IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In re Harvey Zane Jenkins,	)	**No.** S175242
	)	(3rd District Court Of Appeal No. C059321. Lassen County Superior Court No. CHW2321)
On Habeas Corpus.	)	

REVIEW FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA FOR THE
COUNTY OF LASSEN

HONORABLE DAWSON ARNOLD, Commissioner

APPELLANT'S OPENING BRIEF ON THE MERITS

CENTRAL CALIFORNIA
APPELLATE PROGRAM

Linnéa M. Johnson
California State Bar No. 93677

2407 J Street, Suite 301
Sacramento, CA 95814
(916) 442-3792

Attorney for Appellant

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ISSUE PRESENTED

If a prisoner is not assigned to a prison work program due to reasons that are not his or her fault, such as a transfer between prisons or within the prison, is the prisoner nonetheless entitled to the favorable classification points, which may reduce the prisoner's custody level, that can be earned for performance in such a program?

Combined Statements of the Case and Facts

On July 25, 2007, Harvey Zane Jenkins filed a petition for writ of habeas corpus in Lassen County Superior Court. (1 C.T. pp. 1-18.) In the petition, he alleged that he had been deprived of credits and a two-point classification score reduction for good time and work time arising out of his non-adverse transfer from

Centinela State Prison to High Desert State Prison.[1] He relied on sections 3045.3, subdivisions (a) and (b)(13), 3043.6, subdivision (a), and 3375.4, subdivision (a) of Title 15 of the California Code of Regulations,[2] and *In re Player* (2007) 146 Cal.App.4th 813, to support his claim. (1 C.T. p. 3.) He also alleged that he had exhausted his administrative remedies, and he included the documentation of that claim as exhibits to his petition.[3]

On July 30, 2007, the Lassen County Superior Court issued an order to show cause. (1 C.T. p. 19.) On September 28, 2007, the California Department of Corrections (CDCR) filed its return and supporting memorandum of points and authorities. (1 C.T. pp. 26-36.)

In its return, CDCR denied that Mr. Jenkins was entitled to be assigned to a program that qualifies inmates to earn sentence-reducing credits, citing section 2933, subdivision (b). CDCR further denied that inmates are entitled to favorable

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[1] The opinion of the Court of Appeal correctly notes that there were two transfers coving the period Mr. Jenkins was challenging: one from Centinela State Prison to High Desert State Prison, and one transfer between facilities within High Desert State Prison. (*In re Jenkins* (2009) 175 Cal.App.4th 300, 305.)

[2] All references to sections number hereafter will refer to Title 15 of the California Code of Regulations, unless otherwise indicated.

[3] On October 27, 2006, Mr. Jenkins appealed the decision of his annual review of October 24, 2006. (1 C.T. p. 10.) On February 14, 2007, his first level appeal was denied. (1 C.T. pp. 14-25.) On March 22, 2007, his second level appeal was denied. (1 C.T. pp. 12-13.) On June 19, 2007, the Director's level appeal was denied. (1 C.T. p. 9.) In its return to the OSC, respondent admitted that Mr. Jenkins had exhausted his administrative remedies. (1 C.T. p. 28.)

behavior points for participation in a work, school or vocation program during periods of time in which they were not assigned to any such program, citing sections 3375.4, subdivision (a)(3)(B), and 3375.5, subdivision (a)(3)(C)(2) of Title 15 of the California Code of Regulations. (1 C.T. p. 27.) CDCR admitted that Mr. Jenkins was entitled to "S" time[4] for authorized absences from work, school, or vocational assignments to reduce the length of the sentence with credits he would have been permitted to earn if he had been assigned to a program and not been absent. But CDCR denied that Mr. Jenkins was entitled to "S" time for the time between his non-adverse transfer until he was given another job. (1 C.T. pp. 27-28.) This is because during the 194 days at issue here, Mr. Jenkins was not assigned to a program. (1 C.T. p. 27.)

In its points and authorities, CDCR confirmed this was its position and argued that Mr. Jenkins was not entitled to "S" time because section 3043.3 does not allow "S" for the time between the non-adverse transfer and the assignment to a work program. (1 C.T. p. 34.) CDCR also argued that Mr. Jenkins was not entitled to classification points for the time he was not assigned to a program, citing sections 3375.4, subdivision (a)(3)(B), and 3375.5, subdivision (a)(3)(C)(2). (1 C.T. p. 31.) In the declaration filed with the return, A. Cain, a counselor at High

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[4] "S" time is defined in section 3045.3 of Title 15 of the California Code of Regulations. It provides sentencing-reducing work credit to inmates who cannot attend a program assignment due to an authorized absence. (Cal. Code Regs., tit. 15, §3045.3.)

Desert State Prison, recited that the classification score is used to determine the security level of an inmate's housing, and that it is comprised of several factors, including the length of the inmate's prison term, personal background, favorable prior incarceration behavior, and unfavorable prior incarceration behavior. Counselor Cain explicitly represented that an inmate's work and privilege group status is not a factor in calculating the inmate's classification score. (1 C.T. pp. 38-39.)

On October 23, 2007, Mr. Jenkins filed his traverse, and supporting memorandum of points and authorities. (1 C.T. pp. 72-78.) In the traverse, Mr. Jenkins argued that the arbitrary and capricious failure to apply *In re Player* denied appellant equal protection and due process, as there was no reasonable basis for the interpretation of laws and regulations CDCR advanced, when that interpretation had been "overruled" in *Player*. (1 C.T. p. 73.)

On April 25, 2008, the Lassen County Superior Court granted Mr. Jenkins' writ petition, finding there were no factual issues requiring an evidentiary hearing, and relying on the *Player* decision. The superior court found that CDCR had improperly denied Mr. Jenkins "S" time, and the accompanying favorable work/behavior classification points for 194 days. The superior court agreed that work assignments are a privilege and not a right, but held that they should not be taken away without the fault of the inmate, because such conduct would constitute a denial of due process. (1 C.T. pp. 79-80.)

Although the superior court found Mr. Jenkins was entitled to "S" time toward his sentencing-reducing credits, and classification points, and granted his habeas writ petition, its order to CDCR was to reduce Mr. Jenkins' classification score only. The order did not include any direction to CDCR regarding "S" time to be factored into his sentence-reducing credits under Penal Code section 2933. (1 C.T. pp. 79-80.)

The order was served by mail on April 29, 2008, and CDCR filed a notice of appeal on June 27, 2008.[5] (1 C.T. pp. 81-82.)

The Opinion of the Court of Appeal

On appeal, CDCR did not contest the superior court's determination that Mr. Jenkins was entitled to "S" time for the time in question.[6] CDCR contended that the entitlement to "S" time credits against his sentence did not include the entitlement to classification points for the same period of time. (R-AOB, pp. 18-19.) In the superior court, CDCR contended that section 3375.4, subdivisions (a)(3)(B) and section 3375, subdivision (a)(3)(C)(2), required assignment to a

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[5] The appellate court found the notice of appeal here to have been timely when measured from the date of mailing of the habeas order, which had not been pronounced in open court. (*In re Jenkins, supra*, 175 Cal.App.4th at p. 306.)

[6] Jenkins' entitlement to "S" time was not at issue in this appeal because CDCR did "not contest the superior court's determination that Jenkins was entitled to 'S' time for the time in question." (*In re Jenkins, supra*, 175 Cal.App.4th 300, 307, n. 5; See also Respondent-Appellant's opening brief in the appellate court (hereinafter R-AOB), p. 17: "Appellant does not contest the superior court's determination that Jenkins was entitled to "S" time for the time in question.")

program before classification points could be earned. (1 C.T. p. 31.) CDCR retained this argument on appeal. (R-AOB, p. 16.)

The appellate court held then that it was not arbitrary, capricious or irrational to deny two additional work/school performance points to Mr. Jenkins because he was not assigned to a job, school, or vocational program for more than half of the total review period, even though this occurred through no fault of his own, and even though he was willing to participate. The appellate court recited that in reviewing classification decisions, it must uphold CDCR's decision as long as it was supported by "some evidence." Framed in light of that standard of review, it held the denial was not arbitrary, capricious or irrational.

In making that finding, the appellate court rejected the analysis of the Fourth District Court of Appeal in *Player*. It did so by finding that awarding classification points was a completely different matter involving completely different considerations; therefore, without deciding whether awarding time for section 2933 credits was appropriate, the appellate court found that the CDCR regulation that denies work/school performance points to inmates who are not assigned to a program, regardless of whether the lack of assignment is attributable to the inmate or CDCR, has a rational basis. (*In re Jenkins, supra*, 175 Cal.App.4th at pp. 320.) It also found that the disparate treatment of classification points and sentence-reducing credits was rational as well.

