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6 IN THE SUPERIOR COURT OF SAN DIEGO  
IN AND FOR THE COUNTY OF SAN DIEGO

7 THE PEOPLE OF THE STATE OF )  
8 CALIFORNIA, )  
9 Plaintiff, )  
10 v. )  
11 Defendant. )  
12 \_\_\_\_\_ )

Case No. CR \_\_\_\_\_

DEFENDANT  
SENTENCING MEMORANDUM  
IN SUPPORT OF PROBATION  
OR LOCAL CONFINEMENT

DATE & TIME:  
DEPT:

13 Sentencing is scheduled for \_\_\_\_\_ at 9:00 a.m. in this Department. The  
14 defendant stands convicted by a jury of \_\_\_\_\_ counts of \_\_\_\_\_. This Court  
15 is familiar with the facts of this case having heard the testimony at the jury trial. [This  
16 memorandum is filed in addition to the motion to strike portions of the presentence  
17 report (PSR) and additional to the statement in mitigation.] Although it may be  
18 considered a statement in mitigation, it focuses on one issue: why a sentence to state  
19 prison should not be imposed. The reason: the court would be sentencing the  
20 defendant to serve confinement in an environment that presently constitutes cruel or  
21 unusual punishment.

22 **I. THE CONDITIONS IN STATE PRISON ARE UNFIT FOR HUMAN**  
23 **HABITATION AND WOULD HAVE A SEVERELY DELETERIOUS IMPACT**  
**ON THE DEFENDANT AND HIS FAMILY.**<sup>1</sup>

24 Nearly everyone agrees that the conditions in state prison are awful. A sentence  
25 \_\_\_\_\_

26 <sup>1</sup> The following data supporting this memorandum may be found in Sevilla,  
27 “California Department of Corrections & Rehabilitation: The Argument Against  
28 Imprisonment,” California Criminal Defense Practice Reporter (Matthew  
Bender/LexisNexis March 2007).

1 to state prison is a cruel consignment of a human being to a vastly overcrowded  
2 warehouse teeming with gangs, racism, violence, indifferent or brutal guards, an  
3 incompetent health system that kills, and a paralyzed bureaucracy that cannot  
4 administer itself.

5 The current California Department of Corrections & Rehabilitation (CDC&R)  
6 Director has labeled the state prisons a “powder keg” ready to blow. It is already  
7 blowing. Each year there are thousands of inmate-upon-inmate assaults. This is not  
8 surprising given the above conditions. It is a place so depressing that the suicide rate  
9 is over four times that of the general population. “In California ...there have been 41  
10 suicides this year, the most in at least six years and a 17% increase from 2005.” Most  
11 suicides occur when inmates are placed in isolation for 23 hours a day.<sup>2</sup>

12 Overcrowding has meant no room for rehabilitation programs. The space has  
13 literally given way to the inevitable requirement for beds. Small wonder that little  
14 rehabilitation is on-going. The proof: the recidivism rate is an astounding 65 to 70%  
15 within three years of release, the highest in the nation.

16 Our prisons do not rehabilitate. Given the abysmal state of California's prisons  
17 it is not a question of rehabilitation, it is survival. In the 1970's prison reformers:

18 totally abandoned the notion that prisons can, or should even try to,  
19 rehabilitate. In fact, they ...adopted the opposite view: that all prisons,  
20 however new, well staffed or well equipped, are profoundly harmful; that  
21 they systematically destroy all of the best instincts of those they imprison;  
22 and that they make offenders more likely to commit crimes when they are  
23 released than when they were committed.<sup>3</sup>

24 A prison sentence is a consignment of a defendant to Dante's Inferno. Indeed,

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25 <sup>2</sup> Kevin Johnson, “Inmate Suicides Linked to Solitary,” USA Today, December  
26 27, 2006; [usatoday.com/news/nation/2006-12-27 -inmate-suicides\\_x.htm](http://usatoday.com/news/nation/2006-12-27 -inmate-suicides_x.htm).

27 <sup>3</sup> Art Campbell, Law of Sentencing, pp. 91-92 (3rd ed. 2004), quoting M.  
28 Serrill, “Critics of Corrections Speak Out,” 2 Corrections Magazine, 5, 5-6 (March  
1976).

1 if state planners had purposely set out to design institutions to warp, scar or kill  
2 inmates, they could not have done a better job than exists in the California penal  
3 institutions now incarcerating 174,000 men and women. These are harsh words, but  
4 they depict what every informed source says about our prisons.

