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3                   **IN THE UNITED STATES DISTRICT COURT**  
4                   **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

5 ALEJANDRO MADRID, et al., )

6                   Plaintiffs                   )  
7                   )                   )

8                   v.                   )  
9                   )                   )

10 JAMES E. TILTON et al., )

11                   Defendants,                   )  
12                   )                   )  
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NO. C90-3094-T.E.H..

SPECIAL MASTER'S FINAL REPORT  
RE STATUS OF STATE OF CALIFORNIA  
CORRECTIVE ACTION PLANS FOR  
ADMINISTRATIVE INVESTIGATIONS  
AND DISCIPLINE; RECOMMENDATIONS

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**I.**

**INTRODUCTION**

A. The Special Master's Final Post Powers Report and Recommendations.

On June 24, 2004 the Special Master issued a Final Report Re Department of Corrections "Post Powers" Investigations and Employee Discipline" ("Final Report") concerning the California Department of Corrections' (since renamed the California Department of Corrections and Rehabilitation ["CDCR"]) "Post Powers"<sup>1</sup> investigations. The report found that CDCR internal affairs investigations and administrative discipline were plagued by systemic problems that, in terms of actual practice, rendered investigations and discipline entirely ineffectual. In addition, the report found a pervasive code of silence in the CDCR (a problem so ingrained in California prisons that there was a code of silence about the code of silence itself), a pattern and practice of interference with administrative and criminal investigations at Pelican Bay State Prison ("PBSP") by representatives of the California Correctional Peace Officers Association ("CCPOA"), and the inappropriate termination of the Post Powers investigations by the former Director of Corrections, Edward Alameida and Thomas Moore, the former Deputy Director of the Office of Investigative Services.

At the conclusion of the Final Report, the Special Master informed the Court that the State of California's response to these problems was, at first, entirely inadequate.

The CDC's initial response to the Court's scrutiny of the Post Powers investigation shut-down was poor. CDC officials focused their attention downward, suggesting the Office of Investigative Services ("OIS") agent was responsible instead of a lack of leadership within the Central Office. Promises were made of a review of OIS by a retired annuitant, while Moore and Alameida put great stock in ordering the three administrative investigations to be re-opened as criminal investigations. The Office of the Inspector General, which had done a

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<sup>1</sup> These administrative investigations had been opened to look into allegations that correctional officers had perjured themselves during the trial of Sergeant E.M. Powers ("Powers") and Correctional Officer J. R. Garcia ("Garcia"), who were charged in the United States District Court for the Northern District of California (case CR-00-0105-MJJ) with a conspiracy to violate civil rights (18 U.S.C. § 241) and a substantive count of violations of civil rights (18 U.S.C. § 242). Following a trial by jury, Powers and Garcia were each convicted of one count of conspiracy to violate civil rights and sentenced to prison.

1 diligent and professional job auditing and analyzing the serious systemic shortfalls  
2 of both OIS and the Employment Law Unit ("ELU"), was essentially gutted by  
3 budget cuts. At first, there was no indication that the CDC had an interest in  
4 solving the investigation and discipline shortfalls described above.

5 Report at 106.

6 However, the State's response changed for the better in dramatic fashion following the  
7 election of Governor Arnold Schwarzenegger. As explained in the report:

8 The State of California's response to the problems described in the draft  
9 report changed significantly for the better after Arnold Schwarzenegger was  
10 elected as Governor. Roderick Hickman has replaced Robert Presley as the  
11 Secretary of the Youth and Adult Correctional Agency ("YACA"). Thomas  
12 Moore, Robert Gaultney, and Edward Alameida either transferred to new  
13 positions or retired. Jeanne Woodford, the former Warden of San Quentin, has  
14 been appointed as Director of Corrections.

15 Under Mr. Hickman's leadership, a Post Powers remedial team was  
16 established in YACA. Warden Joe McGrath from PBSP was placed on a special  
17 assignment to help develop this remedial plan. Martin Hoshino, formerly of  
18 Office of the Inspector General ("OIG"), was appointed as Assistant Director of  
19 OIS and has brought in a team of former OIG staff to make improvements to OIS  
20 operations. To date, significant progress has been made in terms of policies,  
21 procedures, consistency, and computer controls over case work. Kathleen  
22 Keeshen, Deputy Director of Legal Affairs, has begun a series of corrective  
23 actions in ELU and started work developing a plan for long term changes to the  
24 unit.

25 Mr. Hickman has announced a "zero tolerance" policy concerning the code  
26 of silence . . . YACA and CDC officials, counsel for plaintiffs, and the Special  
27 Master have engaged in a series of meetings concerning possible remedial efforts.  
28 The Special Master characterizes the progress as positive. All in all, defendants'  
effort to formulate an adequate remedial plan is better organized and staffed today  
than at any time in the past nine years.

In addition, Governor Schwarzenegger made the decision to re-institute a  
strong Office of the Inspector General. Matthew Cate has been nominated as the  
Inspector General and has actively participated in the Post Powers remedial  
process. Michael Gennaco, an experienced civil rights litigator who manages the  
Office of Independent Review that monitors the internal affairs investigations of  
the Los Angeles County Sheriff, has been appointed the Court's expert to assist  
the parties with the remedial process.

Report at 106-107.

Because of the expressed determination by the Schwarzenegger Administration to address  
the serious problems found in the Final Report, the Special Master recommended that he:

1 [C]ontinue to work with defendants concerning the development and  
2 implementation of an adequate remedial plan to address the problems with  
3 investigations, adverse action discipline and the code of silence identified in the  
4 Special Master's Final Report re Department of Corrections "Post Powers"  
Investigations and Employee Discipline. The Special Master should report to the  
Court as necessary during this process, and submit recommendations for further  
Court orders if warranted.

5 Recommendation 3.A., Report at 122.

6 B. The Court's Post Powers Remedial Orders.

7 On July 29, 2004, the Court issued an interim Order adopting the Special Master's  
8 proposed interim monitoring plan. Specifically, the Court instructed the parties to consider the  
9 following:

10 The Special Master's monitoring shall encompass investigations and discipline  
11 cases arising from violations of the use of force policies, including integrity issues  
12 such as the code of silence. This monitoring shall, of necessity, involve  
monitoring Defendants' and the BIR's handling of casework from prisons other  
than Pelican Bay State Prison . . .

13 Pursuant to the July 29, 2004 Order, the Special Master continued working with the  
14 parties concerning investigations, adverse action discipline, and the code of silence. At the same  
15 time, the Office of the Inspector General began to organize a new bureau, the Bureau of  
16 Independent Review ("BIR"). The BIR was to function as a "real time" oversight agency that  
17 monitored CDCR use of force and code of silence investigations from inception through the  
18 completion of the State's discipline process.

