IGI Covello (and sought to demonstrate this in questioning of Mr. Lira as well) that the face below the headband with "Chino" supposedly on it looks in physical appearance just like Mr. Lira. (Covello, RT 447:11-24) Apart from the fact that it does not (especially the photo of Mr. Lira from 1992 in Trial Ex. 298) that defense counsel confronted him with in questioning), this simply cannot be so in view of Leyba's testimony that the drawing could not refer to Mr. Lira because it was made before the two of them met. Covello also testified that the design around the numeral "1" in the drawing was a four-leaf clover, accounting for the "4" to go with the "1" to make up a "14." (Covello, RT 447:111-24) The Rorschach quality of this whole exercise was probably best demonstrated by Covello's testimony from deposition in which he identified the shapes of the noses on two of the faces at the bottom of the drawing as somehow hiding even more gang symbols. (Ex. 115)

4. The Other Drawing

And then there is the issue of the other drawing, the Sombrero Hat Lady drawing. (Ex. 120, p. 2) It is unclear when or how this drawing was first placed in Mr. Lira's C-file, but it appears to have originated from Merced County Jail, where it was confiscated from a different inmate, Juan Morales. This comes from a handwritten notation that appears to have been made originally on the back of the drawing as confiscated but was then photocopied on a separate page as later forwarded to CDCR. The notation reads: "This is a copy of a drawing that was confiscated from Morales, Juan

property during a cell search 12/6/91. Romero, R. 5340"[3] (*Id.*)

The obvious question raised here is whether this drawing was ever confused with Leyba's drawing in the course of later, periodic ICC reviews of Mr. Lira's validation, such as they were, at DVI and Pelican Bay. This concern is made more palpable by the handwritten notation in the lower right corner of the drawing, "See 128 B dated 5/10/93," which is a direct reference to the chrono for the drawing by Leyba. (Ex. 8) No one from the Department could explain by whom, when, or why that notation was made.

Mr. Lira discovered this Sombrero Hat Lady drawing during an *Olsen* review of his C-file at Pelican Bay, and a related file memorandum states that the drawing was not used as support for his validation. (Lira, RT 1025:16-1031:12) But this review process went on at least annually for Mr. Lira's entire confinement at Pelican Bay through April 2004. The Department is in no position to assure the Court that this drawing was not at some point, or possibly more often than that, confused with Leyba's drawing and mistakenly relied on as part of the validation evidence. After all, the Department's own gang expert Robert Marquez mistakenly seized on the Sombrero Hat Lady drawing in his Rule 26 report as sufficient by itself to establish Mr. Lira's Northern Structure affiliation, and not just as an associate but as a full member of the gang. (Marquez, RT 1840:19-184:1)

B. The September 1992 Laundry List Debriefing Report

This informant inmate report was originally generated at DVI by Assistant IGI RJ Hernandez, and a copy was sent to Mr. Lira's C-file at SCC by early 1993. (Ex. 4) The report is a classic laundry list identification of Mr. Lira, who is merely named in a table listing some 30 inmates as gang affiliated according to the informant. Mr. Lira's own line entry in this laundry list reads:

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[3] Unlike Leyba's drawing, this is a real prison gang drawing, with nothing at all hidden about the gang symbols or insignia in it. The name of the prison gang, "Nuestra Raza," is printed in the size of a banner headline at the top. (Ex. 120)

NAME	NUMBER	AKA	HOMETOWN	STATUS
*		*		*
LIRA, ERNESTO	H-36693	CHINO	MERCED	NS CAT III

(Ex. 4, p.11) Nothing else in the entire debriefing report, including its extended narrative text detailing every gang-significant experience and aspect of the informant's prison career, makes any mention of Mr. Lira or how the informant may have personal knowledge of his Northern Structure affiliation.[4] (Hernandez, RT 334:9-235:2) According to Hernandez, any such information, if provided by the informant, would have been in the text of the report and, if it involved actual gang activity by Mr. Lira, would also have been separately documented in Mr. Lira's C-file. (Hernandez, RT 370:19-373:15)

1. The Likely "Filter List" Source of the Laundry List Identification

That is not to say however, that the record is devoid of evidence as to how these laundry lists are typically compiled. According to the testimony of several CDCR personnel, all Northern Structure members are required to memorize lists of other member names and identifying information. (Marquez, RT 1786:2-24; Piland, RT 475:13-478:21) Such lists, sometimes referred to as "filter lists," are passed around hand to hand within the prison system among Northern Structure members for this purpose. (*Id.*)

It is hard to imagine a ranker form of hearsay than this. There is no way of knowing when such a list was initially compiled, or from what source or sources, or by whom. There is also no way of knowing whether or how a list was added to or changed in serial circulation, as it "filtered"

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[4] During direct examination of CDCR's gang expert Marquez, an effort was made to compare Mr. Lira's CDCR confinement history with that of the informant's, as detailed in his debriefing report, to show at least some concurrent confinement in the same facility. The closest that Tristan could come to such an overlap was the period of several months in mid-1995 when Mr. Lira had come back into the system on parole violation at DVI, and the informant was housed there at the same time. However, Mr. Lira was in the reception part of the mainline at the facility, and the informant, as a validated gang member, was housed there in Ad-Seg. Tristan conceded that the two of them never would have had any direct contact, as the informant was only allowed out of his Ad-Seg cell in the custody of two guards. (Marquez, RT 1855:15-1857:9, 1865:11-1866:24)

through who-knows-how-many other hands before it would have purportedly reached this informant. The Ninth Circuit has spoken directly to this issue in *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987), in which the Court ruled that an inmate statement relayed to correctional officials by a confidential informant with no firsthand knowledge of the statement was deemed necessarily insufficient to constitute "some evidence" supporting gang validation. Subsequent decisions have followed this basic rule consistently, reaffirming that a confidential informant's reliability is necessarily dependent upon the reliability of the information conveyed, and with no means of verifying its accuracy – or in this case, even its source – no evidentiary significance can be recognized. *Thomas v. Mendoza-Powers*, 2008 WL 1702501, at * 4 (E.D. Cal.); *Sira v. Morton*, 380 F.3d 57, 78 (2d Cir. 2004) (hearsay statement reported by confidential informant cannot constitute "some evidence" without independent assessment of statement's reliability; "[c]redible informants, may, after all, unwittingly pass along suspect information from unreliable sources.").

2. The Need for Independent Verification of Informant Reliability

The reliability of confidential informants in the context of prison gang validation is a specific requirement of the Fourteenth Amendment. *Cato*, 824 F.2d at 705. The reliability concerns that support and inform this rule are reflected in past decisions of this District. *Madrid*, 899 F. Supp. at 1273-74. The potential for unreliability derives in substantial part from the debriefing process itself, which inherently involves pressures on the debriefing inmate to overstate and falsely report his gang involvement and broader knowledge, including the naming of other inmates as gang affiliated. As the district court in *Jones v. Gomez*, 1993 WL 341282 (N.D. Cal. 1993) observed:

> When . . . prison officials base decisions to segregate for administrative reasons on statements by unidentified informants, an inquiry into the reliability of such statements is necessary for several reasons. First, such statements often are gathered during "debriefing interviews." Because producing information that appears useful to the interviewer is often perceived by inmates as the only way to secure release from segregation, there is high risk that the information may be false.
>
> Second, given the differences that arise between prisoners due to jealousies, gang loyalties and petty grievances, and the unfortunate discrete instances where guards seek to retaliate against prisoners, to

> rely on statements by unidentified informants without anything more to establish reliability is worse than relying on no evidence: 'it is an open invitation for clandestine settlement of personal grievances.'

1993 WL 341282, at *4 (quoting *Baker v. Lyles*, 904 F.2d 925, 934-34 (4th Cir. 1990), *rehearing denied en banc (*Sprouse, J. dissenting).

Such hidden agendas and incentives for false identification of laundry-listed inmates were frankly acknowledged by Officer Hernandez. As he explained, inmate informants are advised that they must demonstrate their "sincerity" in electing to debrief by fully disclosing everything and everybody they know from their own gang history. And informants are rejected for debriefing if they do not recount enough gang involvement, and name enough other inmates, to satisfy their debriefers. (Hernandez, RT 349:22-350:11, 352:11-20)

Among all the other pressures on a debriefing inmate, his most obvious inducement to relate whatever he believes his debriefers want to hear is the continued indefinite SHU confinement that he otherwise faces if he does not debrief. This inducement must be regarded as powerful for any validated inmate, and overwhelming for at least some, since SHU confinement conditions are so brutal, the continued confinement for many inmates is measured in years, even decades, and the debriefing process represents the only way out, short of death or parole. This pressure was also frankly acknowledged by Hernandez as a dynamic in this informant's debriefing.[5] (Hernandez, RT 350:12-20)

3. CDCR's Indicia of Reliability

By regulation, CDCR has established its own "indicia of reliability" for confidential inmate debriefing reports, 15 Cal. Code Regs. §3321, and the September 1992 report cites three of them as supporting the reliability of this informant. (Ex. 4, p.12) 15 Cal. Code Regs. § 33321 (c)(2)(3) and

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[5] Curiously, and though the September 1992 debriefing report lists the informant inmate's reasons for wanting to debrief – e.g. to devote more time to his family, to make a better citizen of himself – the opportunity to be free of the grueling confinement and isolation of SHU imprisonment is nowhere mentioned. (Ex. 4, p. 1) This follows a consistent and equally curious pattern throughout the set of debriefing reports in the trial record. (Trial Exs. 51, p.1 and 70, pp. 1-2)

(4). Each of these, however, is of negligible, if any, value in demonstrating the reliability of Mr. Lira's laundry-list identification.

The first indicia of reliability noted, i.e., that the inmate "incriminated himself in the course of the debriefing process," is entirely imaginary. Official CDCR policy in 1992 mandated that debriefing informants were not to be given *Miranda* warnings, for the specific purpose of precluding any possibility of self-incrimination. This was admitted by Hernandez in his testimony, (Hernandez, 342:21-344:4) and was independently confirmed by the declaration of Lt. J. Briddle submitted by CDCR in *Medina v. Gomez*, 1997 WL 488588 (N.D. Cal. 1997). (Ex. 102) In that case, the Department successfully defended its inmate debriefing process against challenges on Fifth Amendment grounds by affirmatively asserting that the process involves no risk of self-incrimination. *Medina*, 1997 WL 488588 *5 ("existing procedural safeguards preclude the possibility that a debriefing interview will later be used as a basis for a criminal proceeding and thus adequately serve the policy underlying the Fifth Amendment").

The other two regulatory indicia of reliability noted in this debriefing report, i.e., that some of the information in the report "has already proven to be true," or "has independently shown to be true," also provide no meaningful assurance of reliability here. The only "information" identifiable for either reliability factor, included at the end of the debriefing report, is a list of some 13 CDCR incident reports regarding different gang activities and experiences related by the informant. (Ex. 4, pp. 11-12; Hernandez, RT 344:10-345:9) But 11 of these 13 incident reports date from 1981 and 1982, and thus were already 10 years old at the time of the debriefing. (Hernandez, RT 345:10-14) Moreover, 4 of the 13 reports concern incidents in which the informant himself was directly involved, and for which the informant presumably was aware that incident reports had been generated, rendering their "independent" quality questionable and their demonstration of reliability questionable as well. (Hernandez, RT 345:17-349:3) But most importantly, 13 of these 13 incident reports involve incidents that did not have anything to do with Mr. Lira. (Hernandez, RT 349:4-7)

4. The Conflicted Meaning of the Laundry List Identification

The laundry list identification of Mr. Lira in the 1992 debriefing report is not only unsubstantiated and likely sourced in unreliable hearsay, if sourced in anything at all, it is also conflicting in its meaning according to the testimony of Department personnel. Thus, Officer Hernandez and Sgt, Mark Piland (333:8-13; Piland, RT 478:24-479:6) testified that the "CAT III" designation assigned to Mr. Lira in the laundry list, for which there is no explanatory key or legend, identified Mr. Lira as a *member* of the Northern Structure prison gang. (Hernandez, RT) According to CDCR's gang expert Marquez, Mr. Lira's "CAT III" designation signifies a member of the Northern Structure, but beyond that, a member *of the highest rank or position of authority within the gang.* (Marquez, RT 1283:3-20) According to Lieutenant Michael Ruff, Mr. Lira's "CAT III" designation means a high-ranking member of a prison gang, but a *different gang*, namely, the Nuestra Familia. (Ruff, RT 380:3-381:22)

Needless to say, this menu of imputed gang membership roles and ranks offers much more in the way of variety than coherence. How is the cryptic "CAT III" laundry list identification, coupled with this explanatory testimony, supposed to be meaningful evidence that Mr. Lira was an *associate* of the Northern Structure? Is that supposed to be some sort of lesser-included validation status?

5. CDCR's Amended Regulation Disallowing Laundry List Identifications as Inherently Unreliable

CDCR changed its regulations on acceptable validation evidence items in January 2006, pursuant to its settlement of *Castillo v. Alameida,* No. C-94-2847 (N.D. Cal. 1994), and under the regulations as amended, laundry list identifications in debriefing reports are no longer acceptable. Instead, debriefing reports now must not only name an inmate as gang-affiliated, but in addition:

> Staff shall articulate how the information specifically relates to the inmate's involvement with the gang as a member or associate. The information may be used as a source of validation if the informant provides specific knowledge of how he/she knew the inmate to be involved with the gang as a member or associate.

15 Cal. Code Regs. §3378 (c)(7)(H).

This was done out of recognition that laundry list identifications are inherently unreliable.[6] CDCR witnesses throughout trial were grudging in their acknowledgment of this, but the record evidence developed during discovery in *Castillo* leading to settlement leaves no doubt of it. CDCR personnel also noted in their testimony that the regulation as amended is only prospective in effect, (Marquez, RT 1813:18-24) but there is nothing merely prospective about the inherent unreliability of laundry list identifications that underlies this change in official CDCR validation policy.