> . . . the distinction between worktime credits and work/school performance points in this regard is not arbitrary, capricious, or irrational. The department could have rationally determined that an inmate who performs at average or above-average level in a work, school, or vocational program requires less security than an inmate who performs below average or who has not demonstrated any performance in such a program. Thus, there is a rational basis for the department's regulation that denies work/school performance points to inmates who are not assigned to a program, regardless of whether the lack of an assignment is attributable to the inmate or to the department.

(*Ibid.*)

The Court of Appeal found nothing unreasonable in the result: that an inmate's "prison sentence will be reduced because he is willing to participate [citations], but his security risk as reflected in his classification score will be unaffected." (*Id.* at p. 321.) It based its reasoning on what the appellate court asserted was the legislative intent behind Penal Code section 2933:

> By enacting section 2933, the Legislature determined that an inmate's mere willingness to work or go to school should be rewarded with time off the inmate's sentence. As a basis for this determination, the Legislature need not have decided that an inmate who wants to work or go to school poses a reduced risk to society and therefore should be released earlier than another unmate who wants to do neither. Rather, the Legislature simply could have decided that work and school programs have a beneficial rehabilitation effect on inmates, and offering custody credits for the willingness to participate in such programs is a rational and justifiable way to encourage inmates to move toward rehabilitation.

(*Id.* at p. 322.)

Noting an absence of guiding authority from the Legislature, the appellate court also found that CDCR could have rationally determined that:

> . . . *actual* average or above-average performance in a work, school, or vocation program - - versus a mere *willingness* to participate in such a program - - is necessary to show that an inmate poses a reduced security risk such that his security classification should be reduced. Viewed from this perspective, the different treatment of worktime credits and work/school performance points is plainly not irrational. Stated another way, just because the legislature decided an inmate should get time off his sentence for being willing to participate in [sic] work or school program does not mean the department was bound to decide that the same inmate poses a lesser security risk while in prison because of that same willingness. [Italics in original text.]

(*Ibid.*)

The Court of Appeal concluded:

> . . . the warden has demonstrated that the regulation restricting work/school performance points to those inmates who are actually participating in a qualifying program and are performing at average or above-average level in that program has a rational basis. Moreover, we conclude the application of that regulation to deny Jenkins two of the possible four work/school performance points he could have earned for the annual review period, based on the fact that he was unassigned to a program for more than half of that period, was rational as well.

(*Ibid.*)

The Court of Appeal then reversed the order granting the habeas writ petition, and remanded to the superior court with instructions to enter a new order denying relief. (*Id.* at p. 323.) However, because CDCR did not appeal the award of "S" time toward his sentence-reducing credits, and the award of S time was part of the superior court's decision, the appellate court's order erroneously reversed the granting of the habeas petition, when it should have stated that it

was a partial reversal, and when it should have remanded for the superior court to enter an order partially denying relief.

ARGUMENT

I. THE COURT OF APPEAL VIOLATED MR. JENKINS' DUE PROCESS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS WHEN IT ALLOWED CDCR TO RAISE, FOR THE FIRST TIME ON APPEAL, AN ISSUE WHICH WAS BASED ON AN ASSERTION OF HISTORICAL FACTS WHICH CDCR DID NOT PLEAD IN ITS RETURN, WHICH MR. JENKINS THEREFORE HAD NO OPPORTUNITY TO CONTEST, AND WHICH CDCR DID NOT PROVE IN AN EVIDENTIARY HEARING, BUT WHICH THE APPELLATE COURT RELIED ON IN REFUSING TO FOLLOW *IN RE PLAYER*

In the appellate court, CDCR raised, for the first time on appeal, its claim that an inmate who performs at average or above-average level in a work, school or vocational program requires less security than other inmates. (R-AOB, p. 14.) CDCR claimed that it had determined that satisfactory performance in a program assignment is one way to demonstrate a lower security risk, citing Cal. Code Regs., tit. 15, §§ 3375.4. Section 3375.4, however, contains no such explicit claim or finding.

Mr. Jenkins argued that the claim had been forfeited because it had not been raised in the superior court. (Petitioner-Appellee's brief (P-AB), pp. 7-8.) Mr. Jenkins pointed out that this new claim was based on the premise that institutional security requires that prison officials actually observe an inmate's program performance before reducing an inmate's security level for participation. (R-AOB, pp. 14-15, 17-24.) The appellate court found that this is "not a question

of historical fact that had to be determined based on evidence presented in the case." Instead, the appellate court found this to be a question of law, and therefore declined to apply the forfeiture rule to prevent CDCR from raising this issue for the first time on appeal.

The appellate court was incorrect. This is a fact-based claim[7] that Mr. Jenkins could have controverted in his traverse if it had been asserted in the return to his habeas petition. This, in turn, would have required the superior court to set the matter for an evidentiary hearing; however, because CDCR did not assert this claim in its return, Mr. Jenkins did not have an opportunity to contest its assertion of this claimed fact, and to request an evidentiary hearing at which CDCR could have proved the factual basis for this claim, and at which Mr. Jenkins could have refuted the claim. As a result, the appellate court should have found this argument to have been forfeited under principles of procedural due process.

Mr. Jenkins acknowledged that this court has previously allowed parties to:

> . . . " 'advance new theories on appeal when the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy.' " (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6 [74 Cal.Rptr.2d 248, 954 P.2d 511].)

(*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089.)

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[7] For an analysis of what constitutes a fact-based claim, see the discussion of *People v. McKee* (January 28, 2010) 2010 Cal. LEXIS 586, included in Argument II, infra, at pp. 18-19.

But where factual development is necessary, forfeiture should be applied. To hold otherwise here would deprive Mr. Jenkins of his due process right to an evidentiary hearing at which he could have contested this claim of historical fact.

This court has recently set forth the forfeiture test:

> With respect to this and virtually every other claim raised on appeal, defendant urges that the error or misconduct he is asserting infringed various of his constitutional rights to a fair and reliable trial. In most instances, insofar as defendant raised the issue at all in the trial court, he failed explicitly to make some or all of the constitutional arguments he now advances. In each instance, unless otherwise indicated, it appears that either (1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution. To that extent, defendant's new constitutional arguments are not forfeited on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 433–439 [35 Cal.Rptr.3d 644, 122 P.3d 765]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [17 Cal.Rptr.3d 532, 95 P.3d 811]; *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [2 Cal.Rptr.3d 186, 72 P.3d 1166].)

(*People v. Boyer* (2006) 38 Cal.4th 412, 441, n. 17.)

Mr. Jenkins recognizes that here CDCR took an appeal from the granting of a habeas writ, so the procedural posture of CDCR differs from that of the defendant in *Boyer*; nonetheless, the application of the forfeiture test to this issue compels this court to apply forfeiture to CDCR's new argument. First, the appellate claim here is of a kind that required trial action to preserve it. CDCR

here did not plead the claim in the return it filed in the superior court, and did not allege any facts to support the claim in its return. (1 C.T. pp. 26-28.) In failing to raise the claim and allege facts to support the claim in its return, there was no allegation for Mr. Jenkins to controvert in his traverse; accordingly, the superior court did not become aware that there were any contested issues of fact requiring it to convene an evidentiary hearing before it could issue its decision on the habeas writ petition. This scenario then segues into the second prong of the *Boyer* forfeiture inquiry, which is that the new claim raised by CDCR for the first time on appeal invoked facts different from those the trial court itself was asked to decide. While forfeiture need not be applied when the new issue raised does not require the further development of a factual record, here the issue CDCR raised for the first time on appeal did require further development of a factual record. The current record does not contain any evidence bearing on what is clearly an empirical fact-based issue: whether there is any statistical association between average or above-average work or program performance and decreased security risk, and between below average work or program performance and increased security risk. Accordingly, because the appellate court did not apply the forfeiture rules, it decided factual matters that should have been decided in the superior court after an evidentiary hearing.

Under *Boyer*, the appellate court erred as a matter of law in failing to find a forfeiture, and deprived Mr. Jenkins of his procedural due process rights in the

litigation of his habeas petition. This court has explained the procedural rights involved in litigating a habeas action:

> In a habeas corpus proceeding the petition itself serves a limited function. It must allege unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which he bases his claim that the restraint is unlawful. (§ 1474.) If, taking the facts alleged as true, the petitioner has established a prima facie case for relief on habeas corpus, then an order to show cause should issue. (*In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4 [87 Cal.Rptr. 681, 471 P.2d 1].) We have previously observed that the order to show cause, although not expressly provided for in the statutes governing the writ, has developed as an appropriate means by which to initiate a hearing and disposition of a petition on behalf of a person in custody without the necessity of bringing the petitioner before the court. (*Id.*, at p. 873, fn. 2.) The return to the order to show cause then becomes the principal pleading, analogous to a complaint in a civil proceeding. The factual allegations of the return will be deemed true unless the petitioner in his traverse denies the truth of the respondent's allegations and either realleges the facts set out in his petition, or by stipulation the petition is deemed a traverse. (*In re Saunders* (1970) 2 Cal.3d 1033, 1047-1048 [88 Cal.Rptr. 633, 472 P.2d 921].) The issues are thus joined, and if there are no disputed material factual allegations, the court may dispose of the petition without the necessity of an evidentiary hearing.

