UNCONSTITUTIONALITY of CDCR'S STG/SDP

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EXHIBIT 1

INTRODUCTION

Since completing my last article entitled, "Dismantling CDCR's STG Step-Down Program," I have done extensive research on the applicable law and standards we would have to meet in order to prevail. I am happy to report with confidence that the law is firmly on our side and with you assistance we can improve one of the most objectionable parts of the Step-Down Program (SDP).

While class counsel has just filed a Supplemental Complaint, we are not precluded from following tat up with another directed at challenging the constitutionality of the SDP (adopted October 17, 2014). In fact, it is clear from the language in the recent filings that class counsel is preparing to do just that. I begin this article by addressing this procedural hurdle that we must overcome.

What follows is a detailed application of the law to the facts of this case. I had hoped to obtain, and attach as exhibits, the "Reports, Studies, and Documents Relied Upon" by CDCR in the adoption of the SDP, but unfortunately I have been unable to obtain them. If you have these documents or related materials, please send me a copy as my work on these issues and my goal to have them presented in both the state and federal court will continue.

It is my hope that class counsel will utilize this article to oppose any attempt by CDCR to have the due process claims dismissed as moot in light of the implementation of the SDP. As set forth in both of my articles, the SDP itself contains due process violations.

1.

AN AMENDED OR SUPPLEMENTED COMPLAINT SHOULD BE CONSIDERED IN ORDER TO ENSURE THAT THE MERITS OF THE CHALLENGES TO THE STEP DOWN PROGRAM ARE HEARD

I found it pretty bold for the deputy attorney general to write, "The reality that Plaintiffs' due process claim soon will become moot does not render it ripe for early resolution." Def's. Opp'n Pls' Admin. Mot. at Page 2 (COURT DOCKET No. 337)

The attorney general seems to be operating on the false presumption that the new SDP is constitutional, but the "reality" is that it is not. Therefore, there is nothing moot about our due process claims. Fortunately, the

procedural posture of the case makes a supplemental complaint challenging the constitutionality of the SDP ripe for submission.

CDCR'S SDP HAS BEEN CONSTANTLY CHANGING AND HAS ONLY RECENTLY BEEN PERMANENTLY ADOPTED

The attorney general will surely mount a strong opposition to any proposed amendments or supplements to the complaint, but the fact is CDCR's SDP has been a "moving target" since its inception. It began with the 2007 study "Security Threat Group Identification and Management"[1] In March 2012, CDCR made more changes and distributed the "CDCR STG Prevention, Identification and Management Strategy," March 1, 2012 (3/01-version 5.5) [2] Then in October 2012, CDCR made more changes and implemented the "STG Pilot Program (see Cal. Code of Regs. Title 15 §3999.13):

> "This pilot program will remain in effect for a 24-month period from the date it is filed with the Secretary of State, at which time it will lapse by operation of law or will promulgated through the Administrative Procedure Act." at p.4

The pilot program was enacted in accordance with Cal. Penal Code §5058.1 (a) which states:

> "(a) For the purpose of this section, 'pilot program' means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information." (emphasis added)

As expected from the above language two more sets of amendments were made to the pilot program followed by CDCR's formal Notice of Change to Regulations No.14-02 (January 31, 2014), the final text incorporated yet more changes and were adopted on October 17, 2014 which are available at: http://www.cdcr.ca.gov/Regulations/AdultOperations/docs/NCDR/2014NCR/14-02/Final_Text_of_Adopted_Regulations_STG.pdf .

It is also worth noting that while all these changes were taking place, the California State Legislature held hearings on CDCR's use of long-term solitary confinement. I believe class counsel Anne Butterfield Weills and Charles Carbone took part in these hearings wherein the Security Threat Group (STG) Step-Down Program (SDP) was discussed. These hearings led to California Assembly Bill 1652 and California Senate Bill 892, both of which proposed substantive changes to the STG SDP and created a reasonable expectation that yet more changes to the STG SDP would occur.

1 The 2007 study is available at: http://s3.documentcloud.org/documents/240261/final-draft-policy-statements-14-2.pdf

2 Available at: https://www.prisonlegalnews.org/media/publications/cdcr_gang_management_report_2012.pdf

Clearly, any meaningful challenge to the SDP prior to this point would have been premature as the STG SDP has been a "moving target." Surely the attorney general would have argued that until the regulations were promulgated, they are temporary and just a pilot program.

The language in class counsel's recent filings only supports a motion for leave to amend or supplement the complaint and operates as notice to the defendants' that a challenge to the STG SDP was forthcoming. For example:

> "According to CDCR regulations, progression from step-to-step requires 'participation in program activities' including 'completion of all required components/curriculums SC ¶190. Yet the various programs, components and curriculums required for successful completion of the Step Down Program are not enumerated in the regulations nor listed in any public CDCR policy statements, and many do not yet exist. *Id.* ¶191."

Pltfs' Motion for Leave to File Supp. Compl. at p.17 lines 14-18 (Court Docket No. 345), see also *Id*. at p.11 lines 2-3; pp.15-16 lines 23-24; Pltfs' Supp. Compl. at ¶¶177, 190, 191, 192, and 221 (c).

As noted in the motion for leave "Although newly alleged matters 'need not arise out of the same transaction or occurrence as the allegations contained in the original complaint,' they must bear 'some relationship' to the subject matter of the complaint to be supplemented." Pltfs' Motion for Leave at p.12 lines 23-26 (Court Docket No.345) (citations omitted).

For all the reasons cited about, class counsel should consider filing an amended or supplemented complaint to ensure that the merits of the challenges to the SDP are fully heard by the court and not subject to exclusion in the event of an appeal on some technical grounds.

2.

MEMORANDUM OF POINTS & AUTHORITIES ON THE UNCONSTITUTIONALITY OF CDCR'S SECURITY THREAT GROUP STEP-DOWN PROGRAM

A. Applicable Law

The liberty inquiry here is controlled by the Supreme Court's decision in Vitek v Jones, 665 U.S. 480 (1980), in which the court held that Nebraska prison officials violated a state prisoner's due process rights by classifying him mentally ill and transferring him to a mental hospital for mandatory behavior modification treatment without having provided the prisoner with a prior hearing. *Id.* at 491-94. These actions by prison officials implicated both a state-created liberty interest as well as a liberty arising from the Due Process Clause itself. 445 U.S. at 490-91.