19 On November 17, 2004 the Court issued its final order concerning monitoring, entitled  
20 "Order re Special Master's 'Post-Powers' Report re Investigations and Employee Discipline and  
21 (2) CCPOA's Motion to Intervene." At page 25, paragraph 3, the Court ordered as follows:

22 The Special Master shall continue working with defendants concerning the  
23 development and implementation of an adequate remedial plan to address the  
24 problems with investigations, adverse action discipline and the code of silence  
25 identified in the Special Master's Final Report re Department of Corrections "Post  
26 Powers" Investigations and Employee Discipline, and shall keep the Court fully  
27 informed as to defendants' progress.  
28

1           C. The Purpose and Timing of this Report.

2           Pursuant to the November 17, 2004 order, the Special Master, working closely with  
3 counsel, the CDCR, Court experts, and the Inspector General, has continued to monitor progress  
4 toward improving the CDCR's administrative investigation and discipline process. This report  
5 sets forth the Special Master's findings and recommendations concerning the current status of the  
6 Post Powers remedial program. It is submitted at this time for two reasons. First, the initial  
7 phase of the Post Powers remedial process is nearing completion and, as explained below, the  
8 BIR has begun to assume monitoring oversight over CDCR use of force and code of silence  
9 investigations and discipline. Second, a recent series of disturbing events signals an abrupt  
10 reversal of policy by the Governor's Office, a retreat from prison reform that may threaten the  
11 Court's ability to enforce the Post Powers remedial plan, including the elimination of the code of  
12 silence.

13           To summarize, the initial phase of the Post Powers' remedial plan, which took place  
14 during the first twenty-four months of the governorship of Arnold Schwarzenegger, marked one  
15 of the most productive periods of prison reform in California history. In addition to re-  
16 organizing the California corrections system, eliminating several agencies and modifying the  
17 missions and structure of others, Governor Schwarzenegger and his appointees, working with the  
18 Special Master and counsel, agreed to implement a number of critical remedial programs which  
19 started the process of improving CDCR investigation and employee discipline practices.

20           Once again however, California has taken three steps forward and then three steps back  
21 when attempting to reform its troubled prison system. Following the appointment of Susan  
22 Kennedy as the Governor's Chief of Staff on January 1, 2006, a series of disturbing  
23 developments have taken place which signal a return to the prior Davis Administration's practice  
24 of allowing the CCPOA to over-rule the most critical decisions of the CDCR Secretary. In a  
25 period of six weeks, two CDCR Secretaries committed to reform, Rod Hickman and Jeanne  
26 Woodford, left state service, stating as their reasons the CCPOA's influence with the Governor's  
27 Office. The top ranking leadership of the CDCR is confused, understaffed, dispirited, and most  
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1 important, uncertain who is really in charge: the Acting Secretary or the President of the CCPOA.  
2 At the same time, a quiet purge of the leadership of the Department of Personnel Administration  
3 (“DPA”) was instituted by the Governor’s Office, removing the State’s experienced labor  
4 administrators. Ms. Kennedy also allowed the CCPOA to over-rule Acting Secretary Jeanne  
5 Woodford’s appointment for CDCR Assistant Secretary of Labor relations, thereby reducing the  
6 bargaining credibility and authority of State negotiators on the eve of the 2006 negotiations  
7 concerning the CCPOA’s more than one *billion* dollars per year contract, negotiations which, as  
8 explained below, potentially impacts on numerous aspects of the Post Powers remedial plan. The  
9 sum total of this turn-about by the Governor’s Office raises serious questions of whether the  
10 Court’s Post Powers remedial plan is now in jeopardy.

## 11 II.

### 12 FINDINGS

#### 13 A. The Post Powers Corrective Action Plan.

##### 14 1. *Introduction.*

15 As explained in the Special Master’s Final Report, the Order of July 29, 2004, and the  
16 Order of November 17, 2004, there are four major elements to the State of California Post  
17 Powers Remedial program: (1) eliminating the code of silence; (2) improving internal affairs  
18 investigations; (3) improving the CDCR’s handling of employee adverse action discipline cases;  
19 and (4) establishing a “real time” process for monitoring use of force and code of silence related  
20 investigations by the Office of the Inspector General.

21 The State’s efforts to address these challenges was instituted by Governor  
22 Schwarzenegger. It was led by Rod Hickman, CDCR Secretary, and Matthew Cate, Inspector  
23 General. Court approved remedial programs involved the re-structuring and improvement of the  
24 internal affairs and employment law units, the promulgation of new legislation, establishing new  
25 and effective department operating policies, establishing new data processing systems, and  
26 creating the Bureau of Independent Review. Throughout the reform process, CDCR officials  
27 (including but not limited to Rod Hickman, Joe McGrath, Mark Gant, Martin Hoshino, Bruce  
28

1 Slavin, Kathleen Keeshen, and Debra Ashbrook) have worked closely with the Special Master  
2 and Court experts Dr. Patrick Maher and Michael Gennaco. Meetings were conducted on a  
3 regular basis that included counsel for the parties. A chart displaying the status of the remedial  
4 plan is attached as Exhibit 1. A descriptive summary is set forth below.

5                   2. *Providing CDCR Officials With the Authority to Manage Investigations,*  
6                   *Discipline, and the Code of Silence.*

7                   I. Introduction.

8           While giving prison officials the authority to do their job would seem to be a given, in the  
9 State of California the power to manage has been delegated to a significant degree to the  
10 CCPOA. Thus, perhaps the most important energizing aspect of the reform process was  
11 Governor Schwarzenegger's decision not to accept money from the CCPOA.

12                   ii. Managing the Labor Relations Process.

13           During the first two years of the Schwarzenegger administration, the Governor's Office  
14 did not allow the CCPOA to interfere with the management prerogatives of CDCR officials.  
15 Governor Schwarzenegger's approach to prison management was in striking contrast to the  
16 policy of the Davis Administration. During the Davis Administration, CCPOA officials  
17 exercised their close relationship with the Governor and his Chief of Staff, Susan Kennedy, to  
18 interfere with the management discretion necessary to run the largest prison system in the United  
19 States. For example, the Davis administration required the Director of Corrections to meet  
20 directly with CCPOA officials whenever the CCPOA wanted to talk, and regardless of the topic  
21 for discussion. The Special Master's Final Report describes examples of inappropriate contacts,  
22 including Chuck Alexander's telephone call to Director Edward Alameida concerning the status  
23 of an internal affairs investigation involving CCPOA members (Final Report at 58-59) and Lance  
24 Corcoran's telephone call to Director Alameida objecting about the fact that CDCR investigators  
25 were assisting the United States Attorney concerning a criminal prosecution against a CCPOA  
26 member (Final Report at 89-90; *see also* Exhibit 38 to the Final Report).

27           In contrast, in 2004 Governor Schwarzenegger, former Legal Secretary Peter Siggins,  
28

and Secretary Hickman put into place a program for dealing with CCPOA complaints that was consistent with how other California agencies deal with the needs of employee unions: a process whereby legitimate union concerns are dealt with through the formal grievance process and through a “meet and confer” procedure. To this end, the CDCR’s Office of Labor Relations was re-organized and strengthened. Bridget Hanson was appointed as Assistant Secretary of CDCR Labor Relations and Tim Virga appointed as Chief of Labor Relations.

iii. The Corrections Independent Review Panel.