(*In re Lawler* (1979) 23 Cal.3d 190, 194.)

Here, the issue was never joined. The factual allegation for the new claim was not included in the return. If CDCR had pleaded these facts in the return in superior court, and Mr. Jenkins had contested them in his traverse, the superior court would have had to conduct an evidentiary hearing to resolve this factual contest. The failure to apply the forfeiture doctrine here deprived Mr. Jenkins of

his due process right to litigate a contested matter. Accordingly, this court must apply the forfeiture doctrine to avoid a procedural due process deprivation.

Without relying on the new claim that satisfactory performance in a program assignment evidences a lower security risk, which was the ratio decidendi of the appellate court's opinion, there was no basis on which the appellate court should have reversed the superior court order granting the relief Mr. Jenkins sought in his habeas corpus petition; accordingly, this court should affirm the superior court order.

II. THE APPELLATE COURT'S DECISION REVERSING THE SUPERIOR COURT'S ORDER GRANTING THE RELIEF SOUGHT IN MR. JENKINS' WRIT PETITION AND REMANDING TO THE SUPERIOR COURT WITH INSTRUCTIONS TO ENTER A NEW ORDER DENYING RELIEF IS NOT SUPPORTED BY ANY EVIDENCE AND IS CONTRARY TO IN RE PLAYER

A. The "Some Evidence" Standard of Review Applies to the Superior Court's Order Granting Mr. Jenkins' Habeas Corpus Petition

The appellate court, and the parties, appear to agree that the applicable standard of review is the "some evidence" standard established by the United States Supreme Court in *Superintendent v. Hill* (1985) 472 U.S. 445, and adopted by the court in *In re Wilson* (1988) 202 Cal.App.3d 661, 666-667. The high court equated the quantum of evidence under this standard of review with "a modicum of evidence" establishing "some basis in fact." (R-AOB, p. 12; *In re Jenkins, supra,* 175 Cal.App.4th at p. 315.) The remaining question, however, is to which

finding that standard is to be applied: to the superior court's order granting the classification points Mr. Jenkins sought in his habeas writ petition, or to CDCR's decision denying him the classification points. Both the appellate court and CDCR presume that standard applies to the appellate court's review of CDCR's decision. (*In re Jenkins, supra*, 175 Cal.App.4th at p. 315.) But the appellate court and CDCR were both incorrect. CDCR appealed, seeking review of the superior court's decision granting Mr. Jenkins the classification credits. Because the appellate court should have been reviewing the decision of the superior court, the appellate court transposed the standard of review and applied it incorrectly.

In *In re Wilson,* the prison authorities had designated Wilson as an "R" suffix inmate. Wilson filed a habeas petition in the superior court, and the superior court granted the petition, concluding that respondent prison authorities had acted arbitrarily and capriciously in so designating Wilson. The prison authorities then appealed. The appellate court observed, in conjunction with setting forth the standard of review, that its only function was to decide whether the superior court's "ruling finds adequate evidentiary support." (*In re Wilson, supra*, 202 Cal.App.3d 666.) That should have been the appellate court's function here.

The superior court's ruling here was supported by "some evidence." The superior court found that there were no issues of fact to resolve. This is because

CDCR did not plead or prove the justification for distinguishing classification points from sentence-reducing credits.

While the superior court's decision was supported by "some evidence," the decision of CDCR was not supported by any evidence. This is because, to the extent that CDCR contends that institutional security requires that prison officials actually observe an inmate's program performance before reducing an inmate's security level for participation, this claim presents an empirical question, which was not raised in the superior court, and upon which no evidence was introduced in the superior court; accordingly, even if the standard of review were transposed here, so that the appellate court was reviewing CDCR's decision, instead of the decision of the superior court, there is no "modicum of evidence" to establish "some basis in fact" for this claim first made in the appellate court. In fact, there are no facts which support this belated claim.

A similar failure of proof was recently recognized by this court, which caused it to remand back to the trial court, to permit the litigation of the facts underlying the basis for the disparate treatment of sexually violent predators (SVPs) under Proposition 83. This court determined that these underlying facts must be established so that it could be determined whether they justify treatment of SVPs in a manner that differs from two similarly situated groups: mentally disordered offenders and criminal defendants who enter pleas of not guilty by reason of insanity.

> But the government has not yet shown that the special treatment of SVP's is validly based on the degree of danger reasonably perceived as to that group, nor whether it arises from any medical or scientific evidence. On remand, the government will have an opportunity to justify Proposition 83's indefinite commitment provisions, at least as applied to McKee, and demonstrate that they are based on a reasonable perception of the unique dangers that SVP's pose rather than a special stigma that SVP's may bear in the eyes of California's electorate.

(*People v. McKee* (January 28, 2010) 2010 Cal. LEXIS 586.)

This court in *McKee* specifically instructed the trial court to determine whether the legislative distinctions in classes of persons subject to civil commitment are supported factually.

In short, the basis for the disparate treatment identified in *McKee* was not supported by any evidence.

B. The Superior Court Properly Followed the Reasoning of *In re Player* in Defining the Law to be Applied to the Uncontested Facts

The appellate court circumvented the procedural defect in CDCR failing to plead its justification for its disparate treatment of classification points and sentence-reducing credits by finding that this claim was "not a question of historical fact that had to be determined based on evidence presented in the case." Instead, the appellate court found this to be a pure question of law, which it could decide.

The superior court found CDCR erred as a matter of law when it denied Mr. Jenkins classification points which should have been awarded under the

Player decision. The superior court rejected CDCR's attempt to distinguish *Player*, because here CDCR denied Mr. Jenkins "S" time and in *Player*, CDCR had granted "S" time to Mr. Player. But the superior court here held that under *Player*, "S" time should have been granted, and the denial of the "S" time for the 194 days was wrongful. The superior court held that Mr. Jenkins was entitled to receive not only "S" time, but also the accompanying classification points, because although work assignments are not a right, they should not be taken away without the fault of the inmate because to do so would deny the inmate due process. (1 C.T. pp. 85-86.)

Here, the superior court did not abuse its discretion in its interpretation and application of the regulations, guided by *Player*, and its decision was not arbitrary, capricious, or irrational.

This court's review of the superior court's decision should also be guided by the reasoning of *In re Player.* As the issues were pleaded in the return in the superior court, *Player* was controlling. But under an analysis of the new issue raised for the first time in the appellate court, the appellate court found *Player* distinguishable. In so doing, the appellate court deprived the superior court of the opportunity to hear and decide that issue, where under the rules of appellate review, the issue should first have been decided. Even if this court exercises its discretion to consider the new issue in this review, it should still be guided by the *Player* analysis.

In *Player*, the inmate filed a writ petition in the Court of Appeal,[8] in the exercise of its original jurisdiction. Here, CDCR appealed the superior court's order granting Mr. Jenkins' writ petition. Mr. Player challenged CDCR's refusal to grant classification points to reduce Mr. Player's classification score for three six-month periods during which his work status classification was interrupted. This interruption was due to no fault of Mr. Player. The appellate court issued an OSC and granted relief, finding that CDCR's interpretation of the "period" considered "continuous" for the reclassification annual review under subdivision (a) of section 3375.4, was unreasonable and unfairly applied.

In its return, CDCR had argued that Mr. Player's entitlement to favorable work behavior credits/points, was based on the mistaken belief that "S" time is the same as "assigned" status and that Mr. Player was not entitled to relief because he was "unassigned" to any qualifying assignment during the periods for which he sought classification credits. In his traverse, Mr. Player argued that a reading of sections 3043.6, subdivision (C)(2) and 3375.4, subdivision (a), supports a finding that he was entitled to favorable work points/credits for the "continuous period" of each questioned reclassification annual review (AR), containing two periods of six months for the respective AR which was interrupted through no fault of Mr. Player. The court distilled the argument to the following: CDCR's interpretation

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[8] Mr. Player filed a writ petition in the superior court, which was denied for failure to exhaust administrative remedies. *In re Player, supra,* 146 Cal.App.4th at p. 820.

and application of the pertinent regulations regarding what constitutes a continuous period, for purposes of awarding favorable behavior points, precluded Mr. Player from benefitting from such reclassification credit/point for the three periods of time in question. The appellate court concluded that was unfair and violated due process. (*Ibid.*)

The *Player* decision turned on the interpretation of the regulation defining a continuous period of review for purposes of awarding classification points. CDCR calculates classification points for each six-month period of an AR separately, and if the inmate is not in a credit-qualifying work assignment at the inception of the six-month period in the AR, CDCR will not grant classification points for that segment, because "continuous refers to the six-month period within the AR, and not to the one-year AR period."