C. The April 1993 Merced County Jail Yard Incident Report

The report from the Merced County Sheriff Department of an April 12, 1992 incident in the yard of the Merced County Jail involved a fire-alarm evacuation of a cellblock which inadvertently resulted in two Southern Hispanic or Sureno inmates released to the same jail yard as a number of Northern Hispanic or Norteno inmates. (Ex. 6) According to the report written by Sgt. Randolph Romero who witnessed the incident, a group of Norenos, including Mr. Lira, approached the Surenos and questioned them about their tattoos and gang affiliation in a challenging manner. No violence ensued, and the group was shortly dispersed by the guards and led back to their cells. CDCR relies on the report as evidence that Mr. Lira associated with a validated gang member who was also in the Nortenol inmate group. The report also quotes Mr. Lira as commenting to Sgt. Romero as the altercation was broken up, "Come on Romero. All we wanted to do was play with them a little awhile. You know when we go to the 'pen' they (meaning Surenos) rushes from the gate." (Ex. 6) CDCR relies on this as a self-admission by Mr. Lira of gang affiliation.

1. The Two Versions of the Report

This incident report is problematic as prison gang validation evidence in many ways. As a threshold problem, there are two versions of the report, and they are very different. The report relied on by CDCR, the typed version dated April 23, 1993, was prepared by Sgt. Randolph Romero a full year after the incident, and in response to a phone call from Milo Smith at SCC soliciting any gang

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[6] *See* Declaration of M. White re: Opp. to Def.'s in Limine Motion No. 2, Ex. A (deposition of Ernest Madrid, Nov. 7, 2003, Vol. I, 64:6-70:25).

information Merced County Jail may have had on Mr. Lira. (Romero, RT 388:7-25)The typed report highlights Mr. Lira's role as a leader of the Norteño inmate group, his threats and intimidation of two Sureño inmates, and also quotes Mr. Lira as speaking to Romero purportedly in some gang leadership role as the incident was broken up.

The other version of the report, also authored by Romero, was a handwritten account of the yard incident prepared that day or the day following. (Ex. 1) This contemporaneous version has none of the high-profile description of Mr. Lira as an organizer of the confrontation and gang spokesman that was added to the typed version a year later. Mr. Lira is instead merely listed as one of six Norteño inmates involved, described as a member of two purported street gangs, "VPX" and "Norte 14." (*Id.*) The original handwritten version names inmate Daniel Hernandez and validated Northern Structure member Juan Morales as the two instigators of the encounter with the Sureños. The typed version instead names Lira and Morales as the instigators.[7]

Romero testified at trial regarding the two versions of his report and the yard incident itself. He confirmed that he put down in his original handwritten report everything he thought was significant to document regarding the incident, making the year-later description of Lira's allegedly central role even more conspicuous in its absence. (Romero, RT 378:3-380:10) Under either version of the report, this incident was brief, even momentary, did not result in any violence or even physical contact, and was quickly broken up by the guards when Romero noticed it developing and radioed for backup. (Romero, RT 386:24-388:1) As plaintiff's gang validation expert Dan Vasquez testified, this was too inconsequential to have any prison gang significance, and does not constitute

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[7] Mr. Lira's own account was that he was let out into the yard along with the other inmates in his cellblock when smoke intruded from the electrical fire in the adjacent block. After milling around for a few minutes, he began playing pickup basketball with several other inmates. Mr. Lira was not part of any group of Norteños who confronted the two Sureño inmates, and after awhile he was led along with everyone else back to the cell block. (Lira, RT 507:15-512:11) Questioned at trial about his alleged association with inmate Morales, Mr. Lira testified that he knew of him from being housed in the same cellblock for months, but never associated with him at the county jail or otherwise. (Lira, RT 553:6-558:2)

any evidence that Mr. Lira was an associate of the Northern Structure. (Vasquez, RT 1053:24-1055:1)

2. The Mistaken Chrono Reference to Lira as a Northern Structure Associate

There is also an issue about what the typed version of the report actually says about that. The 128 chrono for the report, prepared by Smith on May 10, 1993, begins by stating:

> "On April 13, 1993 I received information from Officer Romero of the Merced County Sheriff's Department, who identifies inmate Lira H-36693 AKA 'Chino' 'to be *an associate of the NORTHERN STRUCTURE Prison Gang*, and a member of the NORTE 14."

(Exh. 10, emphasis added)

This apparently comes from Smith's misreading of the typed report. (Smith, RT 265:9-25) The text of the report includes a block of type listing serially the six Norteno inmates involved, including their imputed gang affiliations. Romero used a slash mark as punctuation to separate each listed inmate from the next, and Smith apparently read past that mark for Mr. Lira's listing:

> "AS 3 BLOCK CAME INTO THE YARD THE FOLLOWING GANG MEMBERS GROUPED TOGETHER AND STARTED TO SCAN THE YARD. THE INMATES WERE, LIRA, ERNESTO, GEORGE, AKA 'CHINO' DOB 010664 CDC #C60918, NORTENO, M 14 *ASSOCIATE/NORTHERN STRUCTURE* MEMBER AND NF ASSOCIATE, MORALES, JUAN AKA 'PULGA' DOB 021866 CDC # D02845. . . .." (Exh. 6; emphasis added)

Thus, it now appears that Smith made a critical error in interpreting the typed report, which he prominently recorded in the supporting 128 chrono he prepared for it, and which became a part of Mr. Lira's validation package, along with the report itself. What is not known, and will never be known, is the number of times over subsequent years that ICC hearing panels, inmate appeal reviewers, and gang investigators have relied on this erroneous information in periodically reconfirming Lira's validation. In this regard, it is significant to note that the Department's own gang validation expert, Robert Tristan, acknowledged in his trial testimony that he made the same mistake that Smith did when he himself first read the typed version of the report, and came to the same erroneous understanding that it explicitly identified Mr. Lira as a Northern Structure associate. (Tristan, RT 1700:22-1701:6)

3. Sgt. Romero's March 8, 1998 Letter

The evidentiary value of the typed incident report as a validation item is made even more doubtful by Sergeant Romero's subsequent letter of March 8, 1998. (Ex. 49) This was a letter that Mr. Lira was able to secure when he rotated from Pelican Bay SHU back to Merced County Jail at that time for re-sentencing on his conviction. By then, he had finally discovered that the typed yard incident report was part of the validation evidence relied on by CDCR. Romero, when he learned of this from Mr. Lira, agreed to write an explanatory letter to CDCR, which he then did and gave to Mr. Lira. Written on Merced County Jail letterhead, and addressed "To Whomever It May Concern," the letter read in full:

> In checking with the Classification Department, we cannot find any gang validation on Ernesto Lira in Merced County Jail. Lira is always housed in general population with other Northern Hispanics, which is the majority of our jail. I hope this letter will help clarify any misunderstanding you might have. Thank you.
> R. Romero, C.O.

(Ex. 49) Despite Mr. Lira's repeated efforts, the Department has never officially regarded this Romero letter as having any significance to the yard incident report or the incident itself. Departmental personnel at trial all sought to extenuate the letter as merely reporting that Merced County Jail's own gang validation files did not record Mr. Lira as gang affiliated, while at the same time leaving unaddressed the yard incident and its purported gang significance as described in the typed report. (Tristan, RT 1706:15-1708:19)

But this is a strangely literalist reading of Romero's March 1998 letter. Clearly, Romero was attempting to convey to CDCR that his typed report had been mistaken – or the subject of a "misunderstanding" in Romero's words – in its import as evidence of Mr. Lira's prison gang affiliation. As will be seen, the Department's myopic indifference to Romero's letter led subsequent IGI investigators to conduct no investigation into the matter.

4. Sgt. Romero's Declaration and Trial Testimony

This is all the more regrettable in view of Romero's declaration in this litigation, secured in October 2007, as well as his testimony during trial, in which he explained that Mr. Lira was known to the Merced County Jail as a Norteño, and that at the time of the yard incident in April 1992, authorities there had no evidence that he was a prison gang member or associate. (Romero, RT 417:18-24) As to the yard incident itself, Romero testified that it involved a brief encounter between Norteño and Sureño inmates that was quickly broken up, with no difficulty in avoiding any trouble, and no fights started. (Romero, RT 399:3-8) Romero also testified that there was nothing he saw Mr. Lira do that indicated he was trying to instigate a fight, that he could not say that Mr. Lira was trying to start trouble, nor could he say that Mr. Lira was a problem maker at the incident. (Romero, RT 417:8-17) Turning to his March 1998 letter to the Department, Romero testified that he didn't think Lira was a gang-banger and had no reason to believe he was a prison gang member or associate. (Romero, RT 417:18-24)

D. The April 1, 1998 Confidential Inmate Debriefing Report

This informant debriefing report was generated at Pelican Bay in March 1998, but was not used to continue Mr. Lira's validation on active status until April 2000. (Ex. 51) The report includes several accounts of gang activity by Mr. Lira. The most serious, as Assistant IGI Brian Fielder acknowledged, is the account of Mr. Lira assaulting and "beating" a new cellmate at the direction of a non-validated gang member. The account includes other details, confidential but known to the Court, regarding the somewhat elaborate circumstances and planning interactions leading to the directed assault, as well as its gang-significant aftermath.

1. The False Cellmate Assault Account

This entire account, however, has now been shown to be a fabrication. Exhibit 44 includes a chronology of Mr. Lira's cellmate history at Pelican Bay SHU, generated by CDCR. (Ex. 44, p. 3) It shows that, during the timeframe for the assault as described in the debriefing report, Mr. Lira had only two cellmates. The first, Anthony Montoya, became Mr. Lira's cellmate on the first day he

arrived at Pelican Bay on September 25, 1996, and so could not have been the assault victim as described in the report. The second, Anthony Ramirez, was Mr. Lira's cellmate for just one day, on October 7, 1997. Guard activity logs for that date, maintained both for Mr. Lira's isolation pod and unit, include entries that Mr. Lira and Ramirez were engaged in a "fight" in cell 124 at 11:20 a.m.. (Ex. 44, pp. 6 and 8)

It is now known what exactly did and did not occur in this incident, because SHU staff initiated the 115 disciplinary charge and proceeding against Mr. Lira and Ramirez over it. Exhibit 45 is the 115 investigation hearing report dated October 31, 1997, which shows that what actually occurred was nothing more than a loud argument over move-in space between the two. The incident began when guards came to Mr. Lira's pod and tried to convince him to take on a new cellmate, Ramirez, from an adjoining pod. (Ex. 45) Mr. Lira was reluctant but tentatively agreed. Ramirez' property cart was brought in, and as Ramirez was unloading it, an argument began, and Mr. Lira told Ramirez to get out of his cell. A minute later, the guards returned and led Ramirez and his cart away. (*Id.*)

This actual account of the incident is documented in the 115 record, developed following a full investigation, including interviews of the involved guards, Ramirez and Mr. Lira, and a formal hearing at which all of them testified. The final determination of the 115 hearing panel included specific findings that the record did "not contain any evidence that physical contact was made by either inmate," nor any evidence of "an argument or any sign of hostility between LIRA and RAMIREZ." (Ex. 45, p. 4) On this basis, the charges of mutual combat were dismissed entirely and the matter closed. (Ex. 45, p. 4)

Now that this evidence has emerged to show that the principal charge against Mr. Lira in the April 1998 debriefing report is fictional, CDCR has once again sought to shift ground, adducing testimony from its own personnel that all manner of cellmate assaults occur that are never detected by guards at the time. (Fielder, RT 642:7-24) From this, the Department now implies that such an undetected assault likely occurred here, and this likely explains the debriefing report account of one

as some incident separate from Mr. Lira's October 7, 1997 altercation with Ramirez. But this is nothing but wishful speculation by CDCR – an attempt to conjure an undetected cellmate assault *on an undetected cellmate*, which is not only unsupported but plainly refuted by the trial record.

2. The Other Implausible and Discredited Accounts of Gang Activity

The April 1998 debriefing report includes other charges against Mr. Lira, i.e., that he taught the Northern Structure "bonds" to other inmates and that he wrote a threatening letter to the informant's mother. (Ex. 51, pp. 4-6) But these are implausible on their face,[8] and more importantly, the demonstrated falsity of the cellmate assault account vitiates any credibility these further accounts from the same informant could otherwise have. Here is an informant who related what turns out to be a made-up and rather elaborate story about Mr. Lira attacking and beating a new cellmate, a story the informant either passed on from others or invented himself. How can anything else he relates against Mr. Lira in this same report be given any credence?

Diana Crandall, the Assistant IGI who prepared the debriefing report, testified that she always investigated every allegation by an informant involving any other inmate, and would only include it in the report if it could be independently verified. (Crandall, RT 92:12-93:4) But while this may have been Crandall's usual procedure – and certainly reflects the way such allegations ought to be addressed in this debriefing process – it is clear that no such investigation was conducted here as to the cellmate assault allegation. Fielder testified that 115 documentation for disciplinary proceedings that result in a dismissal of charges are permanently archived in Sacramento at CDCR's registry.

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[8] The account of Mr. Lira's mailing of a threatening letter to the debriefing inmate's mother is particularly strange. Inmate mail at Pelican Bay during this period was screened closely for gang-related communications, including threats. (Fielder, RT 646:20-648:6) According to the debriefing account, this letter would have been screened twice, first when Mr. Lira inexplicably mailed it to the mother, and then a second time when the mother inexplicably mailed it back. Searching for a way to explain how this could have happened, the Department presented testimony from its own personnel at trial regarding the prison gang practice of sending messages in secret (even invisible) code, though there was no explanation provided as to why Mr. Lira or anyone would mail a threat in indecipherable form. *Zavaro v. Coughlin*, 970 F.2d 1148, 1152-53 (2d Cir. 1992) (disciplinary finding based on "blatantly implausible" statements by guard do not constitute "some evidence.")

