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.	)	
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	)	

APPELLANT'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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

APPLICATION FOR LEAVE TO FILE OVERSIZED REPLY BRIEF ON THE MERITS

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Application for Leave to File Oversized Brief on the Merits

TO THE HONORABLE RONALD C. GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Harvey Zane Jenkins applies to this court for leave to file an oversized brief on the merits. Appellant's reply brief on the merits consists of 9,202 words, exclusive of captions and tables. Rule 8.520(c)(1) of the California Rules of Court provides that a reply brief on the merits shall not exceed 8,400 words if the brief is produced on a computer, and that the word count excludes the tables and word count certificate from the word count total.

Appellant hereby represents that this brief on the merits is approximately 800 words over the limitation specified in rule 8.520(c)(1). Appellant requests, pursuant to rule 8.520(c)(4), that this court permit appellant to file an oversized brief. Good cause to do so is shown by the following:

1. The reply brief exceeds, by approximately 800 words, the word count limit for a reply brief defined in rule 8.520(c)(1) of the California Rules of Court;

2. The reply brief included two additional new sections: first, a discussion of the issue on review as defined by this court, and the issue on review which CDCR recast and addressed in its Answer Brief on the Merits; and an introduction which placed CDCR's arguments in the context of the issues Mr. Jenkins framed pursuant to the issue on review as defined by this court;

3. The two new sections added 1,170 words to the length of the brief, and completely accounts for exceeding the word count limit;

4. These two new sections were necessary because: (a) CDCR attempted to recast the issue on which review was granted, and to thereby eliminate some of the sub-issues Mr. Jenkins had raised in his Opening Brief on the Merits, and (b) CDCR did not address the issues Mr. Jenkins raised, but framed its own issues, which did not correspond to Mr. Jenkins' contentions or the issue on review as framed by this court;

5. Counsel for Mr. Jenkins endeavored to be as succinct as possible in the preparation of this reply brief on the merits, but found the addition of the two new sections to be necessary to assist the court in placing CDCR's arguments in the context of the issues as Mr. Jenkins raised them;

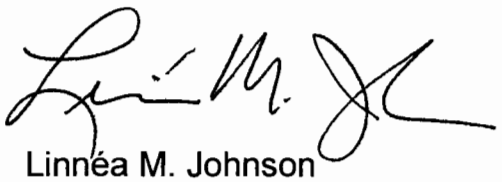
6. Due to the addition of the two new sections necessitated by CDCR's

approach to this grant of review, counsel for Mr. Jenkins was unable to condense his brief further without sacrificing content and analysis which counsel believes will assist the court in reaching its decision on this matter.

For the foregoing reasons, Mr. Jenkins requests that he be granted leave to file an oversized brief on the merits.

DATED: May 11, 2010

Respectfully submitted,



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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 May 12, 2010, I served the attached

APPLICATION FOR LEAVE TO FILE OVERSIZED REPLY 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.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 12, 2010, at Sacramento, California.

_____
DECLARANT

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APPELLANT'S REPLY BRIEF ON THE MERITS

THE DISPUTE OVER WHAT THE ISSUE PRESENTED IS

When this court granted Jenkins' petition for review, it framed the issue upon which review had been granted as:

> 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?

In its brief, CDCR represented the issue on review to be:

> Is the California Department of Corrections and Rehabilitation's (CDCR) denial of favorable classification points for work or school to a prisoner whose classification point-qualifying assignment was disrupted for a period due to a non-adverse transfer to another prison facility, arbitrary, capricious, and/or irrational in light of the award of work credits which reduced the prisoner's sentence for the same period of incarceration?

These are not the same issues. This court granted review on the broader questiond whether a prisoner who is the subject of a nonadverse transfer is entitled to classification credits, and did not limit the basis on which Jenkins could make his claim to classification points.

CDCR reframed the issue, restricting it to whether CDCR's denial of favorable classification points was arbitrary, capricious or irrational where work credits for the same unassigned period were awarded to reduce the prisoner's sentence. CDCR's reframed issue excludes any additional grounds upon which Jenkins' claim could be based, and includes a factual basis which is incomplete and therefore inaccurate. CDCR represented that the issue involved the transfer from one prison facility to another when there were two transfers involved here: the first, from Centinela to High Desert State Prison, where Jenkins was unassigned for 22 days, and the second within High Desert State Prison, where Jenkins was unassigned for 172 days. (1 C.T. p. 58.)

Accordingly, Jenkins will address the issue framed by this court based on the accurate and complete facts and will not restrict his briefing to the issue as reframed by CDCR.

INTRODUCTION

Initially, Jenkins has advanced several independent and free-standing theories to support his claim to favorable classification points for the time he was unassigned to a prison work program, through no fault of his own. Although each

theory utilizes its own standard of review, the showings required under the various theories overlap. Nonetheless, for clarity of analysis, it is important to deal with each claim separately, and to rely on cases that construe the error and prejudice showings related to the claim advanced on the same theory.

Jenkins first argued that the appellate court violated his state and federal due process rights when it allowed CDCR to raise, for the first time on appeal, an issue which CDCR did not plead in its return to Jenkins' habeas petition, and which Jenkins had no opportunity to contest in the superior court in his traverse or at an evidentiary hearing. The appellate court relied on that new claim in refusing to follow *In re Player* (2007) 146 Cal.App.4th 813, and in finding a rational basis for refusing to award "S" time for classification points, while allowing the award of these credits against an inmate's sentence.

CDCR did not respond to this due process claim. Instead, in its analysis of Jenkins' equal protection claim, CDCR argued that it did not forfeit the argument that performance in a program assignment demonstrates that the inmate poses less of a threat to the institution's security. (RABOM, p. 25.) Jenkins directs this court's attention to the due process deprivation he claimed based on procedural error, and not to the merits of the equal protection claim, which is the only context in which CDCR responded to this argument, and which will be dealt with in the analysis of the equal protection claim.