The *Player* court held that the plain language of section 3375.4, subdivision (a), refers to the period of review, which is one year, comprised of two six-month periods, and that if one is interrupted through no fault of the inmate, the entire period should be considered "continuous" for that AR. Only when a review period is less that one year, due to the need for reclassification because of a disciplinary violation or referral to the UCC or ICC for a program, housing or behavior concern, should the period include only one six-month period since the last review. (*Id.* at p. 826.)

For our purposes here, the relevant part of the *Player* analysis is that in recognizing that worktime credits that reduce an inmate's sentence are different from classification points, the *Player* count nonetheless found them to be interrelated, because both incentives reward an inmate's work/school behavior or performance and depend upon the inmate's status as assigned to a credit-qualifying work, school or program. In short, credits and classification points derive from the same status: assignment to a program. Under the case law and plain language of the regulations, CDCR could not deny Mr. Player his worktime credits and properly granted him "S" time to cover each segment. (*Id* at p. 827.)

While acknowledging that "S" time technically refers to excused work time for purposes of calculating credits off a prisoner's sentence, the *Player* court held that it was not logical or fair to deny Mr. Player the favorable classification points for each respective six-month period at issue in the somewhat analogous situation where his credit-qualifying assignments were disrupted or changed due to an adverse transfer which was subsequently determined to be nonadverse. To find otherwise would have deprived Mr. Player of the favorable points he would have earned during those "continuous" periods if he had been left in the assignment status he was in before CDCR changed it to unassigned.

The *Player* court found CDCR's interpretation, that an inmate must be in an assigned position at the beginning of the six-month review period to be able to earn classification points, was not reasonable. Since "S" time is to be considered

the same as time worked for purposes of credits against the sentence, it logically follows that classification points for that same period of "S" time should be awarded unless other factors negate the award. This would comport with the CDCR policy of liberally construing work performance in the absence of staff documentation of the inmate's performance. (*Id.* at p. 829.) It would also avoid the "Catch-22" situation where an inmate is unassigned in the other six-month period of an AR through no fault of his own. The *Player* court agreed with the court in *Reina*: the incentive for rehabilitation is enhanced by the perception that fairness exists in the operation of the rehabilitation program, and that includes the classification of inmates for housing them for work and school programs as well as for their security needs. (*Ibid.*)

Here, the appellate court found the distinction between credits awarded against an inmate's sentence, and classification points which reduce an inmate's security level, which was recognized by the *Player* court, to be more important than the fairness of the rehabilitative programs. The basis for believing this distinction to be more important than fairness was that credits against an inmate's sentence reward "willingness" to work, while classification points enable CDCR to maintain prison security. As the "rational basis" for this distinction, the appellate court here posited that actual performance in a job, school or vocational program is necessary to show than an inmate poses a reduced security risk such that his classification should be reduced.

> Stated another way, just because the Legislature decided an inmate should get time off his sentence for being willing to participate in work or school program does not mean the department was bound to decide that the same inmate poses a lesser security risk while in prison because of that same willingness.

(*In re Jenkins,* 175 Cal.App.4th at p. 322.)

This ratio decidendi is flawed and irrational. The governmental interest in incarcerating convicted defendants to serve out their sentences is first, and foremost, for the protection of the public. The interest of the government in prison security is significant, to be sure, but it is not a governmental interest that trumps the safety of the general public. In short, if the Legislature has seen fit to award credits against the sentences of convicted felons based on their mere willingness to work, CDCR is hard-pressed to claim that the award of a couple classification points for the willingness to work, as opposed to the actual average or above-average performance on a job or in a program, is going to jeopardize prison security, or that the marginal effect of a two-point reduction in security classification creates a more significant security risk to inmates and prison personnel, than the risk to the state's population created by an early release of a convicted felon.

Accordingly, even if the transposed standard of review is applied to CDCR's decision, instead of the superior court's decision, the appellate court erred in reversing the superior court's order. First, there are no facts which support the claim that: (1) average or above-average program performance

correlates to a lower security risk, (2) lack of opportunity to perform in a program correlates to a higher security risk, or (3) that the marginal effect of a two-point reduction in classification will jeopardize prison security. Second, under *Player*, these unproven claims do not trump the necessity for fairness in the rehabilitative program, which translates into awarding classification points and sentencing-reducing credits based on willingness to participate where an inmate is unassigned to a program, due to a nonadverse transfer, which is no fault of his own.

III. DENYING MR. JENKINS CLASSIFICATION POINTS FOR THE 194 DAYS HE WAS UNASSIGNED DUE TO A NON-ADVERSE TRANSFER VIOLATES THE EQUAL PROTECTION CLAUSES OF THE CALIFORNIA CONSTITUTION (CAL. CONST., ART. I, §15) AND THE U.S. CONSTITUTION

Under the California Constitution:

> The state may not, however, arbitrarily accord privileges to or impose disabilities upon one class unless some rational distinction between those included in and those excluded from the class exists. "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*Purdy & Fitzpatrick v. State of California* (1969) 71 Cal.2d 566, 578 [79 Cal.Rptr. 77, 456 P.2d 645].)

(*In re Gary W.* (1971) 5 Cal.3d 296, 303.)

Under the U.S. Constitution, Mr. Jenkins' burden is the same: he must make his challenge at the level of rational basis, because he is not a member of a suspect classification, and he has no fundamental interest in classification points.

Accordingly, to uphold the operation of these regulations, CDCR need show only a rational basis for its classification. (See *Gregory v. Ashcroft* (1991) 501 U.S. 452, 470.)

This court's analysis in *McKee* explicates the mode of adjudicating equal protection claims. Mr. Jenkins recognizes, under his state constitutional claim as well, that he is not a member of a suspect class triggering strict scrutiny, but rather, is simply a member of class receiving disparate treatment, through the interpretation and application of regulations. Accordingly, his burden is to show there is no rational basis for the disparate treatment.

The first showing Mr. Jenkins must make is that there is a classification that treats two similarly situated groups in a disparate manner:

> As we have stated: " 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' " (*Cooley v. Superior Court, supra*, 29 Cal.4th at p. 253.) In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws.

(*People v. McKee, supra*, 2010 Cal. LEXIS 586, 46-47.)

The interpretation and application of the regulations advocated here by CDCR and adopted by the appellate court creates a classification that treats similarly situated groups in an unequal manner. This can most easily be depicted

by observing the operation of the regulations in a situation where two inmates have each experienced non-adverse transfers. One is immediately assigned to a program, but misses 194 days due to an authorized absence. The other inmate remains unassigned for 194 days. The former will receive both classification points and sentence-reducing credits for that period of time. He will receive "S" time toward his sentence-reducing credits under section 3045.3, subdivision (b)(13), and classification points under section 3375.4, subdivision (a), while the latter will receive no sentence-reducing credits or classification points for that same period, because both regulations require that the inmate be assigned to a program. And even though, under the regulation itself as written, "S" time could arguably be applied only to sentence-reducing credits, a similar provision is contained in section 3375.4, which permits CDCR to disregard an interruption in an evaluation period, that occurs through no fault of the inmate.

This disparity also demonstrates the fallacy in CDCR's position, and the flaw in the appellate court's opinion, because under this scenario, CDCR is deprived of the same period of time during which it could observe either inmate's work performance. Yet in one scenario, the inmate earns sentence-reducing credits and classification points, while the other earns neither, when CDCR had no opportunity to observe either of them on the job for that 194 days. The observation of work performance is the claim upon which CDCR, and the appellate court, rely to deprive Mr. Jenkins of his classification credits.

But there is a second and more compelling flaw in the interpretation and application of regulations which results in this disparate treatment. CDCR is in complete control of when the work or program assignment is made, and is free to exercise its unstructured and unbridled discretion to decide which inmate is assigned, and which inmate is not assigned. In short, in making this decision, CDCR controls who will receive sentence-reducing credits and classification points, and who will not.