In addition, Governor Schwarzenegger ordered an independent evaluation of California's prison system by a "Corrections Independent Review Panel." The Panel, chaired by former Governor George Deukmejian, issued a comprehensive report in June 2004 entitled *Reforming Corrections*. Notably, the first page of the report detailed a correctional system in need of drastic and fundamental reform, commenting that "[t]raditional management functions have been negotiated away in a labor agreement between the state and the correctional officers union." The Panel recommended that the Secretary of the CDCR be responsible for negotiating all management issues with the CCPOA (rather than deferring to negotiators from the Department of Personnel Administration ["DPA"] who do not understand prison operations), and that the Memorandum of Understanding ("MOU") between the State and CCPOA be modified to provide for the following:

1. Eliminating the practice of allowing CCPOA members to sit on management committees;
2. Not allowing the CCPOA to sit in at meetings that review inmate assaults;
3. Changing seniority rules;
4. Changing longevity pay issues;
5. Eliminating the 70-30 percent rule for assignments and overtime, and;
6. Revising the existing sick leave policy.

*See, Reforming Corrections* at pages 229 - 232, attached as Exhibit 2).

1                               iv. Re-Negotiating the CCPOA Memorandum of Understanding in 2006.

2           The State of California/CCPOA MOU impacts upon all aspects of CDCR operations.  
3   Not only are the respective rights of investigators and subjects defined by the MOU, so is a  
4   Warden's ability to assign officers and prison managers to key posts, including special housing  
5   units and units with investigation responsibility. As described below, problems of interpretation  
6   in the existing MOU provisions which affected investigations have been addressed by the Special  
7   Master. However, the clarifications do not apply to changed language or new language which  
8   may be negotiated in the 2006 contract renewal process. Therefore, the need to make changes to  
9   the MOU, and the need to protect those MOU provisions which relate to investigations and  
10   discipline, was designated by the Administration as a necessary part of the Post Powers remedial  
11   plan.

12           To accomplish this objective, beginning in 2005, CDCR officials began to meet with  
13   DPA. Plans were developed for Ms. Hanson and Mr. Virga to negotiate all issues involving  
14   CDCR management during the 2006 bargaining sessions. This strategy was developed and  
15   approved by the Director of DPA, Mike Navarro, and by Deputy Director Bill Avritt. Assurances  
16   were provided to counsel and to the Court that in 2006 the Governor of California would finally  
17   put a stop to the "Capitol walk" (a process whereby, in past bargaining years, the President of the  
18   CCPOA has walked away from formal bargaining with DPA straight into the Capitol building to  
19   get whatever he wanted directly from the Governor). With the groundwork established for  
20   CDCR officials to use their authority and discretion to implement prison reform without "back  
21   door" interference by the CCPOA, the State of California began to correct the problems set forth  
22   in the Final Report.

23                               3. *Correcting the Primary CDCR Cultural Problem That Allows Prisoner Abuse,*  
24                               *Thwarts Investigations, and Renders Administrative Discipline Difficult To*  
25                               *Administer - The Code of Silence.*

26                               a. *The Leadership of Rod Hickman:* Without question, the most important  
27   step in the Post Powers remedial process was the decision by Secretary Hickman to take timely  
28

1 and definite steps to end the code of silence. The process was initiated by Mr. Hickman's "Zero  
2 Tolerance" letter of February 17, 2004 (Exhibit 3), when Hickman displayed the courage to do  
3 what no leader of California's prisons has ever done - take steps to end the code of silence. As  
4 explained below, integrity and commitment to reform cost Mr. Hickman his job.

5                   b. *The Code of Silence Corrective Action Plan*: The initial code of silence  
6 corrective action plan had two primary components:

7                   I. Policy Statements and Standards: Rules prohibiting the code of  
8 silence were established, and documented in the letter of February 17, 2004 (distributed to all  
9 employees and posted on the CDCR website). A new Code of Conduct was published on March  
10 30, 2005, and later incorporated into Article 22, and a revised Law Enforcement Code of Ethics  
11 was published on June 16, 2004 (the date that the new oath was provided to new cadets and  
12 direction given from the Director's Office to Hiring Authorities to publish the revised oath in IST  
13 bulletins for existing staff's review).

14                   ii. Training: Thereafter, the CDCR began development of an eight  
15 hour interactive training program concerning the code of silence. Working with the Court  
16 experts, a program was established to provide code of silence training for all CDCR personnel.  
17 The program began in late 2004 and continued, until fully implemented, for a one year period.

18                   4. *Professionalizing the Internal Affairs Investigation Process.*

19                   a. *Introduction*: The problems within the CDCR's internal affairs  
20 operation were so severe that a wide range of corrective actions were needed to initiate the path  
21 to reform. Six major changes to operation and policy have now begun.

22                   b. *Establishing Consistent and Professional Policies and Procedures*:  
23 Internal affairs policies were almost entirely re-written, including fundamental changes in the  
24 manner in which investigation conclusions are reported. One significant change in CDCR  
25 operations implemented in 2005 was for the prison's hiring authority (warden or health care  
26 manager) to be responsible for determining the "result" of an investigation (e.g. whether the  
27 charges against the employee should be "sustained" or "not sustained") rather than the

1 investigator making this finding. The change of policy is consistent with the preferred practices  
2 of progressive California law enforcement agencies.

3                   c. *Establishing a Central Intake Unit:* After several months of struggling  
4 with the need for operational consistency and the sound initiation of investigations, the decision  
5 was made to form a “Central Intake” unit at CDCR headquarters. In essence, the initiation of all  
6 internal affairs cases in the CDCR must now be approved by a team of professional investigators  
7 and attorneys.<sup>2</sup> Requests for investigations which lack foundation are rejected, requests that can  
8 be dealt with through the local institution’s discipline process are referred back to the prisons for  
9 action, and cases where the investigation request is too vague or uncertain are returned for  
10 clarification. Central Intake has had an initial significant impact on improving the quality and  
11 fairness of CDCR investigations.<sup>3</sup>

12                   d. *Establishing and Enhancing the Case Management System:* A Case  
13 Management System was developed to track the status of investigations and discipline cases  
14 pending in the CDCR’s thirty-three institutions, central office, and parole facilities. Over time,  
15 the CDCR’s internal affairs unit has begun to move from a system with no controls into a system  
16 that is beginning to provide the ability for the “real time” monitoring of all agent activity. A  
17 summary of the tracking of each implementation stage is attached as Exhibit 4.

18                   e. *Training:* Training has been provided to internal affairs agents.  
19 Concerning many important issues, e.g. sexual assault investigations and critical incident review,  
20 specific agent-oriented training materials have been prepared and distributed to staff. New and  
21

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22                   <sup>2</sup> Participating in decisions made by the Central Intake Unit are attorneys from the Bureau of  
23 Independent Review (“BIR”) and the Employment Advocacy Prosecution Team (“EAPT”), both  
24 entities which are discussed later in this report. The participation of the BIR and EAPT in these  
25 decisions ensures the presence of independent voices and strengthens the work of the Central Intake  
26 Unit.

27                   <sup>3</sup> Establishing a central intake unit serves to protect correctional officers and other employees  
28 from local retaliation. A warden or health care manager can no longer initiate an investigation  
without Central Office approval. This employee protection is an example of many such protections  
that were part of the reforms instituted by Secretary Hickman.

