

RETHINKING PAROLE FOR LONG-TERM SHU PRISONERS

[The end notes and references have been omitted from this outline. If you are interested in obtaining the document with all the end notes and supporting references, please contact the PHSS Parole Committee at P.O. Box 5586, Lancaster, CA 93539.]

- I. Major changes are taking place in California corrections, mirroring trends elsewhere. The Board of Parole Hearings (BPH) will want to ensure that its policies and practices are also aligned with these changing trends.
 - A. One sweeping change in state prison operations is the end of CDCR's indeterminate gang lockup program. After 30 years of trying to address the issue of prison gangs by locking prisoners up indefinitely unless and until they "debrief" (inform on other prisoners), the Department has implemented a significant shift in policy and practice:
 1. Thousands of prisoners have been transferred to general population after years, in some cases decades, in SHU.
 2. For the most part, long-term indefinite SHU terms can no longer be imposed in California.
 3. SHU terms must now be based on behavior, not on perceived status.
 4. Prisoners no longer have to become informants to get out of SHU.
 5. CDCR is joining many other states in greatly reducing its use of solitary confinement.
 - B. We are concerned that BPH policies which developed to align with CDCR's discontinued policies have not changed to reflect and support the State's current direction. Prisoners who were in SHU under these discontinued policies find that:
 1. Parole panels and Forensic Assessment Division (FAD) staff are still telling them they must debrief to be found suitable, (despite no connection to SHU confinement or suitability criteria).
 2. Parole panels and FAD staff are penalizing them for long SHU terms almost universally condemned as unconscionable or even unconstitutional, while discounting the accomplishments and progress prisoners achieved while in SHU.
 3. Parole panels and FAD staff are penalizing prisoners for participation in peaceful hunger strikes that led to CDCR's dramatic policy changes.
 - C. What are the specific concerns with these BPH practices?
 1. The CDCR policies they were based on were a failure by every reasonable measurement.
 2. They do not reflect the Board's own standards of suitability.

3. They are out of step with societal and community standards, and with the State of California's direction.

II. How Did We Get Here?

A. The Incremental Development of BPH Policies

1. SHU Housing:

- a. The Board traditionally viewed SHU time as a meaningful reflection of bad behavior. Before CDCR's mass gang lockup policy, even administrative SHU was tied to behavior.
- b. Before 1985, SHU terms were determinate or limited in time. With a few rare exceptions, no one stayed in SHU for many years, and certainly not decades.
- c. When CDCR initiated its gang lockup policies in 1985, it imposed a new meaning and a new set of facts on SHU time – it became a permanent fact of life for thousands of prisoners, many with no disciplinary issues. However, the Board continued to view it as it always had – a meaningful reason to find unsuitability.
- d. Prior to the gang lockup program, the lack of programming, loss of good time and other disabilities of SHU time were temporary (and less onerous – family contact was rarely restricted for SHU prisoners). Within a reasonable time, the prisoner had another opportunity to demonstrate progress. Under CDCR's gang lockup policies, these disabilities were allowed to accumulate for an unconscionable period of time for reasons often beyond the control of the individual prisoner.

2. Debriefing:

- a. CDCR developed its “debrief or die” policy in the mid-1980s. Unless a prisoner debriefed, he could not get out of SHU. As a result, the unwillingness to debrief became synonymous with long-term SHU housing.
- b. Because of the historical tie between SHU and bad behavior, as described above, the Board wanted prisoners to get out of SHU before being found suitable; thus, the Board started advising prisoners to debrief so they could get out of SHU.
- c. While CDCR viewed the unwillingness to debrief as evidence of continued gang activity, in many cases Board panels conceded there was no evidence of gang activity, yet still counseled prisoners to debrief to get out of SHU.
- d. Before 1990, the Board never asked anyone to become an informant in order to be suitable for parole. Today, the Board is asking prisoners, even those designated “inactive” (and in some cases, even non-validated prisoners) to inform and go into protective custody in order to be suitable for parole.