Where two groups have the same interest at stake, and CDCR treats them differently, it must do so because the risks involved with lowering a classification score for someone unassigned carries significantly greater risks than those involved in lowering a classification score for someone who is assigned to a program, but who has not performed for the same length of time. Mr. Jenkins has raised a substantial factual question about the empirical basis for this position.

This position exalts the risk to the safety of prison personnel and inmates occasioned by a change of two points in classification score, regardless of whether it triggers a change in security level, over the risk to the safety of the people of the State of California occasioned by the early release of a convicted felon whose rehabilitation has not been confirmed through actual job performance. It evidences CDCR's belief that performance on the job is more probative of the institutional security concerns an inmate presents, than it is

indicative of the successful rehabilitation of an inmate justifying his early release in the community at large.

Equal protection safeguards against the arbitrary denial of benefits to a certain defined class of individuals. (*People v. McKee*, *supra,* 2010 Cal. LEXIS 586 (Cal. Jan. 28, 2010).) In *McKee*, the civil committee challenged his indeterminate term commitment as a violation of equal protection, based on being similarly situated to a mentally disordered offender, or a defendant who has pleaded not guilty be reason of insanity. Finding sexually violent predators to be similarly situated to these two groups, this court acknowledged that it did not find "that the People could not meet its burden of showing the differential treatment of SVP's is justified. We merely conclude that it has not yet done so."

Here, CDCR has not proved the factual justification for the disparate treatment of Mr. Jenkins and inmates similarly situated. This court should remand, as it did in *McKee*, for a factual development of CDCR's justification for the disparate treatment.

IV. DENYING MR. JENKINS CLASSIFICATION POINTS FOR THE 194 DAYS HE WAS UNASSIGNED DUE TO A NON-ADVERSE TRANSFER, WHEN CDCR FAILED TO CLAIM OR PROVIDE EVIDENCE IN SUPPORT OF A LOGICAL CONNECTION BETWEEN THE REGULATION AND ITS LEGITIMATE SECURITY INTERESTS, VIOLATES THE DUE PROCESS CLAUSE OF THE CALIFORNIA CONSTITUTION (CAL. CONST., ART. I, § 7)

Unlike the equal protection claim, a due process analysis under the state constitution does not begin as an analysis of a federal constitutional due process infringement would. Under the federal due process clause, the analysis would begin by establishing that the statute or regulation has created an entitlement that can be characterized as a liberty interest requiring due process protection.[9]

Instead, the analysis of a due process infringement under the California Constitution begins with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake. *(People v. Ramirez* (1979) 25 Cal.3d 260, 264, 266-268.) In short, the analysis proceeds straight to balancing the interests involved.

> Therefore, we held in *Ramirez* that "identification of the dictates of due process [Cal. Const., art. I, § 7, subd. (a); *id.*, § 15] generally requires consideration of (1) the private interest that will be affected

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[9] To date, the federal courts appear to have decided that there is no liberty interest implicated, for due process purposes, when an inmate is denied classification points, unless it results in a atypical and significant hardship on the inmate, exceeding those which are the ordinary incidents of prison life under *Sandin v. Conner* (1995) 515 U.S. 472. Classification as a sex offender, for example, would involve a classification that imposes atypical and significant hardships on the inmate that surpass the ordinary incidents of prison life. (*Neal v. Shimoda* (9th Cir. 1997) 131 F.3d 818, 828, 830.)

> by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Id.*, at p. 269.)

(*In re Jackson* (1987) 43 Cal.3d 501, 510-511.)

Here, the private interest that is being affected is Mr. Jenkins' interest in applying the "authorized absence" exception to both the computation of sentence-reducing credits and classification credits alike. The risk of erroneous deprivation flows from the denial of these credits, through the application of CDCR's regulations, based on lack of assignment to a program. The dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official is reflected in the due process afforded an inmate in the calculation of classification scores. Finally, the government's interest is in maintaining the security of the prison.

> But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context. In *Haines v. Kerner, supra*, the state prisoner asserted a "denial of due process in

> the steps leading to [disciplinary] confinement." 404 U.S., at 520. We reversed the dismissal of the § 1983 complaint for failure to state a claim. In *Preiser v. Rodriguez, supra*, the prisoner complained that he had been deprived of good-time credits without notice or hearing and without due process of law. We considered the claim a proper subject for a federal habeas corpus proceeding.

(*Wolff v. McDonnell* (1974) 418 U.S. 539, 557.)

The standard of review applicable to decisions denying good time is constitutionally mandated, and has been defined by the United States Supreme Court as requiring support by some evidence in the record:

> We now hold that revocation of good time does not comport with "the minimum requirements of procedural due process," *id.*, at 558, unless the findings of the prison disciplinary board are supported by some evidence in the record.

(*Superintendent, Massachusetts Correctional Institution v. Hill* (1985) 472 U.S. 445, 454.)

The U.S. Supreme Court also noted that while due process requirements allow for a certain degree of flexibility where government action is concerned, a prisoner has a liberty interest in good time credits, and a strong interest in assuring that his credits are not arbitrarily confiscated:

> The requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action. E. g., *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily. 418 U.S., at 561.

(*Id.* at p. 454.)

At the same time, the high court recognized the interests of the institution that should be accommodated:

> This interest, however, must be accommodated in the distinctive setting of a prison, where disciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Ibid.* Consequently, in identifying the safeguards required by due process, the Court has recognized the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation. See, e. g., *Ponte v. Real*, 471 U.S. 491 (1985); *Baxter v. Palmigiano*, 425 U.S. 308, 321-322 (1976); *Wolff v. McDonnell, supra*, at 562-563.

(*Id.* at pp. 454-455.)

The appellate court's finding that making a distinction between awarding "S" time against an inmate's sentence, and awarding time for classification points was "rational" is not the end of the analysis. To analyze a constitutional challenge to the facial validity of a prison policy, this court must determine whether the prison regulation and the governmental interest is "rational." This requires a further inquiry, which was explained in *Snow*, where a First Amendment challenge to the facial validity of a prison policy was claimed:

> In order to determine whether there is a rational connection between a prison regulation and a governmental interest justifying the regulation, a court must find the following: (1) the governmental interest is legitimate; (2) the governmental interest is neutral; and (3) the logical connection between the regulation and the interest is close enough to be rational and not arbitrary. (*Turner, supra*, 482 U.S. at pp. 89–90.)

(*Snow v. Woodford* (2005) 128 Cal.App.4th 383, 390.)

Indeed, the "rationality" of a rule identified in the third prong, that is, whether the connection between the regulation and the interest is close enough, can be contested factually:

> We disagree because Department must produce such evidence only in response to an inmate's evidence refuting the connection: "When the inmate presents sufficient (pre or post) trial evidence that refutes a common-sense connection between a legitimate objective and a prison regulation, ... the state must present enough counter-evidence to show that the connection is not so 'remote as to render the policy arbitrary or irrational.' [Citations.] On the other hand, when the inmate does not present enough evidence to refute a common-sense connection between a prison regulation and the objective that government's counsel argues the policy was designed to further, *Mauro* applies and, presuming the governmental objective is legitimate and neutral [citation], Turner's first prong is satisfied." (*Frost v. Symington* (9th Cir. 1999) 197 F.3d 348, 357.)

(*Id.* at p. 392.)

Had CDCR raised the existence of a logical connection between the regulation and the security interests of its prisons in the return it filed in the superior court, Mr. Jenkins could have presented evidence to refute the connection between average or above-average program performance and a resulting risk of diminished security. If he had been given that opportunity and had presented evidence sufficient to refute the "common sense connection," CDCR would have been required to present evidence to substantiate the historical fact: that inmates who perform in a work or educational program at an

average or above-average level, require less security and create less of a security problem in the institution.

In *Snow*, the connection between the inmate's interest and the government's interest was a matter of common sense, and the evidence relied on to refute it was insufficient:

> The evidence presented is insufficient to refute the common sense connection between sexually explicit images and the sexual harassment of female correctional officers and other security problems. Accordingly, Department was not required to present evidence to substantiate the connection between sexually explicit images and its legitimate interests.

(*Ibid.*)

But here, because CDCR did not make this claim in its return, Mr. Jenkins was deprived of his opportunity to refute it, and to have an evidentiary hearing at which CDCR would have been required to prove the historical facts necessary to substantiate its claim. The appellate court's failure to apply forfeiture here has denied Mr. Jenkins his right to procedural due process. For that reason, this court should apply forfeiture.

