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Your Responsibility When Using the Information Provided Below:

When we wrote this Informational Material we did our best to give you useful and accurate information because we know that prisoners often have difficulty obtaining legal information and we cannot provide specific advice to all the prisoners who request it. However, the laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to this material every time the law changes. If you use this pamphlet, it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in your institution law library.

GANG VALIDATION AND DEBRIEFING revised January 2012

You have written to us with questions or concerns about the gang validation and/or the debriefing process. This letter explains how the California Department of Corrections and Rehabilitation (the CDCR) may “validate,” or officially label, a prisoner as a prison gang member or associate and how a prisoner may try to have that label removed. References to “15 CCR” are to Title 15 of the California Code of Regulations.

Note: The CDCR is currently reviewing its gang validation process, indeterminate SHU program and the conditions for prisoners on indeterminate SHU status. The CDCR has been working on drafting a new policy since May 2011. However, as of the start of January 2012, the new policy has not been finalized or implemented. Attached to this letter are two CDCR memoranda generally describing the changes that are being proposed. We intend to update this letter when there are any further significant developments.

I. The Gang Validation Criteria

The CDCR’s regulations require that allegations of gang involvement be verified through an investigation. 15 CCR § 3378(c). Each prison has an Institutional Gang Investigator (IGI) or other staff member, generally with the rank of lieutenant, whose job is to determine which prisoners are involved with prison gangs. A gang “member” is a prisoner, parolee or “any person” (someone who is not under CDCR jurisdiction) who has been accepted into membership

by a gang.¹ 15 CCR § 3378(c)(3). A gang “associate” is a prisoner, parolee or “any person” who is involved periodically or regularly with members or associates of a gang. 15 CCR § 3378(c)(4). The CDCR sometimes refers to gang “affiliates”; the term is used to describe people who are either gang members or associates.

CDCR regulations state that a prisoner or parolee may not be validated as a gang member or associate unless three independent pieces of information (“source items”) support the gang identification. 15 CCR § 3378(c)(3) and (4). Types of source items include self-admissions, tattoos and symbols, written material, photographs, staff information, information from other agencies, association with known gang members, confidential information, history of gang offenses, legal documents, visitors, communications such as letters or phone conversations, and debriefing reports. 15 CCR § 3378(c)(8). At least one source item must show a “direct link” to a current or former validated gang member or associate. 15 CCR § 3378(c)(3)-(4). The source items must contain factual information or, if from a confidential source, must be deemed to be reliable. 15 CCR § 3378(c)(2).

The CDCR has rules on when confidential information may be considered to be reliable. Each confidential source item must meet one of the following criteria:

- information previously supplied by the informant has proven to be true;
- other confidential sources have independently provided the same information;
- the information incriminates the source;
- the information is “sufficiently corroborated” through investigation or by information from non-confidential sources. Corroboration can be by hearsay or secondary information; or
- the confidential source is the victim of a related rule violation.

15 CCR § 3321(c). Federal courts also require that the notice of confidential information include a prison official’s affirmative statement that safety considerations prevent the disclosure of the informant’s name. *Zimmerlee v. Keeney* (9th Cir. 1987) 831 F.2d 183, 186.

The CDCR regulations create a liberty interest in not being placed in segregation based on an unsupported gang validation; this state-created liberty interest is protected by the federal constitutional guarantee of due process. U.S. Const., Amends. V and XIV. To comply with due process, prison officials must have “some evidence” with “some indicia of reliability” to support a gang validation. The “some evidence” standard is met if there is any evidence in the record that could support the validation. *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1273; *Bruce v. Ylst* (9th Cir. 2003) 351 F.3d 1283; see also *Superintendent, Massachusetts*

¹ The portion of 15 CCR § 3378(c) that authorizes the CDCR to validate people who are not inmates or parolees was added in 2011. Under that new amendment, a CDCR prisoner or parolee might end up being validated based on a link to a validated non-prisoner who has never had the opportunity to challenge CDCR’s allegations of gang activity. Relying on such a link to support a validation could arguably violate the prisoner’s or parolee’s right to due process.