3. Participation in the hunger strikes:

- a. The hunger strikes carried out by thousands of CDCR prisoners in 2011 and 2013 were instrumental in leading to reform of failed policies that were grossly out of step with traditional correctional philosophy and with current ways of thinking about corrections.
- b. The issue raised by the Board about prisoner participation generally relates to rule violations issued by CDCR for participation in the hunger strikes, but also has been

viewed as indicative of gang affiliation or sympathy. This may align with CDCR's media posture about the hunger strikes, but is inconsistent with its view of the 115s in making custody decisions, and with recent case law addressing the legality of the 115s.

B. Why did CDCR's policy of indeterminate lockup and debriefing fail?

1. It was a system that operated, contrary to accepted correctional philosophy, without regard to individual behavior.
 - a. Prisoners who debriefed progressed to the highest privilege level regardless of how bad their behavior was before debriefing; they remained there regardless of bad behavior after debriefing. They remained classified as "dropouts" regardless of new gang-related behavior.
 - b. Prisoners who did not debrief remained in SHU at the lowest privilege level regardless of significant clean time and efforts to program within the confines of SHU. They remained gang validated in spite of no meaningful evidence of gang or criminal activity.
2. The lack of a behavioral-based reward system resulted in a system plagued by increased management problems, recidivism and the growth of new gangs.
 - a. Violence in California prisons has increased over the course of this program, as has the recidivism rate;
 - b. Widespread media reports (L.A Times, major network news and others) now describe the growth of gangs in CDCR as unchecked, with the greatest expansion occurring in the SNYs (Special Needs Yards, formed by CDCR to house "gang dropouts" – those who got out of SHU by debriefing). According to the FBI and other sources, gang activity and violence is bleeding out from these yards onto the streets. According to news reports and correctional sources, the SNYs have experienced unprecedented numbers of riots and injuries over the last decade or two.
 - c. CDCR housing is a growing patchwork of protective yards, with growing numbers of potential enemies who have to be separated for safety.
3. As a result of its flawed gang validation and debriefing policies, CDCR vastly overused expensive security housing by wrongly tagging hundreds of prisoners as security threats, and obtained virtually no reliable or usable intelligence on prison gangs and criminal activity.
 - a. Validations were based largely on the unverified allegations of prison informants fueled by an intense desire to escape the SHU, unrelenting pressure from gang investigators and, in many cases, more questionable motives.
 - b. Informant allegations are notoriously unreliable and the use of them in many contexts has been greatly limited by law, policy and practice.
 - c. The forms of information and evidentiary standards used by CDCR to validate prisoners have been widely criticized and found wanting by the courts and others. CDCR's gang investigators have foregone real investigative work for decades.

- d. The flawed processes of CDCR provide a strong incentive to lie, and in many cases require prisoners to commit felony perjury.
4. CDCR can produce no evidence supporting the effectiveness of its three-decade experiment with gang lockup.
5. CDCR has been inundated with litigation over its use of solitary confinement. The litigation has not only cost the state millions, but has opened CDCR to continuing civil liability for erroneous and unsupported gang identification and validation, and for the unconstitutional practice of imposing long SHU terms based on the refusal to debrief.
6. The cost of corrections escalated greatly, based in part on the gross overuse of solitary confinement, which adds at least \$20,000 a year per prisoner. This contributed significantly to the state's budgetary problems.
7. Long term isolation in SHU inflicted well-documented psychological pressure on prisoners, leading to increased anxiety, panic, paranoia, memory and concentration problems, agitation, suicidal thoughts, mounting anger and sleep disruption. Prisoners in SHU for more than a decade experienced additional symptoms of self-isolation, emotional numbing and despair. Some prisoners were unable to withstand these pressures and experienced irreversible psychological damage.
8. The use of long-term SHU confinement has come under almost universal condemnation as both inhumane and counterproductive – from Supreme Court justices, the President, the United Nations and the Pope; from the courts, professional organizations such as architects, psychologists and health care workers; and from the legislative branch, which called it “aberrant.”
9. Other major states were far ahead of California in discontinuing similar failed policies. California's policies were generally viewed as more extreme and harsh than other states. CDCR's debriefing policy was always out of step with the majority of states and the federal system.

