In the Supreme Court of the State of California

In re

HARVEY ZANE JENKINS,

On Habeas Corpus.

Case No. S175242

Third Appellate District, Case No. C059321
Superior Court of California, County of Lassen Case No. CHW-2321
The Honorable Dawson Arnold, Court Commissioner

ANSWER BRIEF ON THE MERITS

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COURT RULES

ISSUE PRESENTED

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?

STATEMENT OF THE CASE AND FACTS

In 2005, inmate Harvey Jenkins was transferred to High Desert State Prison, where he was unassigned to a training or work program for 22 days. (Clerk's Transcript (CT) at pp. 49, 58.) Jenkins was subsequently transferred to Facility B at High Desert State Prison and went unassigned to a program for 172 days. (CT at p. 49.) Jenkins admittedly was not performing in a program assignment during these two periods of time. (CT at pp. 1-18.) Jenkins's transfers were non-adverse because they were not to a higher security facility based on his actions. (CT at p. 48.)

In 2006, Jenkins appeared before the High Desert State Prison classification committee for his annual review hearing. (CT at p. 43.) The committee evaluated Jenkins's classification score, which reflects the security level needed to safely house him. (*Ibid.*) The committee denied Jenkins favorable classification score points for the time when he was unassigned to a program. (CT at pp. 38, 43, 48-52.) The committee reduced Jenkins's classification score based on the time he was performing in a program. (*Ibid.*) The committee also reduced Jenkins's score because he had remained disciplinary-free during the entire year. (*Ibid.*)

Jenkins filed a petition for writ of habeas corpus, claiming that he should receive two additional favorable classification points and "S" time for the time when he was not performing in a program. (CT at pp. 1-18.)

"S" time is sentencing-reducing work credit an inmate may earn despite not participating in a job or program. Relying on *In re Player* (2007) 146 Cal.App.4th 813, the superior court determined that Jenkins should receive "S" time or work credit because he was unassigned to a program through no fault of his own. (CT at pp. 79-80.) The Court of Appeal in *Player* noted that work credit and classification points are different, but nonetheless held that an inmate who is issued "S" time or work credit must also receive a corresponding classification score reduction. (*In re Player*, *supra*, 146 Cal.App.4th at pp. 827-829.) Following this reasoning, the superior court determined that because Jenkins should have received "S" time, his classification score had to be reduced accordingly. (CT at pp. 79-80.) CDCR appealed the superior court's order regarding Jenkins's classification score reduction, but not the issuance of "S" time.

The Court of Appeal reversed the superior court's order, holding that the *Player* court erroneously linked work credit and classification decisions. (*In re Jenkins* (2009) 175 Cal.App.4th 300, 320.) The court held that "the *Player* court was mistaken when it asserted that worktime credits, like work/school performance points 'reward an inmate's work/school behavior' and that worktime credits like work/school performance points, 'depend upon the inmate's status as assigned to a credit-qualifying work, school, or program.'" (*Ibid.*) Rather, classification score points "applied in determining an inmate's classification score are entirely different" from work credit because "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." (*Id.* at pp. 319-320.) The Court of Appeal also held that "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 assignment is

attributable to the inmate or the department." (*Ibid.*) This Court granted Jenkins's petition for review to resolve the disagreement between the courts in *Player* and *Jenkins*.

SUMMARY OF ARGUMENT

Classification decisions must be upheld unless arbitrary, capricious, or irrational. Jenkins maintains that because he was unassigned through no fault of his own and was provided work credit for the time he was unassigned, it is irrational and arbitrary to not reduce his classification score. CDCR, however, has rationally determined that without assignment to, and performance in, a program, it does not have a basis to observe and evaluate whether an inmate is a reduced security risk. Thus, if an inmate is unassigned to a program, CDCR cannot safely lower an inmate's classification score based on program performance, even if the inmate was not at fault for the lack of assignment. Further, classification and work-credit decisions involve different interests, purposes, and legislative mandates. The purpose of a classification score is to provide CDCR a mechanism to determine an inmate's threat to institutional security. And the Legislature has left classification decisions to CDCR's broad expertise and discretion in matters of institutional security. In contrast, the purpose of work credit is to provide inmates an incentive to rehabilitate, and work-credit decisions do not reflect an inmate's security risk or implicate CDCR's expertise in institutional security and prison administration. In fact, the Legislature has not indicated that credit eligibility should be a basis for CDCR to deem an inmate a reduced security risk. Given the differences between credit and classification and CDCR's need for program performance, the Court of Appeal properly held that it is not arbitrary or irrational to deny favorable classification score points to an inmate for time when he or she is not performing in a program, even if the unassigned

inmate is not at fault and is also issued work credit. Therefore, the appellate decision should be affirmed.

ARGUMENT

I. CDCR'S CLASSIFICATION DECISION MUST BE UPHELD UNLESS ARBITRARY, CAPRICIOUS, OR IRRATIONAL.

A. The Nature of Classification Points Versus Work Credit.

This case involves issuing favorable classification points and sentence-reducing work credit, or "S" time, to inmates. CDCR uses classification score points to reflect the security level needed to safely house an inmate. (Cal. Code Regs., tit. 15, §§ 3375.1, 3377.) The classification process is an objective system and takes "into consideration the inmate's needs, interests and desires, his/her behavior and placement score, in keeping with the department and institution's/facility's program and security missions and public safety." (Cal. Code Regs., tit. 15, § 3375, subd. (b).) Upon entry into CDCR, an inmate's classification score is calculated based on a host of factors, including the inmate's commitment offense, sentence length, and any prior criminal history. (Cal. Code Regs., tit. 15, § 3375.3.) The classification score is subsequently adjusted up or down based on an inmate's program performance, disciplinary history, and periods of continuous minimum custody. (Cal. Code Regs., tit. 15, § 3375.4, subds. (a), (b).) A lower classification score indicates lesser security control needs, and a higher classification score indicates greater security control needs. (Cal. Code Regs., tit. 15, §§ 3375, subds. (b), (d), 3375.1, subd. (a).) As "a general rule, a prisoner's classification score is directly proportional to the level of security needed to house the inmate. For example, prisoners with high classification scores will be sent to prisons with higher levels of security." (*In re Richards* (1993) 16 Cal.App.4th 93, 95 fn. 1; Cal. Code Regs., tit. 15, §§ 3375, subd. (k),

3375.1, subd. (a).) Classification decisions are governed by Penal Code section 5068, which directs CDCR to examine each inmate newly committed to state prison, and "upon the basis of the examination and study, the Director of Corrections shall classify prisoners." The Legislature has not otherwise restricted CDCR's ability to determine an inmate's threat to institutional security. (Pen. Code, § 5068.)