Second, Jenkins argued that the appellate court's decision reversing the superior court's order was not supported by any evidence, and was contrary to *In re Player*, *supra*. CDCR has not responded to the claim that the appellate court's decision was not supported by any evidence. Instead, CDCR has simply argued that its classification decision must be upheld unless it is shown to be arbitrary, capricious, or irrational, and here, it is not arbitrary to require an inmate to be assigned to, and performing in, a program, before reducing his classification score. (RABOM, pp. 4-15.) CDCR also asserted that it is not arbitrary or irrational for it to refuse to use work-credit eligibility as a basis for evaluating an inmate's threat to institutional security. (RABOM, pp. 15-22.)

Third, Jenkins claimed that denying his classification points for the days he was unassigned due to a non-adverse transfer violates the equal protection clauses of the state and federal constitutions. Here, CDCR argued that it had no obligation to produce evidence to sustain the rationality of its position and that Jenkins has the burden of disproving every conceivable rational basis CDCR could have. CDCR distinguished this court's decision in *People v. McKee* (2010) 47 Cal.4th 1172, arguing that in *McKee*, this court remanded for factual development only because the strict scrutiny test applied. (RABOM, p. 24.)

Fourth, Jenkins argued that the lack of evidence showing a logical connection between the regulations and legitimate governmental security interest constituted a substantive due process violation of the California Constitution.

CDCR negated numerous arguments Jenkins did not advance: that Jenkins has no federal or state due process interest in a classification score because inmates have no due process liberty interest in classification and housing decisions, and no state due process right in a particular classification score. Ultimately, however, CDCR acknowledged that this court has held that due process under the state constitution applies when a person is deprived of a statutorily conferred benefit, and that If due process is triggered, courts balance four factors to determine the protections necessary. (*People v. Ramirez* (1979) 25 Cal.3d 260, 268-269.) CDCR then asserted that Jenkins had failed to identify any statute entitling him to a particular classification score or to have his program performance or receipt of work credit considered as part of his classification calculation.

Fifth, Jenkins argued that sections 3045.3 and 3375 of CDCR's regulations do not have a rational basis and are invalid. CDCR's only response to this claim was offered in the context of its equal protection response, and misconstrued Jenkins' claim as being that section 3375.4 exceeded the scope of the enabling statute, Penal Code section 5068. CDCR urged this court not to consider the claim because it was not raised in the appellate court; however, CDCR did not claim that Jenkins' contention was beyond the scope of the question upon which review was granted by this court.

CDCR then concluded that Jenkins' position invites this court to micro-manage the prison system. Jenkins replies that the decision in *In re Player* did not involve any such judicial micro-management, but merely defined the limits of CDCR's regulations in guiding the exercise of its discretion.

I. The Appellate Court Denied Jenkins His Right to Due Process of Law under the State and Federal Constitutions When the Appellate Court Allowed CDCR to Raise a New Issue for the First Time on Appeal, and Found That Issue to Be the Basis for its Refusal to Follow *in re Player* (2007) 146 Cal.App.4th 813

In his opening brief, Jenkins argued that his due process rights were violated, under both the state and federal constitutions, when CDCR raised, for the first time on appeal, its new "rational basis 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. (AOBOM, pp. 9-14.)

The appellate court found this rational basis claim to be dispositive of all CDCR's claims on direct appeal. (*People v. Jenkins* (2009) 175 Cal.App.4th 300, 318-322.) Over Jenkins' objection to raising this new issue on appeal, the appellate court refused to find forfeiture because this was a question of historical fact and did not have to be determined based on evidence presented in the case. (*Id.* at p. 320.)

CDCR has simply adopted the appellate court's reasoning, arguing that "CDCR could have rationally determined that it will not issue favorable classification points for time when an inmate is unassigned to a program even if

that inmate receives work credit for the same time." This determination, according to CDCR, is rational and non-arbitrary, does not require fact-finding, and is therefore not subject to forfeiture. (RABOM, pp.25- 26.) Whether fact-finding is required is the dispositive issue on this procedural due process claim. The merits of the equal protection claim, as to whether the regulation is rational and non-arbitrary, is not the dispositive issue on the due process claim.

CDCR asserted that it raised, in its return, the issues Jenkins claimed were forfeited, and therefore forfeiture should not apply. But CDCR has only repeated the assertion that classification points should not be given because the points are used to determine the security level for placing an inmate within CDCR and within a specific prison. (RABOM, pp. 26-27.) Notably missing in this recitation from the record in the superior court is the claim which first appeared in the appellate court, and upon which CDCR prevailed: that actual performance in a job, school or vocational program is necessary to show that an inmate poses a reduced security risk so that his classification score should be reduced.

The claim CDCR did make was first made in its opening brief in the appellate court. (R-AOB, pp. 13-14.) There, CDCR claimed that it "has determined that an inmate's satisfactory performance in a program assignment is one way to demonstrate a lower security risk." (R-AOB, p. 13.) First, this contention does not claim that satisfactory performance in a program assignment is the only way an inmate can demonstrate a lower security risk. In fact, the

overall conduct of the inmate's behavior while incarcerated, which is reflected in his C-file, would give a much more complete picture of the inmate's security risk, and his performance in a program assignment would be merely one component of his C-file picture. Second, that claim was not supported by any authority that CDCR had made any such finding. Finally, because Jenkins had the burden to negative that claim, he was foreclosed from doing so in the superior court, through declarations or an evidentiary hearing, because it was first raised in the appellate court, and not in the superior court.

Jenkins therefore had no opportunity to refute this claim with any evidence, even though the appellate court relied on it in refusing to follow *In re Player, supra,* 146 Cal.App.4th 813. It is the prejudice to Jenkins' opportunity and ability to refute, with evidence, this new claim, raised for the first time on appeal, that constitutes a due process deprivation.