(Fielder, RT 624:4-625:15) Crandall apparently never checked this source. It is fair to wonder how much investigation she conducted into these other allegations as well.[9]

E. The Validation Evidence in Overview

In summary then, what CDCR's 17-years' worth of collected gang evidence on Mr. Lira amounts to is just these four items:

1. A drawing by another inmate with no intended and no apparent gang insignia, let alone any "unique to" the Northern Structure.

2. A yard incident report from Merced County Jail regarding a momentary encounter between inmates that involved no violence or even physical contact, a report which turns out to be a recreated and substantially altered version of the original report from a year before, and for which the author of both reports has repeatedly disclaimed any prison-gang significance regarding Mr. Lira's own involvement in the incident.

3. A laundry list debriefing report with no corroborating information as to Mr. Lira's cryptically identified gang affiliation – however that may be construed – which was likely sourced in some "filter list" if sourced in anything at all.

4. A later debriefing report from Pelican Bay in which Mr. Lira is related to have beaten a new cellmate as a gang-directed assault, an account that has now been shown by CDCR's own contemporaneous records to have been a fiction.

As earlier discussed, the "some evidence" standard requires that the information offered must satisfy the two basic criteria that all evidence must satisfy to be evidence. First, it must be meaningful, i.e., it must have probative significance by making more likely some fact in issue.[10]

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[9] The inmate debriefing report reflects that Crandall conducted a cell search for the alleged threatening letter and other "gang materials" that Mr. Lira allegedly kept hidden in his books and other possessions. The search turned up nothing. Crandall admitted in her testimony that verifying allegations about threatening letters and teaching other inmates the Northern Structure bonds "is difficult to do." (Crandall, RT 96:14-18)

[10] *See Smith v. McCaughtry*, 1996 WL 137869, at * 4-5 (7th Cir.) (unpub.)

(continued...)

Second, it must be reliable, i.e., it must have some demonstrated basis for believing that the information is accurate and derives from some source that can be regarded as trustworthy for this purpose.[11]

None of these four validation items satisfies either of these two basic requirements.

The drawing is not meaningful because it is thoroughly ambiguous in its significance, even inscrutable, as a drawing with hidden gang symbols. Moreover, the drawing can hardly be considered reliable evidence of something that Mr. Lira "freely admitted" making himself now that inmate Leyba has testified that he made the drawing and that he intended no gang insignia in it. *Smith v. Menifee*, 2003 WL 1872668, at * 2 (S.D.N.Y. 2003) ("'Some evidence' that is fantastical or directly rebutted by exculpatory evidence is essentially no evidence at all.")

The yard incident report from Merced County Jail is not meaningful evidence of Mr. Lira's prison gang association for several reasons. First and foremost, the author of the report, Sgt. Romero, has repeatedly disclaimed any prison gang significance to Mr. Lira's involvement in the incident, in both correspondence to CDCR ten years ago and more recently in his declaration and

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[10](...continued)
(discovery of concealed cancelled postage stamps in prisoner's cell did not constitute "some evidence" that prisoner violated disciplinary rule prohibiting "knowingly mail[ing] or attempt[ing] to mail any letter" with canceled postage stamp; "a finding of guilt based upon no evidence is a substantive due process violation.");

See also Tapia v. Alameida, 2006 WL 842470, at * 9 (E.D. Cal.) (validation evidence relied on, address book purportedly containing names and addresses of three Mexican Mafia associates, did not constitute "some evidence" where defendants admitted in discovery that two of the names were not written in address book and there was no other evidence that plaintiff ever corresponded with either, and third person was in book, but was not validated at time plaintiff knew him).

[11] *See Gomez v Kaplan*, 964 F. Supp. 830, 834-35 (S.D.N.Y. 1997) (disciplinary conviction for stabbing another inmate not supported by "some evidence" where hearing officer did not make independent assessment of confidential informant's credibility); *Hyson v. Neubert*, 820 F. Supp. 184, 189-90 (D.N.J. 1993) ("some evidence" did not support disciplinary finding that plaintiff possessed knife when hearing officer relied on corrections officer's report which recounted in "completely conclusory terms" accusations made by two confidential informants, there was no evidence that they had past record of reliability, and hearing officer made no independent evaluation of their credibility).

testimony at trial. The typed version of the report relied on by CDCR also presents serious issues of reliability, given its year-later creation at the request of Assistant IGI Smith and its marked differences from the original handwritten, contemporaneous version. Past cases have dealt with similar situations in which the actual circumstances of an alleged incident are questionable in significance and unreliably substantiated, and courts have consistently found the some evidence standard unsatisfied on such a record.[12]

The September 1992 laundry list debriefing report is not meaningful because it is not known what this laundry list identification is actually supposed to denote, with three different versions of it from CDCR witnesses, none of which involves an identification of Mr. Lira as a Northern Structure

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[12] *See, e.g.*, *Lenea v. Lane,* 882 F.2d 1171, 1175-76 (7th Cir. 1989) (affirming grant of summary judgment to plaintiff and order requiring expungement of disciplinary conviction for aiding and abetting other inmates' escape from prison chapel; fact that plaintiff was in chapel at time of escape was not evidence of guilt because he worked in chapel and his admission that he knew both escapees "is only marginally relevant since both had visited the chapel on earlier occasions. Further, it is hardly incriminating for one prisoner to admit he knows another. ... If this 'evidence' proves anything, it proves only that Plaintiff had the *opportunity* to aid an escape. It is not even a modicum of evidence that he did so.") (emphasis in original);

Broussard v. Johnson, 253 F.3d 874, (5th Cir. 2001) (disciplinary finding of attempted escape based on confidential informant's hearsay statement that inmate had hidden bolt cutters in kitchen area to which one hundred other inmates had access did not satisfy "some evidence" standard where no evidence supporting his reliability was presented to hearing officer).

Madrigal v. Ryder, 2007 WL 1686994, at *2-3 (W.D. Wash.) (granting inmate's motion for summary judgment as to his claim that his disciplinary conviction for attempted escape was not supported by "some evidence"; only evidence supporting charge was that plaintiff was in an unauthorized area (the prison hallway near visitors area) without his ID badge; but defendants "also knew, and do not contest, that Plaintiff was told to go into the hallway by a corrections officer, that the hallway was still within the security perimeter of the institution, that Plaintiff had his toddler child with him, that Plaintiffs' wife remained in the visitor area, and that Plaintiff immediately returned to the visitor area when asked to do so.");

Jones v. Clemente, 2004 WL 2624723, at * 8 (D. Or.) (inmate's disciplinary conviction for assaulting guard by injuring her hand was not supported by "some evidence" where guard's misbehavior report stated that inmate had "attempted to break our grip by kicking and moving his body around" while he was being removed from his cell (for which he received other convictions), but mentioned no injury, and although guard was treated by prison nurse for injury to her hand at approximately same time, guard never claimed that plaintiff had injured her and none of ten witness statements said that plaintiff injured her hand).

associate. This debriefing report identification is also unreliable, indeed, inherently unreliable, as recognized by CDCR itself in amending its validation regulations effective January 2006 pursuant to the *Castillo* settlement. *Gilanian v. City of* Boston, 431 F. Supp. 2d 172, 177-178 (D.Mass. 2006). See *Sira v. Morton*, 380 F.3d 57, 76, 81 (2d Cir. 2004) ("In a recent discussion of the 'some evidence' standard, this court observed that only 'reliable' evidence can constitute 'some evidence.' The principle is not new. A reliability inquiry has long been required when confidential source information is relied on to satisfy the 'some evidence' standard."); *Tellez v. Peters*, 1997 WL 51441, at * 9 (N.D. Ill.) (disciplinary conviction for attempted escape not supported by "some evidence" where committee's finding of guilt was based on confidential informants whose reliability had not been independently assessed).

Moreover, this laundry list identification is most likely grounded in "filter list" hearsay, which necessarily fails the "some evidence" standard. Cato, 824 F.2d at 805; *Sira v. Morton*, 380 F.3d 57, 75-78 (2d Cir. 2004) (hearing officer's "failure to probe and assess the totality of the circumstances in assessing the reliability of third-party hearsay information disclosed by confidential informants," instead relying only on confidential informants' past record for credibility, meant that "some evidence" standard was not satisfied as matter of law.)

The April 1998 debriefing report is not meaningful evidence because it is not true. It has been independently shown to report false information about a gang-directed cellmate assault that never occurred. *Johnson v. Greiner*, 2007 WL 2844905, at * 11 (S.D.N.Y) ("some evidence" standard not met where plaintiff "thoroughly undermined" one confidential informant's credibility by proving that plaintiff had not attended any of meetings at which informant alleged he had committed wrongful acts and other informant's allegations were merely conclusory). It is also unreliable for that same reason , and also because there is no independent corroboration for the other implausible charges against Mr. Lira in the report.[13]

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[13] *See Zavaro v. Coughlin*, 970 F.2d 1148, 1152-53 (2d Cir. 1992) (affirming grant (continued...)

F. CDCR's Investigation and Evaluation of the Validation Evidence

The "some evidence" standard is an objective one. *Sass v. Calif. Bd. Of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006) (to satisfy "some evidence" standard, decision must "have some basis in fact"; without "some evidence" "the state could interfere with a liberty interest ... without support or in an otherwise arbitrary manner."). Though sometimes cast in terms of what a responsible correctional officer would make of the evidence as proof of gang affiliation, the some evidence standard obliges the trial court to make its own evidentiary assessment, independent of any assessment made by prison staff during the validation process. Their subjective view of the validation items and their gang significance is, accordingly, of limited if any probative value. *Id.*; *Giano v. Kelly*, 2000 WL 876855, at * 19 (S.D.N.Y.).

Nevertheless, some note must be taken here of the subjective evaluations made by CDCR personnel of the four validation items procured and used against Mr. Lira, as their evaluations reflect a consistent pattern of institutional bias towards construing these items as meaningful and reliable evidence of Mr. Lira's association with the Northern Structure, even in the face of conflicting evidence demonstrating otherwise. Some examples from the trial record:

1. Assistant IGI Smith testified that Mr. Lira's criminal history would be highly significant if it showed any prior convictions for violence or prison gang activity, and likewise Mr. Lira's prison disciplinary history. (Smith, RT 212:17-213:11) However, the complete absence of any violence or gang activity in Mr. Lira's entire criminal and prison disciplinary history, according to Smith, would

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[13](...continued)
of summary judgment for inmate; disciplinary finding that plaintiff had participated in messhall riot, based only on three guards' statements that "every inmate in the mess hall" had participated, was not "some evidence"; such statements "are so blatantly implausible when taken literally that they do not constitute even 'some evidence' of a particular inmate's guilt."); *See also Burnsworth v. Gunderson*, 179 F.3d 771, (9th Cir. 1999) (affirming order requiring Arizona DOC to expunge escape conviction from inmate's prison records; "some evidence" standard not met where only evidence that plaintiff attempted to escape was plaintiff's statement to prison official that if he were not placed in protective custody to protect him from some other inmates, he would be forced to "hop the fence and run all the way to Tucson."; agreeing with district court that "there was no evidence, much less 'some evidence'" supporting the charge of attempted escape.

have no significance at all. (Smith, RT 213:22-214:12); (Marquez, RT 1799:6-17)

2. According to the Department, the typed yard incident report from Merced County jail was not called into question by the markedly different, contemporaneous handwritten version of the report a year earlier. The glaring inconsistencies between them, according to both Department personnel and experts, were not imprtant to their evaluation. (Smith, RT 273:2-11)

3. Department personnel testifying on the September 1992 debriefing report acknowledged that corroborating information for Mr. Lira's laundry list identification, either in the text of the report itself or from any other source, would have been significant. At the same time, the actual absence of any such corroborating evidence has no significance. (Hernandez, RT 362:2-363:2)

4. CDCR by regulation regards prison gang tattoos as important evidence of gang affiliation, and Marquez in his testimony presented graphic depictions of these as common and highly probative of gang membership. (Marquez, RT 1774:16-1778:9) Confronted with CDCR record evidence reflecting that Mr. Lira has no tattoos of any kind, let alone gang tattoos, CDCR witnesses testified that this is likewise insignificant. (Smith, RT 279:25-282:6)

5. The April 1998 debriefing report and its cellmate assault story have now been directly refuted by CDCR's cellmate chronology and 115 disciplinary documentation of what turns out to have been a shouting match. Yet, the Department's gang validation expert Marquez found no inconsistency at all in these two accounts, heroically speculating that Mr. Lira may have decided to fake an assault instead.[14] (Marquez, RT 1863:14-1864:12)

6. In what was possibly the most skewed construction of the record to shore up Mr. Lira's validation, Marquez described the significance of one of the Northern Structure "bonds," no. 3, which directs that "All Norteño Soldados will strive for 'mainline' status." (Ex. 345) Marquez explained that this means a Northern Structure member in SHU should resist debriefing, but should otherwise seek always to escape SHU confinement. In Marquez' expert opinion, Mr. Lira's 12-year-

[14] Confronted with the specific statement in the debriefing report that Mr. Lira "attacked him as soon as he came into the cell and *beat* him" (Ex. 51, emphasis added), Marquez explained that "it depends on what you mean by 'beat'."

long inmate appeal and litigation struggle to challenge his gang validation as wrongful is actually, though clandestinely, Mr. Lira's effort to follow this Northern Structure bond and thus proves that his validation was proper. (Marquez, RT 1793:24-1797:1)

* * *

Overall, CDCR's approach to collecting and evaluating evidence during its gang validation process repeatedly reflects an institutional mindset that is skewed markedly, even aggressively, towards imputing gang significance to validation evidence items on any perceived basis, real or imagined. CDCR collects these items and prepares descriptive chronos for them with no real investigation into any of the often patent inconsistencies and ambiguities in the items themselves, and then doggedly resists any later effort to re-evaluate in the face of conflicting and even refuting evidence.