1 important forms have been prepared, and old forms revised (including the 989 form, and the 402  
2 and 403 forms).<sup>4</sup>

3 *f. Securing Necessary Staff:*

4 At the time of the Special Master's Final Report, internal affairs was understaffed and  
5 under funded. To implement the reforms above, including Central Intake, additional  
6 investigators and support staff were required. To its credit, the Schwarzenegger Administration  
7 has fulfilled the first phases of a staged plan to staff internal affairs, and the recent shortage of  
8 investigators caused by the need to staff the unfunded intake unit has now been addressed.  
9 Additional resources will be required in the future, however, and the Special Master should  
10 continue to monitor the adequacy of investigator staffing.

11 *g. Leadership:* Martin Hoshino provided the leadership and integrity to  
12 get the internal affairs reforms off to a timely and effective start. Subsequently joined by Mark  
13 Gant, these two leaders oversaw the implementation of the reform of the CDCR's investigative  
14 process. Without the tireless work of Mr. Gant and Mr. Hoshino, the important changes  
15 described above would not have taken place. They have consistently demonstrated  
16 professionalism and integrity that is very opposite of the official misconduct by their predecessor,  
17 as described in the Special Master's Final Report.

18 *5. Improving the CDCR Employee Discipline Process.*

19 *a. Introduction.*

20 The Post Powers remedial process pertaining to discipline involved two separate  
21 programs: (1) improving CDCR legal support for investigators and hiring authorities and (2)  
22 developing a fair and consistent discipline matrix.

---

26 <sup>4</sup> This training, much of which focused on due process rights and consistency, serves to ensure  
27 the appropriate protections for staff who are under investigation.

1                                    *b. Changing How the Office of Legal Affairs Provides Support for*  
2                                    *Investigations and Employee Discipline Litigation.*

3                                    I. *Introduction:* If anything, problems with lack of organization,  
4 poor morale, and the ineffectual leadership of the Employment Law Unit (that section of the  
5 Office of Legal Affairs responsible for representing the CDCR during employee discipline  
6 litigation), were more severe than those faced by internal affairs. As found in the Final Report:

7                                    The Special Master previously reported to the Court about the *Mayo* cases, which  
8 involved MTA's at PBSP who were not disciplined for very serious violations of  
9 CDC policy because the CDC's investigation and discipline process took more  
10 than one year. Because of the *Mayo* cases, in 2001 the Special Master requested  
11 that the OIG conduct an audit of the CDC's adverse action process. Similar to the  
12 OIG's findings in the OIS audit, the OIG audit report of March 2002 (which has  
13 previously been filed under seal with the Court), found numerous systemic  
14 problems with the processing of adverse action cases, including a lack of  
15 coordination between ELU and OIS, inadequate or non-existent policies  
concerning important issues such as when to file an appeal or how to settle a case,  
inadequate training for OIS agents and the Employee Relations Officers in the  
prisons, inadequate tracking of discipline related processes, confusion about the  
POBAR one year statute of limitations, and a lack of clarity concerning the roles  
and responsibilities of the CDC officials involved with employee discipline. The  
OIG found that these problems led to *forty percent* of all adverse actions being  
dismissed or otherwise compromised because the CDC was unable to complete  
the cases in a one year period of time.

16 *Final Report* at 82-83.

17                                    Structurally reorganizing the former ELU was necessary prior to initiating the Post  
18 Powers remedial plan pertaining to employee discipline. The remedial actions implemented for  
19 the unit, which has been re-named the Employment Advocacy & Prosecution Team ("EAPT"),  
20 include the following.

21                                    ii. *Management Reviews:* To its credit, the CDCR sought the  
22 advice of outside consultants, who performed a detailed evaluation of the management,  
23 organization, and attitudes of the employees of what is now EAPT. Numerous recommendations  
24 of the consultants have been, over time, successfully implemented.

25                                    iii. *Establishment of the Vertical Advocate Model of Litigation*  
26 *Control:* The manner in which the EAPT monitors investigation and discipline cases has  
27 improved. Instead of the past practice of EAPT lawyers first becoming involved with an  
28



investigation only after the investigation was completed, discipline imposed, the matter taken to a *Skelly* hearing, and the case appealed by the employee to the State Personnel Board, EAPT lawyers are now assigned to investigations as soon as they are initiated. In essence, the vertical prosecution model is operable in EAPT, in that an EAPT lawyer works closely with internal affairs, the hiring authority (usually a warden), and the prison's Employment Relations Officer ("ERO") to ensure that the case is properly initiated, the investigation proceeds in a timely manner, the findings by the hiring authority are supported by the facts, and the discipline imposed (if the allegations of the investigation are sustained) is consistent with CDCR and State policy.

iv. *Securing Additional Staff:* At the time of the Special Master's Final Report, the old ELU was understaffed and under funded. To implement the reforms above, additional attorney and support staff were required. To its credit, the Schwarzenegger Administration has fulfilled its initial promise to appropriately staff the EAPT.

EAPT, however, has encountered difficulty hiring and retaining attorneys given the current low salaries, constant travel, litigation pressures, and the significant work load of the unit. The State's response to this problem, including the response of the DPA and State Personnel Board, has been untimely and inadequate. Simply stated, a host of State bureaucratic barriers have been raised to preclude the appropriate adjustment of the salaries of EAPT attorneys, increases that are necessary in order that EAPT related Post Powers' corrective actions continue. Therefore, the Special Master recommends that the Court issue an order enhancing the salaries of EAPT attorneys, as explained below.

v. *Development and Implementation of New Policies:* To establish a base for EAPT reforms, extensive work was necessary to establish professional and consistent policies and procedures, including policies relating to: (a) settlements, (b) the Skelly process, (c) and writs and appeals. These projects are now complete.

1 vi. *Implementing Information Technology to Control Case*

2 *Processing*: Similar to the situation with internal affairs in 2004, the EAPT had to establish a  
3 computerized tracking system to manage workload and monitor case deadlines. The EAPT  
4 accomplished this conversion in a timely and effective manner.

5 vii. *Leadership*: Kathleen Keeshen and Deborah Ashbrook

6 demonstrated the foresight, patience, and perseverance necessary to plan, manage, and implement  
7 the EAPT reforms set forth above. These efforts called for paying attention to operational details  
8 as well as acquiring a “big picture” vision, not to mention hours of work far above that normally  
9 expected from State employees. Without Ms. Keeshen and Ms. Ashbrook’s devotion, the  
10 changes in operation described above would not have taken place.

11 b. *Establishing the CDCR Discipline Matrix.*

12 Secretary Hickman also led the effort to establish a CDCR discipline matrix, whereby  
13 administrative misconduct calls for a specific range of punishment. Yet again, this reform  
14 provides important protections for employees. Regardless of institution, regardless of rank, if the  
15 matrix is followed, the discipline imposed should be fair and consistent. The matrix addresses  
16 code of silence concerns; for example, mandating for the first time that CDCR officials impose  
17 an appropriate punishment for those employees who lie, cover-up, or threaten other employees in  
18 a concerted effort to impose a code of silence.