5 **A. Sentencing: The Place of Confinement is Highly Relevant.**

6 California's sentencing rules require consideration of the conditions at the  
7 location where the defendant is to be confined in order to accomplish the goals of  
8 punishment. Cal. Rules of Ct., Rule 4.410(a), states that general objectives of  
9 sentencing include among other goals: punishing the defendant, encouraging him or  
10 her to lead a law abiding life in the future and deterring future offenses, deterring  
11 others from criminal conduct by demonstrating its consequences, and preventing the  
12 defendant from committing new crimes by isolation through incarceration.

13 However, defendants are not encouraged to live law-abiding lives through  
14 prison sentences. This is dramatically evidenced by the fact that California paroled  
15 inmates have the highest recidivism rate in the nation.<sup>4</sup> CDC utterly fails to  
16 rehabilitate.

17 Cal. Rules of Ct., Rule 4.414 (b)(5) specifically states that one of the criteria  
18 affecting a sentence of probation includes the likely effect of imprisonment on the  
19 defendant and his or her dependents. There can be no doubt that the effect of sending  
20 someone to state prison will be profoundly negative, involving far more than the  
21 removal and separation from family, friends and surroundings. A sentence to the CDC  
22 is a passport to a uniquely surreal and violent world where gangs and guards control  
23 all aspects of day-to-day life.

24 One goal of imprisonment is to punish, but our prison system inflicts far more  
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26 <sup>4</sup> The California Inspector General's office issued a report on April 18, 2006  
27 titled, "Department of Corrections and Rehabilitation Not Doing Enough to Prepare  
28 Inmates for Release, Adopt Modern Technology, or Provide Inmates with Medical  
Care." (See <http://www.oig.ca.gov/press-rlse/pdf/prlse-04-06.pdf>).

1 than punishment. It severely traumatizes and warps the human spirit so that re-entry  
2 to society is bound to fail. Once free, the “ex-con” carries the life-long stain of  
3 societal condemnation. There is little actual forgiveness even after the defendant pays  
4 his debt to society. In fact, laws make felons ineligible for many jobs and benefits and  
5 thus compound the difficulties of re-entry.<sup>5</sup> Additionally, the inmate has neither been  
6 prepared for nor directed to resources upon release. Thus, the CDC reports that  
7 thousands become homeless immediately and thousands more shortly thereafter.<sup>6</sup>

8 Current California sentencing rules thus make deplorable prison conditions  
9 highly relevant to the sentencing decision and militate against prison sentences.

### 10 **B. California Prisons Are Unnecessarily Cruel.**

11 What follows is a description of the conditions of the California prisons that is  
12 largely statistical in nature only because space forbids putting a human face on each  
13 one of them. But for every statistic, there are human beings subjected to the cruel

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15 <sup>5</sup> “Depending on the jurisdiction and the crime, felons who have served their  
16 sentences and are no longer under any sort of state supervision may nevertheless be  
17 unable to vote, obtain certain types of employment, receive food stamps, qualify for  
18 student loans, maintain parental custody, or even pick up their child from school. ...  
19 In many cases, blanket provisions mean that nonviolent, first-time offenders are  
20 subject to the same restrictions as hardened criminal.” (Saxonhouse, “Note: Unequal  
21 Protection: Comparing Former Felon's Challenges to Disenfranchisement and  
22 Employment Discrimination,” 56 Stan. L. Rev. 1597 (2004); *see also* A. Campbell,  
23 Law of Sentencing, pp. 554-563 (3rd ed. 2004), for a discussion of post-sentence  
24 collateral concerns.)

25 <sup>6</sup> “There are fewer social service and employment supports in prison than there  
26 were just 10 years ago, and there are also fewer supports on the outside when the  
27 inmates return to their communities. In fact, the California Department of Corrections  
28 released data early in 2000 indicating that 102,222 adults had been paroled from state  
prisons during January and February. Of that number, 7325, or 7.17 percent, were  
homeless upon release. More become homeless after they have been released for a  
few weeks or months.” (“A Home for Every Californian: The Recommendations of  
the Senate Bipartisan Task Force on Homelessness For 2001,” California Senate  
Bipartisan Task Force on Homelessness, March 12, 2001, found at  
[http://www.senate.ca.gov/sor/reports/REPORTS\\_BY\\_SUBJ/ECONOMY\\_EMPLOYMENT/Homeless.htm](http://www.senate.ca.gov/sor/reports/REPORTS_BY_SUBJ/ECONOMY_EMPLOYMENT/Homeless.htm).)

1 conditions described. Prisoners sentenced to the CDC face these conditions as a daily  
2 living reality.