The due process deprivation here is based on the following: first, the state and federal equal protection analyses requires Jenkins to negate every conceivable rational basis for the disparate treatment, even though the basis was not mentioned in the legislative history, and may have been based on nothing more than speculation; second, the state due process claim requires Jenkins to contest the "closeness" of the connection between the regulation and prison security to prove the lack of rationality; and third, in failing to apply the waiver/forfeiture rule of state appellate procedure, which would have prevented

CDCR from raising a new issue for this first time on appeal, and in allowing a new issue to be raised for the first time on appeal, the state appellate court denied Jenkins his state and federal due process rights to negate the proffered rational basis claim in an evidentiary hearing, a determination that is central to the disposition of the state and federal equal protection claims, the state due process claim, and the challenge to the validity of the regulations, sections 3045.3 and 3375.

A. As a General Rule of State Appellate Procedure, a New Argument Cannot Be Raised for the First Time on Appeal

1. The Rule of Forfeiture, and its Concomitant Rule of Appellate Procedure, Generally Bars a Party from Raising, for the First time on Appeal, an Issue which was Not Raised in the Trial Court

The first step in the due process deprivation analysis is to establish that the rule of forfeiture, and its attendant rule of appellate procedure, apply under state law. This court has recognized forfeiture and the rule of appellate procedure banning raising a new issue for the first time on appeal. It has further recognized that the rule should be applied unless an exception exists. (*People v. Friend* (2009) 47 Cal.4th 1, 29, n. 13.)

The appellate rule against raising new issues on appeal has been applied in the equal protection arena. (*Brandon S. v. State of California ex rel. Foster Family Home etc. Ins. Fund* (2009) 174 Cal.App.4th 815, 831-832.) Here, Jenkins did raise the equal protection claim in the superior court through his

reliance on *In re Player*. CDCR did not, however, raise its rational basis claim in that court. This was prejudicial because the appellate court relied on that justification when it refused to follow *In re Player* and found, instead, that the rational basis claim was central to its disposition of the state and federal equal protection and state due process claims. In so doing, the appellate court deprived Jenkins' of his opportunity to respond to the rational basis claim, and to develop any evidence to attenuate the rational basis claim.

2. The Exceptions to the General Rule of Appellate Procedure Do Not Apply Here

The second step in the analysis is to recognize that there are narrow exceptions to forfeiture and to the appellate procedure rule. The first exception arises where a new point of law is decided after the trial court proceedings. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654, fn. 3.) No new point of law is involved here.

A second exception applies where the new arguments are based upon factual or legal standards no different from those the trial court was asked to apply, but raise the additional legal consequence of violating the Constitution. (*People v. Farley* (2009) 46 Cal.4th 1053, 1081.) But the "general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial. (*Panopulos v. Maderis* (1956)

47 Cal.2d 337, 340-341 [303 P.2d 738].)" (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780.)

CDCR has argued that the relationship between observable and documented successful job performance and a lower security risk need not be proved in an evidentiary hearing, but instead, can be based on whether CDCR "could have rationally determined" that it would not issue favorable classification points for time when an inmate is unassigned to a program, even when that inmate receives work credit for the same time. (RABOM pp. 25-26.) For that reason, CDCR implicitly contends that this was not an issue that it had to raise in the trial court. Assuming, arguendo, that CDCR is correct, that is not end the of the analysis. Even if CDCR was not required to empirically prove that relationship in an evidentiary hearing, Jenkins had the burden to negative this claim, and he had the right to do so empirically in his traverse, and in an evidentiary hearing. If CDCR is allowed to raise, for the first time on appeal, a claim that Jenkins is required to negate factually, it forecloses Jenkins from shouldering his burden, and refuting the claim.

The most persuasive way for Jenkins to negate a speculative claim, and to show that it was attenuated, would have been to include an allegation in his traverse, denying the facts underlying the rational basis claim, and to introduce empirical evidence showing attenuation by way of declaration attached to the traverse, or by testimony in an evidentiary hearing. It is possible that Jenkins

may have had to make a motion to engage in discovery in order to challenge the rational basis. But because respondent did not plead this rational basis in the trial court, Jenkins was deprived of his opportunity to negate and refute respondent's rational basis claim. This was a significant deprivation because all his claims, save for this procedural due process claim, turn on whether there is a rational basis for the disparate treatment. It is also significant because the rational basis test is an extremely low threshold for CDCR to satisfy, and an extremely high threshold for Jenkins to refute. (See *Abebe v. Mukasey* (9th Cir. 2009) 554 F.3d 1203, 1208.) So while raising this new issue on appeal presented no problem for CDCR, it created significant problems for Jenkins, whose burden it was to show how attenuated work performance points are from maintaining prison security.

To avoid this infringement, the appellate court should have remanded the matter to the superior court for further proceedings in which Jenkins could negate the new claim and prove that the connection between prison security and job performance is so attenuated that it is irrational.

B. Permitting CDCR to Raise a New Issue for the First Time on Appeal, and Relying on that New Issue to Reverse the Superior Court's Decision, Was Prejudicial and Denied Jenkins his Procedural Due Process Rights

Because Jenkins could not, within the superior court's habeas proceeding, contest the issue on which the appellate court reversed the superior court, he

suffered prejudice. This form of "prejudice" has been recognized in the Ninth Circuit Court of Appeals as the source of the rule of appellate procedure prohibiting the raising of a new issue on appeal. In order to allow a new issue to be raised on appeal, the court should find that the opposing party would not have tried his case any differently had the issue been raised below in the first instance:

> The evident principle underlying this exception is that the party against whom the issue is raised must not be prejudiced by it. Thus, if he might have tried his case differently either by developing new facts in response to or advancing distinct legal arguments against the issue, it should not be permitted to be raised for the first time on appeal. [footnote omitted]

(*United States v. Patrin* (9th Cir. 1978) 575 F.2d 708, 712.)