Correctional Institution v. Hill (1985) 472 U.S. 445, 455, 105 S. Ct. 2768; *Cato v. Rushen* (9th Cir. 1987) 824 F.2d 703, 705. The “indicia of reliability” means that “an inmate may not be confined to the SHU for gang affiliation unless the record contains some factual information from which the IGI and classification committee can reasonably conclude that the information was reliable.” *Madrid*, 889 F.Supp. at p. 1274; see also *Cato*, 824 F.2d at p. 705.

II. The Gang Validation Process

The federal courts have held that gang validation and segregation advances legitimate prison administrative purposes and is not punishment. Thus, prisoners who are being validated as gang members are not entitled to the same procedural due process protections as prisoners who are undergoing serious disciplinary proceedings. *Madrid*, 889 F.Supp. at pp. 1274-1275; *Bruce*, 351 F.3d at p. 1287. In deciding whether a prison’s procedures are adequate, courts must weigh various factors: prisoners’ interest in being free from long-term segregation on the basis of gang validation, the risk that prison officials will erroneously validate a prisoner and place him in segregation, the probable value of additional or different procedural safeguards, and the monetary and administrative burdens that additional or different procedural requirements would cause. *Wilkinson v. Austin* (2005) 545 U.S. 202, 125 S.Ct. 2384.

Under these principles, prisoners who are facing gang validation are entitled to notice of the allegations and an opportunity to present their views to prison officials involved in the validation decision. *Madrid*, 889 F.Supp. at pp. 1272, 1274-1275; see also *Wilkinson*, 545 U.S. at p. The CDCR’s regulations describe the procedures currently in effect; some of these regulations were adopted as a result of a settlement agreement in a lawsuit, *Castillo v. Almeida* (N.D. Cal. June 1, 2004) No. 94-2874MJJ.

Before a gang validation decision is made, the prisoner is entitled to an interview with the IGI or IGI’s designee during which the prisoner must have the opportunity to be heard regarding the evidence used for the validation. 15 CCR § 3378(c)(6)(A); *Madrid*, 889 F.Supp at pp. 1273-1274; *Castro v. Terhune* (9th Cir. 2002) 29 Fed.Appx. 465. CDCR staff must evaluate a prisoner’s mental health status and/or any other need for staff assistance prior to the interview. 15 CCR § 3378(c)(6)(F).

CDCR staff must give the prisoner at least 24 hours notice of the interview with the IGI. 15 CCR § 3378(c)(6)(B). The notice must include disclosure of all source items used in the validation review. The prisoner must be given copies of all non-confidential source documents unless the prisoner requests in writing that he not receive them. The existence of any confidential information must be disclosed via a CDCR Form 1030. 15 CCR § 3378(c)(6)(C).

CDCR staff must document what is said at the interview and record the prisoner’s position on each source item used in the validation. 15 CCR § 3378(c)(6)(D). Staff must also provide a written record of the interview to the prisoner within 14 calendar days after the interview and before the validation package is submitted to the CDCR’s Office of Correctional

Safety (OCS) for review. 15 CCR § 3378(c)(6)(D).

The Chief of the OCS or a designee must review the record and accept or reject the gang validation recommendation. 15 CCR § 3378(c)(6). The decision must be documented on a CDC Form 128-B2. 15 CCR § 3378(c)(6)(G). When the paperwork is returned to the prison or parole office, a Classification and Parole Representative (C&PR) or Parole Administrator I must note on each piece of evidence whether it was found to meet the gang validation requirements. 15 CCR § 3378(c)(6)(G). This is so that prison officials will not improperly rely on previously-rejected items when making classification decisions. *See Madrid*, 889 F.Supp. at p. 1279.