The Due Process Clause protects certain fundamental rights, one of which is the right to be free from unjustified bodily and mental intrusions. Washington v. Harper, 494 U.S. 210, 221 (1990) (prisoner possesses a significant liberty interest in avoiding unwanted administration of psychotropic drugs); Youngberg v. Romeo, 457 U.S. 307 (1982)(freedom from bodily restraint recognized as "core" of liberty interest protected by the due process clause); Vitek, 445 U.S. at 492-93 (involuntary transfer of inmate to mental institution where he would receive compelled behavior modification treatment implicates liberty interest). Based on the combination of stigma and compelled behavior modification treatment, the Vitek court held the inmate had been deprived of a protected liberty interest. Id. at 494.

As recognized by the Fifth Circuit, the principles of Vitek apply to different contexts that involve "materially indistinguishable fact." Coleman v. Dretke, 409 F.3d 665, 669 (5th Cir. 2005)("Vitek imposed an obligation on the states to provide process before imposing stigmatizing classifications and concomitant behavior modification therapy on individuals in their custody."); Coleman v. Dretke, 395 F.3d 216, 223 fn.30 ("Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." (quoting Yarborough v. Alvarado, 124 S.Ct. 2140, 2151 (2004)); Michael C. v. Gresback, 526 F.3d 1008, 1017 (7th Cir. 2008)("[A] general constitutional rule already identified may apply wit obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.").

The federal District and Circuit Courts of Appeals have since applied Vitek to a number of different contexts that involve materially indistinguishable facts as those present in Vitek v. Jones, including STG Gang Classifications. S*ee* e.g. Farr v. Rodriguez, 255 Fed. Appx. 925, 926 (5th Cir. 2007) (STG Classification); Jiminez v. Cox, 2008 U.S. Dist. LEXIS 88079 *28-29 (D. Nev. Feb. 15, 2008) (STG Validation); Knowlin v. Wurl-Koth, 2010 U.S. Dist. LEXIS 102495 *12-13 (W.D. Wis. Sept. 9, 2010) (Substance Abuse Programs), affn' 420 Fed. Appx. 593 (7th Cir. 2011); Canterino v. Wilson, 546 F. Supp. 174, 208 (W.D.Ky. 1982), vacated and remanded on other grounds, 869 F. 2d 948 (6th Cir. 1989) (inmate classification).

By far the most instructive cases on applying the framework of Vitek to new contexts comes from the arena of sex-offender treatment programs. *See* Neal v. Shimoda, 131 F. 3d 818 (9th Cir. 1997); Renchenski v. Williams, 622 F. 3d315, 325-331 (3d. Cir. 2010) (collecting cases on whether stigma of sex-offender label affects a liberty interest and concluding that the label, coupled with compelled therapy, does affect such an interest); Coleman v. Dretke, 395 F. 3d 216 (5th Cir. 2004), reh'g en banc denied, 409 F. 3d 665 (5th Cir. 2005)(per curiam); Kirby v. Siegelman, 195 F. 3d 1237 (10th Cir. 2000) (relying in part on Vitek v. Jones).

In the Ninth Circuit, Neal v. Shimoda is the precedential case on the application of the Vitek framework. *See* Cooper v. Garcia, 55 F. Supp. 2D 1090, 1100-1102 (S.D. Cal. 1999) (following Neal v. Shimoda's framework for applying Vitek); Putzer v. Whorton, 2010 U.S. Dist. LEXIS 100264 *18-21 (D. Nev. Aug. 9, 2010) (same).

Just as in the cases cited above, the class members/STG SDP inmates meet the Vitek framework based n the SDP's combination of stigma and compelled behavior modification treatment.

B. THE STIGMA REQUIREMENT

Vitek does not require publication to establish stigma. In fact, the plaintiff in Vitek had not been required to register the fact of his classification as mentally ill, and the Court nowhere indicated that his treatment providers would not keep his records confidential. *See* Vitek, 445 U.S. at 483-86 & 492. The Court nevertheless found it "indisputable" that commitment to the mental hospital alone could cause "adverse social consequences to the individual" and stated that "whether we level this phenomena 'stigma' or choose to call it something else[,] we recognize that it can occur and that it can have a very significant impact on the individual." *Id.* at 492 (internal quotation marks omitted).

"Disclosure of one's designation as a person in need of sex offender treatment – even to other persons similarly situated – casts stigma on the prisoner or parolee. "Chandler v. U.S. Parole Comm'n, 2014 U.S. Dist. LEXIS 109395 *35; Renchenski, 622 F. 3d at 328 n.9 (rejecting state's argument that prisoner's "claim of stigmatization falls short," and relying on the fact that because the prisoner's "weekly therapy sessions, are group therapy sessions, which comprise as many as fifteen inmates...his categorization as a sex offender would surely be known to the prison population"); *see* also Doe v. U.S. Parole Comm'n, 958 F. Supp. 2D 254, 267 (D.D.C. 2013) ("Even if [Doe's classification as a sex offender] is not made public...Doe himself is fully aware of it and may well feel a stigma because of it.").

In Neal v. Shimoda, the Ninth Circuit reasoned that because Hawaii's "regulations render the inmate *completely ineligible for parole* if the [sex offender treatment program] is not satisfactorily completed, the attachment of the 'sex offender' label to the targeted inmate has a practical and inevitable coercive effect on the inmate's conduct." Neal, 131 F. 3d at 829 (emphasis added). The Neal court concluded that the "coercive competent" of the [SOTP] was "functionally equivalent to the psychiatric treatment required by the statute at issue in Vitek that followed inexorably from the inmate being labelled as mentally ill." *Id.* At 829.

In this case, the stigma or "stigmatizing consequences" comes from being labeled both mentally ill and a STG member or associate.