The Legislature has established a different framework for inmates to earn sentence-reducing work credit. (Pen. Code, §§ 2930-2933.6.) These statutes offer "state inmates who participate in qualifying work, training and educational programs the privilege of earning 'worktime credit' against their sentences. Ordinarily, the maximum rate at which a prisoner may earn worktime credit is 50 percent, or one day's credit for each day's participation." (*In re Reeves* (2005) 35 Cal.4th 765, 768.) The Legislature has declared some inmates ineligible for work credit or only eligible for a reduced amount of credit. (*Ibid.*; Pen. Code, §§ 2933-2933.6.) Inmates may also forfeit earned work credit. (Pen. Code, § 2932.) Consistent with the work-credit statutes, CDCR has promulgated a regulation issuing inmates "S" time for periods of time when inmates are not at fault for not performing in a job or program. (Cal. Code Regs., tit. 15, § 3045.3, subd. (a); Pen. Code, § 2933; *In re Carter* (1988) 199 Cal.App.3d 271, 275-276; see also Cal. Code Regs., tit. 15, § 3043.2, subd. (c) [credit may not be denied or forfeited for failure to participate in a program for reasons beyond inmate's control].) Thus, "S" time is the issuing of sentence-reducing work credit to an inmate at his or her appropriate earning rate when the inmate is not performing in a job or program. In sum, classification scores reflect CDCR's assessment of an inmate's security risk, while work credits enable inmates to earn time off their sentence.

Following *Player*, Jenkins attacks CDCR's classification scheme on two grounds. First, he argues that because he was unassigned to a program

through no fault of his own, CDCR must deem him a reduced security risk and lower his classification score. Second, he asserts that because he should have received "S" time or work credit for the time he was not performing in a program, he is necessarily entitled to a lower security level. But under the applicable standard of review, as long as CDCR's decision is not arbitrary, capricious, or irrational, Jenkins is not entitled to relief.

B. Standard of Review.

Several appellate courts have held that a classification decision must be upheld unless the decision is arbitrary, capricious, or irrational. (*In re Farley* (2003) 109 Cal.App.4th 1356, 1361; *In re Wilson* (1988) 202 Cal.App.3d 661, 667; *In re Gatts* (1978) 79 Cal.App.3d 1023, 1033.) The Court of Appeal here similarly inquired as to whether CDCR's classification decision was arbitrary or irrational. (*In re Jenkins*, *supra*, 175 Cal.App.4th at pp. 317-321.) Jenkins also invoked this standard in his petition for review. CDCR agrees that the question before this Court is whether its decision was arbitrary, irrational, or capricious.

But invoking *In re Wilson*, Jenkins now submits that the some-evidence standard established in *Superintendent v. Hill* (1985) 472 U.S. 445 also applies to classification decisions.[1] In *Wilson*, the parties had agreed that the some-evidence test in *Hill* governed, and thus, the Court of Appeal did not consider the nature of the some-evidence test or whether it was proper to apply the test in the classification score context. (*In re Wilson*, *supra*, 202 Cal.App.2d at p. 666.) The United States Supreme Court developed the some-evidence test as a federal due process protection in the context of disciplinary proceedings where inmates lose work credit. (*Hill*,

[1] Jenkins suggests that the some-evidence standard applies to the superior court's decision, not an agency's decision; but the some-evidence test is a standard of judicial review applied to an agency's decision, not a lower court decision. (*Hill*, *supra*, 472 U.S. 445.)

supra, 472 U.S. at pp. 453-454.) Thus, the some-evidence test is a due process protection, not an independent standard of judicial review.

Jenkins, however, does not have a federal or state due process interest in a classification score, let alone a classification score calculated in a particular manner. Federal courts have uniformly found that inmates lack a due process liberty interest in classification and housing decisions. (*Moody v. Dagget* (1976) 429 U.S. 78, 87 fn. 9 [because Congress afforded prison officials complete discretion over classification decisions, "petitioner has no legitimate statutory or constitutional interest sufficient to invoke due process"]; *Meachum v. Fano* (1976) 427 U.S. 215, 223-225 [no due process right to particular security classification]; *Neal v. Shimoda* (9th Cir. 1997) 131 F.3d 818, 828 [same]; *Olim v. Wakinekona* (1983) 461 U.S. 238, 245 [no due process right to be housed at particular prison]; see also *Sandin v. Conner* (1995) 515 U.S. 472, 483-484 [liberty interest in prison context only arises when action "imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life."].) California courts have also determined that not every adverse decision by prison administrators invokes the contours of the federal due process clause. (*In re Johnson* (2009) 176 Cal.App.4th 290, 297-298.)

Further, Jenkins does not have a state due process right in a particular classification score. Under the state constitution, a "person may not be deprived of life, liberty, or property, without due process of law." (Cal. Const., art I, § 7, subd. (a).) This Court has held that due process under the state constitution applies when a person is deprived of a statutorily conferred benefit. (*People v. Ramirez* (1979) 25 Cal.3d 260, 268-269.) If due process is triggered, courts balance four factors to determine the protections necessary. (*Ibid.*) Thus, "[a]lthough under the state due process analysis an aggrieved party need not establish a protected property interest, the claimant must nevertheless identify a statutorily conferred

benefit or interest of which he or she has been deprived of to trigger procedural due process under the California Constitution and the *Ramirez* analysis of what procedure is due." (*Ryan v. Calif. Interscholastic Federation* (2001) 94 Cal.App.4th 1048, 1071; see also *Gresher v. Anderson* (2005) 127 Cal.App.4th 88, 105 [following *Ryan*]; *Burt v. Co. of Orange* (2004) 120 Cal.App.4th 273, 284 [same]; *Las Llomas Land Company v. City of L.A.* (2009) 177 Cal.App.4th 837, 855 [due process only protects "benefits conferred by statute"].) "The requirement of a statutorily conferred benefit limits the universe of potential due process claims; presumably not every citizen adversely affected by government action can assert a due process right; identification of a statutory benefit subject to deprivation is a prerequisite." (*Schultz v. Regents of the Univ. of Calif.* (1984) 160 Cal.App.3d 768, 786.)