C. What is the effect of CDCR's change in policy?

1. Some in CDCR warned that the release of so many prisoners from long-term SHU would result in a “bloodbath” in the general population; what has actually happened?
 - a. At the time of the *Ashker* settlement, CDCR Secretary Jeffrey Beard reported that 1100 prisoners had already been released from SHU in a pilot program “and there have been minimal problems.” This success paved the way for the settlement.
 - b. Over 1400 more have been released since then; by all reports, large numbers of them are adjusting, programming, following the rules, and enjoying the fresh air and their first real human contact in years or decades.

- c. Significantly, many are exerting a calming influence on previously tense general population yards, adhering to the Agreement to End Hostilities developed after the first hunger strikes.
 - d. Preliminary reports indicate disruptive incidents have decreased in general population yards where these prisoners are placed.
2. CDCR operations are gradually returning to a more rational behavior-based system of rewards and privileges, with more emphasis on opportunities for positive programming. While problems remain, and some elements resist change, the state's clear direction is to move toward these more tried and true correctional practices.

III. How Should BPH Practices Change to Re-align with Changes in State Corrections?

A. Long-Term SHU Housing

1. The Board needs to develop an alternative framework for reviewing prisoners who have been subject to long-term SHU under CDCR's misguided policies. Judging them through the same lens as the average prisoner is inappropriate for many reasons:
 - a. As stated above, long-term SHU under CDCR's gang-lockup/debriefing policies was not a traditional behavior-based punishment, and did not correlate with an individual's behavior and rehabilitation.
 - b. Long-term SHU for these prisoners resulted from widely condemned and discredited policies that were found by at least one court to be unconstitutional.
 - c. Many of these prisoners have been incarcerated far beyond any reasonable base term under the Board's matrix; many are far beyond the age that is considered an important determinant of suitability under accepted correctional theory. Many have developed health problems that will cost the state millions of dollars over time. Requiring them to demonstrate many more years of progress to make up for lost time is in essence a sentence of life without parole.
 - d. Many of them have made extraordinary efforts to maintain a positive direction and influence within the confines of long-term SHU, overcoming formidable state-created obstacles:
 - (i) They obtained and completed some form of programming within a system designed to prevent it;
 - (ii) They remained disciplinary-free in a system providing no incentive or reward for it;
 - (iii) They maintained strong family support in a system designed to destroy family ties;
 - (iv) They remained psychologically stable and resilient in spite of a system known to inflict psychological damage.
 - e. CDCR policies prevented SHU prisoners from receiving laudatory chronos and other positive documentation, while maximizing negative paperwork.

2. In addition to taking into account the special circumstances of these prisoners' long SHU terms, the Board needs to ensure they are reviewed based on individual factors rather than broad general assumptions about the long-term SHU experience. These assumptions can create an unfair bias that leads to determinations of unsuitability unsupported by the facts. For example, panels are:
 - a. Assuming prisoners had no programming in SHU despite the fact that many engaged in forms of programming available to them in the restricted SHU environment;
 - b. Assuming family support was inevitably eroded, despite evidence of strong current family support;
 - c. Discounting discipline-free time in SHU based on the assumption that the restrictive environment somehow prevented misconduct, despite clear evidence to the contrary;
 - d. Assuming a lack of positive documentation is evidence of a lack of positive behavior, given CDCR's manipulation of file documentation; and
 - e. Assuming psychological fragility where it is not warranted.

B. Debriefing

The BPH should discontinue any consideration of debriefing, not only as a factor in determining suitability but as the basis for any negative implications regarding a prisoner.