3 **1. Overcrowding**. This is the underlying problem. There are 174,000 prisoners  
4 crammed into prisons with a capacity of 100,000.<sup>7</sup> No rocket scientist is needed to  
5 calculate the by-product of this: deplorable living conditions, lack of security, and a  
6 lack of decent medical attention. Add to this the constant threat of gang and race war,  
7 the ever present threats of violence, guard rule, hepatitis, AIDS, frequent lock-downs,  
8 and you have an environment unfit for habitation much less rehabilitation.<sup>8</sup>

9 In the 1980's, California went on a prison building binge once it became obvious  
10 that its new Determinate Sentence Law of 1976, repeatedly amended to make terms  
11 longer, would be delivering an ever-increasing number of inmates to prison. In 1976,  
12 there were twelve prisons housing about 17,000 inmates. Now there are thirty-three  
13 prisons housing 174,000. To house the inmates safely, California would have to build  
14 another dozen or more prisons. But prisons are incredibly expensive to build and run.  
15 The CDC budget is already at nine billion dollars per year.<sup>9</sup> Throwing billions more  
16 into the budget and building more prisons will not solve anything soon, and unless the  
17 flow of prisoners slows, it will not be a solution.

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19 <sup>7</sup> December 21, 2006, Press Release, Office of the Governor,  
20 “California's 174,000 prison population lives in facilities designed for 100,000, and  
21 overcrowding has forced more than 17,000 inmates into gymnasiums and classroom  
22 housing, a dangerous alternative that puts both offenders and guards in danger.”  
([http://gov.ca.gov/index.php?/press-release/4972/.](http://gov.ca.gov/index.php?/press-release/4972/))

23 <sup>8</sup> CDC's name was changed in 2005 to add “Rehabilitation.” It is now  
24 CDC&R, the California Department of Corrections and Rehabilitation. When the  
25 Determine Sentencing Law was first passed in 1976, Penal Code section 1170(a)(1)  
26 stated: “The Legislature finds and declares that the purpose of imprisonment for crime  
27 is punishment.”

28 <sup>9</sup> Indeed, the new budget for the next fiscal year pushes the CDC budget to \$10  
billion. Additionally, the Governor is calling for another \$10.9 billion to build  
housing for 78,000 prisoners. (Mark Martin, “The State Budget: Governor's Proposal  
Corrections, San Francisco Chronicle, January 11, 2007, A-10.)

1 We are not building new prisons as of this moment so the Governor has begun  
2 transferring thousands of prisoners to serve their time out of state.<sup>10</sup> Reportedly,  
3 19,000 volunteered to leave the state prisons to go out of state. If more are needed to  
4 leave, they will go involuntarily. The guards union, the California Correctional Peace  
5 Officers Association (CCPOA), opposes this despite the fact that a federal judge is  
6 now considering putting a numerical cap on the number of prisoners in prison which  
7 would force more out-of-state transfers and/or lead to the politically unpopular choice  
8 of early release.<sup>11</sup>

9 Another obstacle has been erected by an omnipresent force within the prisons,  
10 the gangs. They have put out the word that no one is to volunteer for transfer, the fear  
11 being that transfers could be used as a device to split up the gangs.<sup>12</sup>

12 Perhaps the gangs and the union are both right for the wrong reasons. The major  
13 problem with the transfer alternative is that, in the words of lawyer Don Specter of the  
14 Prison Law Project, it “is an idiotic thing to be spending time on, because the number  
15 of beds they will be able to find in other states will amount to a grain of sand on a  
16 beach.” Transfers won’t relieve the overcrowding because the situation is getting  
17 worse as new prison admissions and parole revocations occur. “By 2011, ...California  
18 would have more than 193,000 inmates, equal to the population of Irvine.”<sup>13</sup>

19 In the meantime, prisoners are not being prepared for re-entry to society. One

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21 <sup>10</sup> “First Batch of Prisoners Transferred Out of State,” San Diego Union-  
22 Tribune, Nov. 4, 2006, p. A-4. *See also* “Indiana Agrees to Take Up to 1,200  
23 California Prisoners,” Los Angeles Daily Journal, October 9, 2006, p. 2.

24 <sup>11</sup> “Federal Judge Vows to Step in to Ease State’s Crowding,” San Diego  
25 Union-Tribune, December 12, 2006, p. A-4.

26 <sup>12</sup> Mark Martin, San Francisco Chronicle, “Prisoners Not Taking Offer to Be  
27 Transferred: Gangs Tell Inmates not to Volunteer,” as cited in the San Diego Union-  
28 Tribune, December 24, 2006, A-4.