Here, before basing its decision on the new issue, the appellate court should have made a finding that Jenkins would not have litigated his habeas writ petition differently if CDCR had pleaded and proved the rational basis for the disparate treatment. The appellate court made no such finding before deciding the matter on the new issue, concluding that this was "historical fact" which need not be proved.

Because the appellate court here failed to make the findings required to raise a new issue on appeal, and because Jenkins would have proceeded differently in the superior court if the rational basis claim had been made there, this court should remand to the superior court for further proceedings.

II. The Standard of Review the Appellate Court Was to Apply to the Decision of the Superior Court Granting Jenkins' Habeas Writ Was Whether the Superior Court's Ruling Was Supported by Adequate Evidence, and the Appellate Court Here Applied the Wrong Standard of Review to the Wrong Decision and Refused to Follow *In re Player*; Had it Applied the Correct Standard of Review, It would Have Affirmed the Superior Court's Decision

A. The Decision of the Superior Court Was Supported by Some Evidence, and that is the Proper Standard of Review Under *In re Wilson* (1988) 202 Cal.App.3d 661

In his opening brief, Jenkins argued that because he prevailed in the superior court, and CDCR appealed, the standard of review the appellate court was to have applied was whether there was adequate evidentiary support for the superior court's ruling, citing *In re Wilson* (1988) 202 Cal.App.3d 661, 666-667. (AOBOM, pp. 14-17.) CDCR argued that because the parties in *In re Wilson* had agreed that the "some evidence" test in *Hill* governed, the appellate court did not consider the nature of the test or whether it was proper to apply to a classification score. (RABOM p. 6.) CDCR is incorrect.

The appellate court in *Wilson* did consider what standard of review applied to a classification decision; moreover, it also viewed the question of what standard of review should be applied to be an issue of first impression, likely to recur. In fact, this was the reason the court proceeded to decide the case, even though Wilson had been paroled, and the issue could have been found to be moot. (*In re Wilson, supra*, 202 Cal.App.3d 661, 665, n. 2.)

The appellate court then adopted a standard of review, and applied it to its review of the trial court's decision reviewing the prison's classification decision:

> The trial court concluded that appellants had acted arbitrarily and capriciously in designating Wilson as an "R" suffix inmate. Our only function is to decide whether that ruling finds adequate evidentiary support.

(*Id.* at 666.)

The *Wilson* court did acknowledge its task was made easier by the parties agreement as to the appropriate standard of review, but it is not accurate to say that the court did not decide what the standard of review should be. *(Id.* at p. 670.) *Wilson* has been the published authority on this issue since 1988. But here the appellate court applied a different standard of review to the decision of CDCR, and not to the decision of the superior court. (*In re Jenkins, supra,* 175 Cal.App.4th at p. 315.) This was prejudicial error because its application of the standard of review accorded no deference to the trial court, substituted its own judgment for that of the trial court, and decided the issues on a claim that was not first presented to the trial court. The appellate court should have remanded, as this court did in *People v. McKee*, *supra*, 47 Cal.4th 1172.[1]

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[1] *McKee* is cited here for its use of remand to address whether certain legislative distinctions were supported factually. Because *McKee* is an equal protection claim, it is not substantively relevant here. However, in this case, as in *McKee*, remand is necessary because the parties and the courts did not understand the burden of proof. (*People v. McKee, supra,* 47 Cal.4th at p. 1208.)

B. The Superior Court Properly Relied on the *Player* Decision to Award Jenkins' "S" Time for Sentencing Reducing Credits and Classification Credits, and the Basis for the Appellate Court's Rejection of *Player* Is Flawed

Instead of remanding, the appellate court found the issue to be a pure question of law, and refused to follow *In re Player*, *supra,* because that decision did not articulate the extent of the difference between work-time credits, and classification points. (*In re Jenkins, supra*, 175 Cal.App.4th at p. 318.)

The substantive flaw in the appellate court's entire analysis is its focus on CDCR's need for information based on actual performance in a program as a prerequisite to adjusting a classification score. While that theory may have a certain intuitive appeal, the regulations, pursuant to which this distinction is made, do not support it.[2]

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[2] Penal Code section 5068 is the statutory authority pursuant to which the classification regulations were promulgated by CDCR. (Cal. Code Regs., tit. 15, §§ 3375, and 3375.4, subd.(a).) Contrary to CDCR's claim that section 5068 does not restrict CDCR's ability to determine an inmate's threat to institutional security, section 5068 states the classification and placement is to be based on "all pertinent circumstances of the person's life" 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 . . . . " The Legislature defined "reasonable" as "including consideration of the safety of the prisoner and the institution, the length of term, and the availability of institutional programs and housing." Here, CDCR transferred Jenkins within HDSP, removing him from housing where he had a program assignment, to housing where he had no program assignment for 172 days. This internal transfer was "non-adverse." CDCR further concedes that it is its goal to house each inmate at the lowest custody level consistent with his classification. (RABOM, p. 13.) This concession is based on the Legislature's declaration of its intent that "the department house each inmate at the lowest custody level consistent with his or her classification . . . ." (Stats. 1980, ch. 1122, § 2, p. 3620.)" (*Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 731.)