19 6. *Establishing Oversight For CDCR Investigations and Discipline: the Office of*  
20 *the Inspector General.*

21 a. *Introduction.*

22 The most important element of State of California reforms implemented in response to  
23 the Final Report was the re-establishment of the Office of the Inspector General, and the creation  
24 of the BIR. While an adequate internal affairs operation and a vertical advocate oriented EAPT  
25 are necessary components to bring CDCR investigations and discipline up to standard, the  
26 creation of the BIR will provide California taxpayers the appropriate State watchdog agency to  
27 monitor and report upon misconduct within the CDCR. A fully functioning BIR should, over  
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1 time, lead to the end of Federal Court monitoring of the CDCR's investigation and employee  
2 discipline process.

3 *b. Creation of the BIR.*

4 In late 2004 the Special Master and counsel for the parties met with Peter Siggins, the  
5 Governor's Legal Secretary, to discuss the Post Powers remedial process. One of the issues that  
6 was discussed was how to develop a procedure whereby the State of California could adequately  
7 monitor CDCR investigations, and report to the Legislature and public about administrative  
8 misconduct, employee discipline, special incidents, and corruption. The concept of forming an  
9 agency to conduct "real time" monitoring of CDCR investigations and discipline was first  
10 developed during those meetings.

11 Governor Schwarzenegger displayed the courage to reverse an earlier decision to  
12 eliminate the Office of the Inspector General. He not only re-established the Office, he instituted  
13 a plan to restore to the Office the scope of operations it had prior to a wave of budget cuts  
14 implemented during the final years of the Davis Administration. In addition, the Governor took  
15 an additional step; he added a new Bureau to the Inspector General's Office, the Bureau of  
16 Independent Review. Credit should also be given to two California Senators, Gloria Romero and  
17 Jackie Speier, who sponsored important Administration bills that re-instituted the Office of the  
18 Inspector General and established the BIR.

19 *c. The BIR Concept.*

20 The BIR provides the Legislature and public with real-time monitoring of critical CDCR  
21 administrative investigations. In other words, the BIR is involved in the initial CDCR decision  
22 to accept or reject a request for an internal affairs investigation during the Central Intake process,  
23 it subsequently tracks the progress of the investigative agent, the decisions of the hiring authority  
24 after he or she receives a completed investigation, and the work of the EAPT attorney during the  
25 employee discipline process. Modeled after the successful Office of Independent Review in Los  
26 Angeles County, the BIR provides expertise, experience, access to internal processes, and a new  
27 window of transparency into the world of prison misconduct that should prove to be far superior  
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1 to a more traditional (and often politicized) “civilian review panel” model.

2 In addition, the BIR has the expertise and flexibility to respond to special incidents; for  
3 example, prison disturbances, officer deaths or injuries, misconduct by clinical personnel, etc.  
4 Furthermore, working with the fiscal side of the Inspector General’s Office, BIR staff can refer  
5 for investigation cases that they encounter which involve fiscal misconduct or corruption.

6 B. Documenting the Post Powers Remedial Plan.

7 The policies listed below provide insight concerning the detail and the scope of planning  
8 that was necessary to begin to implement the Post Powers remedial effort:<sup>5</sup>

9 1. *“Zero Tolerance” Code of Silence Letter*: The letter was signed by Secretary Hickman  
10 on February 17, 2004 and included as a paycheck stuffer in February 2004. It has been posted  
11 indefinitely on the CDCR webpage.

12 2. *Law Enforcement Code of Ethics*: On June 16, 2004 the oath was implemented for  
13 new cadets and direction given from the Director's Office to Hiring Authorities to publish the  
14 revised oath in IST bulletins for existing staff's review (with a revised oath published in local IST  
15 bulletins in July and August 2004). The staff Code of Conduct was established on March 30,  
16 2005 (the date that Secretary Hickman distributed the Code of Conduct). The Code itself was  
17 posted statewide at local sites on or before April 29, 2005, and was redistributed to all CDCR  
18 ee's on September 28, 2005 with information regarding how and where to report misconduct  
19 (Code later incorporated into Article 22).

20 3. *Article 22 of CDCR “Department Operations Manual” (“DOM”)*: On March 8, 2005  
21 direction was given to the field to implement Article 22 following statewide training; initial draft  
22 submitted to Special Master on February 25, 2005, secondary draft submitted on December 5,  
23 2005; order filed on December 22, 2005; direction provided to implement in field on January 3,  
24 2006).

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26 <sup>5</sup> This list is not exhaustive. Furthermore, it does not include policies, procedures, training plans,  
27 etc. from the BIR.

4. *Vertical Advocacy Policy*: On March 1, 2005 the model was implemented at headquarters, implemented statewide on March 8, 2005. Initial modifications to Article 22 were forwarded to Special Master on November 1, 2004; Special Master's report filed on November 6, 2004. Modifications were also proposed and approved after that date.

5. *Employee Disciplinary Matrix Policy*: On March 8, 2005 the Matrix was implemented statewide. Original proposal for a matrix provided to Special Master on September 24, 2004; order filed on October 19, 2004. Since that date, revisions to Matrix were included in the December 5, 2005 version of Article 22.

6. *CDCR Settlement Policy Re Administrative Disciplinary Cases*: On March 8, 2005 a new discipline settlement policy was implemented statewide, as part of Article 22. Revisions were subsequently implemented which are included in the December 5, 2005 version of Article 22.

7. *CDCR “Skelly Hearing” Policy/Procedure & Forms*: On March 8, 2005 a modified Skelly policy/procedure was implemented statewide, as part of Article 22. (Subsequent revisions were included in the December 5, 2005 version of Article 22).

8. *CDCR Writs and Appeals Policy to Address Adverse State Personnel Board (“SPB”) Decisions*: On March 8, 2005 the writs and appeals policy was implemented statewide, as part of Article 22.

9. *New CDC Form 989 (the form utilized to open an internal affairs investigation):* On July 18, 2005 the modified form 989 was distributed with direction to implement statewide. This form is included in modified Article 14 of the DOM.

10. *New CDC Forms 402 & 403 (the forms used to document the closure of an internal affairs investigation)*: On March 8, 2005 the new 402 and 403 forms were distributed with Article 22 and implemented statewide. Subsequently, revised forms were included in the December 5, 2005, version of Article 22 and distributed with directions to implement on January 3, 2006.

11. *Investigative Report Template:* On May 2005 CDCR Hiring Authorities began to render investigative findings using the template. Likewise, a revised investigative report format was implemented at the OIA regional offices and at the local CDCR institutions.

12. *Central Intake Policy:* On January 2006 Central Intake was fully implemented statewide. To begin this process, various policy directives by memorandum were distributed between April 2005 and January 2006. The finalized Central Intake policy is included in Article 14.

13. *Formalized OIA Training Plan*: On November 8, 2005 the formal OIA training plan was submitted to the Special Master.