<sup>13</sup> Jenifer Warren, “State Prison Crowding Emergency Declared,” Los Angeles  
Times, October 5, 2006, A-1

1 of the biggest problems is that “[r]oughly two-thirds of California's 173,000 inmates  
2 read below a ninth-grade level, according to corrections department figures, and more  
3 than half read below a seventh-grade level, making them functionally illiterate, unable  
4 to read and follow complex written directions. A total of 21 percent read below a  
5 third-grade level.” Addressing this problem would go far in helping prisoners make  
6 it in the free world, but [j]ust 6 percent of inmates are in academic classes, and 5  
7 percent attend vocational classes.” A law requires CDC bring a prisoner up to a 9th  
8 grade reading by the time of their parole, but the law is ignored.<sup>14</sup> As the acting  
9 superintendent of education at CDC said, “If we were working in a perfect world, that  
10 would be something we would try and achieve.”<sup>15</sup> In other words, the CDC is  
11 incapable of obeying the law.

12 **2. Violence.** “Regarding violence in the California Department of Corrections,  
13 in the last full year reported (2003) there were eight incidents per 100 inmates,” and  
14 this number of inmate-on-inmate assaults is “vastly understated particularly with  
15 respect to inmate rapes.”<sup>16</sup> The reason for a vastly understated violence rate is the

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17 <sup>14</sup> Penal Code § 2053.1 states: “The Director of the Department of Corrections  
18 shall implement in every state prison literacy programs that are designed to ensure  
19 that upon parole inmates are able to achieve a ninth-grade reading level. The  
20 department shall prepare an implementation plan for this program, and shall request  
21 the necessary funds to implement this program as follows: ¶ (a) To make the program  
22 available to at least 25 percent of eligible inmates in the state prison system by July  
1, 1991. ¶ (b) To make the program available to at least 60 percent of eligible inmates  
in the state prison system by January 1, 1996.”

23 <sup>15</sup> James Sterngold, “Illiteracy Reinforces Prisoners' Captivity,” San Francisco  
24 Chronicle, December 27, 2006, A-1.

25 <sup>16</sup> Robert Bastian, “Mounting Data Point to Prisons’ Gross Failure to Correct  
26 Anything,” July 10, 2006, Los Angeles Daily Journal, p. 8; but see “California  
27 Prisoners and Parolees 2005: Summary Statistics on Adult Felon Prisoners and  
28 Parolees, Civil Narcotic Addicts and Outpatients and Other Populations,” Dept. of  
Corrections and Rehabilitation, Tables 22 & 24 (2006) [stating the rate as 2.8 per  
hundred].

1 dominance of the gang-race culture in prison and the code of silence. A prisoner  
2 “rats” on an assailant at the risk of his life.

3 Even inmates with a demonstrated history of violence may be placed in general  
4 population where they can inflict harm. On March 14, 2006, the California Inspector  
5 General issued a report entitled, “Prison Reception Centers Still Failed to Isolate  
6 Potentially Violent Inmates after Officer’s Stabbing Death.” The audit was  
7 commissioned after a fatal guard stabbing in 2005 at the California Institution for Men,  
8 the first such guard fatality in twenty years. The homicide was occasioned by the  
9 placement of a dangerous inmate in general population. Thereafter, the Inspector  
10 General audited five prisons to see if improvements were made in classification and  
11 placement of dangerous inmates. His report found that “large numbers of potentially  
12 violent inmates who had paroled from segregated housing units had still slipped  
13 through the cracks and ended up in general population cells instead of administrative  
14 segregation.” (Ibid.)

15 Violence and the constant threat of it are a daily fact of life in prison.

16 **3. A Bureaucracy that Does Not Work, Serve, or Protect.** The CDC is a  
17 model for institutional malfunctioning: long time political indifference to prison  
18 functioning and a decrepit bureaucracy that over the years has solidified its  
19 institutional incompetence. CDC has proven totally incapable of dealing with the  
20 massive influx of inmates over the last three decades.

21 The last thirty years has seen a torrent of crime bills to send inmates away for  
22 longer and longer times, *e.g.*, the “nickle prior,” “three strikes and you’re out,” and  
23 “one strike” life sentences.<sup>17</sup> Currently, there are about 8,000 prisoners serving life  
24 terms based on a Three Strikes conviction. Adding to this the number of lifers

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26 <sup>17</sup> See Penal Code sections 667(a)(1) and 1192.7(c)(14) (five year enhancement  
27 or “nickel prior”), 667(b-i), 668 and 1170.12 (the “strike” prior which doubles the  
28 sentence; if two priors are found, it mandates 25-to-life), and 667.61 (list of sex abuse  
offenses warranting life term).

1 (20,916) and life without parole inmates (3,387), there are approximately 32,000  
2 inmates serving life sentences, or about one fifth of the entire inmate population.  
3 (“Prison Census Data as of June 30, 2006,” Department of Corrections and  
4 Rehabilitation, Table 10.) There are also an unknown number of prisoners serving  
5 the equivalent of life sentences based upon the Determinate Sentence Law. Sex  
6 offenders are particularly apt to get longer than natural life sentences.