Jenkins does not assert that he has been deprived of a statutory benefit. (Opening Brief at pp. 30-34.) Nor does he 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. (*Ibid.*) Rather, he only claims in a conclusory manner that his due process rights were violated and does not assert how his due process rights are implicated or what due process protections he should have received. (Opening Brief at pp. 31-34.) Regardless, the only statute addressing CDCR's classification duties is Penal Code section 5068. Section 5068 does not place any limits on CDCR's ability to assess Jenkins's security level based on program performance, nor does it confer Jenkins any benefit to be classified in a particular manner. Accordingly, Jenkins does not have a state due process right to receive a particular classification score.

Because Jenkins does not have a due process interest in a classification score, it is improper to import the some-evidence test—a due process protection—to the classification context. Further, due process is

flexible, and the nature of the interest involved determines the process due. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481; *Ramirez*, *supra*, 25 Cal.3d at pp. 268-269.) Unlike the disciplinary proceeding in *Hill*, Jenkins's sentence length and personal liberty are not at issue. Thus, even if Jenkins had a federal or state due process interest at stake, it would not follow that satisfying the some-evidence test is necessary to comport with due process.[2] Moreover, Jenkins only disputes CDCR's policy of requiring program performance for classification purposes and not equating work credit and classification score decisions. He does not dispute any factual findings made by the classification committee or that he was unassigned to a program for the time in question. Thus, his claim is not susceptible to review under the some-evidence standard.

Accordingly, the only question for this Court is whether it is arbitrary, capricious, or irrational for CDCR to deny favorable classification points to an inmate for the time he or she was not performing in a program even if the inmate was unassigned through no fault of his or her own and received work credit for the same time. As discussed below, CDCR's determination is not arbitrary.

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[2] In fact, Jenkins received advanced notice of the classification hearing, had an opportunity to be heard at the hearing, was informed of the classification committee's decision, and had a further opportunity to challenge the decision administratively. (Cal. Code Regs., tit. 15, § 3375.) That CDCR provides inmates these regulatory procedures during the classification process does not create a due process right since a state agency is permitted to institute procedures even when neither the federal or state constitution or a governing statute require such procedures.

II. IT IS NOT ARBITRARY FOR CDCR TO REQUIRE AN INMATE BE ASSIGNED TO, AND PERFORMING IN, A PROGRAM BEFORE REDUCING A CLASSIFICATION SCORE BASED ON PROGRAM PERFORMANCE.

Invoking *Player*, Jenkins argues that it is arbitrary and irrational to not reduce his classification score because he was unassigned through no fault of his own. (Opening Brief at pp. 35, 42-46, 52.) Jenkins claims that because the transfers were not his fault, CDCR does not have a valid security interest in requiring performance in a program as a basis to reduce his classification score. (*Ibid.*) Jenkins fails to demonstrate that CDCR's policy is irrational or arbitrary.

CDCR issues up to four favorable classification score points per year for "average or above *performance* in [a] work, school or vocational program." (Cal. Code Regs., tit. 15, § 3375.4, subd. (a)(3), italics added.) Thus, CDCR has determined that an inmate's satisfactory performance in a program assignment is one way to demonstrate a lower security risk. (*Ibid.*) The regulations are clear, however, that favorable classification score points "*shall not* be granted for average or above performance for inmates who are not assigned to a program." (Cal. Code Regs., tit. 15, § 3375.4, subd. (a)(3)(B), italics added.)

Because classification is a security determination, CDCR must exercise its institutional security expertise when making classification decisions. The United States Supreme Court has recognized that the "problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve the internal order and discipline and to maintain institutional security." (*Bell v. Wolfish* (1979) 441 U.S. 520, 547; *Jones v. North Carolina Prisoners' Union* (1977) 433 U.S. 119, 128, 132; *Procunier v. Martinez* (1974) 416 U.S. 396,

404-405.) Such considerations "are peculiarly within the province and professional expertise of correctional officers, and, in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." (*Pell v. Procunier* (1974) 417 U.S. 817, 827.) Thus, courts "must accord substantial deference to the professional judgment of prison administrators . . . ." (*Overton v. Bazzetta* (2003) 539 U.S. 126, 132.) California courts have also recognized the deference owed to the judgment and expertise of prison officials in matters of institutional security and prison administration. (See, e.g., *In re Johnson*, *supra*, 176 Cal.App.4th at p. 298; *Woods v. Horton* (2008) 167 Cal.App.4th 658, 673; *Wright v. State of Calif.* (2004) 122 Cal.App.4th 659, 669; *In re Collins* (2001) 86 Cal.App.4th 1176, 1182; *Small v. Super. Ct.* (2000) 79 Cal.App.4th 1000, 1013-1014; *In re Rhodes* (1998) 61 Cal.App.4th 101, 108; *People v. Torres* (1990) 218 Cal.App.3d 700, 706.)

Performance in a program provides CDCR a basis to evaluate whether an inmate is a lesser security risk. "Inmates must perform assigned tasks diligently and conscientiously. Inmates must not pretend illness, or otherwise evade attendance or program performance in assigned work and program activities, or encourage others to do so." (Cal. Code Regs., tit. 15, § 3041, subd. (a).) Inmates must timely report for their assignments and cannot leave a program assignment without permission from correctional officials. (Cal. Code Regs., tit. 15, § 3041, subd. (b).) Further, inmates must perform their work and program assignments in a safe manner and "must cooperate with the instructor or the person in charge, and must comply with instructions, and all requirements for participation in the assigned activity." (Cal. Code Regs., tit. 15, § 3041, subds. (c), (d).) Each inmate assigned to a program is provided a job description which establishes "the minimum standards of acceptable participation and

performance and the possible consequences of failure or refusal to meet the standards." (Cal. Code Regs., tit. 15, § 3040, subd. (i).)

If an inmate is not assigned to, and performing in, a program, CDCR does not have a basis to determine whether the inmate is complying with the program requirements and whether or not his or her program performance renders him or her a reduced security risk. (Cal. Code Regs., tit. 15, §§ 3041, 3375.4, subd. (a)(3)(B).) Thus, issuing favorable classification points without performance would lower an inmate's security level without proof that the inmate is in fact a reduced security risk. Therefore, it was not irrational here to deny Jenkins favorable classification points for the time when he was unassigned and not performing in a program. As the Court of Appeal below concluded, "the department could have rationally determined that an inmate who performs at average or above-average level in a work, school, or vocational programs requires less security than an inmate who performs below average or who has not demonstrated any performance in such a program." (*In re Jenkins*, *supra*, 175 Cal.App.4th at p. 320.)