V. THE REGULATIONS, SECTIONS 3045.3 AND 3375, DO NOT HAVE A RATIONAL BASIS, AND ARE INVALID

A. The "S" time regulation, as written, applies to sentence-reducing credits for inmates assigned to a program, but does not apply to classification points

The deference built into the "some evidence" standard of review has the effect of limiting judicial intervention to demonstrated instances of actions by

prison officials that are arbitrary, capricious, irrational, or an abuse of the discretion granted those given the responsibility for operating prisons. (See *In re Wilson, supra,* 202 Cal.App.3d at p. 667.) Indicia of arbitrariness, capriciousness, irrationality or abuse of discretion includes unfairness. In fact in *People v. McKee, supra,* 2010 Cal. LEXIS 586, this court seemed to equate unfairness with arbitrariness in its equal protection analysis of Proposition 83.

Although a claim that Mr. Jenkins is entitled to Penal Code section 2933 sentence-reducing credits is not directly at issue in this appeal, it is impossible to evaluate his claim to classification points, without considering his corresponding claim to section 2933 credits as well, because it is in this comparison that the unfairness becomes apparent. An award of "S" time to Mr. Jenkins is also relevant because "S" time was held to apply to both sentencing-reducing credits and to classification points in the *In re Player* analysis.

CDCR contended that assignment to a program was necessary before it could award classification points, so the inmate could demonstrate average or above-average performance in the program. The problem with this analysis is that under the regulations, if an inmate was assigned to a program, but excused for all but one day of the six-month evaluation period, he would still receive the classification points, even though CDCR had been deprived of that same opportunity to observe the inmate perform in the program and about which CDCR complains in this case.

At the heart of this controversy is the CDCR regulation which allows CDCR to award "S" time for authorized absences from work or educational program assignments:

> (a) S" time shall be noted on timekeeping documents for an authorized absence from the inmate's work/training assignment by order of the prison administration. The inmate shall receive sentence-reducing credit commensurate with their designated work group. Inmates who are removed from their work/training assignment for the reasons noted below, shall retain their existing work/training group status unless otherwise impacted by a; [sic] classification committee or disciplinary action.

(Cal. Code Regs., tit. 15, §3045.3, subd. (a).)

Here, regardless of whether "S" time applies to classification points, Mr. Jenkins was not assigned to a program, which the regulation appears to require. The appellate court here distinguished the award of "S" time from the award of classification points, for two reasons: first, Mr. Jenkins was "unassigned;" and second, the purposes of Penal Code section 2933 credits and classification points are different. While Mr. Jenkins' entitlement to Penal Code section 2933 credits was not litigated in the appellate court, it should be considered here, to observe the inconsistencies in the application of the regulations.

First, although Mr. Jenkins habeas petition pressed his claim for classification points, he claimed his entitlement to "S" time as well. (1 C.T. p. 3.) Moreover, in its return, CDCR denied the Mr. Jenkins was entitled to be assigned

to a sentence-reducing credits program, and further denied the he was entitled to classification points for that same time period. The superior court agreed. But in its appeal, CDCR did not directly raise the award of sentence-reducing credits as an issue. CDCR simply argued that "S" time cannot be applied to classification points. (R-AOB, p. 22.) And without deciding whether Mr. Jenkins was entitled to the award of "S" time for sentence-reducing credits, the appellate erroneously reversed the entire order of the superior court granting the habeas relief. The appellate court refused to uphold the award of classification points to Mr. Jenkins during this same period because he was not assigned to a program. (*In re Jenkins*, 175 Cal.App.4th at p. 320.) Yet the appellate court does not appear to have decided whether Mr. Jenkins was entitled to "S" time for sentencing reducing credits despite the fact he was not assigned to a job or educational program. (Cal. Code Regs., tit. 15, §3045.3, subd. (a).)

At the same time, Mr. Jenkins did not receive classification points under the classification regulations specifically because he was not assigned to a program. (Cal. Code Regs., tit. 15, § 3375.4, subd. (a)(3)(B).) In short, both regulations required assignment to a program before classification points, or "S" time for sentencing reducing credits, could be awarded.

The regulation, CDCR, and the appellate court, improperly focused on the requirement that the inmate be assigned to a program. Under the regulation as written, an individual who has been assigned to a program, but misses 99% of

one six-month period (or more under *Player*) because of an excused absence, will receive full Penal Code section 2933 credits as "S" time, while an individual who is not assigned, through no fault of his own, but wants to work, will not receive any "S" time. This regulation is then in conflict with Penal Code section 2933, which requires prisoners who are willing to work receive some sentencing reducing credits: "every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to a full-time assignment or is assigned to a program for less than full time" is entitled to no less than one-to-two worktime credits. (§ 2933, subd. (a).) So the "S" time program-assigned inmate who does not work due to an excused absence can receive more credits than the unassigned inmate who is willing to work, but through no fault of his own, has not been assigned. There is no rational basis for this distinction.

The "S" time regulation, as written, applies only to "sentence reducing" credits, and does not explicitly include classification points. So, while the Legislature wanted to make sure some credits were awarded for sheer willingness of an inmate to work, without reference to whether the inmate had been unassigned to a program, CDCR appears to be willing to treat an entire absence period as "S" time, so long as the inmate has been assigned to a program. But here, CDCR did not extend the award of "S" time to Mr. Jenkins, who has not yet been assigned to a program, through no fault of his own. The

regulation, as written, does not require that. There is definitely dissonance between the statute and the "S" time regulation because of the regulation's focus on assignment to a program.

B. CDCR's Requirement that an Inmate be Assigned to a Program as a Condition Precedent to the Award of "S" Time or Classification Points Exceeds the Scope of the Legislative Delegation Because It Does Not Limit the Classification Decision to "Available Information"

The power to classify prisoners was delegated to CDCR by the Legislature in Penal Code section 5068. The regulation promulgated to implement this statutory delegation is section 3375 (Cal. Code Regs., tit. 15, §3375.) That regulation includes a provision that restricts the classification decisions to "available information."[10]

When an individual is "unassigned," through no fault of his own, his performance in that job or program is information that is "unavailable." Because the information on which the additional two points of credit could be earned was not "available," Mr. Jenkins' classification score should have been scaled to reflect the unavailability of those points, rather than being used to penalize Mr. Jenkins for failing to earn those points, through no fault of his own. Even giving affect to CDCR's claim that the purpose of classification points is to maintain prison security, and that purpose is different from awarding section 2933 credits

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[10] "Classification committee decisions shall be based on evaluation of available information and mutual agreement of the committee members." (Cal. Code Regs., tit. 15, §3375, subd. (f)(7).)

toward release, it is unfair to penalize Mr. Jenkins for failing to earn points that he was unable to earn, through no fault of his own. Unfairness is an indication of arbitrary, capricious or irrational action.

C. The Legislature's Original Purpose of Awarding Sentence-Reducing Credits Was to Reward Performance, Not Willingness to Participate

The Court of Appeal found that the purpose of the sentence reducing credits award was to provide an incentive to participate, and to reward the willingness to participate, and distinguished this purpose from the purpose of awarding classification points. A review of the history of section 2933 demonstrates, however, that rewarding willingness to participate was not the Legislature's original intent in enacting section 2933.

First, to determine the legislative intent of the statute, the language of the statute itself is the primary source. If the statute itself is clear and unambiguous, the legislative intent analysis is complete.

Section 2933, subdivision (a), provides:

> It is the intent of the Legislature that persons convicted of a crime and sentenced to the state prison under Section 1170 serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections. Worktime credits shall apply for performance in work assignments and performance in elementary, high school, or vocational education programs.

(Pen. Code §2933, subd. (a).)

The Legislature explicitly declared that worktime credits apply for "performance," and not willingness.

The early case law confirmed that "active participation" was the policy objective of section 2933:

> To serve their rehabilitative purpose, section 2933 conduct credits must be earned through active participation in qualifying programs. (See § 2933, subds. (a) and (b).)

(*People v. Caruso* (1984) 161 Cal.App.3d 13, 20.)

The context in which section 2933 was enacted also explains the Legislature's intent. The Attorney General has conceded that the purpose of enacting section 2933 was to provide credits for "performance" in work assignments and educational programs:

> As the Attorney General's opinion explained, "In 1982 the Legislature substantially revised the system of credits to reduce prison sentences. (Statutes of 1982, ch. 1234.) Section 2930 and 2931 were amended to phase out the use of good behavior and participation credits not to exceed one-third the sentence by limiting its application to those whose crimes were committed prior to January 1, 1983. Section 2933 was added to provide 'worktime credits' for a prisoner's performance in work assignments and educational programs. The sentence is reduced one day for each day of such performance." (70 Ops.Cal.Atty.Gen. 49, *supra.*) Section 2933, however, is expressly applicable only to those prisoners sentenced to determinate terms under Penal Code section 1170. (*Id.*, at p. 50.)