14. *Internal Affairs Related Training Materials:*

a. *Sexual Assault Guide*: On October 12, 2005 this Guide was implemented statewide.

b. *Critical Incident Manual*: On August 29, 2005 the manual was implemented statewide.

c. *Direction for Local Internal Affairs Investigators:* On April 8, 2005 memoranda and direction were distributed to Hiring Authorities concerning the statutory requirements of the Penal Code for staff conducting IA investigations.

The following policies are "in the works." Most are expected to be formally implemented in the near future.

15. *Incompatible activity regulations [15 California Code of Regulations (CCR), sec. 3413]* - Submitted to Special Master on October 11, 2005, currently pending in the Office of Administrative Law (“OAL”).

16. *Travel and salary compensation for employee witnesses regulations* [15 CCR, sec. 3413.1] Submitted to Special Master on October 11, 2005, currently pending in the OAL.

17. *Reporting Serious Misconduct and Protecting Employees from Retaliation* - Submitted to Special Master on October 11, 2005, to be included with almost-finalized Article 14 of the DOM.



1           C. The Status of Post Powers Remedial Efforts.

2                   1. *Investigations.*

3           The CDCR internal affairs operation is significantly stronger today than in 2004. As  
4 noted above, improvements have been made in case initiation, processing, and documentation.  
5 In addition, new policies have been implemented, limited staffing enhancements have been  
6 provided, and investigators are now supported (and monitored) by the EAPT and BIR.

7           Additional investigators are needed, however, to ensure timely completion of all  
8 investigations (a limited number of cases continue to languish unnecessarily, and some of the  
9 timeliness improvements achieved for use of force investigation has been achieved by shifting  
10 investigators and slowing down the processing of other cases). Certain investigators have proven  
11 unable to meet the standards for casework defined by Articles 22 and 14 of the DOM, which will  
12 require re-training and in some cases, reassignment or progressive discipline. A number of high  
13 level internal affairs positions still need to be filled with competent personnel.<sup>6</sup> Additional  
14 remedial work is necessary to complete the essential computer based controls on pending  
15 investigations and discipline. Finally, internal affairs needs additional, well trained investigators  
16 skilled in, or adequately supported for, cases that involve overlapping issues such as the code of  
17 silence combined with medical malpractice.

18                   2. *Employee Discipline.*

19           Similar to internal affairs, the CDCR's legal support for employee investigations and  
20 discipline is significantly more complete and sophisticated today than in 2004. Nevertheless, the  
21 EAPT suffers from continued unacceptable levels of turn over, caused in part by inadequate  
22 salaries for EAPT attorneys. More training is needed for new attorneys, and for the ERO's who  
23 serve on the front line of the employee discipline process inside the CDCR's thirty-three prisons.  
24 Similar to EAPT attorneys, ERO's turn over is so excessive that a team approach to employee

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26           <sup>6</sup> As explained below, one of the CDCR officials who helped initiate the improvements in  
27 internal affairs, Assistant Secretary Mark Gant, retired following the resignation of Secretary  
28 Hickman.



discipline (hiring authority, ERO, and EAPT attorney) is often difficult, if not impossible, to accomplish in day-to-day practice.

As mentioned above, two of the more important changes in CDCR operations put in place by the Post Powers remedial plan are (1) having the hiring authority instead of the investigator make the final determination concerning whether charges are sustained or not sustained; and (2) using the CDCR discipline matrix for imposing consistent and fair sentences for charges that are sustained. Again, however, unacceptably high level of turn over among prison wardens and health care managers have created what one CDCR official has termed an ongoing "training nightmare." Inexperienced hiring authorities who are unskilled in making sustained or not sustained findings, and who are also unfamiliar with using the discipline matrix, have generated case problems and/or delays which have increased the burdens on the EAPT and BIR.

Simply stated, the Post Powers remedial plan is encountering certain implementation problems because of fundamental problems within the CDCR, and it may be necessary to modify the remedial plan in the future. In addition, it may be necessary to staff internal affairs, the EAPT, and the BIR with more agents and attorneys than originally anticipated, assuming that the current levels of warden and health care manager turn over continues into the future.

### *3. The Code of Silence.*

As explained above, the CDCR has completed its code of silence training program. Investigators and State attorneys close to the administrative investigation process have indicated some improvement in staff conduct when faced with code of silence issues as a result of the training and Secretary Hickman's "Zero Tolerance" letter.

The CCPOA leadership, however, continues to refuse to acknowledge the existence of the code of silence, and continues to attack efforts to eliminate the code. Typical of CCPOA attempts to ridicule, identify, and attack those who report force is the "rat trap" case out of Calipatria State Prison.

After observing a use of force incident at Calipatria, a prison Captain believed that staff misconduct had taken place. He reported his observations to the Warden, as required by policy.

1 The CCPOA's top ranking representative at the prison, however, objected to the Captain's report,  
2 and also objected to the investigation which followed. Thereafter, the Calipatria local president  
3 hung a rat trap and note inside the CCPOA bulletin board at the entrance to the prison's  
4 administrative building (see Exhibit 5). Note use of the words "rat trap" on the pictured mouse  
5 trap.<sup>7</sup> The implications of the words "the CCPOA will attempt to catch them" should be  
6 obvious.<sup>8</sup>

7 Meanwhile, in Sacramento, Secretary Rod Hickman was subject to repeated attacks by  
8 the CCPOA's leadership because of his decision to address the Code of silence in the CDCR.  
9 Indeed, any doubts about the importance of the Code of silence for CCPOA President Mike  
10 Jimenez and Executive Vice President Chuck Alexander have been dispelled by their repeated  
11 denials that the Code exists, and their subsequent attempts to criticize and humiliate Secretary  
12 Hickman. For examples of CCPOA attacks, *see* the fake money ridiculing Secretary Hickman  
13 and insults posted on various blog sites affiliated with the CCPOA (for example, a "Hickman  
14 Has to Go" posting accusing the Secretary of being "either a liar or a rat" or the "official resume  
15 translated" posting, claiming that Governor Arnold Schwarzenegger "didn't know sh\*t from  
16 Shinola about corrections" (Exhibits 6 - 8).<sup>9</sup> <sup>10</sup> The Court has previously commented on the  
17 troubling questions posed by the CCPOA's response to Post Powers corrective actions, including  
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19 <sup>7</sup> The term "rat" is used by prison inmates to designate a prisoner who reports crimes or  
20 misconduct to prison staff. The term has been adopted by the CCPOA and its blogs to enforce the  
21 Code of silence by labeling officers who report the misconduct of fellow officers as "rats." For  
example, *see* Final Report at page 121.

22 <sup>8</sup> When an internal affairs investigation was initiated to look into the matter, CCPOA President  
Mike Jimenez accused the CDCR of launching an attack on all local CCPOA presidents.

23 <sup>9</sup> The attacks on Secretary Hickman are part of a CCPOA program of "attack your enemies and  
24 reward your friends." To a large degree, this confrontational strategy is based on Ronald G.  
DeLord's rendering of Saul Alinsky's community organizing theory, which is taught to CCPOA  
25 representatives at the guard's union annual convention (*see* Exhibit 9).