The source items relied upon for the validation must be documented on a CDCR Form 812-A, which must be placed in the prisoner's central file. 15 CCR § 3378(c)(2). A classification committee will review and update the CDCR Form 812-A at least once a year, at which time questionable gang identifications or new information of gang activity are to be referred to the IGI. 15 CCR § 3378(c)(7).

III. Placement of Validated Gang Affiliates

Once a prisoner is validated as a prison gang member or associate, he is presumed to be a threat to security and placed in a SHU on an indeterminate basis. 15 CCR § 3341.5(c)(2). Indeterminate SHU placement based on gang validation has survived court challenges. *Madrid*, 889 F. Supp. at p. 1261; *Toussaint v. Yockey* (9th Cir. 1984) 722 F.2d 1490, 1494 fn.6.

Prisoners who are validated gang members or associates, and who have serious mental illnesses, may be housed in a Psychiatric Services Unit (PSU) instead of a SHU. A PSU provides housing and care for prisoners who require SHU-type level of security and who have mental health disorders requiring EOP (Enhanced Out-Patient) level of care. 15 CCR § 3341.5(b).

As of January 25, 2010, prisoners who are housed in SHUs as validated gang members are placed on D-2 status, which means they cannot earn any good conduct credits. D-2 status also applies when a gang member is placed in a PSU or BMU (Behavior Management Unit). Penal Code § 2933.6(a); 15 CCR § 3043.4 and 3044(b)(7). Under prior law, prisoners serving SHU terms as validated gang member were placed on D-1 status and eligible to earn some good conduct credits unless they had committed certain types of serious misconduct. There is a legal argument that taking away credit-earning eligibility from prisoners who previously could earn credits violates the U.S. Constitution's prohibition on ex post fact laws. See, e.g., *Hunter v. Davis* (9th Cir. 2003) 336 F.3d 1007; *In re Lomax* (1998) 66 Cal.App.4th 639. Two courts of appeal have rejected such an argument in regards to the recent changes to D-2 status. *In re Sampson* (2011) 197 Cal.App.4th 1234, review denied on 11/2/2011; *In re Efstathiou* (2011) 200 Cal.App.4th 725, petition for review pending as of 1/6/2012.

A prison classification committee must review a prisoner's indeterminate SHU term

placement every 180 days. 15 CCR § 3341.5(c)(2)(A). A prisoner is entitled to minimal due process protections at these classification reviews – the rights to advance written notice, to be physically present, to have an opportunity to be heard and to present documentary evidence, and a limited right to a staff assistant. *Toussaint v. McCarthy* (9th Cir. 1986) 801 F.2d 1080. No investigative employee is assigned for these reviews. 15 CCR § 3341.5 (c)(2)(A).

Generally a prisoner placed in indeterminate SHU based on gang affiliation will not be transferred to a lower security level of housing unless the original validation is deemed faulty, the prisoner debriefs from the gang, or the prisoner is recognized as being an inactive gang member. The procedures for debriefing and becoming an inactive gang member are described in following sections of this letter.

The rules do not specifically address the situation in which a prisoner is paroled while serving an indeterminate SHU term for a gang validation and is later returned to prison for a parole violation or a new criminal offense. However, it is likely that such a prisoner will be returned to a SHU, unless prison officials have reasons to find that the gang validation or SHU placement are no longer appropriate.

IV. Debriefing from a Gang

A gang member or associate can be verified to be a prison gang “dropout” and released from SHU. 15 CCR § 3378.1. Verification as a gang dropout requires formal “debriefing.” Debriefing is a two-step process, consisting of an interview/investigation phase and an observation phase. A prisoner must request or agree to participate in the debriefing process and may end his participation in the process at any time. 15 CCR §§ 3378.1(a) and 3378.2.

The debriefing process starts with an interview and investigation by the IGI. The purpose of the interview is for the IGI to learn enough information to reasonably conclude the prisoner has dropped out of the gang. As part of this process, the prisoner will be required to submit a written autobiography of his gang involvement. 15 CCR § 3378.1(b). A prisoner undergoing debriefing need not give up the right to self incrimination, and staff must ask a prisoner whether he wants to give up that right prior to any questioning about an incriminating matter. A prisoner’s refusal to incriminate himself shall not affect the decision as to whether he successfully participated in the debriefing. 15 CCR § 3378.2.