(*In re Monigold* (1988) 205 Cal.App.3d 1224, 1227.)

D. The Shift in Intent under Penal Code section 2933 Arose Because Fairness in the Operation of the Rehabilitation System Trumped the Need for Actual Performance

After *Monigold,* however, the debate over the intent of section 2933 began. Two conflicting lines of appellate court decisions emerged. The *Smith-Bender* line of decisions adhered to the view that actual participation was required before a prisoner could be awarded one-for-one credits. The *Carter-Reina* line of cases focused on an equal protection concern created by the regulation allowing for "S" time credits. The court found that the incentive for rehabilitation behind section 2933 was advanced by the appearance of fairness, so that an inmate was not prevented from earning credits by a nonadverse transfer.

What emerged from the conflict between the *Smith/Bender* and *Carter-Reina* line of cases, is the identification of the role "fairness" should play in furthering the goal of rehabilitation. The *Carter* court determined that CDCR was required to apply "S" time to section 2933 credits based on fairness:

> The policy behind the work/training incentive program is "to instill good work habits, teach marketable skills, improve [inmates'] reintegration into society and seek self-sufficiency for the prisons." (Cal. Dept. of Corrections Classification Manual, ch. 800, § 801, subd. (b).) This policy is not furthered by denying Carter worktime credits because he did not have a pass, any more than if he were prevented from working because of inclement weather or some other administrative necessity, circumstances for which he would be entitled to credits. Also, the regulations recognize that an inmate should not lose other privileges associated with his group A-1 classification simply because he is unable to participate in the work/training program. Section 3044 specifically provides: "An inmate diagnosed by a physician and/or psychiatrist as totally

> disabled and therefore incapable of performing a work/training assignment . . . will remain in group A throughout the duration of their total disability." (Subd. (B)(1)(D).)

(*In re Carter* (1988) 199 Cal.App.3d 271, 275.)

Even though the purposes of Penal Code section 2933 credits was to teach skills that would further the rehabilitation of prisoners, the fairness of the program was held to be a more significant consideration than participation in the program:

> However, in *In re Carter, supra*, the court found the *Smith* analysis of equal protection "wanting in its generality." (*In re Carter, supra,* 199 Cal.App.3d at p. 274.) The court pointed out that the *Smith* court reasoned that the purposes of one-for-one credits could not be served unless a prisoner actually participated in the program. However, the *Smith* court made no reference to the regulation allowing many categories of inmates to earn "S" time credits even though unable to work. In agreement with the *Carter* court, we find the *Smith* analysis of equal protection inadequate since it ignored the fact that the CDC rules treat similarly situated groups differently. Further, the *Carter* court found our reasoning in *In re Reina, supra,* 171 Cal.App.3d 638, to be persuasive. In *Reina* we rejected the argument that work must be done in order to earn credit and reasoned that the incentive for rehabilitation behind Penal Code section 2933 was advanced by the appearance of fairness when the inmate is not prevented from earning credits by a transfer beyond his control. (*Id.*, at p. 644.) Thus, the *Smith/Bender* analysis, which seems to tie credits to actual labor, is faulty.

(*In re Randolph* (1989) 215 Cal.App.3d 790, 794-795.)

In short, it was not the original intent of the Legislature that sentence-reducing credits be awarded for mere willingness to work. That came about because the focus on program assignment resulted in unequal treatment, and an appearance of unfairness.

Without a decision from this court resolving the conflict in the two lines of cases, the *Carter/Reina* analysis then seemed to become the prevailing view which was adopted in *Player*.

Nonetheless, some courts appear to continue to operate under the impression that Penal Code section 2933 credits require actual full-time performance, unaware of the operation of "S" time:

> One-for-one "worktime" credits under section 2933 are awarded for actual full-time performance in a work, training or education program established by the Department of Corrections. (§ 2933, subd. (a).)

(*People v. Ramos* (1996) 50 Cal.App.4th 810, 820, n. 11.)

In fact, the Third District Court of Appeal has adhered to this view, and explained the purpose of the credits awarded under section 2933 is to instill skills necessary for productive citizenship and to achieve prison self-sufficiency, and that the reduction of credits is a privilege, incident to rehabilitation, which provides an incentive to participate in rehabilitative programs. This harkens back to the view expressed in the pre-*Carter/Reina* line of cases:

> Rehabilitation as an object of imprisonment has to an extent been restored by section 2933. However, rehabilitation is no longer achieved directly through the fixing of sentences. Under indeterminate sentencing, the possibility of a short sentence theoretically provided a direct "incentive" to behave well; a showing of reformation would lead to a shorter sentence. (See *In re Lynch*, *supra*, 8 Cal.3d at pp. 416-417.) Now rehabilitation is not a goal of sentencing per se. Even under section 2933, it is the Legislature's intent that prisoners serve the sentence imposed by law. (§ 2933, subd. (a).) Instead, rehabilitation is to be accomplished through specific full-time work and education programs designed to instill the

> skills necessary for productive citizenship and to achieve prison self-sufficiency, incident to which prisoners may, as a privilege, have their fixed sentences reduced in accordance with a specific statutory formula. The possibility of reduced sentences provides an incentive to participate in rehabilitative programs, though it no longer specifically provides an incentive to "behave well."

(*People v. Caddick* (1984) 160 Cal.App.3d 46, 52-53.)

The regulation's reliance on assignment to a program is inconsistent with Penal Code section 2933. Assignment to a program is not reasonably necessary to effectuate the purpose of the statute.

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

(Gov. Code § 11342.2.)

The decision of the appellate court here, as set forth below, conflicts with Penal Code section 2933:

> Thus, in contrast to worktime credits, work/school performance points do depend on actual assignment to a qualifying program and do reward actual performance in such a program, namely, performance that is average or better.

(*In re Jenkins, supra,* 175 Cal.App.4th at 320.)

Just as fairness trumped the Legislature's intent that credits be awarded for performance, so should it trump CDCR's intention that classification points be awarded for performance. The award of "S" time should apply to authorized

absences of inmates who are willing to work, regardless of whether the inmate has yet been "assigned," and classification points should be awarded to an inmate who is willing to work, regardless of whether the inmate has yet been "assigned." In other words, being unassigned to a program, but willing to work, should be treated as an authorized absence for purposes of awarding classification points and sentence-reducing credits, because fairness in the operation of the rehabilitation programs is essential for their success.

E. The Sentence-Reducing Regulation and the Classification Point Regulation, as Interpreted and Applied by CDCR, Are Invalid

Mr. Jenkins was unassigned to a program due to a nonadverse transfer, and under CDCR's regulation 3375.4, subdivision (a)(3)(B), he was therefore not entitled to classification points. (Cal. Code Regs., tit. 15, §3375.4, subd. (a)(3)(B).) It is, however, the validity of this regulation that is at issue:

> Where the Legislature has delegated to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only where the agency has clearly overstepped its statutory authority or violated a constitutional mandate." (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 355-356 [185 Cal.Rptr. 453, 650 P.2d 328], fn. omitted.)

(Stoneham v. Rushen (1984) 156 Cal.App.3d 302, 308.)

Whether the regulation is arbitrary is within the scope of judicial review:

> Under the statutory scheme, review of the sufficiency or qualitative substance of the regulation is delegated to the executive branch and, in the absence of arbitrariness is beyond the scope of judicial oversight. (See *Ford Dealers Assn. v. Department of Motor Vehicles,*

supra, 32 Cal.3d at p. 355; see also Gov. Code, § 11350, subd. (c).) [footnote omitted]

(*Id.* at 308-309.)

Such an analysis proceeds as follows: first, are the regulations contained in sections 3045.3 and 3375.4 within the scope of the authority conferred; second, are the regulations reasonably necessary to effectuate the purpose of the statute; and third, are the regulations reasonably necessary, thereby requiring this court to defer to the expertise of CDCR, or is the regulation arbitrary and capricious, thereby permitting this court to substitute its own independent policy judgment for the agency's policy judgment?

It is clear that the appellate court's analysis failed to distinguish between the standard of review relating to the evidence, and the standard of review applicable to an administrative regulation. There is no factual contest here because CDCR failed to plead and prove the basis for the claim it makes here. The issue the becomes whether the regulations themselves are arbitrary and capricious.

The classification score dictates the security level at which an inmate is housed. The question is whether successful "programming" is a valid proxy variable for an inmate being less of a security risk than he was before he was successful in his programming, and whether the willingness to "program," without a performance component, is not a valid proxy variable for an inmate being less

of a security risk. The appellate court's opinion implicitly finds such relationships to exist by means of speculation, rather than proof.