Jenkins repeatedly argues that CDCR's decision was unfair. But Jenkins overlooks the fact that he does not have a right to receive or retain a program assignment, or to a classification score, let alone a classification score calculated in a particular manner. (Pen. Code, § 5068.) Jenkins also fails to appreciate that the classification score is a determination of an inmate's security risk. (Cal. Code Regs., tit. 15, § 3375, subd. (d).) Although Jenkins was unassigned due to non-adverse transfers, he was still not demonstrating through program performance that he was a lower security risk. If Jenkins's argument were accepted, CDCR would be forced to lower an inmate's security level without objective evidence that the inmate is successfully performing in a program and is therefore a reduced security risk. In essence, Jenkins asks the Court to require CDCR to

assume that had he been assigned to a program during the time in question, he would have performed adequately and thus showed that he is a lower security risk. But given the peculiar dangers and security risks involved in prison administration, it not arbitrary or irrational for CDCR to exercise its security expertise, refuse to make this assumption, and instead require performance in an assignment and compliance with the program's standards before lowering his security classification.

Further, CDCR's goal in the classification process is to "house each inmate at the lowest custody level consistent with his or her classification . . . ." (*Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 732, fn. 1; Cal. Code Regs., tit. 15, § 3375.) The determination not to award favorable classification score points if an inmate is unassigned to a program is not punitive since classification scores are not increased as a result of an inmate being unassigned. (Cal. Code Regs., tit. 15, § 3375.4.) Moreover, CDCR strives for every able-bodied inmate to participate in a work or program assignment, as successful program performance promotes the interests of both inmates and correctional staff. (Cal. Code Regs., tit. 15, § 3040, subd. (a).) But program assignments are not always immediately available for every inmate at every institution or at every facility within an institution. (See, e.g., Cal. Code Regs., tit. 15, § 3043.6, subd. (a)(3); see also *Cal. Correctional Peace Officers Ass'n. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 809-810, 822-823 [describing historic overcrowding in California's prisons].) And transfers, while at times disruptive to an inmate's programming and non-adverse, are part of the daily necessities of operating a prison system. (*In re Rhodes*, *supra*, 61 Cal.App.4th at pp. 101-106; *McKune v. Lile* (2002) 536 U.S. 24, 39-40 [inmates have no expectancy in remaining in a certain institution for duration of term of incarceration or in retention of access to programs]; Cal. Code Regs., tit. 15, § 3040, subd. (d) [operational needs may override a program

assignment].) Thus, as a result of the necessities of day-to-day prison management, inmates will at times be unassigned to a program. But this does not mean that it is arbitrary for CDCR to put security concerns first and not assume that an unassigned inmate would have performed adequately if assigned to a program. In fact, "central to all other correctional goals is the institutional consideration of internal security within the corrections facilities themselves." (*Pell v. Procunier, supra,* 417 U.S. at p. 823.)

Even if CDCR's decision were viewed as unfair, any such unfairness is not grounds for the judiciary to disregard CDCR's institutional security determination. (See *In re Johnson, supra*, 176 Cal.App.4th at p. 299 [fact that inmate was unhappy with decision made by prison administrators is not enough to invoke due process protections].) Prisons "by definition are places of involuntary confinement of persons who have demonstrated proclivity for antisocial criminal, and often, violent conduct." (*Hudson v. Palmer* (1984) 468 U.S. 517, 526.) Thus, courts defer to prison administrators "to make the difficult judgments concerning institutional operations . . . ." (*Jones, supra*, 433 U.S. at p. 128.) Given the Legislature's deference to CDCR to evaluate an inmate's security threat and CDCR's need to safely house thousands of felons in a uniform and consistent manner, it is not arbitrary for CDCR exercise its expertise, err on the side of caution, and put institutional security concerns ahead of other considerations when calculating classification scores.[3]

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[3] Jenkins attempts to minimize CDCR's security interest because only two classification points are at issue. (Opening Brief at pp. 23, 52.) The classification system, however, depends on an accurate assessment of each inmate's security risk, and every point reflects an inmate's security risk. (Cal. Code Regs., tit. 15, § 3375-3375.5.) While two additional favorable points may not immediately alter the level security needed to

(continued...)

Therefore, CDCR's determination that it cannot lower an inmate's security level without the inmate being assigned to, and adequately performing in, a program is not irrational. Rather, CDCR's decision is grounded in its expertise and discretion in classifying inmates, maintaining institutional security, and administrating the day-to-day operations of the prison system. Accordingly, the Court of Appeal properly determined that CDCR's classification decision was not arbitrary or irrational.

III. IT IS NOT ARBITRARY OR IRRATIONAL FOR CDCR TO NOT USE WORK-CREDIT ELIGIBILITY AS A BASIS FOR EVALUATING AN INMATE'S THREAT TO INSTITUTIONAL SECURITY.

Relying on the *Player* court's linking of work credit and classification, Jenkins maintains that it was irrational for CDCR to deny him favorable classification score points because he was also provided work credit for the time at issue. (Opening Brief at pp. 20-24, 26-28, 36-39, 45-49.) Put another way, Jenkins argues that because he could earn work credit, CDCR must necessarily deem him a reduced security risk. CDCR does not dispute that it had to issue Jenkins "S" time or work credit.[4] But as the Court of Appeal explained here, that fact does not render CDCR's classification decision irrational, and *Player* confused the concepts

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(...continued)
house an inmate, each favorable classification point issued may result in an inmate being assigned to a facility inconsistent with his or her actual security threat. (Cal. Code Regs., tit. 15, § 3375.1.) For example, if Jenkins were granted the two points, he would become eligible for a transfer to a lower security facility sooner then he would have if he did not receive the two points. (*Ibid.*)

[4] Jenkins argues that the Court of Appeal's reversal also overturned the superior court's finding that he must receive "S" time. Since CDCR did not appeal the superior court's determination regarding "S" time, the superior court's order regarding "S" time remains in effect.

of classification score points and sentencing-reducing work credit. (*In re Jenkins*, *supra*, 175 Cal.App.4th at pp. 319-320.)