Obviously, we are afforded procedural due process prior to being labeled STG members or associates and while those procedures may be sufficient to classify an inmate as STG, they in no way address CDCR's authority to force of compel STG inmates to undergo at least 3 years of psychotherapy as a pre-condition to release from solitary confinement, credit earning, and the long list of other deprivations. (I've compiled the list below). As the Supreme Court in Vitek concluded, an inmate's criminal conviction and sentence:

> "...do not authorize the State to classify him mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections." (emphasis added)

Vitek, 445 U.S. at 494; Neal, 131 F. 3D at 828.

Nor do they address the other constitutional issues such as the State's interest in forcing psychotherapy over the inmates' right to refuse such treatment (see PART 3-B-2), or the fact that the mandated psychotherapy bears virtually no "reasonable relation" to suppressing STG activity but instead is designed to instill (by "evidence-based psychotherapeutic treatment") government prescribed morals, values, and social skills through "an integrated, cognitive behavior change program that will include cognitive restructuring, social skills development, and development of problem solving skills. This program [is] designed fro small groups and [will] address the cognitive, social, and emotional needs of the inmate population." (Cal. Code of Regs. Title 15 §3999.13 at section 700.2 "Step Down Program Components"); see attached EXHIBIT 1. That is a very troubling description of the SDP, it is unconstitutional. While I fully address this issue in PART 4. I cannot help but quote Justice STEVENS dissenting opinion in Beard v. Banks:

> "What is perhaps most troubling about the prison regulation at issue in this case is that the rule comes perilously close to a state-sponsored effort at mind control. The State may not 'invade the sphere of intellect and spirit which is the purpose of the First Amendment to out Constitution to reserve from all official control.'"

Beard v. Banks, 548 U.S. 521, 552 (2006) (Stevens, J., dissenting) (citing cases).

In this case we indeed have a 'state-sponsored effort at mind control' and we must invoke the protection of the Constitution or we will be doing a great disservice to all those thousands of inmates who will find themselves stuck in the SDP.

These are all valid constitutional questions that are in no way addressed through the current STG process. To assume that any inmate labeled STG automatically requires mental health treatment in the form of at least 3 years of involuntary psychotherapy without a prior hearing to determine whether there is a need for such treatment is as clear a constitutional violation as will ever be seen.

Later in this article, I address the Matthew v. Eldridge factors that clearly call for more procedural protections prior to compelling STG inmates to complete behavior modification therapy. See PART 3.

The stigma of mental illness attaches to STG inmates as a result of in effect being classified mentally ill and being subjected to at least 3 years of intrusive psychotherapy that includes intensive cognitive behavioral therapy such as progressively enhanced cognitive instruction and weekly group therapy sessions just as the inmates in Renchenski cited above. *See* CDCR Form 128-B SDP4 (Rev.06/14); C.C.R. Title 15 §3999.13 section 700.

CDCR does not deny that STG inmates are required to undergo enhanced psychotherapy, nor can they. *See* attached EXHIBIT 1. Just as in the cases cited about, STG inmates are stigmatized mentally ill by virtue of being required to submit to the therapy. That STG inmates are not required to register as mentally ill or be formally enrolled in CDCR's Mental Health Delivery System does not lessen or diminish the stigma of mental illness. In Chandler v. U.S. Parole Comm'n, 2014 U.S. Dist. LEXIS 109395 *32-33 (D.D.C. Aug. 8, 2014) analyzed this exact situation and held:

> "Whether or not the parolee must now list his name on an official sex offender roster, by requiring him to attend sex offender therapy, the state labelled him a sex offender – a label that strongly implies that he has been convicted of a sex offense and which can undoubtedly cause adverse social consequences... "Even if Doe's classification as sex offender is not made public...Doe himself is fully aware of it and may well feel a stigma because of it.'
>
> Likewise, Chandler's assignment to supervision by CSOSA's sex Offender Unit v. Colorado D.O.C., 205 F. 3D at 1242, regardless of whether he was formally 'labeled' as such, or required to register as a sex offender, or forced to disclose his status as a supervisee of the Unit [citation]; see also Wills v. U.S. Parole Comm'n, 882 F. Supp. 2D 60, 76 (D.D.C. 2012 (concluding, in case involving imposition of Special Sex Offender Aftercare Condition on D.C. Supervised releasee, that 'USPC essentially classified the plaintiff as a sex offender and CSOSA complied with that classification,' although release was not required to register as a sex offender.)"

See also Knowlin, 2010 U.S. Dist. LEXIS 10249523; Doe, 958 F. Supp. 2D at 267 & 272 (citing Jennings v. Owens, 602 F. 652, 659 (5th Cir. 2010)).

The following is a list of the "stigmatizing consequence" which attach to an inmate who is classified as an STG member or associate:

* Placement on non-credit earning status. C.C.R. Title 15 §3042.4(b), 3044(b)(7);
* Placement in a Behavioral Management Unit. C.C.R. Title 15 §3334(b)(3);
* Placement in Security Housing Unit for indeterminate term. C.C.R. Title 15 §3341.5(c)(5) (includes long list of restricted conditions already recognized as constituting a "significant and atypical hardship");

* Placement on "High Control" parole conditions (very restrictive). C.C.R. Title 15 §3504(a)(1) (includes Parole Officer engaging in "collateral contacts" i.e. speaking to family, friend, neighbors, job contacts. *See* §3504(a)(5));

* Exclusion from numerous parole programs. C.C.R. Title 15 §§3505(a)(6), 3521.1(c)(8), 3521.2(d)(8);

* Placement on "Continuous Electronic Monitoring Technology." C.C.R. Title 15 §§3540, 3545(c)(5);

* Placement on "Global Positioning System (GPS) technology. C.C.R. Title 15 §§3560, 3561(b)(2);

* Requirement to Register as a Gang Offender with attendant restrictions. Cal. Penal Code §186.30, C.C.R. Title 15 §36519b)(2).

All of these stigmatizing consequences are also recognized as "collateral consequences" relevant to any due process claim. *See* Wolff v. McDonnell, 418 U.S. 539, 565 (1974) (recognizing "collateral consequences" as relevant to due process analysis).