1. Debriefing and questionable gang validations no longer determine the long-term static custody – SHU housing – that automatically led to continuous parole denials.
2. Debriefing itself does not have any rational relation to statutory suitability factors.
 - a. As noted above, debriefing is not tied to any record of positive change prior to debriefing, or improvement in behavior after debriefing; SNYs, where prisoners who debrief are housed, have become significant management problems, spawning new violent gangs.
 - b. Debriefing may be inversely related to the development of insight into prior criminality; it is a sanctioned way to avoid accepting responsibility and understanding past wrongs, and encourages rationalization of personal actions.
 - c. As noted above, debriefers were and are often under pressure from corrections and law enforcement for perjured testimony. The faulty debriefing process creates an incentive to lie in order to successfully debrief.
 - d. Because CDCR takes the position that debriefers are under threat of violence from those they inform on, traditional sources of support on parole may be fearful and hesitant.
 - e. As noted above, the unwillingness to debrief does not correlate with negative behavior or attitude. Many long-term SHU prisoners have many years of discipline-free behavior with no evidence of any gang or criminal involvement, and have had a positive impact on general population yards.

3. The more recent Board position (since release of *Ashker* class members from SHU to general population) that success on an SNY is preferable to success in general population is contrary to all historical precedent and lacks any convincing rationale.
4. The debriefing requirement is cruel and callous and shows a deliberate indifference by the BPH to known safety risks, psychological issues and corruption, including forced perjury.
5. Sadly, the BPH and the FAD are both relying on the questionable and discredited confidential information disclosure forms previously produced by CDCR's gang staff to validate and retain prisoners in SHU, to assign risk ratings and deny parole to the same prisoners.

C. Participation in the Hunger Strikes

1. The Board should not penalize prisoners for their participation in the hunger strikes leading to CDCR's reform of its gang lockup policies.
2. Rule violations for participation should not be considered equivalent to other rule violations; participation is not evidence of gang ties or activity.
 - a. In reviewing prisoners for release from SHU after the *Ashker* settlement, the state did not use CDCR 115s issued for participation in the hunger strikes against prisoners in determining their eligibility for release to general population.
 - b. A court recently ruled that a prisoner's participation in the hunger strikes was not disruptive to the institution and its essential functions, and therefore was not an adequate basis for a CDCR 115.
 - c. Since over 30,000 prisoners participated in the hunger strikes at one time or another, it cannot be reliable evidence of gang affiliation or activity.
3. The hunger strikes were in the time-honored tradition of peaceful, non-violent protest that is the hallmark of great political and social movements throughout American and world history.
 - a. The goal of these strikes was to end a practice that has been roundly condemned (see section II.B.8 above) and which CDCR has now abandoned. As former Secretary Beard himself said, the resulting settlement "moved California more into the mainstream of what other states are doing," adding that "[w]e don't believe that its good for anybody to keep them locked up for 10, 20, 30 years."
 - b. The hunger strikes were initiated as a last resort, after years of filing 602s and appeals to the courts, and after appeals to lawyers, the legislature and the media were unsuccessful in drawing attention to the issue of indeterminate SHU confinement.

- #### D. Continuation by the Board of practices that align with and support policies and practices now abandoned by the CDCR exposes the Board to the same liabilities, discredit and condemnation that the CDCR has experienced.

IV. How does BPH Psychological Staff (FAD) improperly contribute to and support these BPH policies?

- A. By improperly using them as indications of a “criminal mindset” and as the basis for a diagnosis of personality disorder or psycho-pathology.
- B. By improperly using them as evidence of continuing violence potential.
- C. By improperly assuming a prisoner’s psychological development, maturity and insight remained frozen in time for the duration of his indeterminate SHU term.
- D. By using CDCR confidential informant reports for risk assessment without disclosing this fact, or without disclosing the content, date and other relevant information to the prisoner with an opportunity to respond.
- E. FAD evaluators’ practice of using their professional status to support the CDCR’s former gang lockup and debriefing policies runs against the tide of many psychiatric and health care professional organizations that have taken stands against just such practices.
- F. Template language for Comprehensive Risk Assessments needs to be changed; Forensic Assessment Division staff needs to be educated on new standards.

This outline and the End Notes were prepared March 2017 by Pamela J. Griffin, Attorney at Law, on behalf of the Prison Hunger Strike Solidarity Coalition, a coalition of California prisoner rights organizations, family members and activists.