A. Work Credit and Classification Serve Different Purposes and Involve Different Legislative Mandates.

The Legislature has enacted statutory schemes reflecting the distinctions between work-credit and classification matters. In the classification context, the Legislature has not placed any restrictions on CDCR's discretion to classify and house inmates, aside from requiring CDCR to house an inmate closest to his or her home when reasonable. (Pen. Code, § 5068; *In re Rhodes*, *supra*, 61 Cal.App.4th at pp. 101, 108.) Thus, the Legislature has afforded CDCR broad discretion in making classification decisions, and has not limited how CDCR determines the security level of an inmate's housing. (*Ibid.*; *People v. Lara* (1984) 155 Cal.App.3d 570, 576; *People v. Flower* (1976) 62 Cal.App.3d 904, 912-913.) In fact, the Legislature does not require the issuing of favorable classification score points at all, and certainly has not mandated or suggested that inmates who are willing to work and receive work credit, but unassigned through no fault of their own, should be deemed lower security risks. (Pen. Code, § 5068.) Instead, the Legislature left day-to-day classification decisions to the discretion and expertise of prison administrators. (*Ibid.*)

Further, CDCR created the classification system in order to help it evaluate the security risk of inmates housed in state prison. (Cal. Code Regs., tit. 15, §§ 3040, 3041, 3375, 3375.1, 3375.4, 3377.) The system was not created as an incentive for inmates to rehabilitate. (*Ibid.*) Rather, the classification system exists for CDCR to determine "the proper level of custody and place of confinement as well as for planning and budgeting considerations." (*Stoneham v. Rushen*, *supra*, 137 Cal.App.3d at pp. 731.) Thus, classification decisions are made for security purposes and require

CDCR to exercise its expertise in institutional security and prison management. (See *Bell*, *supra*, 441 U.S. at p. 547 [prison officials afforded substantial deference for institutional security matters].)

On the other hand, work credits serve a different purpose. In offering work credits, the Legislature identified its purpose as allowing inmates to obtain skills "necessary for productive citizenship and to achieve prison self-sufficiency," and to increase the possibility of an inmate's reintegration into society. (*People v. Caddick* (1984) 160 Cal.App.3d 46, 52-53; *In re Mabbie* (1984) 159 Cal.App.3d 301, 308.) Thus, work credits "provide incentive for inmates to participate" in work and training programs. (*In re Reina* (1985) 171 Cal.App.3d 638, 644; see also *Caddick*, *supra*, 160 Cal.App.3d at p. 53.) The Legislature did not cite institutional security as a reason for providing work credits. (*Caddick*, *supra*, 160 Cal.App.3d at p. 53.) Therefore, unlike classification determinations, work-credit decisions do not involve CDCR's expertise in institutional security and prison administration. (Pen. Code, § 2933.) Rather, the Legislature offers work credit as a privilege for inmates to reduce their sentence length, not as a means for CDCR to evaluate an inmate's security risk. (*Ibid.*)

Further, while work credits are a privilege, not a right, the Legislature has mandated that "every prisoner *shall* have a reasonable opportunity to participate" in the work-credit program. (Pen. Code, § 2933, subd. (c), italics added.)[5] The Legislature has also mandated that for "every six months of continuous incarceration, a prisoner *shall* be awarded credit reductions from his or her term of confinement of six months." (Pen. Code, § 2933, subd. (b), italics added.) Thus, the Legislature has created express

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[5] There is no requirement in section 5068 that an inmate have an opportunity receive a classification score at all, let alone an opportunity to have the score reduced based on particular factors.

limitations and guidelines regarding eligibility for work credit. (Pen. Code, §§ 2932-2933.6.) And inmates are entitled to due process procedural protections before they may be deprived of work credit. (*Wolff v. McDonnell* (1974) 418 U.S. 539, 556-557; *In re Dikes* (2004) 121 Cal.App.4th 825, 829-830.)

Therefore, the Legislature has afforded CDCR more discretion in the classification context than the work-credit context, and classification and credit serve different purposes. Because of these differences, work credit and classification are not interchangeable, and work credit is not tied to an inmate's threat to institutional security. For example, an inmate's commitment offense and work- and privilege-group status, not classification score, determine his or her credit earning capability. (Pen. Code, §§ 2933-2933.5; see also Cal. Code Regs., tit. 15, §§ 3044.) Thus, the Legislature has not linked an inmate's receipt of credit with his or her threat to institutional security. (*Ibid.*) In fact, inmates housed at the highest level of security, Level IV, may earn the same amount of work credit as those inmates housed at the lowest level of security, Level I. (*Ibid.*) Since the Legislature has not determined, or even suggested, that CDCR must consider an inmate's receipt of work credit as a reflection of his or her risk to institutional security, it was not arbitrary or irrational for CDCR to not reduce Jenkins's classification score for the time he was not performing in a program even though Jenkins was provided work credit for that same time.

Further, Jenkins's lengthy discussion of the legislative intent behind Penal Code section 2933 misses the point. (Opening Brief at pp. 40-46.) Jenkins argues that since section 2933 awards work credit for inmates who are willing to perform in, but not assigned to, a program, favorable classification points must also be issued for unassigned inmates willing to work. (*Ibid.*) There is nothing, however, in the plain language or legislative history of section 2933 indicating that the Legislature wanted

classification decisions made in the same manner as work-credit decisions. As the Court of Appeal held here, "just because the Legislature decided an inmate should get time off his sentence for being willing to participate in a work or school program does not mean the department is bound to decide that the same inmate poses a lesser security risk while in prison because of that same willingness." (*In re Jenkins*, *supra*, 175 Cal.App.4th at p. 322.)[6]

In fact, the Legislature did not restrict CDCR's classification score determinations when it enacted Penal Code section 5068. If the Legislature wanted to require CDCR to calculate a classification score in a particular manner or require classification reductions for inmates willing to perform but not actually performing, it could easily have done so in section 5068. Yet the Legislature has not amended section 5068 to reflect such a desire or otherwise indicated that it wanted CDCR to use an inmate's eligibility for work credit as an indicator of the inmate's risk to institutional security. (See *People v. Guzman* (2005) 35 Cal.4th 577, 587 [adding "language into a statute violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes."].) Thus, given the Legislature's decision to leave classification matters solely to CDCR's expertise and discretion, it is not arbitrary for CDCR to not reduce classification scores based on work-credit eligibility. Instead, such a determination is consistent

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[6] Section 2933 has recently been amended, and the language Jenkins relies on is no longer contained in the statute. Further, there is nothing in the new language or legislative history indicating that the Legislature wants work credit and classification decisions to be made in identical manners or that credit eligibility should be a basis for evaluating an inmate's security threat. (See Sen. Rules Com., Off. of Sen. Floor Analyses on Sen Bill No. 18 (2009-2010 3d Ex. Sess.) Aug. 31, 2009; Sen. Rules Com., Off. of Sen. Floor Analyses on Sen Bill No. 18 (2009-2010 3d. Ex. Sess.) Jan. 12, 2010; Sen. Bill No. 18 (2009-2010) 3d Ex. Sess., as amended January 13, 2009.)

with the differing purposes of credit and classification and the Legislature's mandates in sections 2933 and 5068.