The first fallacy in the appellate court's analysis is its focus on actual performance in a program as a condition precedent to awarding classification points. An inmate can earn classification points without CDCR having information on successful performance in an program. If an inmate's work program is interrupted, but the interruption is not the fault of the inmate, the period is to be treated as "continuous" for purposes of awarding classification points. (Cal. Code Regs., tit. 15, § 3375.4, subd.(a).) Favorable classification points, under this regulation, are not to be awarded to an inmate who is not "assigned" to a program, but favorable classification points can be awarded to an inmate who is absent from the program, through no fault of his own, as long as he was assigned on the first day of the six month period. (Cal. Code Regs., tit. 15, § 3375.4, subd.(b). This appears to be, for classification purposes, the equivalent of awarding "S" time, for purposes of sentence-reducing credits, for the excused absence of an inmate who has been assigned to a program. (Cal. Code Regs., tit. 15, § 3045.3, subds.(a) and (b)(13). So CDCR's claim that performance in the program is a prerequisite to the award of classification points is only true for unassigned inmates, and is not true for inmates who have been assigned. The award of "S" points and classification points, interpreted in this way, follow parallel courses. Accordingly, the rational basis here cannot depend on awarding classification points without program performance information; instead, CDCR must show that the prerequisite of program performance is rational to apply to

those who are unassigned to a program, but not to those who are assigned and absent. And that is where the rational basis claim breaks down.

Instead of making that showing, however, CDCR argues that program assignments are not always immediately available following each transfer. That does not, however, justify denying classification points because a program assignment is unavailable, while granting classification points to an inmate who is assigned but excused from the assignment for the same duration as the inmate who is unassigned. In fact, denying classification points to an inmate because he is unassigned effectively amounts to a presumption that an inmate who is not assigned to a program would not have earned classification points, even though the inmate's C-file might show an inmate's long history of earning the maximum possible classification points in every program in which he was placed.

Second, the court in *Player* analyzed the problem from the perspective of CDCR's interpretation of a review period which was considered "continuous" for purposes of the reclassification annual review period referred to in subdivision (a) (Cal. Code Regs., tit. 15, § 3375.4, subd.(a).) CDCR's position in *Player*, as it was described by the *Player* court, seems to be the same as it is here:

> . . . even though it is required to award Player appropriate worktime (incentive) credits for those times he was granted "S" time based on fairness under the regulations as interpreted by the case law (See *Carter, supra,* 199 Cal.App.3d at pp. 274-277), the same rationale does not apply to the award of "favorable points" for average or above-average performance in work, school or vocational program.

(*In re Player, supra,* 146 Cal.App.4th at p. 825.)

CDCR's position is that CDCR will not grant classification points for a six-month period if the inmate is not assigned to a work program at the inception of a six-month period in the annual review period, and that determination is made without regard to the nature of the interruption that caused the inmate not to be in a qualifying assignment on the first day of the following six-month period under review. The *Player* court held that the plain language of the regulation, section 3375.4, subdivision (a), refers to the period of review, which, in most cases, is one year, comprised of two six-month periods. The *Player* court further held that the plain language of the regulation meant that if such one-year period is interrupted through no fault of the inmate, the entire period is considered "continuous" for the annual review. (*Id.* at p. 826.)

The *Player* court found this interpretation to be consistent with the policy of annually reviewing objective information and criteria for the ultimate goal of placing inmates in the lowest custody level corresponding to their case factors and public safety, in conjunction with the goal of instilling good work habits, teaching marketable skills, improving reintegration into society, and seeking self-sufficiency for the prisons. (*Ibid.*)[3]

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[3] The *Player* court found some support for its interpretation of the regulations in the CDCR Operations Manual which was in effect during Player's classification point periods. The *Player* court noted that the DOM was revised on July 26, 2004. It is that revised DOM that was in effect during Jenkins' classification point periods. And while the language making an interrupted period "continuous" was eliminated from the DOM 61020.19.3, the regulation, which this provision of the DOM implements, has not been changed.

Neither Player nor Jenkins were assigned to qualifying programs at the beginning of each of the challenged six-month periods. In *Player*, the inmate was nonetheless awarded "S" time credits for those periods he was unassigned. Here, the superior court ordered that Jenkins receive "S" time against his sentence, even though he was not assigned to a program, and CDCR did not appeal that credits award. CDCR concedes that it had to issue "S" to Jenkins. (RABOM pp. 2, 15, n. 4.)

In *Player*, CDCR argued it was required to award Player appropriate worktime credits based on fairness under the regulations, but the same rationale did not apply to classification points for program participation. (146 Cal.App.4th at p. 825.) Again, both regulations require program assignment as a prerequisite to the award of "S" time for sentence reduction, and for the award of classification points. But in *Player*, CDCR had conceded "S" time should be awarded, even without a program assignment and even though it is required under the statute; similarly, CDCR has effectively made the same concession here, because it did not appeal the award of "S" time awarded here by the superior court.

Third, even if the appellate court in this case correctly faulted *In re Player* for failing to give the appropriate weight to the security concerns implicated by the award of classification points without having actual program performance, the appellate court's opinion suffers from a similar defect: it fails to give the appropriate weight to the security of the public at large which is implicated by

reducing the sentences of inmates for "S" time. In short, the appellate court has found the security of the institution justifies the denial of classification points, but the safety of the people of California does not. This is both arbitrary and irrational because it exalts the safety of penal institutions over the safety of the people.

The appropriate comparison here is not between the award of classification points to inmates who have not actually performed in a program, as opposed to those who have, but rather between the award of points to inmates who have been assigned, but who have not performed in program, and those who have not been assigned and who have not performed in a program. But even viewing the comparison as made by the appellate court, the safety of the prison implicated by a two-point reduction in classification score is not a governmental interest that should surpass the safety of the public at large, and therefore cannot serve as a rational basis for allowing "S" time to reduce a sentence, but not allowing the functional equivalent of "S" time to reduce a prisoner classification score, particularly where lowering a classification score by two points will change a prisoner's security level in only a very limited number of circumstances.[4]

The appellate court here refused to follow *In re Player* because it determined that actual program performance was necessary before favorable

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[4] 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 19-20,28- 29, or 52-53. (Cal. Code Regs., tit. 15, §3375.1.)

classification points could be awarded. But because favorable classification points are awarded under the regulations without actual program performance, this court should reject the flawed analysis of the appellate court, and should adopt the better reasoning of *In re Player*.