7 A major reason CDC does not work is the power and influence of the guard’s  
8 union within CDC and with politicians. Its evolution was inevitable. With the tripling  
9 of the number of prisons and the ten-fold increase in inmates came the dramatic rise  
10 in the number of guards and the size of the union, the California Correctional Peace  
11 Officers Association. It did not take long for the union to discover political uses for  
12 its dues. It has wielded its ample purse to fund friendly politicians to give the union  
13 an inordinate role in running CDC. Ex-CDC Secretaries Jeanne Woodford and  
14 Roderick Hickman both resigned their positions in 2006 because, as Hickman testified  
15 in a federal court, “well-funded special interests ... disallow policy makers to make  
16 good policy because they’re concerned about their political futures.”<sup>18</sup> So long as  
17 union money can legally pay politicians to fulfill its desired agenda, there is little hope  
18 for meaningful corrective reform absent a federal court takeover.

19 **4. Cruel and Unusual Punishment in Mental Health Services.** In 1989, a  
20 study was published on the incidence of significant mental health disorders among the  
21 prison population. It found that 8% of California’s prisoners had major mental  
22 disorders such as schizophrenia, severe depression, organic brain syndrome, bipolar  
23 disorder, and another 17% had other serious mental illness. (Norman, Cotton and  
24 Associates, Stirling Report (1989).) In 2000, a Report of the Little Hoover  
25 Commission emphasized the enormity of the problem.

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<sup>18</sup> “Governor’s Aides Stymied Prison Reform, Ex-Prison Chiefs Say,” Los Angeles Times, December 21, 2006, B-1.

1 Research suggests that 10 to 20 percent of people who enter state and  
2 local criminal justice systems are mentally ill or suffer some form of  
3 functional impairment. About 15 percent of the prison population requires  
4 mental health treatment on any given day. The California Department of  
5 Corrections (CDC) incarcerates 160,000 inmates. Using a rate of 15  
6 percent, there are 24,000 mentally ill prisoners in California.”<sup>19</sup>

7 With approximately 20% of the inmate population suffering from significant  
8 mental health disorders, mental health treatment is in great demand. It has  
9 overwhelmed<sup>20</sup> the CDC such that ten years ago a federal court held the CDC’s mental  
10 health delivery system cruel and unusual punishment and a violation of the Eighth  
11 Amendment.

12 Because of the failure of the Governor, the Legislature and the CDC itself to  
13 deal with the issue, it was left to the federal courts and the Prison Law Office to try to  
14 turn around this Titanic of government bureaucracies.<sup>21</sup> In Coleman v. Wilson, 912  
15 F.Supp. 1282 (E.D. Cal. 1995), Federal District Court Judge Lawrence Karlton  
16 declared the entire CDC mental health system unconstitutional as cruel and unusual  
17 punishment because prison officials were “deliberately indifferent” to the needs of  
18 mentally ill inmates. As of 2007, all thirty-three prisons are still monitored by a court-

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19 <sup>19</sup> “Being There: Making a Commitment to Mental Health,” (2000) p. 25,  
20 [www.lhc.ca.gov/lhcdir/157/report157.pdf](http://www.lhc.ca.gov/lhcdir/157/report157.pdf).

21 <sup>20</sup> As the prison population grew enormous, between 1966 and 1996, the state  
22 hospital population went from 50,000 to less than 5,000. The result is that there are  
23 about three times more people in jails and prisons with severe mental illness than in  
24 state hospitals, 278,000 v. 70,000. (National Alliance on Mental Illness & Bureau of  
25 Justice Statistics, U.S. Dep’t of Justice, Pub. No. NU 174463, Mental Health  
26 Treatment of Inmates and Probationers 1(July 1999).)

27 <sup>21</sup> As with the issue of racial segregation in the first half of the last century  
28 when there was zero political will to do what was right, courageous lawyers and  
judges had to get into the act to force America to live up to its constitutional  
promises. Don Specter and the Prison Law Office have done the important work in  
trying to make the California prisons a habitable and humane place for inmates  
unfortunate enough to be sent to prison.

1 improve the delivery of mental health treatment.

2 The court's recent report demonstrates how difficult it has been to bring the  
3 system up to acceptable standards. The mental health special master for the federal  
4 court reported that “40% of the psychiatrist positions were vacant, as were 25 percent  
5 of psychologists, and psychiatric social worker jobs.”<sup>22</sup>

6 **5. Cruel and Unusual Punishment in all CDC Health Services.** General  
7 health services proved even worse than that of mental health. In Plata v.  
8 Schwarzenegger, U.S.D.C. (N.D. Cal. 2005) No. C01-1351TEH, after weeks of  
9 testimony, Federal District Court Judge Thelton Henderson found health conditions in  
10 the CDC “horrificing, barbaric.” He found that CDC was killing over one inmate per  
11 week (64 preventable deaths of inmates a year and injury to many others) due to  
12 grossly inadequate, incompetent and perverse medical treatment. As one reads the  
13 descriptions of these horror stories of medical mistreatment, it is difficult to imagine  
14 that we are talking about a multiple billion dollar a year institution in California in  
15 2007.