B. The Fact that the Legislature Offers Work Credit to Advance an Inmate's Release Date Does Not Mean that CDCR Must Make the Same Determination for Purposes of Institutional Security.

Jenkins maintains that CDCR's differentiation between work credit and classification points is arbitrary because issuing work credit will accelerate an inmate's release from prison while classification decisions do not. (Opening Brief at pp. 23, 48.) But an inmate's release date and return to the public and whether or not he or she is a lower risk to institutional security based on program performance are two different concepts. An inmate must be released on his or her release date, regardless of his or her threat to institutional security or public safety. (Cal. Code Regs., tit. 15, § 3075.2, subd. (a).) "Inmates, except as otherwise provided by law and regulations, shall be released on their scheduled release date. Inmates shall not be retained beyond their discharge date." (*Ibid.*) CDCR must calculate each inmate's release date based on the term of confinement imposed by the sentencing court, the amount of pre-sentence credit awarded by the sentencing court, and any post-sentence credit earned or forfeited, but cannot otherwise adjust an inmate's release date. (Pen. Code, §§ 2900.5, subds. (d), (f), 2933; Cal. Code Regs., tit. 15, § 3043, subd. (c)(5).) Thus, whether or nor an inmate has demonstrated his or her reduced risk through program performance is not a factor in determining his or her release from prison, nor can it be used as a basis to keep an inmate in prison past his or her release date.

For example, even if an inmate is a severe security risk and housed in a maximum security facility, the inmate still be must be released when his or her sentence expires; nor may an inmate who is a low threat to institutional security be released until his or her sentence expires. The

Legislature, not CDCR, sets sentence length and credit requirements, and CDCR must follow the Legislature's mandates. (See, e.g., Pen. Code, § 1170; see also *Bradshaw v. Duffy* (1980) 104 Cal.App.3d 475, 484 [prison officials bound by statutory mandates for sentence length].) Therefore, simply because an inmate may be eligible to earn early release does not mean that CDCR is required to view the inmate as a reduced risk to institutional security.

At its core, Jenkins's argument is a policy dispute with the Legislature's decision to make certain work credit specifically available to inmates while leaving classification decisions to the discretion of CDCR. (Pen. Code, §§ 2933, 5068.) That the Legislature permits certain inmates to reduce their sentences by earning credit does not mean that CDCR is required to deem those same inmates a reduced security risk. The Legislature could impose such a requirement, but as discussed above, has not interfered with CDCR's broad classification discretion or required CDCR to make classification determinations in the same manner as work-credit decisions. (Pen. Code, § 5068.) Since Jenkins has no statutory interest in a classification score reduction, he is fundamentally asking the Court to craft prison policy and require what the Legislature could have required in section 5068 but has not, i.e., the reduction of an inmate's classification score for periods of time when the inmate is also issued work credit. But such a public policy dispute is for the Legislature, not the courts. (See *Woods*, *supra*, 167 Cal.App.4th at p. 673 [prison administration is responsibility of executive and legislative branches].)

In sum, work credit and classification score decisions involve fundamentally different interests and purposes, and the Legislature has established different statutory schemes for work credit and classification matters. Given these differences and CDCR's rational determination that performance is necessary for an accurate classification score reduction, it is

not arbitrary or irrational for CDCR to deny favorable classification score points to inmates unassigned to a program, even if the inmate did not cause the lack of assignment and may receive work credit for the relevant time period. Accordingly, the Court of Appeal decision should be affirmed.

IV. CDCR'S CLASSIFICATION DETERMINATION DID NOT VIOLATE JENKINS'S EQUAL PROTECTION RIGHTS.

Jenkins also argues that the requirement of performance in a program violates his equal protection rights. (Opening Brief at pp. 24-28.)[7] Jenkins does not expressly identify the alleged classification at issue, but acknowledges that because he has no fundamental interest in a classification score determination, the rational basis test applies. (Opening Brief at pp. 24-25.) The "Equal Protection Clause does not make every minor difference in application of laws to different groups a violation of our Constitution." (*Williams v. Rhodes* (1984) 393 U.S. 23, 30.) Under the rational basis test, a statutory or regulatory classification "must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313; see also *Warden v. State Bar* (1999) 21 Cal.4th 628, 650 [relying on United States Supreme Court equal protection authority for purposes of state equal protection].) Satisfying the rational basis test does not require showing that the classification is necessary or that the determination is supported by empirical or statistical evidence. (*FCC*, *supra*, 508 U.S. at p. 315.) Thus, the contested classification "is not subject to courtroom fact-finding and may be based upon rational speculation unsupported by evidence or empirical data." (*Ibid.*) Rather, where there "are plausible reasons" for a

[7] Because Jenkins did not timely raise this issue in the Court of Appeal, the Court need not consider it. (Cal. Rules of Court, rule 8.500(c)(1).)

decision, the inquiry ends. (*Id.* at p. 313; *Warden v. State Bar*, *supra*, 21 Cal.4th at p. 644.) A classification is presumed valid, and the burden is "not on the State to prove the validity of prison regulations but on the prisoner to disprove it." (*Overton*, *supra*, 539 U.S. at p. 132; see also *FCC*, *supra*, 508 U.S. at p. 315 [classification subject to rational basis has "strong presumption of validity"].) The State "has no obligation to produce evidence to sustain the rationality of a statutory classification." (*Warden v. State Bar*, *supra*, 21 Cal.4th at p. 650.)

Thus, Jenkins carries the burden of disproving every conceivably rational basis CDCR could have for concluding that it cannot issue favorable points for program performance without the inmate performing in a program assignment. Regardless, as discussed above, CDCR is uniquely suited to evaluate institutional security matters and has rationally determined that inmates who have affirmatively demonstrated, or continue to demonstrate, the ability to comply with program rules are reduced security threats. Therefore, Jenkins's equal protection claim fails.

Jenkins argues that CDCR lacks a rational basis for its determination because CDCR controls the availability of program assignments. (Opening Brief at p. 27.) This notion merely restates the reality of prison life since prison administrators by necessity control program availability. (See *Overton*, *supra*, 539 U.S. at p. 131 ["very object of imprisonment is confinement"].) But the fact that CDCR makes program assignments does not mean that programs are always available for every inmate or that there is no rational basis for requiring performance in a program before reducing an inmate's classification score. 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.) 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.*) Regardless, Jenkins has failed to show that there is no conceivable factual situation where CDCR could rationally conclude that inmates assigned and performing in a program are a reduced security risk.