III. Under the Equal Protection Clause of the United States Constitution, Jenkins must Show a Classification Whose Relationship to an Asserted Goal Is So Attenuated as to Render the Distinction Arbitrary or Irrational

As to the federal equal protection clause, Jenkins agrees that an equal protection claim must be upheld if there is any "reasonably conceivable" state of facts that can serve as a rational basis for the disparate treatment, as long as the rational basis furthers a legitimate governmental purpose. Accordingly, the United States Supreme Court has declared, in evaluating an equal protection claim of parties that did not involve a suspect class or fundamental interest:

> Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

(*Vance v. Bradley* (1979) 440 U.S. 93, 97, following *Massachusetts Board of Retirement v. Murgia* (1976) 427 U.S. 307.)

First, however, the similarly situated groups must be identified. CDCR has represented that Jenkins did not expressly identify the classification at issue. (RABOM, p. 22.) This is incorrect. The two similarly situated groups adversely affected were identified. (AOBOM, pp. 25-26.) They are two non-adverse transferees. One transferee is immediately assigned to a program, but missed 194 days due to an authorized absence. The other transferee remains unassigned for 194 days, through no fault of his own. The former will receive both classification points and sentence-reducing credits for the 194 days. He will

receive "S" time toward his sentence-reducing credits under section 3045.3, subdivision (b)(13), and classification points under section 3374.5, subdivision (a). The latter, in contrast, will receive no sentence reducing credits or classification points for that period, under the regulations, because they require that the inmate be assigned to a program. It appears, however, that if the inmate perseveres and is successful on habeas, CDCR will not appeal the order directing it to award "S" time to reduce a sentence.

Despite CDCR's claim to the contrary, it did acknowledge the classification Jenkins identified, although it was buried within its briefing on the equal protection claim:

> Jenkins further suggests that CDCR lacks a rational basis because inmates who are assigned to a program, but receive an authorized absence from the assignment, will receive a classification score reduction for the absent time, but those who are unassigned will not. (Opening Brief at p. 26.)

(RABOM, pp. 23.)

CDCR's refutation of the equal protection claim follows:

> But as discussed, performance is required before a classification score can be reduced. (Cal. Code Regs., tit. 15 § 3375.4, subd. (A)(3).) Thus, an inmate who is absent from an assignment may not receive favorable classification points because he or she is not performing in the assignment. (*Ibid.*)

(RABOM, pp. 23-24.)

CDCR's response is inaccurate. It asserts that an inmate who is absent from an assignment may not receive favorable classification points because he or

she is not performing in the assignment. But the regulation does not say that. Section 3375.4, subdivision (a)(3)(B), states that "Favorable points shall not be granted for average or above average performance for inmates who are not assigned to a program." This means favorable points can be granted for average or above average performance to inmates who are assigned to a program. The focus of the regulation is on "assignment" to a program as a prerequisite for earning classification points. When performance is interrupted, the performance will nonetheless be considered continuous for purposes of awarding favorable classification points.

An excused absence of 193 days would still enable an inmate assigned to a program to receive favorable classification points because the review period is one year, and the performance is therefore deemed continuous thought the two six-month review periods. But an inmate who is unassigned to a program for the same, or a lesser number of days, would receive no classification points if he was unassigned to a program on the first day of the review period.

It is clear that the focus here is not on performance in a program, but on assignment to a program. CDCR must then articulate the rational basis for denying favorable classification points based on an inmate being unassigned to a program through no fault of his own, and awarding them to another inmate who was assigned, but absent from the program for the same amount of time. Because CDCR has failed to address the equal protection claim as framed by

Jenkins, Jenkins must now anticipate and refute "every conceivable rational basis" for this disparate treatment.

To prove rationality, the state must articulate a "reasonably conceivable state of facts" that could provide a rational basis for the classification, even if those facts were not articulated at the time the statute was adopted. (*Heller v. Doe* (1993) 509 U.S. 312, 320.)

Respondent's proffer of the rational basis for the legislative choice does not have to be based on empirical data or any other facts. It can be based on mere speculation:

> Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, *supra*, at 485, quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L.Ed.369, 31 S.Ct. 337 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations -- illogical, it may be, and unscientific." [citations omitted.]

(*Id.* at 320-321.)

It is Jenkins' burden to negative every conceivable rational basis: "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." (*Madden v. Kentucky* (1940) 309 U.S. 83, 88.) In *Vance*, the high court translated this burden into convincing the court that "the legislative facts on which the classification was based could not reasonably be conceived to be true by the governmental decisionmaker." (*Vance*

v. Bradley, supra, 440 U.S. at p. 111.) In this mandatory retirement age challenge, "appellees were required to demonstrate that Congress has no reasonable basis for believing that conditions overseas generally are more demanding than conditions in the United States and that at age 60 or before many persons begin something of a decline in mental and physical reliability." (*Vance v. Bradley, supra*, 440 U.S. at p. 111.)

But even the standard of rationality must find some footing in the realities of the subject addressed by the legislation:

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 535 (1973). Furthermore, some objectives -- such as "a bare . . . desire to harm a politically unpopular group," *id.*, at 534 -- are not legitimate state interests. See also *Zobel, supra*, at 63.

(*City of Cleburne v. Cleburne Living Ctr.* (1985) 473 U.S. 432, 446-447.)

Moreover, if an examination of the circumstances demonstrates that the proffered justification could not have been a goal of the regulation, then this court should not presume that the objectives now being articulated are the actual purpose of the regulation:

> In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they "could not have been a goal of the legislation." See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, n. 16 (1975).

(Minnesota v. Clover Leaf Creamery Co. (1981) 449 U.S. 456, 463, n. 7.)