26 <sup>10</sup> The CCPOA denies an official connection with these blogs; nevertheless, blog founders sell  
27 tee-shirts at CCPOA's annual conferences and on occasion, official CCPOA telephone messages  
direct union members to blog sites.

1 the union's juvenile attacks on plaintiffs' counsel (*see* Order Re (1) Special Master's "Post  
2 Powers" Investigation and Employee Discipline; and (2) CCPOA Motion to Intervene filed  
3 November 17, 2004, at page 22).

4 A more recent example of the ridicule, threats, and humiliation delivered by the CCPOA  
5 to competent CDCR employees to enforce this code of silence is found at Exhibit 10, a large full  
6 color picture which the CCPOA leadership had posted on the CCPOA Bulletin Board at CDCR  
7 Headquarters:<sup>11</sup> an unflattering picture of Governor Arnold Schwarzenegger, naked except for  
8 shorts, and standing to the right side of the Governor are cut-and pasted photographs of the faces  
9 of former Assistant Secretary of CDCR Labor Relations Brigid Hanson and the Chief of CDCR  
10 Labor Relations Tim Virga. CCPOA executives adopt the schemes of the convicts they guard.  
11 Identical to the biggest bully in the prison yard, CCPOA leaders deliberately select out specific  
12 individuals to embarrass and publically humiliate, as it is now attempting to do with Brigid  
13 Hanson and Tim Virga. The purpose of this very public attack is simple, to terrorize CDCR  
14 employees so they will not report, or attempt to correct, inappropriate behavior by CCPOA  
15 leaders.<sup>12</sup> By the use of flyers, bulletin board postings, and blog sites, the CCPOA leadership  
16 continues to encourage the code of silence. To summarize, some progress has been made by the  
17 CDCR to train about the code of silence and investigate incidents where the code of silence is

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19 <sup>11</sup> In its Response, the CCPOA claims that this poster has not been placed on all prison bulletin  
20 boards as was stated by the Special Master in his draft report. Instead, the CCPOA argues, this  
21 poster was placed only in the CCPOA bulletin board at CDCR headquarters. Therefore, the Special  
22 Master has modified this section of his report. In doing so, however, the Special Master emphasizes  
23 that he does not believe that the Declaration of Charles ("Chuck") Alexander is accurate in this  
24 regard. The Special Master has been informed that this picture of the Governor has appeared in  
25 some prison CCPOA bulletin boards. In some institutions, to their credit, Chapter Presidents,  
offended by this poster, have refused to display it. In other facilities the picture was posted and  
promptly removed. Without question, there are many correctional officers who do not approve of  
Mr. Alexander's depiction of the Governor, and a considerable number of CDCR employees who  
work at CDCR headquarters believe that it violates State of California rules against an offensive  
work environment.

26 <sup>12</sup> Concerning this specific poster, the underlying issue which angers the leadership of the  
27 CCPOA is not allegation of an abuse of force by its members, but the fact that Ms. Hanson and Mr.  
28 Virga had taken steps to stop the misuse of vacation days and sick leave credits by CCPOA leaders.

1 used to cover up abuses or thwart investigations. CCPOA leaders, nonetheless, continue to  
2 attempt to preserve the code of silence.

3 *4. The Bureau of Independent Review.*

4 *a. Establishing the BIR.*

5 Establishing the BIR as an operational agency involved numerous and difficult  
6 challenges, including developing duty statements for attorneys, investigators, and administrative  
7 support personnel, developing policies and procedures, recruiting, hiring, and appointing key  
8 personnel, establishing offices in the same three locations where internal affairs agents are  
9 located, Sacramento, Bakersfield, and Rancho Cucamonga, training lawyers and investigators,  
10 establishing positive working relationships with prison wardens and health care managers,  
11 establishing positive working relationships with local, State, and Federal law enforcement  
12 agencies and District Attorneys and U.S. Attorneys, meeting and conferring and establishing  
13 relationships with the numerous public and private agencies and interest groups who are involved  
14 with CDCR operations, establishing relationships with the Legislature and Federal Court, and  
15 developing a systematic method of accurately reporting the details of internal affairs  
16 investigations and discipline to the Legislature and public in a manner that does not compromise  
17 the effectiveness of the investigation nor the due process rights of the employees under  
18 investigation.

19 These challenges have been met in a timely manner by the Office of the Inspector  
20 General. Credit is due Matthew L. Cate, David R. Shaw, Barbara Sheldon, Howard Moseley,  
21 Robert Barton, Stephen Miller, and Tim Rieger among many others. Examples of the quality of  
22 BIR public reporting is found at Exhibit 11, the May 2006 BIR Report for the period of July -  
23 December 2005. An example of the quality of Inspector General special reviews is found in the  
24 report entitled Special Review Into the Death of Correctional Officer Manuel A. Gonzalez, Jr.  
25 (issued March 16, 2005) (Exhibit 12).

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Now that the BIR is fully operational, the Special Master will monitor the status of the CDCR's Post Powers' reform through presentations by BIR. In other words, the Special Master will monitor the effectiveness of the BIR's monitoring. This change-over in monitoring began January 2006.

The Court expert's monitoring of the BIR is appropriately characterized as a form of peer review, complimented by public reporting. The decision to intensify case specific monitoring is a positive step, indicating that the BIR is fully operational and performing effectively. Despite decades of State neglect concerning correctional officer investigations and discipline, the Special Master has confidence with the Inspector General assuming primary responsibility for monitoring CDCR investigations and discipline.

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1 operating an effective investigation and discipline process within an organization the size of the  
2 CDCR, it is anticipated that BIR monitoring will become an established structure of California  
3 State Government, and that it will continue indefinitely. The Special Master's enhanced review  
4 of the BIR, however, is temporary, anticipated to be limited to a two-year period commencing  
5 January 1, 2006 and ending in January 2008.

6 The Special Master's proposed Peer Monitoring Plan, prepared by Mr. Gennaco, has been  
7 reviewed and approved by the Inspector General. It is attached to this report as Exhibit 13. As  
8 set forth below, the Special Master recommends that the Court adopt this monitoring program.

9 *c. Future Challenges to an Effective BIR Operation.*

10 The initial effort to create the BIR has been remarkable. The BIR, however, is charting  
11 unknown waters as it begins to monitor on a real time basis the internal affairs investigations of  
12 the CDCR. Without question, the number of important cases and/or events that require BIR  
13 oversight are increasing. The term "real time" encompasses a wide range of oversight: from  
14 periodic monitoring, to the critical juncture review, to monitoring important cases on a day to day  
15 basis. At present, the BIR does not have enough attorneys and investigators to monitor as  
16 intensely as necessary each pending investigation. Furthermore, there are indications that the  
17 salary offered to candidates for BIR positions is no longer competitive, given the quality and  
18 necessary background required for these critical State positions and there are also indications that  
19 it may be appropriate, as some time in the near future, to transfer the BIR lawyers into civil  
20 service positions. Each of these issues calls for continued monitoring by the Special Master.