If the prisoner’s interview and written statement are found to be sufficient, the prisoner will be placed with other prisoners who are undergoing the debriefing process for an observation period of up to 12 months. 15 CCR § 3378.1(c).

A prisoner who successfully undergoes the debriefing process will be verified as a gang dropout and considered for release from the SHU. 15 CCR § 3341.5(c)(4). The CDCR will house the prisoner according to his needs, and if possible, consistent with his classification score. 15 CCR § 3378.1(d).

Prisoners who have undergone debriefing may be placed in a Transitional Housing Unit (THU). 15 CCR § 3378.3. To be eligible for THU placement, prisoners must have completed the debriefing process and be “willing to commit to personal change.” 15 CCR § 3378.3(a). The THU program lasts up to six months and consists of counseling, education, life skills and work assignments designed to reintegrate prisoners into the general population. Each prisoner must participate in at least one of the offered self-help activities, as well as any assigned work or education programs. Prisoners in a THU are placed in Work/Privilege Group A-1A and have privileges similar to other general population inmates. 15 CCR § 3378.3(b). Upon satisfactory completion of the THU program, a prisoner will be referred to a classification committee for transfer. Prisoners who fail to complete the program will also be referred to a classification committee for determination of their program and housing needs. 15 CCR § 3378.3(e).

A person who has debriefed from a gang may later be re-validated and returned to SHU based on only one reliable piece of information identifying the prisoner as an active gang member or associate. The source item must be based on information developed after the prisoner’s release from the SHU and showing activity within the past six months. Otherwise, the regular procedures for gang validation and periodic review apply to such a re-validation. 15 CCR §§ 3341.5(c)(6) and 3378(f).

Debriefing can pose many pitfalls. For prisoners who have been wrongly accused of gang membership, the debriefing process may prove difficult; a prisoner will be unable to provide sufficient information to the IGI if he never knew anything about the gang in the first place. Also, prisoners may be reluctant to provide information regarding gang members given the prisoner code of conduct that discourages cooperation with prison officials and the risk of retaliation by other prisoners. Even when a prisoner agrees to participate in the debriefing process, it may take months to obtain an IGI interview. Finally, there have been cases of prisoners who have successfully debriefed only to find themselves back in segregation shortly thereafter based on a new gang affiliation charge. Thus, prisoners who are contemplating debriefing should carefully consider the possible advantages and disadvantages.

V. Inactive Gang Status

It is possible for an inmate who has been validated as a gang member or associate to be recognized as being an inactive gang affiliate. The process varies depending on whether the prisoner is currently housed in general population or in SHU.

For a validated gang member or associate who has remained housed in the general population, inactive status may be considered if the prisoner has not been involved in gang activity for at least two years. Verification of the inactive status must be approved or rejected by the Chief of the OCS or a designee. A notice of the decision shall be placed in the prisoner’s central file. An Institution Classification Committee shall review and consider this determination at the prisoner’s next classification hearing. 15 CCR § 3378(d).

To be considered for inactive status, a prisoner housed in SHU as a gang member or associate must not have been involved in gang activity for at least six years. Verification of the inactive status must be approved or rejected by the Chief of the OCS or a designee. A Departmental Review Board (DRB) may then authorize release from the SHU. The DRB need not release an inactive gang member or associate from SHU if the prisoner's level of influence in the gang, history of misconduct, record of criminal activity, or other factors indicate that he still poses a threat to other prisoners or institutional security. 15 CCR §§ 3341.5(c)(5) and 3378(e).

Prisoners who are deemed inactive and suitable for SHU release are placed in a Level IV general population facility for up to a year of observation. Upon successful completion of this period, the prisoner is to be housed consistent with his classification score and/or any special needs. 15 CCR § 3341.5(c)(5).