Assuming, arguendo, that there is a rational relationship between prison security and average or better job performance, that is not the rational relationship that CDCR must show here. Instead, the rational relationship shown must be between assignment to a program and institutional security. In other words, is it rational to impute a lower security risk to an inmate who has been assigned to a program, than to an individual who has not been assigned to a program, through no fault of his own? Program assignment, as CDCR concedes, it exclusively within its own powers. Accordingly, the relationship, for equal protection purposes, can be further refined. Is an inmate whom CDCR has assigned to a program less of a security risk than an inmate whom CDCR has not yet assigned to a program? Does assignment to a program make an inmate less of a security concern than an inmate who is not assigned, through no fault of his own?

Since regulations, rather than legislation, are involved here, Jenkins contends that the relationship between assignment to a program and the security of the institution is so attenuated that it could not be a rational basis for the disparate treatment of the assigned and unassigned inmates.

Despite the fact that Jenkins was denied his opportunity to prove this in the trial court and to marshal any and all evidence to prove that attenuation, and assuming this court does not find this to be a due process violation, this court can

still evaluate the equal protection claim and find no rational basis for the disparate treatment of these two similarly situated groups.

IV. CDCR Denied Jenkins His Right to Due Process of Law under the California Constitution, Article I, Section 7, When it Relied on its Regulations to Deny Favorable Classification Points to Jenkins

In his opening brief on the merits, Jenkins argued that the lack of evidence showing a logical connection between the regulations and a legitimate governmental security interest constituted a substantive due process violation under the California Constitution. CDCR acknowledged that this court has held that due process under the state constitution applies when a person is deprived of a statutorily conferred benefit, and that If due process is triggered, courts balance four factors to determine the protections necessary. (*People v. Ramirez* (1979) 25 Cal.3d 260, 268-269.) CDCR then asserted that Jenkins had failed to identify any statute entitling him to a particular classification score or to have his program performance or receipt of work credit considered as part of his classification calculation.

A. Because Freedom from Arbitrary Adjudicative Procedures Is a Substantive Element of One's Liberty, Jenkins Has a Fundamental Interest in Promoting Accuracy and Reasonable Predictability in Government Decision-making

CDCR's claim that a statutorily created right or interest is a prerequisite to claim the protection of the California Constitution's due process clause reflects a misunderstanding of this court's state constitutional due process jurisprudence. "The California test for due process violations is slightly different from that used by the United States Supreme Court." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 755, citing *Ramirez*.) This court described the difference in approach, and

the reasons for it, in *Ramirez*, where this court rejected, for state due process analysis, the federal approach to due process because it focuses on a due process "liberty interest," such as that created by a statute, to the exclusion of the fundamental values of promoting accuracy and reasonable predictability in government decision-making that underlie the state due process clause. (*People v. Ramirez, supra,* 25 Cal.3d at p. 267.)

Numerous appellate courts, including those that authored the decision upon which respondent relies, have interpreted this to mean that no due process protection is required unless a statutory interest is identified.(*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1071.)

These courts have also concluded that the balancing test for the state and federal due process analysis is almost identical:

> Comparatively, other than the addition of the dignity factor, the *Ramirez* balancing test for determining what procedural protections are warranted, given the governmental and private interests involved, is essentially identical to that employed under the federal analysis.

(*Ibid.*)

The claim that the only way to show an interest or benefit subject to due process analysis is by statute ignores portions of *Ramirez* in which this court recognized that under the California Constitution "freedom from arbitrary adjudicative procedures is a substantive element of one's liberty" so that "when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in

being treated with respect and dignity.'" (*Hernandez v. Department of Motor Vehicles* (1981) 30 Cal.3d 70, 81, fn. 12.)

This basis for finding state due process protection, where federal due process would not apply, has been recognized in at least one case by this court, where a client sought damages caused by his attorney from the Client Security Fund (CSF) of the State Bar. The CSF was created by Business and Professions Code section 6140.5, which conferred complete discretion on the CSF to administer the funds, deciding who should receive them, and in what amount.

> . . . under the federal analytical approach the statute conferred no property or liberty interest sufficient to invoke the procedural protections of the due process clause, while under our state analytical approach the individual nevertheless retained a liberty interest in being free of arbitrary adjudicative procedures in order to ensure the decision maker (the State Bar) acted within its discretion in a non-discriminatory and nonarbitrary manner. (*Saleeby v. State Bar, supra*, 39 Cal.3d at p. 568.)

(*Ryan v. California Interscholastic Federation-San Diego Section, supra,* 94 Cal.App.4th at p. 1070.)

Under the regulations, CDCR has complete and unbridled discretion to deny an unassigned inmate classification points. CDCR is able to do this because under its own regulations, earning classification points requires assignment to a program, and CDCR decides who is assigned to a program. Because CDCR moved Jenkins from one part of High Desert State Prison (HDSP), where he was assigned, to another part of HDSP, where he was unassigned for 172 days, CDCR was able to deny Jenkins his classification

points for the unassigned time. However, even if Jenkins' statutory interests are unaffected by actions taken by CDCR under its regulations, Jenkins has a due process interest in the non-arbitrary determination of prison classification points.

B. Jenkins Has an Interest in his Classification Score that Was Created by Statute

Assuming, *arguendo*, that the *Ryan* line of cases is correct, and that Jenkins must show that he has an interest or benefit in his classification score that was created by statute, he can do so. Penal Code section 5068 delegates to the Director of CDCR the authority to classify prisoners and directs that the prisoner shall be assigned to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other factors makes this placement unreasonable. A "reasonable" placement includes consideration of the safety of the prisoner and the institution, the length of the term, and the availability of institutional programs and housing. CDCR has also conceded that its goal in the classification process is to "house each inmate at the lowest custody level consistent with his or her classification." (RABOM, p. 13.)

The bulk of the unassigned time here, 172 days, was a transfer within a prison, and not from one prison to another. CDCR moved Jenkins from housing at HDSP where he was assigned to a program, to other housing in HDSP, where he was not assigned to a program, for a period of 172 days. This transfer was nonadverse; moreover, because CDCR moved him from housing where he had been assigned to a program, to housing within the same institution where he

remained unassigned for a period of 172 days, the transfer violated his statutorily created right to a placement that considers the availability of institutional programs under Penal Code section 5068 in making the assignment.