This is all of a piece with the Department's overall approach to the basic concept of validation. As explained by Assistant IGI Smith, his effort to process Mr. Lira's validation at SCC in 1993 involved only a search for items that could be construed as validation "points," and once three items or "points" were collected, they were made into a package and shipped off to SSU. (Ruff, RT 1351:17-21) Smith testified that in this case, as was his practice, he never at any time tried to take a step back and assess the three items he had gathered in terms of what, collectively, they really demonstrated about Mr. Lira's possible association with the Northern Structure. (Smith, RT 211:8-216:1) Was this really enough to justify committing an inmate to Pelican Bay SHU for years of indefinite confinement? It never occurred to Smith to consider whether Mr. Lira, from a full and fair view of his entire background, criminal history and prison experience, had the look and feel of someone who was actually gang affiliated.

CDCR's implementation of its own gang validation policies and procedures is flawed by this institutional mindset, and it readily explains how someone like Mr. Lira, an inmate with no record of any violence or gang activity in his entire criminal and prison history, could be caught up in this

process and validated with such spurious evidence, especially with the entire process conducted in secret from him.

IV. THE PRISON-GANG VALIDATION PROCESS

A. The Secret 1993 Validation at SCC

Mr. Lira's prison gang validation was initiated in December 1992 at SCC with the search of his locker and confiscation of the drawing. By May 1993, Assistant IGI Smith had collected three evidence items against Mr. Lira, and these were made into a validation package along with a fourth item, and sent with a transmittal chrono to SSU.[15] (Smith, RT 208:11-110:8) There, on July 2, 1993, Judy Olson reviewed the evidence items, found the three to satisfy Departmental requirements, and endorsed Mr. Lira as a validated Northern Structure associate, generating a 128B validation chrono to document the action. (Olson, RT 47:9-13) She made no further or independent investigation of the evidence items, nor of Mr. Lira's alleged affiliation with this prison gang. (Olson, RT 61:14-23)

All of this took place entirely in secret from Mr. Lira. The testimony at trial was unanimous on this question as among Smith, Covello and Mr. Lira himself. (Smith, RT 211:5-7; Covello, RT 153:7-13; Lira, RT 316:20-317:6) No one ever advised Mr. Lira that the validation process had been initiated or was ongoing. (Lira, RT 530:2-12) No one ever asked him any questions regarding any of the evidence items as they were being collected and documented in 128 chronos. No one ever granted Mr. Lira an interview with IGI Covello or any authorized representative, including Smith, to show Mr. Lira the non-confidential evidence items, i.e. the drawing and yard incident report, and advise him of the confidential debriefing report identification, so that Mr. Lira could provide his own information about this evidence and request further investigation. Indeed, Mr. Lira paroled from

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[15] This fourth item was an April 1993 SCC informant report of alleged gang activity at the facility which, according to the text of the report itself, was uncorroborated and unreliable. (Ex. 11, pp. 2-3) It was rejected as a validation item by SSU Olson, RT 68:11-69:13)

SCC in May 1993, completely unaware that this validation already was well in progress.[16] (Lira, RT 531:1-14)

Mr. Lira's first knowledge of this secret validation came two and a half years later, in December 1995, when he returned to the system for parole violation on a charge of transporting three grams of methamphetamine.[17] (Lira, RT 531:16-532:20) IGI staff at DVI turned up information on the Department's data system that Mr. Lira had been validated as a Northern Structure associate. That led directly to the December 28, 1995 114D lock-up order, placing Mr. Lira in Ad-Seg pending further investigation and confirmation of his status. (Lira, RT 533:4-534:6)

Mr. Lira's reaction was direct and immediate. He protested that some mistake must have been made, as he had never been affiliated with any prison gang and had never been validated as such by CDCR. (Lira, RT 541:1422) He protested his Ad-Seg confinement and requested some access to or notice of the evidence that was being relied on for his reported validation. (Lira, RT 536:5-18)

B. The 1996 Revalidation at DVI

Under both the Fourteenth Amendment and CDCR regulation, an inmate confined to Ad-Seg for investigative reasons is to be given an ICC hearing promptly after initial confinement. 15 Cal. Code Regs. § 3335(c) and § 3338(a); *Toussaint IV*, 801 F.2d at 1100. In this case, Mr. Lira's Ad-Seg lock up was followed by months of *non*-hearings before one ICC panel after another, all of whom informed Mr. Lira that his validation status could not be determined without his C-file and that his C-file had not yet arrived at DVI, whereupon Mr. Lira would be led back to his cell after five minutes. (Lira, RT 454:12-24, 536:20-537:13)

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[16] There is also no evidence that Mr. Lira was advised of the validation while on parole following his May 1993 release. CDCR produced a copy of a March 21, 1994 parole violation report as evidence of such notice, but the references to gang affiliation in the report do not mention, or even fairly suggest, official gang validation by the Department. (Ex. 342)

[17] This was to be Mr. Lira's criminal charge and commitment offense, for which he received a prison sentence in March 1996 of 11 years. (Lira, RT 532:20-533:7)

This went on for six months, until June 1996, when Mr. Lira was informed at his monthly ICC hearing that his C-file had finally arrived and was being reviewed.[18] (Ex. 25) Mr. Lira continued to protest his confinement and demand access to the validation record and evidence items, and DVI personnel continued to assure him that all of this would soon be cleared up. (Lira, RT 541:24-543:5; 544:18-545:2)

In the meantime, and once again in a process that was undisclosed to Mr. Lira, IGI staff at DVI had re-sent Mr. Lira's original validation package back to Olson at SSU, not for the purpose of conducting any re-investigation of Mr. Lira's validation status or its supporting evidence, but simply and instead to fill out a new quarter-page chrono for the validation, now known as a 128B-2 chrono, to replace the original. (Ex. 34) The only deficiency in the original validation addressed by this new form was a purely technical record-keeping matter, specifically, the requirement from the intervening decision in *Madrid* that validation records specifically identify each item of evidence relied on and each, if any, rejected. *Madrid*, 889 F. Supp. At 1279. Olson was adamant in her trial testimony that nothing more than that was done in her 1996 "re-validation" of Mr. Lira, and that she worked entirely from the original validation package in performing this essentially clerical function. (Olson, RT 66:2-68:10)

Once the new 128B-2 chrono came back from Olson to DVI, Mr. Lira's validation status became certain and his Pelican Bay SHU confinement imminent. On September 17, 1996, Mr. Lira appeared before an ICC panel at DVI for a final time. (JF 3:7-8) His continued protests and requests for investigation and a hearing were once again rejected. Transfer to indefinite SHU confinement at Pelican Bay was endorsed by the CSR on September 23, 1996, and Mr. Lira was transported the following date to Pelican Bay SHU, where he would spend the next eight years. (JF 3:8-10)

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[18] Ad-Seg confinement at DVI was in someways worse than Pelican Bay SHU: Mr. Lira's eight-foot-by six-foot cell was "filthy," and "it's just cement and a two-inch mattress . . . it's infested with mice, insects, cockroaches and the water is brackish brown." (Lira, RT 540:11-541-12)

C. The Failure of Any Meaningful Periodic Review

Nothing had been done by anyone at DVI in response to Mr. Lira's protests of wrongful validation and requests for access to and re-evaluation of the evidence. The ICC hearings were merely a series of empty formalities, with ICC panels spending six months telling Mr. Lira that they had no means of even considering his grievances without his C-file, and then the next three months secretly processing a new 128B chrono to re-document the validation. Mr. Lira filed two inmate 602 appeals at DVI, but they suffered the same one-two shuffle that played out before the ICC. Mr. Lira's appeals were denied at the first level on the ground that the C-file was not yet available (Ex. 29, p.5), and then, once the new 128B-2 chrono was processed, appeals from that point on were denied at higher levels on the ground that Mr. Lira's validation had been re-documented and nothing more was left to consider. (Ex. 29, pp. 7 and 9)

Lost in all of this was any consideration by anyone of Mr. Lira's complaints of secret validation based on spurious evidence. Former Warden Edward Alameida testified that he denied Mr. Lira's 602 appeals at the warden's level because he assumed that whatever grievances Mr. Lira advanced had been addressed by SSU in the re-documentation of the 128B-2 chrono. (Alameida, RT 580:7-581:6) But that makes no sense at all. Olson at SSU was not even aware of Mr. Lira's 602 appeals, as Warden Alameida must have known.

D. The Continued Failure of Meaningful Review at Pelican Bay

The same history of meaningless ICC hearings and disregarded 602 appeals continued for Mr. Lira at Pelican Bay. At Mr. Lira's very first ICC hearing following arrival there in September 1996, he once again protested his validation and SHU confinement and sought an investigation and hearing into the supporting evidence. (Ex. 40) Mr. Lira was told in response that his only way out of SHU confinement was to debrief, something Mr. Lira was in no position to do, as he repeatedly told his ICC hearing panels, since he had never been gang affiliated to begin with. (*Id.*)

In October 1996, Mr. Lira was finally allowed during an *Olsen* review of his C-file to see and obtain copies of the actual drawing and typed yard incident report. He was also finally provided with

a 1030 disclosure form for the September 1992 debriefing report. (Ex. 41) This was the first time Mr. Lira had obtained direct access to the non-confidential items or any information as to the existence of the confidential third item – three and a half years after they had been used by CDCR to covertly validate him as a Northern Structure associate.

In March 1998, as earlier discussed, Mr. Lira was rotated back to Merced County Jail for re-sentencing and was able to speak with Sgt. Romero while there. When Mr. Lira explained that the yard incident report was being used by CDCR as evidence of prison-gang affiliation and as a basis for his SHU confinement, Romero wrote his March 8, 1998 letter. When Mr. Lira returned to Pelican Bay and tried to present the letter to the next ICC panel he appeared before on March 13, 1998, the panel refused to consider it, advising Mr. Lira that he would have to file another 602 appeal to pursue the issue further. (Ex. 50)

E. Lira's April 1998 602 Appeal

Mr. Lira then filed another 602 appeal in April 1998. (Ex. 52) It was assigned to Assistant IGI Mark Piland at the first level. Piland testified at trial that he had no memory of the appeal. However, a fax transmittal sheet sent by Piland to SSU for guidance on July 29, 1998 included this handwritten notation:

> One of the sources used for validation has been rescinded by the author. A new source has been sent with this fax – see debrief page 4. [Yellow tag] Note this inmate has a 602 going!

(Ex. 53) This fax attached the Romero letter and the April 1998 debriefing report. (Piland, RT 437:8-439:12) Evidently, Piland initially construed the Romero letter as disclaiming any prison gang significance to the yard incident report, and he planned to withdraw that report and replace it with the April 1998 debriefing report, which apparently had been placed in Mr. Lira's C-file by that point.[19]

But guidance came back from SSU in the form of a faxed response on August 3, 1998: "Old source still usable to show assoc. Didn't redo 128B-2 based on in/d." (Ex. 53) Piland's report

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[19] That, at least, is what Piland told Mr. Lira was the plan at their only interview for the appeal on July 30, 1998. (Ex. 52, EL 00698) Piland during that interview asked Mr. Lira no questions regarding the yard incident or the report.

denying Mr. Lira's appeal at the first level four days later followed the same rationale, construing the Romero letter as inconsequential since, although it reported no classification of Mr. Lira as gang-validated at Merced County Jail, the letter did not deny the events of April 24, 1992 as described in the typed yard incident report a year later, and those events, in the Department's view if not in Romero's, show gang association by Mr. Lira. (Piland, RT 426:24-427:5)

Piland's only "investigation" of the Romero letter and the yard incident report involved calling Romero, confirming that he had indeed written the letter, and hanging up. (Piland, RT 432:3-16) It might have been thought that anyone in Piland's position, with or without special training as an investigator, would have been curious enough to ask Romero to explain or reconcile the letter with the typed incident report, given their apparent inconsistency. But that was not done, nor was anything else done by Piland to investigate the matter. (Piland, RT 450:2-21) Mr. Lira appealed to the warden's level, but this was denied by former Warden Joe McGrath on September 21, 1998, in a statement of decision which noted that a "thorough investigation" of Mr. Lira's complaints and concerns had been made. (Ex. 52, EL 00695)

F. Lira's April 2000 Inactive Gang Review

Another year went by. Then, in November 1999, Mr. Lira's annual ICC hearing report records that the hearing panel addressed again the issue of Romero's letter noting that it was "potentially in conflict" with the yard incident report. (Ex. 61) The panel recommended to SSU that the matter be investigated at Mr. Lira's next inactive gang status review.[20] (*Id.*)

That review then followed in late March 2000, conducted by an Assistant IGI from DVI, Brian Fielder, who testified at trial. Fielder related that he was part of a task force reviewing all six-year-old validations of SSU inmates at Pelican Bay for possible inactive status. (Fielder, RT 587:7-590:4) His review of Mr. Lira's case consisted of a cell search, a check of criminal and prison disciplinary records, and a check of various prison-gang control centers and databases, both state and

[20] The ICC hearing report also notes that Mr. Lira protested this action, stating "how can I be a non-active gang associate when I am not a part of this gang?" (Ex. 61)

federal, none of which turned up any evidence of any gang activity by Mr. Lira over the past six years. (Fielder, RT 594:9-597:9, Ex. 63) However, after reviewing Mr. Lira's C-file, Fielder noted the April 1, 1998 debriefing report, and based on its allegation of a gang-directed cellmate assault, recommended that Mr. Lira's validation be continued on active status. (Fielder, RT 593:8-594:5, Ex. 63) Fielder in his testimony made clear that he had no discussion with Mr. Lira regarding the April 1998 debriefing report or its allegations. (Fielder, RT 616:5-618:24) Fielder also made clear that his review included no investigation or re-evaluation of the original three validation evidence items. He made no attempt to address, and was not even aware of, Mr. Lira's complaints and concerns regarding this evidence, including those based on the March 1998 Romero letter.