16 Judge Henderson found “bankrupt” the CDC health delivery system and took it  
17 over. Robert Sillen, a former Executive Director of the Santa Clara Valley Hospitals,  
18 was appointed as receiver of the agency in 2005. We are now hearing from him about  
19 what a paralytic bureaucracy the CDC has become, incapable of doing much of  
20 anything to treat prisoners humanely, but quite January 15, 2007 successful in  
21 mistreating them.<sup>23</sup> Sillen called the system “horrid” and in “an utter state of  
22 disrepair.” He observed that ill prisoners are treated badly and many have suffered by  
23 not getting medical attention, or “more horrifically, [they got] access to care.” He  
24 said, “Almost every necessary element of a working medical care system either does

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26 <sup>22</sup> “Judge Orders Raises for Prison Therapists,” Los Angeles Daily Journal,  
December 22, 2006, p. 3.

27  
28 <sup>23</sup> See “Prisoner Health Czar Vows to Fix System,” Los Angeles Daily Journal,  
November 20, 2006, p. 3.

1 not exist or functions in a state of abject disrepair.” Sillen found the atmosphere in  
2 CDC a “culture of incompetence and nonperformance.”<sup>24</sup>

3 **6. Guard Violence and Union Power and Control.** CCPOA is the most  
4 powerful correctional union in the nation. With more than 33,000 members and yearly  
5 membership dues of \$23 million, it is a potent political force in California.<sup>25</sup> It has  
6 money to get what it wants. Three things it wants are increasing member benefits,  
7 control of the Department, and protection from discipline. It has been very successful  
8 in achieving these goals.

9 With guard union control of the CDC, guard violence against inmates had been  
10 prevalent and often uncontrolled.<sup>26</sup> One of the worst examples was detailed ten years  
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12 <sup>24</sup> Don Thompson, “Prisons’ Health Care is Disgraceful, Report Says,” Los  
13 Angeles Daily Journal, July 7, 2006, p. 3.

14 <sup>25</sup> A recent article found that an astounding number of guards, 6,000, made over  
15 \$100,000 a year last year. The highest paid officer, a lieutenant, was paid over  
16 \$252,000, a salary far in excess of the head of CDC, the Governor, judges, state  
17 legislators and police and fire department personnel. Much of the excess comes from  
18 overtime, a contractual gift of Governor Gray Davis. As part of a five year contract  
19 with the union in 2002, Davis signed on to a 30% pay raise and influence over CDC’s  
20 operations. (Dan Morain, “OT Pushes Guards’ Pay Past \$100,000,” Los Angeles  
21 Times, December 23, 2006, A-1.) Davis, the supreme exponent of “pay to play  
22 politics,” was a huge benefactor of union largesse while in office. “According to the  
23 Los Angeles Times, in 1998 the CCPOA provided a grand total of \$4.1 million in  
24 campaign money, including \$2.3 million to help elect Gray Davis.” (Brigitte Sarabi  
25 & Edwin Bender, The Prison Payoff: The Role of Politics and Private Prisons in the  
26 Incarceration Boom,” Western States Center & Western Prison Project, p. 12 (2000),  
27 <http://www.westernstatescenter.org/publications/ppayoff.pdf>.)

28 <sup>26</sup> Shayne Allyn Ziska, a guard at the California Men’s Colony in Chino  
between 1994 and 2000, demonstrated the violent and surreal world of a California  
prison. He helped a prison gang, the Nazi Low Riders, distribute methamphetamine  
and was found guilty in federal court of allowing a gang member to stab another  
inmate. He was sentenced to 17 ½ years. (Prison Law News, October 2006, p. 21.)  
While on administrative leave, Ziska pocketed several hundred thousand dollars in  
salary and built up vacation days and pension benefits. (Dan Morain, “Guard Get Paid

(continued...)

1 ago in Pelican Bay. In Madrid v. Gomez, 889 F. Supp. 1146, 1181 (1995), the federal  
2 district court was reviewing guard conduct at Pelican Bay:

3 [T]he Court is convinced that the instances of force being used  
4 excessively and for the purpose of causing harm are of sufficient scope,  
5 variety, and number to constitute a pattern. Plaintiffs have convincingly  
6 documented a staggering number of instances in which prison personnel  
7 applied unjustifiably high levels of force, both pursuant to, and in  
8 contravention of, official prison policies. Simply put, the evidence before  
9 the Court is proof of the most powerful, unambiguous kind that a pattern  
10 of excessive force has become an undeniable reality at Pelican Bay.