An inactive gang affiliate may later be re-validated and returned to SHU based on only one reliable piece of information identifying the prisoner as an active gang member or associate. The source item must be based on information developed after the prisoner's release from the SHU and showing gang activity within the last six months. Otherwise, the regular procedures for gang validation and periodic review apply to such a case. 15 CCR §§ 3341.5(c)(6) and 3378(f).

VI. Challenges to and Judicial Review of Gang Validation

It is difficult for prisoners to convince prison officials that they are not, or are no longer, associated with a prison gang, and the courts tend to give high regard to prison officials in their classification decisions. Although challenging a gang validation is extremely difficult, a prisoner who disagrees with such a validation should make every effort to have the gang label removed. Challenges to prison gang validation should focus on any failure of the CDCR to follow its own procedures or lack of sufficient reliable evidence to support the validation. Some of the CDCR indicia used to validate gang members may also be open to challenge as being arbitrary or over-inclusive. See, e.g., *In re Cabrera* (2011)198 Cal.App.4th 1548, petition for review pending as of 11/10/2011 [for "association" to satisfy the "direct link" requirement for gang validation, it must be reciprocal; prisoner's possession of photocopies of drawings by gang affiliates did not establish "association" constituting a "direct link"]. Prisoners should focus on exactly what evidence of gang association is being used and whether that evidence can be challenged as unreliable or insufficient.

A prisoner's first opportunity to attack the gang allegations is during the initial validation process and at subsequent reviews by prison officials. The prisoner should always make an effort to explain any reasons why the gang allegations are not supported and to present any evidence undermining the gang allegations.

A prisoner should also file an administrative appeal (CDCR Form 602) when the initial validation is made and every time the validation and SHU placement are re-affirmed. The

prisoner should pursue the 602 appeal all the way through third level of review. Even if the prisoner believes that the 602 appeal will be denied, it is necessary to complete the administrative appeal process before filing any court action challenging the gang validation. This is because prisoners are usually barred from bringing court actions until they have “exhausted administrative remedies.” See *In re Strick* (1983) 148 Cal. App. 3d 906, 911.

After the 602 appeal is denied at the third level, a prisoner may bring a court action. One option is a state court petition for writ of habeas corpus. Another option is a federal civil rights (“section 1983”) lawsuit. The prisoner’s choice of action should take into consideration whether the issues being raised are matters of state or federal law or both. Further discussion of the pros and cons of the two types of court actions, as well as their procedural and substantive requirements, are beyond the scope of this letter. The Prison Law Office has manuals with more information on filing administrative appeals, state petitions for writ of habeas corpus and federal civil rights suits. These manuals are available free of charge on request.

Memorandum

Date : August 25, 2011

To : Scott Kernan
Undersecretary (A), Operations

Subject: **GANG MANAGEMENT POLICY PROPOSAL**

This memorandum is to provide you a status report on the Gang Management Policy Proposal. Per your instructions, the Office of Correctional Safety (OCS) created a workgroup to review and propose potential modifications to the California Department of Corrections and Rehabilitation's (CDCR) current gang management policy including the Validation Process, the Debriefing Process, the Active/Inactive Review Process, and Indeterminate Security Housing Unit (SHU) procedures. The workgroup includes representatives from OCS, the Division of Adult Institutions (DAI), the Classification Services Unit (CSU), and CDCR headquarters. A report of the workgroup's review and proposals will be submitted to you no later than the third week of September 2011.