G. The Validation Process in Overview

The trial record has now detailed the history of Mr. Lira's validation and continued validation by CDCR over many years, and reveals a complete failure to accord Mr. Lira any of the procedural rights to which he was entitled as an inmate facing indefinite SHU confinement based only on his validation status.

Mr. Lira was entitled to an informal hearing before the IGI at SCC in 1993 once the validation process was initiated against him and before any decision to validate him as gang affiliated was made. That informal hearing never occurred, and indeed, Mr. Lira was kept entirely unaware of this validation process and did not discover his secret validation until two and a half years later, upon his return to the system at DVI in December 1995. The importance of this basic hearing right has been repeatedly recognized in past decisions. As this Court observed in *Lopez v. Valdez*, 2007 WL 1378017, at *3 (N.D. Cal. 2007):

> The person to whom the prisoner presents his views must be the critical decision-maker . . . . because classification committees might be "predisposed to transfer any validated inmate to the SHU," the prisoner's meeting with the investigator of his case, who prepares the gang validation packet and forwards his determination that the prisoner is involved with the gang to the LEIU [formerly SSU] is the critical point.

Past federal courts have repeatedly held that denial of a CDCR inmate's right to informal

hearing before an IGI prior to gang validation constitutes a violation of the inmate's Fourteenth Amendment procedural rights. *Guizar v. Woodford*, 2008 WL 2403000 (9th Cir.) (inmate who was not provided IGI hearing prior to validation was denied due process); *Lopez v. Cook*, 2008 WL 4489898, at * 24 (E.D. Cal.) (citing *Guizar*[21] and denying summary judgment to defendants because the inmate "apparently never received the opportunity to present his views to the gang investigators, who, in effect, were deciding his status."); *Lopez*, 2007 WL 1378017 at *4 (CDCR inmate's evidence that he was denied informal hearing before IGI prior to validation established "'a genuine issue for trial' concerning whether he was afforded his due process right to present his views to the decision-maker"); *Dawkins v. Peterson*, 2007 WL 333818, *3 (E.D. Cal.) (summary judgment denied where inmate never informed of validation process "or otherwise given a hearing or a chance to contest any of the information before the [validation] packet was sent to the LEIU"), adopted 2007 WL 954328 (E.D. Cal.).

In addition, the record demonstrates a consistent failure by CDCR over many years to make any meaningful periodic review of Mr. Lira's validation or any reevaluation of the evidence items relied on to support it. This was a further denial of Mr. Lira's Fourteenth Amendment procedural rights, which was related in consequence to the denial of due process involved in the original 1993 secret validation at SCC, but also constitutes a separate violation of those rights under §1983.

Within the CDCR system, the primary responsibility for ensuring periodic, meaningful review of an inmate's gang validation and SHU confinement is assigned to the ICC.[22] *Pina v. Tilton*,

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[21] The court in *Lopez*, though noting that the Ninth Circuit's decision in *Guizar* was unpublished, nevertheless found it "instructive" on this issue. *Id.* at * 24 and fn. 21 (noting that *Guizar* properly may be cited under Ninth Circuit Local Rule 36-3 even though it is not considered "precedent.").

[22] CDCR regulations provide that the review of indeterminate SHU status (including for validated gang members) at least every 180 may be done by "a classification committee," which covers both the ICC and the UCC. 15 Cal. Code Regs. § 3341.5(c)(2)(A); § 3376. In practice, however, responsibility for the required periodic validation review is assigned to the ICC, not the UCC. This is reinforced by 15 Cal. Code Regs. section 3335, "Administrative Segregation," which appears to designate the ICC as the proper party to perform these reviews.

(continued...)

2008 WL 4773564, at *4, fn. 1 (N.D. Cal.) (Illston, J.),(describing periodic reviews at Pelican Bay required by *Hewitt* and *Toussaint*: "The periodic reviews are done by the ICC, rather than the DRB [Departmental Review Board]."); *Jackson v. Carey*, 2006 WL 2827319, at * 8. (listing as "undisputed fact" that "the ICC is responsible for, among other things, reviewing all cases in Ad-Seg. When an inmate is confined in Ad-Seg, the ICC must review the case and make determinations as to the inmate's housing and classification.")

The need for meaningful periodic review of prison gang validations has been discussed in past decisions of this District, such as *Guizar*:

> Here, defendants initially argue that ICC officials did not violate plaintiff's right to due process because the ICC is not responsible for validating plaintiff as a gang associate. Defendants point out, and plaintiff does not dispute, that IGI and LEIU officials are responsible for investigating and validating gang members, whereas ICC officials are responsible only for deciding where prisoners are to be housed. The procedural protections set forth in *Toussaint I*, however, apply when a prison official places an inmate in Administration Segregation or the SHU. As defendants recognize, and as the undisputed evidence indicates, ICC officials, including those named as defendants herein, were the individuals responsible for deciding whether plaintiff would be placed in administrative segregation and the SHU and, as such, are liable for any failure to meet the procedural requirements of due process.

2007 WL 951294, at *4, *aff'd. on that gd., rev'd on other gd.*, 2008 WL 2403000 (9th Cir.). Moreover, as the Ninth Circuit made clear in affirming the district court on that ground in *Guizar*, the ICC hearing process cannot discharge this constitutional requirement of meaningful periodic review merely with a schedule of annual hearings at which no serious consideration is given to re-evaluation of the validation evidence items relied on, nor any attention paid to an inmate's

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[22](...continued)
See also 15 Cal. Code Regs. § 3335(d)(2) (after gang validation investigation complete, "an ICC shall review the inmate's case within 14 calendar days." *See also* § 3335(e) ("Inmate retention in administrative segregation beyond the initial segregation ICC hearing shall be referred for CSR review and approval within 30 days and then thereafter in accordance with subsection (d) above. In initiating such reviews an ICC shall recommend one of the following possible outcomes: ...(2) Transfer to a Segregated Program Housing Unit in accordance with section 3341.5....")

complaints and concerns regarding the evidence and need for its further investigation. As the Ninth Circuit observed:

> [E]ven if the ICC-defendants satisfied the notice requirement, taken in a light most favorable to Guizar the facts establish that they failed to provide him with an opportunity to present his views. This requirement cannot be satisfied simply because it is undisputed that Guizar routinely appeared before the ICC during its segregation. 'Under [Guizar's] version of the facts, which we must accept as true at this stage of the litigation,' during these appearances the ICC-defendants consistently denied Guizar's multiple requests for an opportunity to refute the gang validation. [citation omitted.]. Both a decade of case law and the language of the regulations in place at the time made clear that the ICC-defendants had "fair warning" that they needed to provide Guizar with such an opportunity, and any mistaken assumption to the contrary was unreasonable.

Guizar, 2008 WL 2403000 at *1.

As to the specific procedural elements that must attend a meaningful periodic ICC review of an inmate's validation status, at least one decision from this District has ruled that those elements are the same as applicable to the required pre-validation informal hearing before an IGI, given their related but independent importance:

> Since the risk that inmates will be deprived of their rights erroneously and the value of additional safeguards are identical in the context of an *initial* decision to segregate and a decision to *continue* retention in the Secured Housing Unit, the Court finds that the procedural protections articulated in *Toussaint IV* are required in this situation. Accordingly, the *Hill/Toussaint IV* evidentiary standards and the *Zimmerlee* reliability and safety requirements apply when prison officials decide whether to retain an inmate in the Secured Housing Unit under section 3341.5(c)(3).

Jones v. Gomez, 1993 WL 341282 at *5 (emphasis in original).

The failure of CDCR personnel to ever afford Mr. Lira a meaningful hearing on his validation was not just some technical or inconsequential lapse in this case. Considering the implausibility and unreliability of the evidence items relied on, there is every likelihood that had Mr. Lira been provided with timely access to the evidence and a timely opportunity to be heard by the IGI at SCC, then at least one if not more of the evidence items would have been critically reviewed and rejected, which, under CDCR regulations, would have precluded validation. Similarly, had Mr. Lira been

provided with a meaningful periodic review of his validation at any point during the subsequent years of his SHU and Ad-Seg confinement, there is every likelihood that a similar result would have ensued. Thus, Mr. Lira's claim for procedural violation of his Fourteenth Amendment rights through denial of an informal IGI hearing prior to validation and denial of any meaningful periodic review thereafter represents a basis for declaratory and injunctive relief sought here that is separate and independent from his claim of substantive violation of Fourteenth Amendment rights based on the lack of "some evidence" to support validation.

At trial, CDCR personnel repeatedly testified that even if Mr. Lira had been afforded the opportunity to be heard, either initially or during later periodic reviews, and even if that had led them to discover evidence undermining any significance or reliability the items otherwise may have had, CDCR nonetheless would have continued to rely upon all three items. But courts have rejected similar obdurate refusals to acknowledge that the provisions of due process protections would have made a difference. *See, e.g., Tellier v. Scott*, 2004 WL 224499, at *12 (S.D.N.Y.) (denying summary judgment to defendants on their argument that even if they had provided inmate all due process rights in their periodic reviews about whether to retain him in administrative segregation for approximately one and a half years because he was escape risk, "*they* would have kept him in SHU regardless of the procedures applied"; "the standard [for determining causation] is not what defendants would have decided; it is what an objective, neutral decision-maker would have decided.") (*quoting Giano v. Kelly*, 2000 WL 876855, at *19 (S.D.N.Y.) (emphasis and brackets in original).

Similarly, in *Giano*, the court following a bench trial determined that, in conducting their periodic reviews of whether plaintiff should be kept in administrative segregation as a security threat, defendants' failure to consider new, "readily available" information that undermined the initial grounds for plaintiff's Ad-Seg placement constituted a violation of his right to "meaningful" periodic reviews over a ten-month period. 2000 WL 876855, at *18-19. In so doing, the court addressed an argument similar to that advanced by CDCR here:

> Defendants argue that they would have continued [plaintiff] in AS regardless of the information available to them. This may be true. However, the standard is not what defendants would have decided; it is what an objective, neutral decision-maker would have decided. Defendants' adamant insistence that they would not have released [plaintiff] regardless of what they knew, and the ease with which they adjusted their after-the-fact rationale for [plaintiff's] confinement, suggests that they were far from neutral decision makers. ...
>
> The question, then, is whether an impartial decision-maker, reviewing the facts "then available," would have determined that [plaintiff's] release from AS would create a risk to the safety or security of the facility ....[I]t was incumbent on defendants to verify that the facts continued to support a finding that [plaintiff] was a security risk during the time he remained confined in AS.

Id. Accordingly, the court awarded plaintiff monetary damages for the period he spent in "the very harsh conditions" of Attica's SHU. *Id.* at * 26:

> It must be stressed that the constitutional claim in this case is not for a "technical" violation but implicates very serious and very real concerns. Giano spent over one year in Attica's SHU under very harsh conditions. His confinement was for an indefinite term, and his only hope for release from AS was premised on a meaningful review of the reasons for his AS confinement. ... In light of the circumstances in this action, the doctrine of due process reveals how important it is for prison officials to conduct periodic and meaningful reviews of the bases for inmates' confinement in AS.

V. LIRA'S PELICAN BAY SHU EXPERIENCE

A. The SHU Confinement Regime

Mr. Lira arrived at Pelican Bay State Prison on September 24, 1996. After initial processing, he was placed in the Security Housing Unit, Cellblock C. Inside that cellblock were ten units, each with six eight-cell "isolation pods." Mr. Lira was placed in D Pod, in a bare concrete 8-foot by 10-foot windowless cell, with a toilet, sink and a concrete slab and two-inch mattress for a bed. (Lira, RT 927:23-928:11; Ex. 100-3 and 100-6) Mr. Lira's only access to the outside world was a set of perforated holes in the cell door, through which he could look out into a windowless pod area to a bare concrete opposite-facing wall. (*Id.*) All of the cells in the pod were oriented the same way, so that none of the inmates ever had visual contact with one another. All cell-door and pod-door access was controlled remotely by guards from a cell block central control room, through video surveillance

cameras located in the pod. (Haney, RT 849:3-22)

Mr. Lira was kept in this cell for 22 and a half hours a day, every day. All meals were eaten alone inside the cell, served twice a day by guards on trays pushed through a cell-door slot. Mr. Lira was allowed out of the cell for 10- minute showers alone in the pod shower room three times a week. (Lira, RT 949:4-5) And once a day (every other day if double-celled), Mr. Lira was allowed to go alone to an exercise "yard," a bare concrete interior courtyard 9 feet by 48 feet, with 18-foot walls, (Ex. 100-4 and 100-5), where Mr. Lira could walk in circles for an hour and a half. (Lira, RT 928:22-929:17) Mr. Lira, like all SHU inmates, was allowed out of his isolation pod infrequently, e.g., to attend annual ICC hearings, periodic medical or dental visits to the infirmary, or visits to the law library every month or two. (Lira, RT 922:10-25) On each occasion, Mr. Lira was first strip-searched, then shackled hands and feet, and escorted by two guards. (Lira, RT 931:8-933:8; Ex. 100-7)

There was no work program of any kind. (Lira, RT 934:13-935:12) Nor was there any education or drug rehabilitation program. No phone calls were allowed. Mail was restricted and closely screened, both incoming and outgoing. Only a limited amount of personal possessions were allowed, and those were constantly searched and sometimes confiscated or taken for examination and never returned. Visitation privileges were limited, though with Pelican Bay located in the farthest northern reaches of California, it was practically impossible for Mr. Lira's family to visit anyway.[23]

These were the hardships officially imposed on Mr. Lira. Pelican Bay SHU was designed to be confining, controlling, and isolating beyond any correctional safety need. (Haney, RT 911:15-913:20) The facility is CDCR's "prison within a prison," where it commits not only gang-affiliated inmates on an indefinite basis, but also inmates convicted of serious disciplinary violations, sent to

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[23] Moreover, Mr. Lira's sister Lucy Harville testified that he wrote from Pelican Bay after a year or so discouraging visits from his family, explaining that they would likely be more painful for him than anything else. (Harville, RT 1438:2-25) Mr. Lira's only visitors during his years at Pelican Bay were local Jehovah's Witness lay ministers, who came four or five times during the course of those eight years and were allowed to speak briefly with Mr. Lira through the pod door. (Ex. 98)

the SHU for definite terms, as punishment for their offenses.[24]

Mr. Lira described in his trial testimony the struggle he endured to cope with these SHU confinement conditions, how he constructed a daily routine for himself, rising by 6:00 a.m., then Bible readings and an entry in his prison journal, and then typically work on one of his 602 appeals, and later his lawsuit, or writing letters to his family. (Lira, RT 938:6-11) But as the years of isolation and monotony wore on, Mr. Lira's tiny, windowless concrete world began to take an increasing emotional toll. He described some of this in his testimony, his emotional pain from loneliness and separation from his family, and it is echoed in many of his journal entries, these, for example:

> "9/28/1997 . . . I finally received some pics. And a letter de Lucy. It was good to see my Lilo ones. I miss them so much. How is it that I live without them. . . . How strange I can get used to this sadness these 4-walls that keep me locked in. As always, I think of all my familia.
>
> 4/27/1999. . . .here I am in this hole. Locked down in this cement cell 23 hours a day. I go out the yard which is a cement facing the walls 18 feet high - - 12 by 18 = it's called a dog walk = all I can see is the sky. I have lost my skin color and I am pale.
>
> Thu. 6-3-99. . . .I wonder how Mom & Lali y mi tia Santos are? I still have not heard de tina and my children. Just another day here in this cave. It would be nice if there was a window to look out - - I am surrounded by cement and steel - - grinding the stone. I am in the wind."