C. THE BEHAVIOR MODIFICATION REQUIREMENT

The second element to the Vitek standard is proving that the stigma is "coupled with the subjection of the prisoner to mandatory behavior modification as a treatment." Vitek, 445 U.S. At 494; Neal, 131 F.3D at 1101-02; Chandler, 2014 U.S. Dist. LEXIS 109395*37 ("whether Chandler actually began receiving the treatment to which he was assigned is immaterial to resolution of his procedural due process claim.").

The courts have consistently recognized that an inmate satisfies the behavior modification requirement when prison officials require successful completion of behavior modification as a precondition to parole eligibility or credits. In Neal v. Shimoda, the Ninth Circuit reasoned that because Hawaii's "regulations render the inmate completely ineligible for parole if the [SOTP] is not satisfactorily completed, the attachment of the 'sex offender' label to the targeted inmate has a practical and inevitable coercive effect on the inmate's conduct." *Id.* at 829. The Neal court concluded that the "coercive component" of the SOTP was "functionally equivalent to the psychiatric treatment required by the statute at issue in Vitek..." Id. at 829; *See* also Cooper, 55 F. Supp. 2D at 1102; Knowlin, 2010 U.S. Dist. LEXIS 102495 *26-27; Chandler at *37; Kirby, 195 F.3D at 1288; Coleman, 395 F. 3D at 223.

In this case, once placed in the SDP it is mandatory that an inmate successfully complete long-term cognitive behavioral therapy. *See* C.C.R. Tiltle 15 §3378.3(a)(3) (2014); attached EXHIBIT 1 (collecting CDCR references to cognitive behavioral therapy as part of SDP). Failure to participate results in, inter alia, non-credit earning status and indeterminate SHU confinement. These preconditions alone are materially indistinguishable from those present in Neal v. Shimoda wherein the Ninth Circuit held that similar preconditions has "a practical

and inevitable coercive effect" which was "functionally equivalent to the psychiatric treatment required [in Vitek]. Neal at 829; Knowlin as *26 ("Whether a prisoner has a 'right' to something does not necessarily affect its power to coerce. To the extent withholding parole compels a prisoner to accept treatment, it would likely make little difference to the prisoner whether he was being denied 'discretionary' or 'mandatory' parole.").

With regard to establishing behavior modification "treatment" or "therapy," the relevant cases, beginning with Vitek itself, all involved situations where the complaining prisoner or parolee had been assigned to undergo treatment whose aim was behavior modification. *See* e.g. Chandler at *42 ("...[the] [] treatment program to which a [parolee] would be assigned has as its primary aim the modification of the offender's sexual thinking and behavior."); Doe, 958 F. Supp. 2D at 266-67 ("'Treatment' connotes an active step -- doing something to 'treat' or remedy an identified problem"... "the assessment condition here does not require Doe to admit his need for treatment, undergo any treatment or therapy, or otherwise change his behavior in anyway.").

In this case, it is clear that the cognitive behavioral therapy component of the SDP has "as its primary aim the modification of the offender's [STG] thinking and behavior." *See* e.g. C.C.R. Title 15 §§3000 ("Step Down Program" definition), 3378.3; STG Notice of Change of Regulations, No. 14-02 ("Initial Statement of Reasons"), §3000 ("Step Down Program" definitions), see also the section of this document entitled "SPECIFIC PURPOSE OF EACH SECTION PER GOVERNMENT CODE 11346.2(B)(1)" sections: 3000, 3044(g)(1), 3341.5(c)(5), 3376.1(d)(3), 3378.3(b)(2), 3378.3(b)(3); STG Pilot Program C.C. R. Title 15 §3999.13 section 700.2 (Step Down Program Components).

Likewise, the requirement that STG inmates successfully complete the SDP "connotes an active stop -- to 'treat' or remedy an identified problem." *See all the authorities cited Id.*

3.

STG SDP INMATES ARE CLEARLY ENTITLED TO ADDITIONAL PROCEDURAL PROTECTIONS UNDER THE MATTHEW V. ELDRIDGE BALANCING TEST

A. APPLICABLE LAW

In addressing a procedural due process challenge, the Court must first determine whether the plaintiff(s) has been deprived of a protected liberty interest. See Gen. Elec. Co. V. Jackson, 610 F.3d 110, 117 (D.C. Cir. 2010). Only after finding the deprivation of a protected interest does the Court apply the Matthew v. Eldridge balancing test to determine whether the government's procedures satisfied due process. "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. "Matthew v. Eldridge,

424 U.S. 319, 333 (internal quotation marks omitted). Due process, however, is not "a technical conception with a fixed content unrelated to time, place and circumstances," but rather is "flexible" and will call for different procedural protections depending on the particular situation at hand. Id. at 334 (internal quotation marks omitted). To determine the kind of notice and hearing required in this case, the Court must balance (1) the significance of the private party's protected interest; (2) the government's interest; and (3) the risk of erroneous deprivation and the probable value, if any, of additional or substitute procedural safeguards. Matthews, 424 U.S. 319, 335 (1976).

B. THE PROTECTED LIBERTY INTERESTS

In this case, the private interests at stake are of great substance. CDCR's actions infringe on significant liberty interest held by STG inmates including (1) avoiding the stigma of being labeled mentally ill or an STG member or associate; and (2) the right to refuse unwanted mental health treatment.

Protected liberty interest can be created by (1) the Due Process Clause of its own force; (2) a court order; or (3) state statutes or regulations. Sandin v. Connor, 515 U.S. 472, 484 (1995) (Liberty interest from Due Process Clause); Smith v. Sumner, 944 F.2d 1401, 1406 (9th Cir. 1993) (Liberty interest created from consent decree); Sandin 515 U.S. at 483-84; *See* also Wilkinson v. Austin, 545 U.S. 209, 223-224 (2005) (Liberty interest in state laws and regulations).

1. AVOIDING THE STIGMA OF BEING LABELLED STG OR MENTALLY ILL

This liberty interest has been fully briefed above. *See* PART 2 of this Article.

2. THE RIGHT TO REFUSE MENTAL HEALTH TREATMENT

In this case, STG SDP inmates have a significant liberty interest in the right to refuse treatment under both federal and state law.