The workgroup reviewed the gang and SHU policies of 28 different state correctional agencies as well as the policies of the Federal Bureau of Prisons (BOP) to determine a "best practices" for a gang management policy. These various agencies were selected based on their inmate population, gang interdiction challenges, and/or physical layout being similar to that of CDCR. In addition, the Security Threat Group report funded by the California Legislature in 2007 detailing the recommendations of gang experts throughout the United States was also reviewed. The "best practices" derived from this review suggests the following be included within CDCR's gang management strategy:

1. A "Behavior-Based" Model
 - a. Validation and housing based on gang-related behavior.
 - b. Negative behavior to be placed in the SHU.
 - c. Positive behavior to be released from the SHU via a step-down program.
2. Weighted Validation Process
 - a. Replaces current CDCR three points of validation.
 - b. Different indicia of gang involvement will be weighted differently (i.e. a self-admission would receive more points than a gang tattoo).
 - c. Different levels of points would validate a person as a member or an associate of a gang or threat group.
3. Gang Observation and Management Program
 - a. Multi-phase "step-down" process.
 - b. Initial phase(s) similar to current SHU.

- c. Subsequent phases inmate receives additional predetermined privileges following ICC review.
- d. Educational component and non-negative behavior required to "graduate" to each less restrictive phase.
- e. Negative behavior could result in returning to earlier phases following due process and ICC review.
- f. Successful program completion would result in return to general population yards.

4. Debriefing Process

- a. Process will be similar to current CDCR process.
- b. Inmate may request to debrief at any time.
- c. Gang Renouncement Incentive Program (GRIP) with programs and incentives to support the rehabilitation of gang members and associates disavowing gang involvement.

5. Assessment Process

- a. Continuous evaluation and review of viability of the Gang Management Policy.
- b. Adjustments made on "lessons learned."
- c. Evidence based best practices.

Once you have reviewed and approved the report, it will be submitted to a Director's Advisory Group comprised of additional internal stakeholders. The purpose of this workgroup is to fine-tune the policy and identify any regulatory and legal changes that need to be made in order to implement the policy. This part of the process is anticipated to be completed by the end of 2011. Following that, the policy will be shared with external stakeholders including CCPOA, prison advocates, other law enforcement agencies, etc., for comment. I will continue to update you throughout the process.

Respectfully submitted for your information.



ANTHONY CHAUS
Chief
Office of Correctional Safety

Memorandum

Date : September 27, 2011

To : All CDCR Inmates

Subject: **REVIEW OF SECURITY HOUSING UNIT AND GANG POLICIES**

In May 2011 the Department began the complex process of assessing the policies and procedures associated with the Gang Validation Process, Indeterminate Gang Security Housing Unit (SHU) Program, as well as privileges associated with inmates on Indeterminate SHU status. The purpose of the review is to improve our policies by adopting national standards in gang/disruptive group management. Before commencing this review, the Department received input from internal and external experts, other state and federal correctional systems, inmates, and other stakeholders. While the process of policy review and change will take several more months to implement, much has already been done. In fact, a draft of the new policy should be ready for stakeholder review next month. In addition, several changes have already been made by the Department, including:

Short-term Action Items:

- Authorization of watch caps for purchase and State issue.
- Authorization of wall calendars for purchase in canteen.
- Authorization of exercise equipment in SHU yards (installation of permanent dip/push-up bars is still under review).
- Authorization of annual photographs for disciplinary free inmates.
- Approval of proctors for college examinations.
- Use of California Department of Corrections and Rehabilitation's (CDCR) Ombudsman for monitoring and auditing of food services.
- Authorization of sweat pants for purchase/annual package.
- Authorization of Hobby items (colored chalk, pen fillers, and drawing paper).

Mid-term Action Items:

As noted above, the Department is conducting a comprehensive review of SHU policies that includes behavior-based components, increased privileges based upon disciplinary free behavior, a step down process for SHU inmates, and a system that better defines and weighs necessary points in the validation process. The initial policies will be completed shortly and upon Secretary approval will be sent for stakeholder review and comment. Upon receipt of this input, the Department will

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initiate any regulation changes in the administrative law process necessary and implement the first major changes to the validation process in the last two decades. Of course this work may be delayed by large-scale inmate disturbances or other emergency circumstances.



SCOTT KERNAN
Undersecretary (A), Operations

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