(Ex. 98)

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[24] Notably, CDCR provides by regulation a schedule of SHU confinement terms as punishment for 115 disciplinary violations, graduated in duration in accordance with the seriousness of the offense. The most severe disciplinary confinement term, specified for murder of a correctional staff member, is five years. 15 Cal.Code Regs. § 3341.5 (SHU Term Assessment Chart). *See, Giano*, 2000 WL 876855, at * 26 ("Ironically an inmate in disciplinary SHU is confined for a defined period of time based on the finding that he violated the prison rule, i.e., by assaulting another inmate. However, the same inmate could be placed in AS [Ad-Seg] based on a mere suspicion that he violated a prison rule, so long as his presence in GP [General Population] is deemed a threat to prison safety or security, and is kept in AS indefinitely.")

B. Lira's "No Good" Status and Deteriorating Mental Health

In addition to the deprivations imposed by institutional design, Mr. Lira also faced additional hardships, and even deadly danger, during his stay at Pelican Bay SHU. Mr. Lira's SHU confinement placed him a concentrated population of actual prison gang members and associates, and as an inmate who had no gang affiliation, he was exposed to threats and other pressures from these fellow prisoners. When Mr. Lira rejected this pressure, he was initially shunned, and then targeted by the Northern Structure as "no good." (Ex. 77, 110)

In December 1997, Mr. Lira became an eyewitness to what this targeted status could mean, when one inmate in his pod attacked and strangled another in front of Mr. Lira's cell door.[25] (Lira, RT 952:11-957:25) Mr. Lira was aware through the prison grapevine that this was not an isolated gang-directed murder, but instead one of a rash of inmate killings that the gang had committed over recent months. In February 1999, Mr. Lira was himself the victim of a gang-directed assault by his cellmate.[26] (Lira, RT 962:2-964:21)

Mental health records for Mr. Lira for his Pelican Bay term are limited, but they include entries reflecting that by 1999, he was beginning to suffer adverse mental effects from his prolonged confinement. An interdisciplinary progress note dated November 23, 1999 records that Mr. Lira reported "having some times of feeling stressed. . . .headaches. . . .reports mild episodes of anxiety but not disabling." (Ex. 99, MHR 227) Of more serious concern was a progress note dated October

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[25] Mr. Lira also later saw the same inmate victim in the infirmary, and his journal records this experience in his entry of December 24, 1997:

> "Wednesday, 12-24-97. Its X-mas eve here. I am in my lilo cell alone which I intend to be for the rest of my time. Well I went to the dentist and got some work done. Last week when I did go while I was on the chair the K-9 wheeled some young Chicano who was dying. I seen the M.T.A. try to revive him by giving him C.P.R. I could see the dudes face all purple. I was thinking to myself why do I have to see all this B/S. It is something that will stay with me por siempre."

(Ex. 98, ELJ-009)

[26] Mr. Lira lost double-celling privileges as a result of this attack, and spent his last five and a half years at Pelican Bay SHU in solitary confinement. (Ex. 44)

26, 2000, "Psychology Note: I/M referred by officers because of signs of paranoid ideation (food tampering) . . Mood appeared angry, strong entitlement sense. . . . Further assessment not possible due to uncooperative attitude and lack of confidentiality." (Ex. 99, MHR 228) A third progress note, dated January 19, 2001, documents a similar referral by correctional staff, "CO referred for lying and/or delusional." Mr. Lira once again refused to cooperate with this attempted intervention. (Ex. 99, MHR 229)

Among all the other stresses of SHU confinement, the fear of being driven to mental illness became at some point a daily reality.[27] Mr. Lira in his trial testimony described repeated occasions when other inmates in his pod would fall apart mentally, with some of them raving and pounding on their cell doors incessantly for days before finally taken away by guards. (Lira, RT 974:8-975:7) Once more, Mr. Lira's journal records some of this experience:

> Wednesday (12-31-97) well here it is once again the last day of the year. I can't believe how focused I am about this year's end. . . .well time sure flows like water. I got a tore-up neighbor who is 65 years old and has 40 years in the system. Dude says he is dying. Also there is a dude a few cells down who is trying to starve him self.... They keep cell-astrackting him 4 K-9s in white suits. It is crazy what they do to the inmates. These guys just give up on life. It's sad. (Ex.98, ELK-009)

C. The Groundless Deadly Weapon Charge

In March 2004, with his parole date from Pelican Bay only weeks away, Mr. Lira was accused by pod guards of taking a razor strip from a disposable razor during his shower. When a strip search and cell search turned up nothing, Mr. Lira was subjected to a 3-day "potty watch" surveillance, in which he was placed in a filthy, small plexiglass cubicle and allowed only water and no food until he produced three stool samples for inspection. (Ex. 81, Lira, RT 985:17-987:18) When no razor strip materialized even after this procedure, SHU staff nevertheless referred a complaint to the Del Norte County District Attorney, who charged Mr. Lira with inmate possession

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[27] In addition, a fear of serious medical illness was imposed on Mr. Lira from and during his SHU confinement. During pod showers, Mr. Lira was given disposable razors to shave that had been recycled from use by other inmates. As a result of this practice, and along with many other inmates, Mr. Lira contracted Hepatitis C in 1998. (Ex. 89)

of a deadly weapon. (Ex. 84)

Mr. Lira was then given a plea offer of eight more months in SHU confinement, and was advised that if the offer were rejected and Mr. Lira were convicted following trial, he would face a sentence of 12 more years. (Lira, RT 988:2-13) Mr. Lira rejected the offer, explaining simply in his trial testimony that "I couldn't stand being there eight more months." (*Id.*) A jury trial then followed, in which Mr. Lira was acquitted on April 13, 2004. (Exs. 86 and 87) That night, Pelican Bay staff loaded Mr. Lira into a bus and drove him to the Merced parole office, where Mr. Lira was dumped in a parking lot the following morning, wearing only a paper jumpsuit and with his parole clothes in a bag, marking the end, finally, of his Pelican Bay SHU imprisonment. (Lira, RT 989:8-21)

VI. LIRA'S POST-PELICAN BAY SHU CONTINUING CONFINEMENT AND MENTAL HEALTH HISTORY

A. Emotional Problems on Release from Pelican Bay

Following his release on parole in April 2004, Mr. Lira returned to his family's house in Planada to live with his mother and grandmother. (Lira, RT 1193:6-15) Although Mr. Lira expected some significant adjustment problems returning to regular life, he did not expect the serious emotional problems he began to develop almost immediately. As Mr. Lira described in his trial testimony, he began to experience anxieties and vivid memories of his SHU experience, including nightmares, flashbacks, and even voices of former pod-mates. (Lira, RT 1193:16-1197:15, 1203:13-1204:25) Mr. Lira became preoccupied with fear for his safety, and could not cope with crowds of people or public places such as shopping malls or movie theaters. Mr.Lira became withdrawn even from his immediate family, and would spend days alone in his bedroom. He also developed insomnia, often unable to sleep for days at a time.

Mr. Lira's sister Lucy Harville confirmed these symptoms in her trial testimony. She spent every other weekend at the family house in Planada during this period helping their mother and grandmother, as she had done for many years, and she saw Mr. Lira's emotional problems firsthand. As she described, Mr.Lira had become a different person following his eight years at Pelican Bay,

too afraid to go out with her even to shop and too anxious and withdrawn even to join holiday family gatherings in the house. (Harville, RT 1442:4-1443:22)

B. Lira's Diagnosis and Treatment by CDCR Mental Health Personnel

Ms. Harville and another of Mr. Lira's sisters Irma tried to obtain sleep medication for him through the Merced parole office, but received no assistance. By mid-2005, Mr. Lira was back in the system at DVI on parole violation.[28] In September 2005, he was seen by Dr. Inge Hansen for mental health evaluation. Her patient interview notes include these reported symptoms from Mr. Lira:

> Difficulty concentrating, reports nightmares, flashbacks, startle reflex related to experiences from previous incarceration. . . .Possible AH [Auditory Hallucination] of voices - - may be experiencing self- talk as voices. . . reports paranoia. . . .c/o trauma-related sxs: concentration problems, nightmares, flashbacks, etc. related to incarceration experience at Pelican Bay.

(Ex. 99, AGO-0034) Dr. Hansen diagnosed Mr. Lira with "PTSD, provisional; R/O [Rule Out] Malingering," along with polysubstance abuse and anti-social personality disorder based on his criminal record. (*Id.*) Dr. Hansen also referred Mr. Lira for further evaluation, including any needed adjustment to his prescribed anti-depressant and sleep medications, which had first been dispensed to him on intake at DVI in May 2005. She also formally admitted Mr.Lira into the Department's CCCMS mental health treatment program, based on "medical necessity." (Ex. 91)

Over the course of the following two years, as Mr. Lira was in and out of the system for repeated parole violations, he continued in the CCCMS program, which involved weekly interviews and ongoing case management and treatment by mental health staff, both at DVI and later at Corcoran SHU. (Hansen, RT 779:10-281:2, 783:17-784:1) Throughout this treatment history, Mr. Lira continued to report the same set of symptoms in patient interviews, along with his belief that

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[28] Lira's parole was initially revoked in December 2004, and he was returned to DVI where he was placed in Ad-Seg. Over the following two and a half years, Lira was released and reincarcerated for parole violation several times, always for infractions unrelated to any gang activity, e.g., domestic disturbance, positive drug tests, and unauthorized contact with his common law wife. On each occasion, Mr. Lira was returned to Ad-Seg confinement, either at DVI or at Corcoran SHU, because of his validation status. (Lira, RT 1205:1-1207:19)

they were sourced in his Pelican Bay experience, as reflected in these record entries:

> [September 27, 2005 (DVI)] – Spent most of his time in Pelican Bay ASU program. States that he feared for his life daily and unable to function when paroled back home. . . Anxiety [?], claims mood depressed, poor energy levels, jumpy and easily becomes anxious around large crowd of people or loud noises and has feelings to protect himself.
>
> [October 28, 2005 (DVI)] – "I am distrustful". . . . IM tells hx Pelican Bay SHU . . . insomnia, claims paranoid feelings, halluc., dels . . . Note: I asked IM to consider whether or not he was "institutionalized."
>
> [November 17, 2005 (DVI)] – He feels on edge. . . . He states he prepares to defend himself – he has a kneejerk response to even being touched [?] by nephew.
>
> [April 24, 2006 (DVI)] – He would like to read a book on anger. He states he suffers from P.T.S.D. He talked about being in Pelican Bay and watching a guy right in front of him get killed and also being in a dentist's office and watching somebody else get killed. He states he was really traumatized, that when the doors open he gets really frightened. He states that this is really hard for him.
>
> [August 16, 2006 (Corcoran)] – "I'm stressed" . . . . I/P speaks about worrying that his cell door will be "popped" and he will have to fight. . . .I/P speaks about fears of returning to the streets. I feel like I am walking a tight rope.
>
> [June 20, 2007 (DVI)] – Pt advises having flashbacks, nightmares, avoidance symptoms, voices calling at night, [increased] startled response, related several emotional traumas in his life. "somebody was killed in front of me". . . .gang was after me. . . . they wanted to kill me.' Currently he is feeling better when on single-cell status. Used to be paranoid, isolated, currently he is less depressed on current med regime.

Mr. Lira was given a number of different diagnoses by CDCR mental health staff at DVI and Corcoran. He was initially diagnosed with "adjustment disorder" in May 2005. (Ex. 99, MHR 046) One staff psychiatrist at DVI, Dr. Jansen, diagnosed Mr. Lira on several occasions with "psychotic disorder NOS," or Not Otherwise Specified. (Ex. 99, MHR 106, 123, 143, 161, 170) But the primary diagnoses were PTSD and depression, and these were Mr. Lira's two primary diagnoses at the time of his final parole in October 2007.[29] (Ex. 99, MHR 053, 069, 116, 128, 178, 004, 010)

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[29] Dr. Hansen had no definite explanation for these multiple diagnoses among (continued...)