(a) FEDERAL RIGHT TO REFUSE TREATMENT

A mentally competent adult has a right under both the common law and the Fourteenth Amendment to refuse medical treatment. Cruzan by Cruzan v. Director Mo. Dep't. Of Health, 497 U.S. 261, 277-78 (1990). The right to refuse treatment extends to prisoners. The Supreme Court, in finding that there is a right to refuse treatment in the Cruzan case, 497 U.S. at 277, relied on two prison cases: Washington v. Harper, 494 U.S. 210, 221 (1989) (holding that prisoners have "a significant liberty interest in avoiding the unwanted administration of anti psychotic drugs") and Vitek v. Jones, 445 U.S. at 494 (holding that transfer to a mental hospital coupled with mandatory behavior modification treatment implicated a constitutional liberty interest); See also Youngberg v. Romero, 457 U.S. 307, 316 (1982) (freedom from bodily restraint recognized as "core" of liberty interest protected by the Due Process clause); Ingraham v. Wright, 430 U.S. 651, 673 (1977) ("The due process clause of the Fourteenth Amendment substantively protects certain fundamental rights. Among these are the right to be free

from unjustified intrusions into the body"); White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990) (prisoners retain limited right to refuse treatment); Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974) (allegation of surgery without consent stated a constitutional claim); Clarkson v. Coughlin, 898 F. Supp. 1019, 1049 (S.D.N.Y. 1995) (lack of sign language interpreters denied deaf prisoner the right to refuse treatment); Rennie v. Klein, 653 F. 2d 836, 844 (3d Cir., 1981); Russell v. Richards, 384 F.3d 444, 447 (7th Cor. 2004) (the court framed the right as one to "refus[e] unwanted medical treatment" and "assume[d] without deciding" that "instructing new inmates to use a delousing shampoo amounts to involuntary medical treatment.").

(b) STATE-CREATED LIBERTY INTEREST IN RIGHT TO REFUSE TREATMENT

A prisoner claiming deprivation of a state-created liberty interest must specify which regulation of statue created the interest. *See* Sandin v. Connor, 515 U.S. 472, 48-485; *See* also Cruz V. Gomez, 202 F. 3d 593, 597 (2d Cir. 2000) (due process claim failed because prisoner did not identify state law creating liberty interest). The alleged state-created liberty interest should be afforded due process protection only if its restriction or deprivation either (1) creates an "atypical and significant hardship" by subjecting the prisoner to conditions much different from those ordinarily experienced by large numbers of inmates serving their sentences in the customary fashion. Sandin, 515 U.S. at 484; Hydrick v. Hunter, 499 F.3d 978, 999 (9th Cir. 2006) (atypical and significant hardships in forced medication in nonemergency situations and in reducing inmates' privileges or altering classifications without hearing) (emphasis added); See also Richardson v. Rumnels, 594 F.3d 666, 672 (9th Cir. 2010). Or (2) inevitably effects the duration of the prisoner's sentence. Sandin, 515 U.S. at 487; Myron v. Terhune, 476 F. 3d 716, 718 (9th Cir. 2007); *See* also Wilson v. Jones, 430 F.3d 1113, 1121 (10th Cir. 2005) (duration of sentence inevitable affected by misconduct conviction resulting in prisoner's demotion to non-credit earning status).

In this case, the policy, regulation, and statues which create the interest are (1) PBSP Health Care Services, Mental Health Policies and Procedures, Volume 1-Chapter 28 ("Refusal of Mental Health Evaluation And/Or Treatment"); (2) C.C.R. Title 15 §3363; and (3) California Probate Code §4650 (a) and California Penal Code §3508:

* PBSP HCS MHP&P, Vol.1 Chapter 28 states in part:

I. POLICY

Mental Health evaluation and/or treatment shall not be forced over the objections of a mentally competent Inmate/Patient (I/P) unless; the I/P ha current Involuntary Medication court order (Penal Code 2602), the I/P is under Medical Conservatorship pursuant to Probate Code 3200, or the I/P is unable to make an informed decision due to a medical emergency. In cases of a medical emergency, all immediate necessary actions shall be taken.

An emergency exists when there is a sudden, marked change in the I/P's condition so action is immediately necessary for the preservation of life or the prevention of seriouly bodily harm to the I/P or others, and it is impractical to first obtain consent.

II. PURPOSE

To ensure and I/P's right to refuse mental health treatment is observed and appropriate documentation and clinical follow up is completed by mental health clinicians.

III. PROCEDURES

Any I/P who is mentally competent may refuse mental health clinical contacts, including group therapy. Such refusals shall be documented on a CDCR 7225, Refusal of Examination and/or Treatment, and in the treating clinician's CDC 7230-A, Mental Health Progress Notes, pertaining to the attempted clinician contact.

* California Code of Regs. Title 15 §3363 states in part:

Right to Refuse Treatment

Inmates/Parolees shall be informed any time they are the object of particular mental health diagnosis or treatment procedures. Such persons shall have the right to assignment to such a program of diagnosis or treatment without being subject to discipline or other deprivation...

(emphasis added)

* California Probate Code §4650 states in part:

THE LEGISLATURE FINDS THE FOLLOWING:

(a) In recognition of the dignity and privacy a person has a right to expect , the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care, including the decision to have life-sustaining treatment withheld or withdrawn.

* California Penal Code §3508 states in part:

BEHAVIORAL MODIFICATION TECHNIQUES

Behavioral Modification Techniques

Behavioral modification techniques shall be used only if such techniques are medically and socially acceptable means by which to modify behavior and if such techniques do not inflict permanent physical or psychological injury.

Depriving an inmate of his right to refuse unwanted mental health treatment and requiring him to undergo long-term cognitive behavioral therapy creates an “atypical and significant hardship” that is much different from that ordinarily experienced by the rest of California state prisoners who enjoy these rights. I think the Ninth

Circuit case Hydrick v. Hunter, cited above, may on point although I have not read it yet.

The mandatory language in the sourced of liberty interests cited about "grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior[.]" Vitek , 445 U.S. at 493-94. As such the above sources of liberty interests meet the criteria to quality as liberty interests under both the Due Process Clause and the standards for state-created liberty interests.