11 Rarely is anything done to punish guards who abuse inmates. One reason is the  
12 guards' pervasive "code of silence" – the refusal to discuss another guard's abusive  
13 conduct.<sup>27</sup> With no support from guard witnesses to abuse, the basis for discipline is  
14 largely defeated. It is made near impossible by concessions the State has given to the  
15 union in politically directed contract negotiations. The union has been awarded an  
16 important role in CDC's investigation and discipline of its own members, a grant of  
17 power certain to affect guard punishment and the willingness of abused inmates to  
18 come forward.<sup>28</sup>

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17 <sup>26</sup>(...continued)

18 to Stay Home," Los Angeles Times, May 29, 2003, B-1, noting that "more corrections  
19 employees are on paid leave than all other departments combined.")

20 <sup>27</sup> John Hagar's "Special Master's Final Report re Department of Corrections  
21 Post Powers Investigations and Employee Discipline," June 24, 2004 in *Madrid v.*  
22 *Woodford et al.*, No. C 90-3094-T.E.H., states: "Like the CDC, the CCPOA functions  
23 in an insular manner, it has not established ethical policies and procedures, it has  
24 failed to train its representatives on ethical standards, and it refuses to acknowledge  
25 the existence of the very code of silence it helps perpetuate." (Id. at p. 27.) Indeed,  
26 "there is a code of silence about the code of silence in the CCPOA." (Id. at 27.) "The  
27 union's filing [in the case] indicates, perhaps inadvertently, that the CCPOA will  
28 continue to interfere with administrative and criminal investigations of correctional  
officers who abuse inmates, and that the union will continue to enforce the code of  
silence in the CDC's prisons." (Id. at 29.)

<sup>28</sup> Mark Martin, "Judge Condemns Deal with Prison Guards," San Francisco  
Chronicle, July 21, 2004, A-1 ("A special master working for [Judge] Henderson  
(continued...)

1 In the special master's report by John Hager, the union is portrayed “as a  
2 corrupting influence on the prison system.” He cites provisions of the State's contract  
3 with the union that requires accused guards to be given speedy notice of inmate  
4 grievances for abusive conduct. This, of course, allows a guard to retaliate against his  
5 or her accusers. Another provision allows the union too much leeway to sit in on  
6 interviews and protect guards accused of crimes.<sup>29</sup>

7 Another example of the union's power in running the CDC is that its contract  
8 with the State has given the union powers few employee organizations have in the  
9 running of a governmental institution. For example, its contract allows it to name the  
10 personnel to fill the vast majority of positions that become open, that is, “70% of the  
11 posts to be filled through seniority, with management assigning the rest.” Further,  
12 wardens complained that costs were rising because the union “had control of overtime  
13 and sick leave.” One prison Warden appointed the local guards union president as  
14 head of gang investigations, which, as one critic put it, now had the union president  
15 “overseeing investigations that could turn up wrongdoing by guards—at the same time  
16 he was responsible for providing them with representation.”<sup>30</sup>

17 In 1971, Stanford psychology professor, Phillip Zimbardo, performed a study  
18 with college students. Half of a group was given the role of playing guards and the  
19 other half played inmates. Within a short time, a shocking pattern developed: the  
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21 <sup>28</sup>(...continued)

22 issued a blistering report in June that suggested the union's labor pact, first negotiated  
23 with [Governor] Davis, made conducting thorough internal-affairs probes of guards  
'almost impossible.'”).

24 <sup>29</sup> Mark Martin, “Guards Union Corrupts Prisons, Report Finds,” San  
25 Francisco Chronicle, June 25, 2004, A-1. The latter article quotes then State Senator  
26 Jackie Speier as stating, “There's a thug mentality that must be ended within the  
CCPOA.”

27 <sup>30</sup> Tim Reiterman, “Union Keeps Tight Rein on Prisons,” Los Angeles Times,  
28 May 24, 2004, B-1.

1 student guards turned sadistic in their treatment of the student inmates. The two week  
2 experiment had to be halted within six days.<sup>31</sup> The study was indicative that a power  
3 position brings out the abusive side of human nature. With proper selection methods  
4 and rigorous training and monitoring, one hopes that the human dark side can be  
5 eliminated. But if the guards' organization is empowered to run CDC, who will guard  
6 the guards?

7 **D. Can Anything Else Be Done?** Nothing is going to be done to alleviate these  
8 conditions soon. A person sentenced to prison will be confronted with all of the above  
9 conditions. Currently before Judge Karlton is the question of whether a numerical  
10 sentencing cap on incoming prisoners is to be imposed to stop the overcrowding.  
11 Release of non-violent inmates nearing the end of their terms is not likely a judicial  
12 option.<sup>32</sup> The court has put off until June 2007, any decision on the cap issue.