Mr. Lira's prescription medications were also continued during this two-year period. This regime of anti-depressant, anti-anxiety, and sleep medications were periodically adjusted, and Mr. Lira reported some beneficial effect from these drugs.[30] (Ex. 99, MHR 080, 124, 158, 174, 184)

Despite Mr. Lira's history and ongoing treatment for his disorders, and some beneficial effect he has received from his medications, he continues to suffer from their symptoms to a degree that remains significant and often severe or even disabling. In addition, the medications have their own adverse side effects as well. Mr. Lira continues to suffer from a major sleep disorder, and continues to suffer not only depression and withdrawal but also anxiety over his physical safety, hyper vigilance, and agoraphobia. (Good, Suppl. Rule 26 Rept. and Witness Stmt., pp. 1-2)

C. Dr. Haney's Evaluation and SHU Syndrome

Dr. Craig Haney testified as one of Mr. Lira's two mental health experts. A longtime research psychologist and professor of psychology at University of California Santa Cruz, Dr. Haney has devoted much of his 30-year career to the subject of prison confinement, particularly SHU or so - called "supermax" confinement, and its effects on the mental health of prison inmates. (Haney, RT 833:9-835:2) Dr. Haney has published research papers of studies on this subject, including an extensive study done at Pelican Bay, and has been an expert witness in a number of court cases in which constitutional challenges have been made to such confinement regimes on Eighth Amendment and other grounds, some of them landmark cases in this area. (Haney, RT 835:12-837:7)

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[29](...continued)
multiple CDCR mental health staff, beyond venturing that possibly there were inconsistenecies between Mr. Lira's reported symptoms with his affect or "presentation" during patient interviews. (Hansen, RT 782:6) Hansen also conceded, however, that she is unfamiliar with Pelican Bay SHU conditions, has never heard of SHU syndrome or the published literature on it, and cannot speak to whether Mr. Lira's eight years of SHU experience at Pelican Bay caused his mental disorders. (Hansen, RT 787:3-788:5)

[30] Since Mr. Lira's discharge in March 2008, he has continued under the care of San Francisco/Stanford psychiatrist Jonathan Russ, who has agreed to have Mr. Lira as a patient on a pro bono basis, has seen him several times, and has continued his prescription medications for depression, anxiety and insomnia.

Dr. Haney, along with others in this field, have identified a set of symptoms reported by inmates confined to long-term SHU confinement. (Haney, RT 652:17-653:16) The symptomatology generally mirrors that of an anxiety disorder, and substantially overlaps with symptoms of PTSD. The symptoms include: withdrawal, anxiety, paranoia, sleep disturbance, headaches, nightmares, hypervigilance, intrusive thoughts, rage, and hopelessness. (Haney Rule 26 Rept. and Witness Stmt., p. 22, Haney, RT 65:11-657:5)

Dr. Haney has formed the professional opinion that the extraordinary isolation and deprivation of SHU confinement can be causally linked to these symptoms in inmates reporting them, as SHU conditions, particularly when imposed over a period of years, can cause inmates to alter their emotional make-up and personality in order to cope with and survive their experience. (Haney, RT 657:6-659:12)

Dr. Haney has examined Mr. Lira's personal and mental health case history in detail and has interviewed Mr. Lira regarding his Pelican Bay experience and subsequent mental health problems. (Haney, RT 839:19-840:5) Dr. Haney has concluded that Mr. Lira's experience and reported symptoms are consistent with SHU syndrome, and that the mental disorders Mr. Lira has been diagnosed and treated for since his release from Pelican Bay in 2004 are sourced in his years of imprisonment there. (Haney, RT 660:5-665:9)

D. Dr. Good's Diagnosis and Opinion as to Cause

Dr. Paul Good, Mr. Lira's other mental health expert, is a clinical psychologist with 30 years of private practice in San Francisco. (Good, RT 1129:18-1130-17) He made a full diagnostic evaluation of Mr. Lira for this case, including extended interviews of Mr. Lira and interviews as well with his sister Ms. Harville, his mother, and his long-time girlfriend Victoria Luna. (Good, RT 1132:12-1135:5) Dr. Good administered a full battery of written diagnostic tests to Mr. Lira, including a test specific to PTSD. (*Id.*) Dr. Good consulted with professional colleagues over the evaluation of those diagnostic test results, and consulted also with Dr. Haney and Berkley psychiatrist Terry Kupers, another recognized expert on SHU syndrome. (*Id.*) Finally, Dr. Good made a full review of the CDCR mental health records for Mr. Lira and other case materials

including Mr. Lira's prison journal. (*Id.*)

In Dr. Good's professional opinion, Mr. Lira, by primary diagnosis, suffers from dysthymia, i.e., a moderate level of depression, and from PTSD. (Good, RT 1135;12-21) His diagnosis of depression is based not only on Mr. Lira's reported symptoms, but also on the results of the diagnostic testing, (Good, RT 1142:15-22), and on the beneficial effect that Mr. Lira has reported in response to prescribed anti-depressant medication. (Good, RT 1132:1-1138:17) Dr. Good's diagnosis of PTSD, in accordance with DSM IV diagnostic criteria, is based on the traumatic event experienced by Mr. Lira in December 1997 in witnessing an inmate murdered (Good, RT 1142:15-1145:23) and on Mr. Lira's reported symptomatology, which tracks the DSM IV diagnostic criteria in each applicable category.[31] (Good, RT 1144:13-1147:22) In Dr. Good's opinion, Mr.Lira does not suffer from psychosis, and he believes that the one equivocal symptom reported in this regard, i.e., hearing voices, is actually the result of anxiety-based intrusive thoughts and not true delusions, something Dr. Hansen also concluded. (Good, RT 1148:18-1149:9)

Turning to the issue of causation, Dr. Good believes that Mr. Lira's Pelican Bay SHU confinement was the cause of the PTSD and, at a minimum, was a substantial contributing cause to his depression. (Dr. Good recognized that Mr. Lira's prior history of drug use, as well as other "stressors" in his life, may also have contributed to his depression.) (Good, RT 1150:17-1151:29) Dr. Good bases his opinion partly on the developed literature on SHU syndrome, which he regards as cogent here, particularly in view of the close correlation between Mr. Lira's reported symptoms and recognized SHU syndrome symptomatology. (Good, RT 1152:16-1153:8) In addition, Dr. Good has noted that Mr. Lira displayed none of these symptoms of mental disorder before he went to Pelican Bay, as reflected not only in the testimony of his sister Ms. Harville, but also in the CDCR mental health record. (Good, RT 1151:25-1152:15)

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[31] As Dr. Good explained in his trial testimony, PTSD symptoms include: (1) re-experienced reaction (nightmares, flashbacks, ruminations); (2) avoidance reaction (withdrawal, agoraphobia); and arousal reaction (hypervigilance, startle reflex).

From mid-1994 to mid-1996, Mr. Lira underwent mental health screening on five separate occasions at DVI, and the screening report for each states that Mr. Lira was not suffering from a mental illness and had no need for referral to a mental health professional. (Good, RT 1153:12-1154:2) In addition, on his arrival at Pelican Bay in September 1996, Mr. Lira underwent a *Madrid* mental health screening, which determined that he had no prior history of mental disorder or treatment and was not excluded from SHU confinement on mental health grounds. (*Id.*) As to the delayed onset of Mr. Lira's depression and PTSD symptomatology, particularly as measured from the December 19, 1997 traumatic event of witnessing an inmate murdered, Dr. Good did not find this unduly prolonged, as delayed onset is not uncommon with PTSD. (Good, RT 1147:23-1148:17) Dr. Good noted as well that Mr. Lira, according to Pelican Bay mental health records, was actually beginning to exhibit some of these symptoms years earlier while still confined there.[32] (*Id.*)

E. Dr. Goldyne's Expert Testimony

In response to the evidence presented by Drs. Haney and Good, CDCR presented Dr. Adam Goldyne, a forensic psychiatrist, retained to provide expert testimony on Mr. Lira's mental health disorders, both as to diagnosis and cause.[33] Dr. Goldyne, however, turned out to have hardly any expert opinions on these subjects at all. Dr. Goldyne diagnosed Mr. Lira with psychosis not otherwise specified or NOS, as he was unable to identify the type of psychotic disorder or level of its severity. (Goldyne Rule 26 Rept. and Witness Stmt., p. 3) Likewise, Dr. Goldyne made diagnoses of anxiety disorder and depression, but once again NOS in each case, with no opinion as to which

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[32] Moreover, as Dr. Haney noted in his Rule 26 report and trial testimony, it is sometimes difficult to know the actual onset of mental disorder for confined inmates, particularly in SHU, given the well-recognized stigma attached to any inmate voluntarily seeking mental health care. This is perceived by other inmates, particularly gang members, as both a sign of weakness and as a suspected pretext for initiating CDCR's informant debriefing process. Note that in both instances during 2000 and 2001 when guards referred Mr. Lira for mental health evaluation due to "signs of paranoid ideation" and "for lying &/or delusional" Mr. Lira refused to cooperate with the referrals. (Ex. 99, MHR 228 and 229)

[33] Dr. Goldyne has been board certified only since 2005, and has testified as an expert witness at trial only once before. (Goldyne, RT 645:5-20)

type of anxiety disorder or which clinical level of depressive severity Mr. Lira might have. (Goldyne, RT 1647:8-19)

More importantly, Dr. Goldyne has no opinions as to the cause of Mr. Lira's mental disorders, however they may be diagnosed. He has no opinion as to the cause of Mr. Lira's psychosis, or his anxiety disorder, or his depression. (Goldyne, RT 1651:8-20) Dr. Goldyne points to several possible causes, including Mr. Lira's history of drug use (which his Rule 26 report is replete with) and even including Mr. Lira's Pelican Bay SHU confinement. But Dr. Goldyne testified that the potential mental health effects of prolonged SHU confinement are not yet clearly established in the professional literature, and so the mental health effects of Mr. Lira's eight years of SHU confinement are unknown and unknowable. (Goldyne, RT 1643:2-1646:1)

Dr. Goldyne's opinions – or non-opinions – on this issue of causation rest on the shakiest forensic grounds. Dr. Goldyne acknowledged in his testimony that he has never been to Pelican Bay, has no detailed understanding of SHU conditions there, and knows about them only from what he has learned from reviewing materials in this case. (Goldyne, RT 1642:4-9) Dr. Goldyne has heard of SHU syndrome, and has heard of Drs. Haney, Kupers, and other recognized researchers in this field, but he has never read any of their published studies. Instead, he testified that he once read an article by someone else who criticized these studies as insufficient to establish SHU syndrome as a diagnostic disorder without further research.[34] (Goldyne, RT 1642:10-21)

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[34] This is an article by a Jeffrey Metzner, which Dr. Haney was cross-examined on at trial. Dr. Haney was familiar with Dr. Metzner's writings and had this, in part, to say about them:

> I've written a literature review of this, of the literature in solitary confinement, which is nearly a 100 pages long. There is very little conflict in the literature about the negative psychological effects of long-term solitary confinement.
>
> It is a position which most of the leading figures in the field who have done research on this issue – unlike Dr. Metzner, who has not – a position which they support.
>
> It is a position which virtually every major human rights organization in the world has taken a position on, from the International Committee of the Red Cross, to

(continued...)

Dr. Goldyne's professional disinterest in the potential mental health effects of prolonged SHU confinement extended also to his evaluation of Mr. Lira's individual case history. Dr. Goldyne made no real inquiry, during his interviews of Mr. Lira or otherwise, relating to his Pelican Bay experience, and thus was unaware of a number of things directly significant to an informed evaluation of Mr. Lira's mental disorders and their cause. (Goldyne, RT 1632:8-18) Dr. Goldyne was unaware of the evidence documenting the strangulation murder and its infirmary aftermath that Mr. Lira witnessed in December 1997, including the descriptive entry in Mr. Lira's prison journal. He was unaware of the gang-directed cellmate assault Mr. Lira suffered in February 1999. (Goldyne, RT 1629:22-1630-14) And although Dr. Goldyne was aware of the mental health record entries on Mr. Lira's referrals by correctional staff in 2000 and 2001 for "paranoid ideation" and "delusional" behavior, he apparently had no interest in learning anything more about these attempted mental health interventions, or their disturbing implications. (Goldyne, RT 1625:19-1627:8)

Dr. Goldyne was also unaware of the ordeal Mr. Lira endured on the eve of his parole in March 2004, when, following a three-day "potty watch" surveillance, he was tried on a groundless felony charge of inmate possession with a deadly weapon — an experience that Dr. Good described as "terrifying" to Mr. Lira, as it must have been. (Goldyne, RT 1633:18-1634:19) Dr. Goldyne was also notably uncurious about Mr. Lira's broader SHU experience, how Mr. Lira himself viewed his own emotional and mental health during those years, and how he had tried to cope with the isolation

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[34](...continued)
Human Rights Watch, to the United Nations. . . .

> So there is really very little difference of opinion in the broader literature. The people who actually study the effects of solitary confinement have reached a consensus on this issue. It is a literature which requires a certain amount of effort to absorb and to muster. Persons who make statements about the literature not being convincing or not pointing in the direction that I have indicated are not, unfortunately, familiar with the entirety of the literature and have not done research on the topics themselves.