Finally, it is worth quoting the California Supreme Court who, in In re Conservatorship of Wendland, 26 Cal. 4th 519, 530-32 (Cal. 2001), held:

> " One relatively certain principle is that a competent adult has the right to refuse medical treatment, even treatment necessary to sustain life. The Legislature has cited this principle to justify legislation governing medical care decisions ([Probate Code] §4650), and courts have invoked it as a starting point for analysis...That a competent person has the right to refuse treatment is a statement both of common law and of state constitutional law.
>
> In Thor v. Superior Court, 5 Cal. 4th 725 (1993), as mentioned, we based our conclusion that a prisoner had a right to refuse life-sustaining treatment solely on the common law without also considering whether the state Constitution provided similar protection. But Thor does not reject the state Constitution as a basis for the right. More importantly, we have since Thor determined that the privacy clause does protect the fundamental interest in personal autonomy. "
>
> (citing cases).

C. THE GOVERNMENT'S INTEREST

CDCR will surely claim that their actions serve their interest in suppressing STG related activity, which is legitimate. That is not in question.

The real question is what legitimate interest does CDCR have in subjecting SDP inmates to long-term psychotherapy, specifically Cognitive Behavioral Therapy (see attached EXHIBIT 1), against their will? Moreover, why does the mandated psychotherapy bear virtually no reasonable relation to suppressing STG activity? Instead, it is designed to instill (by "evidence-based psychotherapeutic treatment") government prescribed morals, values and social skills through

> "an integrated, cognitive behavior change program that will include cognitive restructuring, social skills development, and development of problem solving skills. This program [is] designed for small groups and [will] address the cognitive, social, and emotional needs of the inmate population." C.C.R. Title 15 §3999.13 at section 700.2; *See* also EXHIBIT 1.

In order to establish a legitimate" interest in imposing this specific 3-4 year treatment plan of progressively intense cognitive behavioral therapy, that is unrelated to suppressing STG related activity, CDCR must first demonstrate an individual need for treatment that outweighs the inmates; "significant liberty interest."

It has been held that subjection of all prisoners to a behavior modification program without a showing of individual need was an arbitrary action that denied due process. Canterino v. Wilson, 546 F. Supp. 174, 208-09 (W.D.Ky. 1982), *vacated and remanded on other grounds,* 869 F. 2d 948 (6th Cir. 1989); *See* also Doe, 958 F. Supp. 2D at 263 ("The nature of any special condition imposed is certainly relevant to whether that condition is reasonably related to a defendant's history and characteristics... it would be unreasonable to mandate treatment without any determination that there is a current need for it. To require such a determination be made, on the other hand, is not inherently unreasonable."); U.S. v. Thomas, 212 Fed. Appx at 487-88 (finding "a greater deprivation of liberty than we reasonably necessary"); Knowlin, 2010 U.S. Dist. LEXIS at *17-18 (finding that prison officials' "documents do not demonstrate the reasonable of treatment because none of them explain why Knowlin needed treatment." (emphasis added)).

D. THE RISK OF ERRONEOUS DEPRIVATION AND THE VALUE OF ADDITIONAL PROCEDURAL SAFEGUARDS

1. THE RISK OF ERRONEOUS DEPRIVATION IS GREAT

Currently, inmates who have absolutely no diagnosis of mental health issues or need for psychotherapy are being forced to participate in long-term cognitive behavioral therapy against their will, without "informed consent." and without any showing of individual need.

In light of the "significant liberty interest[s]" at stake, this "one size fits all" approach to mandatory behavior modification involves too great a risk of erroneous deprivation to comport with even the flexible demands of due process.

While the current STG procedural due process may be sufficient to classify an inmate an an STG member or associate that requires segregation, they in no way protect the inmate's liberty interest in avoiding erroneous deprivation of their right to refuse unnecessary and unwanted psychotherapy, for a condition that CDCR has not even proven exists!! Indeed, the current SGT process involves absolutely no assessment or mental health consultation to determine the need for treatment. Nor are there any Mental Health staff involved in the current STG Process.

STG inmates are entitled to a hearing wherein they can challenge CDCR's requirement that they satisfactorily complete long-psychotherapy (against their will) as a precondition to release from solitary confinement. *See* Neal, 131 F.3d at 831 ("Neal did not receive the minimum due process protections required under Wolff. Neal has never been convicted of a sex offense and has never had an opportunity to formally challenge the imposition of the 'sex offender' label in an adversarial setting. He must be afforded that opportunity." (emphasis added)); Conn. Dep't of Pub Safety v. Doe, 538 U.S. 1, 9 (2003) ("The] convicted offender has already had a procedurally safeguarded opportunity to contest." and at 9 (Scalia, J., concurring) (noting that" a convicted sex offender has no right to additional 'process' enabling him to establish that he is not dangerous"); Foucha v. La, 504 U.S. 71, 78-79 (1992) ("keeping Foucha against his will in a mental institution is improper absent a determination in a civil commitment proceeding of current mental illness and dangerousness."); Lappe v. Loeffelhotz, 815 F.2d 1173 (8th Cir. 1986) (First hearing was a "full Vitek type hearing" therefore no need for second hearing); Wills, 882 F. Supp. 2D at 77 ("Neither party disputes that the [sex offender condition] 'required' that the plaintiff, who was not a sex offender, 'undergo sex offender treatment.'"), and at 78 (finding process inadequate where plaintiff "was provided no notice of any sort of prior to the Commission's initial imposition of the condition"); *See* also Jennings v. Owens, 602 F.3d 652, 659-59 (5th Cir. 2010) ("The conclusion that the sex offender therapy condition stigmatized Coleman rested heavily upon the fact that he had never been convicted of a sex offense – therefore, the label 'sex offender' was false as supplied to him." (discussing Coleman v. Dretke, 409 F.3d 665, 668 (5th Cir. 2005) (per curiam)); U.S. v. Brandon, 158 F.3d 947, 953-56 (6th Cir. 1998) (due process violation where pretrial detainee denied hearing prior to being forcibly medicated because detainees have significant interest in avoiding forcible medication and in freedom from bodily intrusion).