13 In the meantime, the Governor has proposed building more prisons and  
14 establishing a sentencing commission to study these problems and recommend  
15 solutions. This was serve as a means to set sentencing standards and urge reforms  
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18 <sup>31</sup> Zimbardo went on to become the President of the American Psychological  
19 Association. In describing one lesson from the experiment, he stated, "Prisons are  
20 evil places that demean humanity.... They are as bad for the guards as they are for the  
prisoners." (<http://news-service.stanford.edu/news/2001/august22/prison2-822.html>).

21 <sup>32</sup> Mistreatment or non-treatment is a problematic basis for a federal habeas  
22 corpus petition seeking release in individual cases. (See *Glaus v. Anderson* (7th Cir.  
23 2005) 408 F.3d 382, 386-387 ["Glaus's habeas corpus petition would be proper if  
24 release were among the possible remedies for an Eighth Amendment deliberate  
25 indifference claim. Unfortunately for Glaus, it is not. If an inmate established that his  
26 medical treatment amounts to cruel and unusual punishment, the appropriate remedy  
27 would be to call for proper treatment, or to award him damages; release from custody  
28 is not an option"]; *Gomez v. United States* (11th Cir. 1990) 899 F.2d 1124,  
1125-1126 [relief of an Eighth Amendment violation over conditions of confinement  
does not include release from confinement.]) In *Glaus*, supra, at 387, the Seventh  
Circuit hinted that federal habeas might possibly be available because the Supreme  
Court has left the door open "a crack" for that remedy.

1 outside the realm of “grandstanding politicians and powerful prison lobbies.”<sup>33</sup> There  
2 surely is a need for understanding these issues given past wilful blindness of the  
3 executive, legislature and CDC itself. For example, ten years ago CDC terminated its  
4 internal research program. “The research unit of the former California Department of  
5 Corrections was abolished in the mid-1990s and was only reestablished as part of the  
6 CDCR reorganization in July 2005.”<sup>34</sup>

7 Sentencing caps, while perhaps the only immediate measure that will begin to  
8 address the overcrowding issue, will only freeze the level of incoming inmates and  
9 cannot soon solve the above conditions and make CDC safe for inmates. Building  
10 more prisons, a bad idea, is years away in any event. A Sentencing Commission is a  
11 good idea for obvious reasons, the most apparent being the prospect of a respected  
12 body to give recommendations for reform and provide political cover for those who  
13 adopt them.

14 The point is that nothing is going to dramatically change prison conditions in the  
15 next few years. This is the reason that this court must face the reality that a sentence  
16 to state prison is unjust punishment and the court and the parties must find local  
17 sentencing alternatives to overcrowded, violent, incompetently run, medically unfit  
18 prisons devoid of the opportunity for rehabilitation.<sup>35</sup>

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20 <sup>33</sup> See Daniel Macallair, “A Case of Sentencing Reform,” Los Angeles Daily  
21 Journal, December 7, 2006, B-9. Macallair is the Executive Director of the Center  
22 on Juvenile and Criminal Justices and serves on the Little Hoover Commissions’  
23 advisory board for sentencing reform. See also, Kara Dansky, “Three Good Reasons  
for Sentencing Commission,” Los Angeles Daily Journal, December 20, 2006, p. 8.

24 <sup>34</sup> Joan Petersilia, Ph.D, “Understanding California Corrections: Summary,”  
25 May 2006, UC Irvine, Center For Evidence Based Corrections,  
<http://ucicorrections.seweb.uci.edu/> or <http://www.ucop.edu/cprc/#>.

26 <sup>35</sup> Compare Penal Code section 1170(a)2) states: “Notwithstanding paragraph  
27 (1), the Legislature further finds and declares that programs should be available for  
28 inmates, including, but not limited to, educational programs, that are designed to  
(continued...)

1           As a federal judge stated in a prisoner rights case, “how we treat these particular  
2 individuals determines, to a large extent, the moral fiber of our society as a whole and  
3 if we trespass beyond the bounds of decency, such excesses become an affront to the  
4 sensibility of each of us.”<sup>36</sup> California prisons are so far beyond the bounds of human  
5 decency that prison must not be the sentence in this case.

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Respectfully submitted,

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9 January 27, 2007

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Attorney for Defendant

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<sup>35</sup>(...continued)  
prepare nonviolent felony offenders for successful reentry into the community.”

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<sup>36</sup> Novak v. Beto (5th Cir. 1971) 453 F.2d 661, 676 (Tuttle, J., dissenting).