Jenkins had another statutorily created interest. Under Penal Code section 2600, CDCR could deprive him of rights only if the deprivation was reasonably related to legitimate penalogical interests. Depriving Jenkins of his statutorily created interest in participating in a work program by transferring him out of a program assignment, and into non-assigned status is not reasonably related to legitimate penalogical interests.

CDCR contends that it is actual performance in a job that demonstrates that an inmate deserves a lower classification store. But CDCR did not deny Jenkins his classification points based on not having performance data. It denied Jenkins his classification points because CDCR had not assigned Jenkins to a program in which he could perform a job. It is a catch 22.

C. Jenkins Has an Interest in his Classification Score that Was Created by Regulation Enacted Pursuant to Statute

A finding that alters an inmate's conditions of confinement to his detriment by subjecting him to placement in a segregated housing unit under sections 3315, 3317, and 3330, of Title 15 of the California Administrative Code was found by this court to trigger state constitutional due process protection in *In re Jackson* (1987) 43 Cal.3d 501, 511. The *Jackson* court also found that there was a risk of

erroneous deprivation of an inmate's interests, and that either of these interests was sufficient to trigger the state constitution's due process clause protection.

Here, Jenkins' interest in his classification score was created by regulations, sections 3375 and 3375.4, enacted pursuant to Penal Code section 5068. CDCR has conceded that these regulations were enacted pursuant to section 5068, but contends that section 5068 does not place any limits on CDCR's ability to assess security level based on program performance, and does not confer any benefit to be classified in a particular manner. (RABOM, pp. 5.)

CDCR is wrong. Penal code section 5068 does place limits on CDCR.

D. The Regulations, Sections 3045.3 and 3375, Do Not Have a Rational Basis, and Are Invalid

In his opening brief, Jenkins demonstrated that there was no rational basis for awarding "S" time to reduce an inmate's sentence, even when the inmate had not yet been assigned to a program, while denying classification points to an inmate who had not been assigned to a program, through no fault of his own. Because this inequity was the product of CDCR's construction of its own regulations, Jenkins included in his showing of a lack of a rational basis for this outcome, the fact that the regulations themselves lack a rational basis, and are, therefore, invalid as well.

CDCR makes only two points on this issue. First, CDCR argues that it expressly put its governing regulations at issue, so this court should reject Jenkins' forfeiture argument. (RABOM, p. 27.) Second, CDCR then argues that

because it had relied on its government regulations in its return, and Jenkins did not challenge their validity in his petition, the claim was not timely made and should not be considered by this court. (RABOM, pp. 27-28, n. 10.)

Jenkins' forfeiture argument is predicated on the appellate court's identification of a rational basis that CDCR did not plead or argue in the superior court. CDCR's claim, therefore, that it put its regulations "at issue" in the superior court is non-responsive, because the extent to which the rational basis the appellate court identified was the product of the regulations was not at issue in the superior court.

Jenkins' attack on the regulations is simply this: the "S" time regulation, as written, applies to sentence-reducing credits for inmates assigned to a program. Nonetheless, CDCR has, in direct contradiction of its own regulation, extended those credits to inmates who have not been assigned to a program, but who are willing to work, and has implicitly done so here because CDCR opposed the award of "S" time for sentencing reducing credits in the superior court, but did not raise that issue in its direct appeal. This could be because Penal Code section 2933 requires "every prisoner to have a reasonable opportunity to participate in a full-time credit qualifying assignment in a manner consistent with institutional security and available resources." It could also be because that is how the case law and the *Player* court have construed section 2933. In either case, CDCR has

not revised its regulation, and instead either adheres to an invalid regulation, or, disregards it, as it has here and in *Player*.

The classification regulation also requires assignment to a program in order to earn points, but, in allowing an excused absence from the program, allows the absent inmate to be awarded classification points. This means that the person assigned but justifiably absent from his work assignment for 172 days earns classification points by having the review period deemed to have been "uninterrupted," while, a person unassigned for 172 days, earns no classification points. It cannot be said, therefore, that the distinction is justified by some relationship between performance in a program and a lower security risk. The showing would have to be that it is rational to award classification points to an inmate who is "assigned" to a program, but has 172 days of excused absence, while denying classification points to a person who is unassigned for 172 days, through no fault of his own. To this analysis, CDCR had advanced no response.

V. This Court's Adoption of the Reasoning of In re Player Will Not Place it in the Position of Micro-Managing the Prison

Jenkins has not asked this court to order CDCR to disregard its security and classification determinations or to micro-manage the prison system. This claim is reductio ad absurdum, an attempt to discredit Jenkins' position by showing that it leads to an untenable conclusion. It does not.

Jenkins asks this court to perform one of the functions for which it was created: to make sure CDCR properly interprets and applies its own regulations

in a constitutional manner, that strikes the proper balance between the governmental interests in treating inmates fairly and securing the institution. This court's adoption of the reasoning of *In re Player* will accomplish that, without jeopardizing prison security, and without placing this court in the position of micro-managing the prison system.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the appellate court.

DATED: May 12, 2010

Respectfully submitted,

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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 9,202 words, which does not include the cover or the tables. This brief therefore does not comply with the rule, which limits a reply brief on the merits filed in the California Supreme Court to 8,400 words, and I am filing with this Reply Brief on the Merits a Motion for Leave to File an Oversized Brief. I certify that I prepared this document in WordPerfect X4 and that this is the word count WordPerfect generated for this document.

Dated: May 12, 2010

_____
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 May 12, 2010, I served the attached Petitioner-Appellee's Reply 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.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 12, 2010, at Sacramento, California.

_____
DECLARANT