(Haney, RT 889:15-890:1, 891:13-21)

and deprivation of his confinement. Dr. Goldyne's Rule 26 reports discuss the results of his two extended interviews with Mr. Lira, and while they record pages and pages of information about Mr. Lira's history of drug use and his criminal history, including misdemeanors and arrests dating back to the California Youth Authority, the reports say virtually nothing about Mr. Lira's eight years at Pelican Bay. (Goldyne Rule 26 Rept. and Witness Stmt., pp. 8-61, pp. 20-23)

With this level of professional interest and understanding, it is not surprising that Dr. Goldyne was unable to form any opinion on whether Mr. Lira's mental illness is sourced in his Pelican Bay experience. Dr. Goldyne at one point in his trial testimony even suggested that inmates in SHU confinement such as Mr. Lira sometimes find it "comforting" to be imprisoned indefinitely under those conditions. (Goldyne, RT 1634:8-1635:4)

Dr. Goldyne's only definite diagnostic opinion is that Mr. Lira is not suffering from PTSD. (Goldyne, RT 1647:14-16) His initial basis before this determination was his view that Mr. Lira's reported "traumatic event," i.e., the December 1997 inmate strangulation murder he witnessed, was not sufficiently substantiated with independent documentation. (Goldyne, RT 1648:21-1649:2) When this documentation was shown to him at trial from Mr. Lira's prison journal and contemporaneous news accounts, Dr. Goldyne relied instead on what he regarded as a years-long delayed onset of Mr. Lira's PTSD symptoms, which in his experience makes a PTSD diagnosis here "implausible". (Goldyne, 1627:10-1628:3)

Dr. Goldyne, though he regards his opinions as supported by the CDCR mental health record, offered no explanation for his deviation from the consensus opinion of four mental health professionals at DVI and Corcoran who separately diagnosed Mr.Lira with PTSD and based their prescribed medications and other treatment of him on that diagnosis, among others, over the course of two years. [35]

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[35] It may be that the $75,000 in expert fees that Dr. Goldyne has charged and received for this assignment provides at least some explanation for that deviation. (Goldyne, RT 1651:21-1652:11) Psychiatrists themselves refer to this form of bias as secondary gain, and their professional literature recognizes it as a serious, and often unconscious, influence in their

(continued...)

VII. REMEDIES - - DECLARATORY JUDGMENT AND EXPUNGEMENT

Mr. Lira seeks two forms of relief under §1983.

First, he seeks a judicial declaration:

1. That his prison-gang validation was a violation of both his substantive and procedural rights under the Fourteenth Amendment, as the validation was done in secret from him, was never meaningfully reviewed thereafter, and was unsupported by any significant or reliable evidence of his alleged gang association; and

2. That his confinement in Pelican Bay SHU for eight years, as well as his later confinement for parole violation in DVI Ad-Seg in Corcoran SHU over three more years, based solely on his wrongful validation, imposed significant and atypical hardship on Mr. Lira in violation of his liberty interest under the Fourteenth Amendment.

Second, Mr. Lira seeks individual injunctive relief in the form of expungement of his wrongful validation from CDCR records, and report of the expungement to all prison-gang databases and clearing houses to which the validation had been reported originally.

A. Declaratory Judgment and Expungement as Authorized Remedies

Despite Mr. Lira's release from confinement and discharge of sentence, expungement remains an authorized and appropriate remedy for §1983 violation in cases where an inmate can show continuing adverse consequences from a wrongful prison record that expungement would avoid or at least mitigate. *Hewitt v. Helms* 482 U.S 7755, 760 (1987) (release from prison did not moot plaintiff's claims involving expungement of misconduct from prison records); *Kerr v. Farrey* 95 F.3d 472, 476 (7th Cir. 1996) (paroled prisoner's claim to have negative references expunged from his prison record not moot "because any such references may have a continuing adverse impact on him.")

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[35](...continued)
forensic work. A. Goldyne "Minimizing the Influence of Unconscious Bias in Evaluation: A Practical Guide," J Am Acad. Psychiatry Law 35:60-6 2007, pp. 61, 62.

The Court has the authority to issue an order requiring defendant Secretary of CDCR to expunge Mr. Lira's gang validation from departmental records as a remedy for Mr. Lira's wrongful and constitutionally defective validation. *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999) (affirming order requiring Arizona Department of Corrections to expunge disciplinary escape conviction from inmate's prison records where conviction not based on "some evidence"; expungement order "was the appropriate remedy for the wrong suffered by plaintiff" and a contrary conclusion ignores the core of our concept of procedural due process."), *quoting United States v. Sweeney*, 914 F.2d 1260, 1264 (9th Cir. 1990) (expungement remedy appropriate "where the maintenance of such records would be fundamentally unfair.").

Federal courts have long recognized their equitable power to order expungement of a variety of state and federal government records in order to remedy constitutional violations. *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1275 (9th Cir. 1998) ("Federal courts have the equitable power to order expungement of Government records where necessary to vindicate rights secured by the Constitution or by statute." (*quoting Fendler v. United States Parole Comm.*, 774 F.2d 975, 979 (9th Cir. 1985)); *Maurer v. Los Angeles County Sheriff's Dept.*, 691 F.2d 434, 437 (9th Cir. 1982) ("It is well settled that the federal courts have inherent equitable power to order the expungement of local arrest records as an appropriate remedy in the wake of police action in violation of constitutional rights." [interior quotations omitted]). The fact that the records to be expunged "are 'state records,' [does] not put them beyond federal control, even though the area is a sensitive one involving delicate policy considerations." *Wilson v. Webster*, 467 F.2d 1282, 1284 (9th Cir. 1972); *see also Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978) (district court erred in dismissing action against sheriff for expungement of allegedly unlawful state arrest records).

Expungement is authorized and appropriate here. Mr. Lira offered evidence at trial to support expungement on two related but independent grounds.

B. Declaratory Relief and Expungement as Beneficial to Lira's Mental Health

First, expungement coupled with a judicial declaration of wrongful validation, would have a beneficial effect on Mr. Lira's ability to cope with his ongoing mental disorders. Both Dr. Haney and Dr. Good spoke to this issue in their testimony.

Dr. Haney noted that Mr. Lira's depression and PTSD are sourced in his Pelican Bay SHU experience, and that a special hardship he endured as a part of that experience was the anguish of knowing that he had been confined there unjustly. (Haney, RT 663:19-665:9) Dr. Haney noted also that Mr. Lira's patient interviews with CDCR mental health staff repeatedly record his "anger" over his wrongful confinement as a diagnostically significant complaint.[36] (Haney, RT 913:21-914:15) In Dr. Haney's view, a judicial declaration and expungement finally recognizing the validation as wrongful will help Mr. Lira psychologically in reconciling to the injustice of this experience and coping with its continuing consequences to his mental health.[37]

Dr. Good concurred in this evaluation. In his opinion, Mr. Lira would be benefitted by a judicial declaration and expungement in dealing with his symptoms of both depression and PTSD. (Good, RT 1155:1-1156:5) Dr. Good based this conclusion in part on his extended recent interview with Mr. Lira on the issue, in which Mr. Lira spoke of a favorable outcome to the case as a means towards coming to terms with the wrong he has suffered and moving on with his life. (Good, RT 1155:24-1157:9) Dr. Good also noted, as did Dr. Haney (Haney, RT 665:13-666:17), the relevant literature on the psychological effect of exoneration following wrongful conviction, as well as

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[36] Note, for example, these mental health record entries: (1) May 24, 2005 (DVI) – intake interview, records symptoms as "Anxious, angry"; (2) February 27, 2007 (DVI) – progress no records "Mr. Lira discussed many issues related to Hx of Ad-Seg placement. He states he hears voices and feels angry"; (3) July 9, 2007 (DVI) – progress note records: "[how's your anger?] 'I hate people. I am angry at this administration for something I did not do – I was validated a gang member but I am not.'" (Ex. 90, AGO -00047, 141 and 185)

[37] Dr. Haney also explained that inmates who experience SHU syndrome often have fought and lost in some measure a battle over their own identity and emotional make-up; in Mr. Lira's case, this battle centered on whether his imputed prison-gang association was valid or instead a falsehood. In Dr. Haney's opinion, a judicial declaration and expungement would help Mr. Lira in restoring his full self-identity. (Haney, RT 865:10-869:1)

studies on truth-and-reconciliation commissions over human rights abuses, which consistently show a beneficial effect from formal, public acknowledgment of illegality and injustice.

(Good, RT 1157:10-1158:12)

CDCR presented opposing expert testimony from Dr. Goldyne, who concluded that a judicial declaration and expungement would likely have no appreciable effect for Mr. Lira. His rationale was that Mr. Lira would only benefit from this judicial relief to the extent that it lessened his anxiety over gang retaliatory violence, which he continues to fear. (Goldyne, RT 1609:16-1611:6) But because this concern is, in Dr. Goldyne's view, a psychotic delusion on Mr. Lira's part, it is doubtful that it would respond in a therapeutically beneficial way to a real-world development like prevailing in this case. (*Id.*)

This opinion by Dr. Goldyne, like others earlier discussed, has a dubious foundation. For one thing, this represents a change in Dr. Goldyne's evaluation from his original November 2007 Rule 26 report and January 2008 deposition, in which he concluded that Mr. Lira's concern over gang retaliatory violence, though a source of his anxiety symptoms, was nevertheless grounded in reality.[38] In his more recent supplemental report of November 2008, Dr. Goldyne has now concluded that Mr. Lira's fear of attack is not grounded in reality, but is instead delusional.[39] (Goldyne, RT 1638:2-

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[38] Thus, for example, Dr. Goldyne had his comment in his original Rule 26 report regarding Mr. Lira's experience of witnessing the strangulation of murder of a fellow inmate:

> *Psychiatric Care.* As noted above, if Mr. Lira did witness a death following the "pop" of a SHU door in 1997 or 1999, it is plausible that might have residual anxiety about doors popping, but his apprehension likely had more to do with an ongoing concern that he was on a "gang" hit list.

(Goldyne Report November 28, 2007, page 47)

[39] As Dr. Goldyne noted in his supplemental report:

> In my 2007 report, I acknowledged the possibility that Mr. Lira's fear of attackers was based on a realistic concern. However, I am now of the opinion that it is most likely a delusion: A false belief which arises as part of a psychotic disorder which persists despite evidence that it is not true.

(continued...)

1639:10) Dr. Goldyne took no account of the relevant published literature on public exoneration and reconciliation, and he left entirely unaddressed the potential beneficial effect of judicial declaration and expungement on Mr. Lira's ongoing depression and anxiety disorder, which Dr. Goldyne also diagnosed.

C. Declaratory Relief and Expungement as a Mitigation of Lira's Risk of Gang Reprisal

The second basis urged for this requested relief is the mitigating effect it would have in lessening the risk to Mr. Lira of retaliatory gang violence that his 12 years of wrongful gang validated status has caused. Following his transfer to Pelican Bay SHU in 1996, Mr. Lira rejected pressure from Northern Structure inmates to affiliate with the gang, and he thus became the victim of reprisal, suffering a gang-directed cellmate assault in February 1999. As of 2001, Mr. Lira's name began surfacing on confiscated Northern Structure "no good" lists.

Dr. Haney has testified to this continuing danger to Mr. Lira, as well as the mitigating effect that would result from the public judicial declaration of wrongful validation sought here. (Haney, RT 668:5-669:1) So has Mr. Vasquez, who noted that the communication network between prison and street gangs, though clandestine and often word-of-mouth, is effective in disseminating such information.

The Department has presented contrary testimony from their own gang experts, both Tristan and Marquez, in an effort to discount the continuing risk to Mr. Lira and the likelihood of any mitigation of it from favorable case decision. This dismissive testimony is difficult to reconcile with the Department's core contention throughout this litigation that prison gang retaliatory violence is a pervasive deadly danger, and one that follows a "no good" inmate for years after he leaves the system. Indeed, this is the entire basis for the unprecedented confidentiality restrictions imposed by the Ninth Circuit, pursuant to CDCR's writ petition, on the use of confidential informant information at trial. The Department has argued successfully that informant identities in this confidential

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[39](...continued)
(Goldyne Report dated November 23, 2008 p.3)

information – even from 10 years and 17 years ago – must remain absolutely protected from disclosure in a sealed record, in order to avoid violent retaliation against the informants or their families. By comparison, Mr. Lira was last attacked in a gang-instigated assault two years ago at DVI by a Northern Structure cellmate, who assaulted him in front of a guard as soon as he affirmed his non-affiliated status.

VII. CONCLUSION

The Department has much to answer for in its treatment of Mr. Lira these past 12 years. For most of that time, Mr. Lira was wrongfully imprisoned in SHU and Ad-Seg solitary confinement under the harshest and most isolating conditions in the entire CDCR system. The experience has damaged Mr. Lira mentally, and so in addition to those 12 lost years, he now lives with the consequences of the clinical depression and PTSD they have caused him.

CDCR's confinement of Mr. Lira in Pelican Bay for this wrongful validation also resulted in his "no good" status with the Northern Structure, which has led to two gang reprisal assaults against him while in CDCR custody and a risk of further assault that continues to this day. In addition, the negligent practices of Pelican Bay staff caused Mr. Lira to contract Hepatitis C, a potentially deadly disease he now has for the rest of his life.[40]

But none of those matters have been placed directly at issue by this case as tried, certainly not by any claim of just compensation for the misery and harm that Mr. Lira has been caused by this Department. Mr. Lira seeks simply but importantly a judicial declaration that his prison gang validation and SHU/Ad-Seg confinement by CDCR were wrongful and violated his constitutional

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[40] And then there is the retaliation against Mr. Lira by prison and parole staff, for his jailhouse lawyering to other inmates, for his own serial 602 appeals, and for his federal lawsuit against the Department and a number of its personnel. The "potty watch" ordeal and the groundless criminal charge of possessing a deadly weapon on the eve of Mr. Lira's March 2004 parole from Pelican Bay reek of retaliation. And so does the November 2005 home invasion assault by a SWAT team of parole and local police agents, to arrest Mr. Lira for parole violation on a dirty drug test. Mr. Lira has fought a years-long litigation battle to vindicate his §1983 claim, and the cost to him in effort and delay from that has been noted. But the trial record that has now been developed also raises the indelible suspicion that Mr. Lira has borne an additional cost over the years in retaliatory abuse for his right to a trial of this case.

rights, and an order directing that the validation be expunged. Mr. Lira submits that the evidence adduced at trial, evaluated in accordance with governing Ninth Circuit authority, fully justifies this relief as requested.

Dated: February 11, 2009 CHAPMAN, POPIK & WHITE LLP

By: /s/
Mark A. White
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