2. THE VALUE OF ADDITIONAL PROCEDURAL SAFEGUARDS

In order to avoid erroneous deprivation in this case the court should require CDCR to (1) demonstrate how the long-term psychotherapy component of the SDP is reasonable related to a legitimate penalogical interest; (2) provide STG SDP inmates with a mental health assessment by qualified personnel who can whether there is a need for involuntary treatment; and (3) allow STG SDP inmates the opportunity to challenge, thought appropriate procedures, any determination that involuntary treatment is necessary. Neal, 131 F.3d at 831; Chandler, 2014 U.S. Dist. LEXIS at *51-52.

4.

CDCR'S MANDATORY BEHAVIOR MODIFICATION PROGRAM VIOLATES THE FIRST AMENDMENT BECUASE IT "INVADES THE SPHERE OF INTELLECT AND SPIRIT" BY INTERFERING WITH THE INMATES' FREEDOM OF THOUGHT AND BELIEF

A. CDCR'S MANDATORY BEHAVIOR MODIFICATION PROGRAM

The Step Down Program's intent and stated purpose is to instill, but "evidence-based psychotherapeutic treatment." government prescribed morals, values and social skills through

> "an integrated, cognitive behavior change program that will include cognitive restructuring, social skills development, and development of problem solving skills, This program [is] designed for small groups and [will] address the cognitive, social, and emotional needs of the inmate population."

C.C.R. Title 15 §3999.13 at section 700.2 ("Step Down Program Components"); *See* also EXHIBIT 1.

As noted in EXHIBIT 1, it really cannot be disputed that the SDP is a progressively intense cognitive behavioral therapy treatment plan that includes weekly sessions of group therapy. This program is materially indistinguishable from other behavior modification programs recognized by the courts to satisfy the Vitek framework.

B. APPLICABLE LAW

The fact that the Court has allowed the government to punish certain categories of speech does not mean that the Court will allow the government to punish individuals because they hold points of view that differ from those of the government. John E. Nowak, Ronald D. Rotund, Principles of Constitutional Law, 4th ed. at p.615 (Thompson Reuters 2010).

All of the clauses of the First Amendment are tied together by the concept of a freedom of belief. Although the freedom of belief or the freedom of thought is not explicitly mentioned in the first Amendment, it is the core value of all of the clauses of the first Amendment. *Id*. at 615. the government may not enter the political marketplace by forcing persons to subscribe or advance favorable messages favorable to the government. Such activity is inconsistent with the fundamental freedom of belief that lies at the core of all First Amendment guarantees. The government should not be able to force a person who objects to a position to endorse that position absent the most unusual and compelling circumstances, none of which have appeared in the cases to date.

For example, in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), the Court prohibited states from requiring children to pledge allegiance to the country at the start of the school day. All students have a First Amendment right to refuse to pledge allegiance to the country or its symbols because of the freedom of though, and belief, that is central to all First Amendment freedoms.

Similarly, in Wooley v. Maynard, 430 U.S. 705(1977), the court held that no private person could be required to broadcast governmental symbols or to endorse governmental position absent the most compelling

circumstances. The Court based its decision on the free speech clause, not the free exercise clause.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." Barnette, 319 U.S. at 642

The holding principles of Barnette have been consistently followed, particularly in the context of religious belief. *See* Torcaso v. Watkins, 367 U.S. 488, 495-96 (1961) (holding unconstitutional a state law that required an individual to affirm a belief in God to obtain a governmental commission).

In Beard v. Banks, 548 U.S. 521 (2006), the court concluded, with no majority opinion, that prison officials could deny newspapers, magazines and photographs to some inmates in order to influence the behavior of those prisoners. It is worth noting that this was a relatively small number of prisoners (as opposed to CDCR's thousands of SDP participants), and the inmates in Beard were not subjected to involuntary psychotherapy as a method of behavioral modification, but instead, suffered extreme deprivation of property and privileges. The court, applying the Turner standard, ruled in favor of prison officials but not without strong and well articulated dissension from Justices STEVENS and GINSBERG:

> "The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom inquiry, freedom of thought...Plainly, the rule at issue in this case strikes at the core of the First Amendment rights to receive, to read, to think."

Beard, 548 U.S. at 543 (J. STEVENS, dissenting)(citations omitted).

> "What is perhaps most troubling about the prison regulation at issue in this case is that the rule comes perilously close to a state-sponsored effort at mind control. The State may not 'invade the sphere of intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control.'" Wooley v. Maynard, 430 U.S. 705, 715 (1977) (quoting West Virginia Bd. Of Ed. v. Barnette, 319 U.S. 624-642 (1943)

Id. at 552.

Surely, if this case made it to the Supreme Court, we would have at least two Justices on our side! I understand this is an ambitious argument to make, but even the most skeptical person would recognize that in this case, the State is indeed "com[ing] perilously close to (if not accomplishing) a state-sponsored effort at mind control."

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EXHIBIT 1

As demonstrated in the next section, CDCR declares openly and often that one of the central components of the SDP is progressively intense cognitive behavioral therapy (See Next Section). CDCR defines Cognitive Behavioral Therapy as follows:

> " Cognitive Behavioral Therapy is evidence-based psycho-therapeutic treatment which addresses dysfunctional emotions, maladaptive behaviors, and cognitive processes, using incremental monitoring and assessment of progress in all three ares to reach prescribed goals."

Cal. Code of Regs. Title 15 §3000 Definitions.

The California Business & Professions Code §2903 defines "Psychotherapy" as follows:

> "Psychotherapy means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive."

(quoted from California Ass'n of Psychology Providers v. Rank, 214 Cal. 3D 1207 (Cal. App. 2nd Dist. 1988)

The "Diagnostic and Statistical Manual, 4th edition" ("DSM-IV") is published by the American Psychiatric Association and provides the nomenclature and standard criteria for the classification of mental disorders. The DSM-IV organizes each mental health diagnosis into five dimensions as follows:

Axis I – clinical disorders, including major disorders (such as schizophrenia, bipolar, depression and anxiety disorders);

Axis II – personality disorders and intellectual disabilities;

Axis III – physical disorders which may or may not impact on psychological conditions

Axis IV – psychosocial and environmental factors that contribute to the disorder or impact on functioning;

Axis V – the global assessment of functioning or GAF score.