This court should find the governmental interest in refusing to award sentence-reducing credits and classification points to inmates who are willing to work, but unassigned through no fault of their own, to be de minimis, and therefore outweighed by the inmate's interest in fairness.

There is a second reason why sentence-reducing credits and classification points should not be calculated differently, and should not rest on the inmate's status as "unassigned:" it simply cannot be the case that the governmental interest in public safety implicated by the release of an inmate into society at large early because he was willing to work, but was absent from work with authorization, or was willing to work and was simply not assigned to a program, is less compelling than CDCR's interest in maintaining prison security at a level that would be compromised by awarding an inmate two classification points in a six-month period, and which will only change his security classification within the institution in limited circumstances[11].

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[11] There are four classification levels to which the classification points apply, and here, the award of two extra points would only lower an inmate's placement level if his score, before the new classification credits were awarded, was 20, 29, 53, or 54:

> (a) Except as provided in section 3375.2, each inmate shall be assigned to a facility with a security level which corresponds to the following placement score ranges:

F. Although the Appellate Court Failed to Conduct the Analysis Mandated by Penal Code sections 2600 and 5068, Doing So Here Confirms that CDCR's Regulations on "S" time and Classification Credits Are, in Part, Invalid

The appellate court here did not engage in the proper inquiry regarding the regulations which are the subject of this appeal. The appellate court should have considered whether the regulations are in conflict with the statute, and whether they are reasonably necessary to effectuate the purpose of the statute:

> Government Code section 11342.2 declares: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Repeatedly, we have held that administrative regulations which exceed the scope of the enabling statute are invalid and have no force or life. (See *Bright v. Los Angeles Unified Sch. Dist.* (1976) 18 Cal.3d 450, 459-464 [134 Cal.Rptr. 639, 556 P.2d 1090]; *Cooper v. Swoap* (1974) 11 Cal.3d 856, 864-865 [115 Cal.Rptr. 1, 524 P.2d 97]; *California Welfare Rights Organization v. Brian* (1974) 11 Cal.3d 237, 239, 242-243 [113 Cal.Rptr. 154, 520 P.2d 970]; *In re Jordan* (1972) 7 Cal.3d 930, 939 [103 Cal.Rptr. 849,

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> (1) An inmate with a placement score of 0 through 18 shall be placed in a Level I facility.
>
> (2) An inmate with a placement score of 19 through 27 shall be placed in a Level II facility.
>
> (3) An inmate with a placement score of 28 through 51 shall be placed in a Level III facility.
>
> (4) An inmate with a placement score of 52 and above shall be placed in a Level IV facility.

(Cal. Code Regs., tit. 15, §3375.1.)

500 P.2d 873]; *Mooney v. Pickett, supra*, 4 Cal.3d 669, 675-676, 681.)

(*Woods v. Superior Court of Butte County* (1981) 28 Cal.3d 668, 680.)

Here, the statute delegating authority to CDCR to promulgate regulations regarding inmate classification provides that:

> The Director of Corrections shall cause each person who is newly committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person's life such as the existence of any strong community and family ties, the maintenance of which may aid in the person's rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.
>
> Upon the basis of the examination and study, the Director of Corrections shall classify prisoners; and when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable.
>
> As used in this section, "reasonable" includes consideration of the safety of the prisoner and the institution, the length of term, and the availability of institutional programs and housing.

(Pen. Code § 5068.)

By statute, another limit on this power has been imposed by the Legislature:

> A person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests.

(Pen. Code § 2600.)

The test this court adopted for making a Penal Code section 2600 determination was borrowed from the United States Supreme Court decision in *Turner v. Safley* (1987) 482 U.S. 78:

> In holding that a prison regulation is valid if it "is reasonably related to legitimate penological interests" (*Turner, supra,* 482 U.S. at p. 89 [107 S.Ct. at p. 2261]), the United States Supreme Court mentioned four factors to be considered. First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." (*Id.* at p. 89 [107 S. Ct. at p. 2261].) Second, the court should consider "whether there are alternative means of exercising the right that remain open to prison inmates," in which case the court "should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.' " (*Id.* at p. 90 [107 S. Ct. at p. 2262].) Third is the "impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." (*Ibid.*) When such accommodation "will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." (*Ibid.*) Fourth, the "absence of ready alternatives is evidence of the reasonableness of a prison regulation," while "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable . . . ." (*Ibid.*)

(*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 131.)

Here the analysis does not move beyond the first step in the *Turner* test because CDCR has proved no valid, rational connection between the prison regulations requiring assignment to a program in order to award sentence-reducing credits and classification points and the legitimate governmental interest of prison security implicated by an award of two classification points.

In this case, CDCR has attempted to shift the attention away from the issue it lost in *Player,* that an annual review period should be construed as continuous, even if during one six-month portion the inmate was willing but unable to work through no fault of his own. In its place, CDCR has focused attention on the necessity for an inmate to have been assigned to a program before he could earn sentencing-reducing "S" time or classification points. This shift in emphasis does not defeat the prime directive of *Player*: that fairness furthers the governmental interest in the rehabilitation of inmates, and therefore CDCR's use of the assignment to a program as a means of defeating an inmate's claim to sentencing-reducing "S" time and classification points for his willingness to work is in conflict with that governmental interest. In balancing the unitary interest of the government and the inmates in fairness in the operation of rehabilitation programs, against the governmental interest in prison security that would be furthered by withholding two classification points because CDCR had no opportunity to observe the inmate's program performance during one six-month period, it is clear that the governmental interest in fairness outweighs the prison security interest in withholding two classification points. Fairness is essential; two classification points toward a security classification is a de minimis governmental interest that has not been demonstrated to be related to a legitimate penological interest.

CONCLUSION

For the foregoing reasons, this court should:

1. Apply the forfeiture doctrine and refuse to consider CDCR's justification for denying classification points based on its lack of opportunity to observe an inmate's performance because CDCR failed to plead and prove that justification in the superior court;
2. Find the decision of the appellate court was not supported by any evidence because CDCR failed to plead and prove its justification for requiring performance in a program before awarding classification credits;
3. Find that CDCR has not proved its justification for treating similarly situated groups differently and remand to the superior court to permit CDCR to amend its return, so that Mr. Jenkins can deny the justification allegation, and the superior court can hold an evidentiary hearing, or, find that denying Mr. Jenkins classification points for the 194 days he was unassigned due to a non-adverse transfer violates the equal protection clause of the California Constitution because CDCR's justification for the disparate treatment of similarly situated groups, even if proved, is not rational;

4. Find that denying Mr. Jenkins classification points for the 194 days he was unassigned due to a non-adverse transfer violates the due process clause of the California Constitution;

5. Find that regulations, as interpreted and applied by CDCR, have no rational basis;

6. Affirm the decision of the superior court and adopt the reasoning of the appellate court in *In re Player*; and

7. If this court does not affirm the decision of the superior court, it must remand to the appellate court to correct its order to the superior court to deny the habeas writ in toto, because the award of "S" time was not appealed by CDCR, and to direct the superior court to include in its order to CDCR that it is to award "S" time of 194 days to Mr. Jenkins to be applied toward his sentence-reducing credits.

DATED: February 3, 2010

Respectfully submitted,

Linnéa M. Johnson
California State Bar No. 93677

Central California
Appellate Program

2407 J Street, Suite 301
Sacramento, CA 95814
(916) 442-3792

Attorney for Appellant

Certificate of Appellate Counsel
Pursuant to rule 8.520(c)(1) of the California Rules of Court

I, Linnéa M. Johnson, appointed counsel for Harvey Zane Jenkins, hereby certify, pursuant to rule 8.520(c)(1) of the California Rules of Court, that I prepared the foregoing opening brief on the merits on behalf of my client, and that the word count for this brief is 13,994, which does not include the captions, cover or the tables. This brief therefore complies with the rule, which limits an opening brief on the merits filed in the California Supreme Court to 14,000 words. I certify that I prepared this document in WordPerfect X4 and that this is the word count WordPerfect generated for this document.

Dated: February 3, 2010

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Linnéa M. Johnson
Attorney for Harvey Zane Jenkins

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On February 3, 2010, I served the attached Petitioner-Appellee's Opening Brief on the Merits by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Christopher J. Rench, Esq.
Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

Harvey Zane Jenkins
H-90221
PO Box 7100 (SATF)
Corcoran, CA 93212

Lassen County Superior Court Clerk
for delivery to: Dawson Arnold, Commissioner
220 South Lassen Street, #6
Susanville, CA 96130-4390

Lassen County District Attorney
221 S. Roop Street
Susanville, CA 96130

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 3, 12010, at Sacramento, California.

_____
DECLARANT