Finally, relying on *People v. McKee* (2010) 104 Cal.Rptr.3d 427, Jenkins argues that the Court should remand this matter to the superior court for factual development regarding the rationality of CDCR's performance regulation. (Opening Brief at p. 28.) In *McKee*, this Court remanded an equal protection challenge to Proposition 86's differential treatment of civilly committed sexually violent predators and mentally disordered offenders. (*McKee*, *supra*, 104 Cal.Rptr.3d. at pp. 453-454.) *McKee*, however, involved strict scrutiny. (*Id.* at pp. 443, 452-454 [remanding for application of principles in *In re Moye* (1978) 22 Cal.3d 457 where court applied strict scrutiny for classes of individuals subject to civil commitment].) Under that test, once the petitioner makes a showing to trigger strict scrutiny, the burden is on the government to prove a compelling interest. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 43.) Thus, remand was appropriate in *McKee* where the government had not yet met its burden of proof. But here, under the rational basis test, it is Jenkins, not the State, who carries the burden for his equal protection claim. An evidentiary basis is not required for the rational basis test, and the State is not obligated to produce any evidence to justify its determination. (*FCC*, *supra*, 508 U.S. at p. 313; *Warden v. State Bar,*

supra, 21 Cal.4th at p. 650.) Thus, *McKee* is not instructive, and Jenkins's equal protection challenge should be rejected.[8]

A. CDCR Did Not Forfeit the Argument that Performance in a Program Assignment Demonstrates Reduced Security Needs.

Along the same lines, Jenkins argues that 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." (Opening Brief at p. 9.) Jenkins maintains he did not have an opportunity to address CDCR's claim that "satisfactory performance in a program assignment evidences a lower security risk." (*Id.* at p. 14.)

But as the Court of Appeal observed, "the proposition that, as a general matter, an inmate who performs at average or above-average level in a work, school, or vocational program requires less security is not a question of historical fact that had to be determined based on evidence presented in this case." (*In re Jenkins*, *supra*, 175 Cal.App.4th at p. 320.) As the Court of Appeal explained, the issue is whether there is a rational or non-arbitrary basis for CDCR's policy decision, i.e., whether CDCR could

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[8] Similar to his equal protection claim, Jenkins maintains that CDCR's classification decision violated Penal Code section 2600, which states that 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." As discussed, Jenkins does not have a right to a classification score or to have his classification score calculated based on the issuance of work credit or his performance or non-performance in a program assignment. Thus, section 2600 is inapplicable. (See *Thompson v. Calif. Dept. of Corrections* (2001) 25 Cal.4th 117, 129 [inmate's rights must be implicated to trigger section 2600].) Regardless, as detailed above, CDCR's decision is rationally related to the legitimate penological interest of preserving institutional security.

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. (*In re Jenkins*, *supra*, 175 Cal.App.4th at p. 320-321; see also *People v. Boyer* (2006) 38 Cal.4th 412, 441 fn. 17 [forfeiture not applicable when arguments do not invoke facts or legal standards different from what the trial court itself was required to apply].) Thus, the question is not whether CDCR proved a rational basis for its decision, but whether CDCR's decision could be viewed as rational and non-arbitrary. This question goes to CDCR's decision at the policy level and does not require fact-finding. (See *Warden v. State Bar, supra*, 21 Cal.4th at p. 650 [in equal protection context, rational basis test is not subject to courtroom fact-finding and the State is not obligated to produce any evidence to withstand challenge to rationality of legislation].) Accordingly, even if CDCR failed to allege that program performance is necessary before reducing a classification score, the Court of Appeal properly considered the issue.

Nonetheless, CDCR raised these issues in its return. CDCR specifically denied that Jenkins was entitled to the favorable classification points at issue, citing California Code of Regulations, title 15, section 3375.4, subdivision (a)(3)(B), which states, "[f]avorable points shall not be granted for average or above average performance for inmates who are not assigned to a program." (CT at pp. 27:15-19, 23-25, 31:5-10.) CDCR also argued that performance in a program was necessary before an inmate's classification score could be reduced based on program performance. (CT at p. 31:5-10; see also CT at pp. 48-52.) And relying on California Code of Regulations, title 15, sections 3375.1 and 3375.2, CDCR asserted that classification score calculations are used to determine the security level of an inmate's housing. (CT at p. 30:21-22.) A correctional counselor also declared that "the classification score is used to determine the security level

of an inmate's housing" and confirmed that assignment to a program was necessary before reducing an inmate's security level based on performance. (CT at pp. 38:3-39:3.) "There is no requirement that a trial court objection be supported by extensive argumentation to avoid forfeiture." (*Boyle v. CertainTEED Corp.* (2006) 137 Cal.App.4th 645, 649.) Rather, a "party's challenge to a procedure is sufficient to preserve the issue on appeal if the challenge alerts the court to the alleged error, even without elaboration through argumentation and citation of authority." (*Id.* at p. 650.) Since CDCR expressly put its governing regulations at issue and asserted its determination that inmates who are not assigned to a program cannot receive the available favorable classification points for performance that would lower their security level, Jenkins's forfeiture argument should be rejected.

Jenkins's reliance on *Snow v. Woodford* (2005)128 Cal.App.4th 383 is also misplaced. (Opening Brief at pp. 16-17, 32-34.) In *Snow*, the petitioner brought a writ of mandate specifically seeking to have a prison regulation declared void. (*Snow*, *supra*, 128 Cal.App.4th at p. 387.) Here, Jenkins did not challenge the validity of CDCR's classification regulations in his petition. (CT at pp. 3-5.) Therefore, Jenkins seems to imply that every time a regulation is implicated or cited in a petition, a responding agency must affirmatively demonstrate the rationality and reasoning of the regulation, even when the petitioner does not challenge the regulation's validity. But in habeas proceedings, the court issues an order to show cause only on the issues expressly raised in the petition, and the return must only respond to allegations in the petition. (*In re Clark* (1993) 5 Cal.4th 750, 781 fn. 16; *People v. Duvall* (1994) 9 Cal.4th 464, 475.) Regardless, after CDCR relied on the governing regulations in its return, Jenkins had an

opportunity to challenge their rationality, and as the Court of Appeal noted, the relevant issues did not need to be determined based on evidence.[9]