See also Indiana Protection & Advoc. Serv. Comm'n v. Indiana D.O.C., 2012 U.S. Dist. LEXIS 182974 *19-20 (same)

"Courts have used the term 'mental disorder' to characterize 'organic functional psychoses, neuroses, personality disorders, alcoholism, drug dependence, behavior disorders, and mental retardation." Indiana, 2012 U.S. Dist. LEXIS at *19 (citing Ruiz v. Estelle, 503 F. Supp.1265,1332 n. 140 (S.D.Tex. 1980), aff'd in part & reversed in part, 679 F. 2d 1115 (5th Cir. 1982)).

Of course, I am no expert but I believe the cognitive behavioral therapy component of CDCR's SDP qualifies as treatment for psychosocial disorder for constitutional purposes under C.C.R. Title 15 §3000; Cal. Bus. & Prof. Code §2903; and the DSM-IV Axis IV.

KEY WORD INDEX OF ALL STG DOCUMENTS

The following is an index of all the references to cognitive behavioral therapy that CDCR makes in describing and/or adopting the Step Down Program and it's components.

COGNITIVE BEHAVIOR CHANGING COMPONENTS:

* C.C.R. TITLE 15 §3999.13 STG Pilot Program (Pilot Program) at §700

COGNITIVE BEHAVIOR CHANGE PROGRAM:

* Pilot Program at §700.2(a)

COGNITIVE RESTRUCTURING:

* Pilot Program at §700.2(a)

COGNITIVE SKILLED BASED PROGRAMMING:

* Pilot Program at §700

*CDCR STG Prevention, Identification and Management Strategy" (March 1, 2012)(herein after "CDCR STG Strategy March 2012") at p.32

MANDATED COGNITIVE INSTRUCTION (including Self-Directed Journals:

* NCR STG Regs Proposed Text (hereinafter "Proposed Text") (1014014) at CDCR Form 128-b SDP1 (Rev. 11/13)

* NCR Proposed Text at CDCR Form 128-B SDP2 (Rev. 11/13)

* NCR Proposed Text at CDCR Form 128-B SDP3 (Rev. 11/13)

* NCR Proposed Text at CDCR Form 128-B SDP4 (Rev. 11/13)

* Pilot Program CDCR Form 128B SDP1 (10/12)

* Pilot Program CDCR Form 128B SDP2 (10/12)

EXHIBIT 1 (continued)

* Pilot Program CDCR Form 128B SDP3 (10/12)

* Pilot Program CDCR Form 128B SDP4 (10/12)

ENHANCED PROGRAMS:

* Pilot Program at section entitled "PURPOSE"

* CDCR STG Strategy March 2012 at p.32

* NCR Specific Purpose at §§3000 (defining SDP), 3341.5 (c)(5), 3376.1(d)(3)

PROGRESSIVE PROGRAMS:

* NCR Proposed Text at §3378.3(a)(2)

* Final STG Adopted Regulations (hereinafter "STG Adopted Regs") (9-2-14) at §3378.3 (a)(3)

* Pilot Program at §§700,700.2(a)

* NCR Specific Purpose at §3378.3(a)

TREATMENT FOR VALIDATED STG MEMBERS:

* Pilot Program at section entitled "BACKGROUND"

* CDCR STG Strategy March 2012 at section entitled "PREFACE"

INDIVIDUAL THERAPEUTIC TREATMENT:

* CDCR STG Strategy March 2012 at p.32

COMPLETION OF ALL REQUIRED COMPONENETS/CURRICULUM:

* NCR Proposed Text at §§3378.3(b)(1), (2), (3)

* STG Adopted Text at §§3378.3(b)(1), (2), (3)

* Pilot Program at §700

* NCR Specific Purpose at §3378.3(b)(2), (3)

NOTICE OF EXPECTATIONS REQUIRING COMPLETION OF ALL SDP COMPONENTS:

*NCR Proposed Text at §§3378.3(a)(1), 3378.3(b)(2), (3)

EXHIBIT 1 (continued)

* STG Adopted Text at CDCR Form 128-B SDP1 (Rev. 6/14)

CDCR Form 128-B SDP2 (Rev. 6/14)

CDCR Form 128-B SDP3 (Rev. 6/14)

CDCR Form 128-B SDP4 (Rev. 6/14)

* NCR Proposed Text at CDCR Form 128-B SDP1 (Rev. 11/13)

CDCR Form 128-B SDP2 (Rev. 11/13)

CDCR Form 128-B SDP3 (Rev. 11/13)

CDCR Form 128-B SDP4 (Rev. 11/13)

*Pilot Program at section entitled "PLACEMENT OF OFFENDERS IN THE STG PILOT PROGRAM"

* NCR Specific Purpose at §3378.3

THINKING FOR A CHANGE:

* CDCR STG Strategy March 2012 at pp. 26 & 32

NOTE: This is a cognitive behavioral therapy program that CDCR stands behind (along with other programs) The court in Erickson v. Magnuson, 2013 U.S. Dist. LEXIS 82347 *17-18 (D.Maine 2013) noted:

> " Thinking For A Change is a cognitive behavioral modification program for offenders developed by and through the National Corrections Institute of the United States Department of Justice; a description of the program is available at the Institute's website, http://nicic.gov/T4C.... It is based upon psychological principles of cognitive behavioral modification."

*CDCR cites numerous CBT programs that are apart of the SDP including:

- The Change Companies
- Interactive Journaling®

In fact these programs are the actual programs being forced on SDP inmates as the so-called Journals are trademarked with these names.

Finally in the STG Notice of Change to Regulations CDCR lists a number of behavior modification programs and Reports, Studies, and Articles relied upon and the works are all based on cognitive behavioral therapy. See e.g. * Vohryzek-Bolden, Miki, Recommendations to the [CDCR] to Address Violence in Male Prisons, California State Univ., Sacramento, Division of Criminal Justice, June 2011 at Table No. 1 (Recommending CDCR incorporate CBT into the Pilot Program (which they of course did), see also p.3 of this document.