B. CDCR's Classification Regulation Does Not Exceed the Scope of the Enabling Statute.

Jenkins also suggests that CDCR's classification regulation, California Code of Regulations, title 15, section 3375.4, exceeds the scope of the enabling statute, Penal Code section 5068.[10] Jenkins argues that the regulation must confine itself to "available information." (Opening Brief at pp. 39-40.) Section 5068, however, does not require that classification decisions be made based on available information. And there are no restrictions in section 5068 regarding how CDCR is to evaluate an inmate's program performance or work-credit eligibility for purposes of determining the security level of his or her housing. Thus, CDCR has not exceeded the scope of section 5068 or contradicted section 5068 by requiring performance in a program and by not linking work-credit eligibility to a classification score reduction. Perhaps recognizing this, Jenkins seems to argue that section 3375.4 exceeds the scope of section 5068 because it conflicts with California Code of Regulations, title 15, section 3375, subdivision (f)(7), which states that classification decisions should be made based on available information. While Jenkins cites no authority that

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[9] Jenkins also cites *People v. McKee* (2010) 104 Cal.Rptr. 427 in support of this argument, but as discussed above, *McKee* is not instructive because it involves strict scrutiny, not the rational basis test, and the State does not carry an evidentiary burden for the rational basis test.

[10] Because Jenkins did not timely raise this issue in the Court of Appeal, the Court need not consider it. (Cal. Rules of Court, rule 8.500(c)(1).) Jenkins also seems to suggest that the regulation exceeds the scope of Penal Code section 2933. But section 2933 is not the enabling statute for the classification regulations, and regardless, as discussed, the classification determination is consistent with the Legislature's different mandates in sections 2933 and 5068.

inconsistencies between two regulations is a basis for determining that a regulation exceeds an enabling statute, his argument is nonetheless misplaced. Whether or not an inmate was assigned to, and performing in, a program and whether or not the inmate receives work credit is information that is readily available to the classification committee. Thus, the regulations are consistent with each other.

V. JENKINS'S CLAIM INVITES MICRO-MANAGING OF THE PRISON SYSTEM AND IS OUTSIDE THE SCOPE OF HABEAS RELIEF.

"The scope of habeas corpus is . . . limited. . . . [I]t will reach out to correct errors of a fundamental jurisdictional or constitutional type only." (*In re Harris* (1993) 5 Cal.4th 813, 828.) "Habeas corpus is an extraordinary remedy designed to provide quicker relief than the normal processes of the appeal to a defendant who has no other remedies." (*In re Mazoros* (1978) 76 Cal.App.3d 50, 55.) Thus, the "writ of habeas corpus does not afford an all-inclusive remedy available at all times as a matter of right. It is generally regarded as a special proceeding." (*People v. Villa* (2009) 45 Cal.4th 1063, 1068-1069, citing *In re Fortenbury* (1940) 38 Cal.App.2d 284, 289.) Accordingly, habeas relief is not available for every adverse decision made by prison officials. (*In re Johnson*, *supra*, 176 Cal.App.4th at p. 298.)

Further, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." (*In re Johnson, supra*, 176 Cal.App.4th at p. 298, citing *In re Collins* (2001) 86 Cal.App.4th 1176, 1182; see also *Bell*, *supra*, 441 U.S. at p. 548 ["operation of . . . correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."].) Courts are "ill equipped to deal with the

complex and difficult problems of prison administration and reform." (*In re Johnson* (2009) 176 Cal.App.4th 290, 298.) Therefore, "prison officials are to remain the primary arbiters of the problems that arise in prison management." (*Shaw v. Murphy* (2001) 532 U.S. 223, 230.)[11]

As Jenkins acknowledges, he does not have a fundamental interest in being classified in any particular manner. Nevertheless, Jenkins implores this Court to order CDCR to disregard its security and classification determinations and ignore the Legislature's differing choices for credit and classification. Jenkins's complaint is rooted in a desire for the Court to redraft prison regulations and overturn the Legislature's decision to leave classification decisions to the sole discretion of CDCR. (Pen. Code, § 5068; see also *In re Rhodes*, *supra*, 61 Cal.App.4th at p. 108 ["it is not for the court to consider de novo or second guess or to micromanage the Director's decision where to house prisoners."].) But such desire is not grounds for relief and is inconsistent with the nature of habeas corpus and established judicial policy. (See *Pitts v. Perluss* (1962) 58 Cal.2d 824, 834-835 [courts do not determine what regulations an agency should implement

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[11] *Player* highlights the problems of unnecessary intervention in the daily operation of a prison system. Inmate transfers are a necessity in operating a prison system, and may serve the interests of both inmates and prison administrators. Under *Player*, any time an inmate is non-adversely transferred, he or she may become entitled to a classification score reduction if the transfer caused the inmate to become unassigned to a program. (*In re Player*, *supra*, 146 Cal.App.4th at p. 829.) Thus, CDCR will be forced to unnecessarily weigh its interest in maintaining accurate classification scores against its, and an inmate's, interest in a non-adverse transfer by having to choose between: (1) transferring an inmate for valid reasons, but reducing his or her security level without evidence that the inmate is a reduced security risk; or (2) withholding a valid transfer because it does not want to take the risk of reducing an inmate's security level on the assumption that he or she would have performed adequately in the program.

within its delegated authority]; *Bell, supra*, 441 U.S. at p. 542 fn. 25 [government action does not have to be the best alternative to be constitutional].) Accordingly, the Court of Appeal properly determined that Jenkins was not entitled to habeas relief.

CONCLUSION

CDCR has rationally concluded that performance in a program is necessary before reducing an inmate's security level based on program performance. Further, work credit and classification decisions involve different interests and purposes, and the Legislature has not tied the ability to earn credit with classification decisions. Thus, it is not arbitrary or irrational for CDCR to exercise its discretion and expertise in institutional security matters and not issue favorable classification points for time when an inmate was not performing in a program, even if the inmate is issued work credit for that period and did not cause the lack of assignment. Therefore, the Court of Appeal decision should be affirmed.

Dated: April 5, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,913 words.

Dated: April 5, 2010

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re Harvey Zane Jenkins, on Habeas Corpus***
Case No.: **S175242**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 5, 2010, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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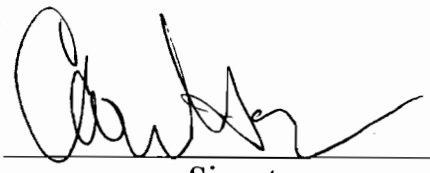
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 5, 2010, at Sacramento, California.

Carrie Haney
Declarant



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