21 *5. Summary.*

22 The State of California attempted to initiate its Post Powers remedial plan concerning the  
23 elimination of the code of silence, adequate investigations, adequate and timely discipline, and  
24 the formation of the BIR in a timely manner. The initial progress has been appropriate; however,  
25 for each critical element of the remedial plan, more work is needed. No one involved with the  
26 Post Powers remedial plan takes the position that the job is done; indeed, the results thus far,  
27 while positive, are best described as tenuous. The loss of a leader of a unit, an increase in turn  
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1 over among key personnel, the failure to obtain needed budget enhancements, and numerous  
2 other factors can quickly turn what so far has been a success into a long term failure. Simply  
3 stated, at this point in time, timely investigations, fair discipline, the elimination of the code of  
4 silence, and adequate investigation oversight are not well established practices in the CDCR, and  
5 they are certainly not immune from outside influences.

6 D. Memorandum of Understanding Issues.

7 The Special Master's Final Report also included a recommendation that he investigate the  
8 real life impact of certain provisions of the MOU on the Court's use of force remedial plans. The  
9 November 17, 2004 Order instructed the Special Master to investigate, hold hearings if  
10 necessary, prepare a report, consider comments from the parties and the CCPOA, and issue  
11 recommendations as to whether certain provisions of the MOU or the August 12, 2004  
12 Addendum to the MOU violated, by their terms or practice, the Court's use of force remedial  
13 plans.<sup>13</sup> In the same order, the Court granted intervenor-party status to the CCPOA for the  
14 following purpose: (1) taking part in the Special Master's investigation and, (2) in the event that  
15 the Special Master, as a result of this investigation, issues a draft or final report which  
16 recommends that the Court find that one or more provisions of the MOU violate, by their terms  
17 or practice, the Court's remedial orders and/or that the Court should consider overriding such  
18 provision(s) in order to cure the constitutional violations at issue in this case, the CCPOA may  
19 raise any objection(s) it has to either the draft or final report, and (3) in the event that any such  
20 objection(s) are not sustained by this Court, it may appeal such decision, to the extent such  
21 decision is otherwise appealable by law.

22 Working with the parties, including the CCPOA, and following numerous meetings and  
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24 <sup>13</sup> The specific provisions of the Agreement Between the State of California and the California  
25 Correctional Peace Officers Association Covering Bargaining Unit Six, Corrections (July 1, 2001  
26 through July 2, 2006) that were examined by the Special Master included Sections 2.07, 2.10, 5.02,  
27 6.01, 9.05, 9.06, 9.09, 9.16, 10.10, 10.12, Appendix #9, Side Letter #12, Side Letter #14, and the  
28 following sections of the 2004 Addendum: Continuous appropriation, CDC/CYA Video Access,  
Transfer of Peace Officers Between Departments, Chapter President Release, Addendum Grievance  
Provision, Side agreement re post and bid for supervisors.

1 revisions a stipulation was prepared, modified, finalized and signed by the State and CCPOA  
2 which addresses the concerns expressed by the Special Master in the Final Report. Both the  
3 CCPOA and DPA participated in this process in a cooperative and professional manner. The  
4 Special Master filed his Report and Recommendations Re Investigation into Selected Provisions  
5 of CCPOA/CDCR Memorandum of Understanding on March 26, 2006, which included the  
6 executed stipulation.

7 E. The 2006 Retreat From Prison Reform.

8 1. *Introduction.*

9 For more than a quarter of a century, the State of California's efforts to comply with  
10 Federal Court orders have been inconsistent at best. Long term, permanent improvement in  
11 corrections has proven elusive; most short term enhancements were followed by sullen retreats to  
12 mediocrity. As a consequence, Federal oversight of CDCR operations has, of necessity,  
13 continued for decades, regardless of whether the underlying constitutional violation involved  
14 conditions of segregated confinement, abuses of force, medical care at specific prisons, medical  
15 care state-wide, mental health care at specific prisons, mental health care state-wide, parole  
16 practices, or care for disabled inmate/patients.

17 Unfortunately, there are now strong indications that the Post Powers remedial process  
18 will be no exception. While the beginning of substantial and significant reform was achieved,  
19 the Special Master has very serious concerns as to whether the Post Powers remedial order can  
20 continue to be effectively implemented in light of recent developments.

21 2. *The Appointments of Susan Kennedy and Fred Aguiar.*

22 Following the defeat of propositions submitted to California voters in late 2005,  
23 Governor Schwarzenegger appointed Susan Kennedy as his Chief of Staff on November 30,  
24 2005. Kennedy, who was Chief of Staff for Governor Davis, assumed her new position on  
25 January 1, 2006. The Governor appointed Fred Aguiar as Cabinet Secretary on December 9,  
26 2005.



1                   3. *The Resignations of Secretary Rod Hickman and Acting Secretary Jeanne*  
2                   *Woodford.*

3           Chief of Staff Susan Kennedy did not meet with CDCR Secretary Rod Hickman during  
4 January or February of 2006. She and Fred Aguiar did, apparently, commence meetings with the  
5 CCPOA, including CCPOA President Mike Jimenez. Neither Kennedy nor Aguiar informed Mr.  
6 Hickman. From what has been stated publically, Secretary Hickman learned of the meetings and  
7 observed CCPOA lobbyists entering the Governor's Office. Understanding that a lack of  
8 support from the Governor's office would mean an end to prison reform, and realizing that a  
9 return to the Davis era practice of allowing the CCPOA to over-rule decisions of the CDCR  
10 Secretary would render his efforts to end the code of silence impossible, Mr. Hickman made the  
11 decision to resign as CDCR Secretary on February 28, 2006. His retirement from state service  
12 was effective May 31, 2006.

13           The Special Master has also learned that following Mr. Hickman's decision to retire, key  
14 CDCR officials responsible for moving the Post Powers remedial plan forward have left State  
15 service. For example, Joe McGrath, Assistant Secretary over Adult Operations, the primary  
16 CDCR contact for all Post Powers reforms, retired effective May 31, 2006. Mark Gant, Assistant  
17 Secretary, Internal Affairs, separated from State service on April 7, 2006.

18           Secretary Hickman was replaced on an acting basis by the Undersecretary of the CDCR,  
19 Jeanne Woodford. Ms. Woodford had been the Director of Corrections prior to the CDCR re-  
20 organization, and had personal knowledge of the Post Powers remedial plan. She was also one of  
21 the driving forces behind the Governor's efforts to bring rehabilitation back into California's  
22 prisons. However, within six weeks, Ms. Woodford also stepped down from the Acting  
23 Secretary position to Undersecretary, and will retire from State service effective July 6, 2006.

24           The Special Master has obtained information indicating that Ms. Woodford's decision  
25 was motivated by the fact that her request to the Governor's Office that Tim Virga, the CDCR  
26 Chief of Labor Relations be appointed as Acting Assistant Secretary of Labor Relations was not  
27 approved by the Governor's Office because placing Mr. Virga into this crucial position was not  
28

1 to the liking of the leaders of the CCPOA. Apparently, Ms. Woodford's appointment  
2 recommendations were the subject of discussion between Susan Kennedy, Fred Aguiar and  
3 CCPOA leaders. Kennedy and Aguiar, without the Acting Secretary Woodford's knowledge,  
4 were conducting regular meetings with CCPOA officials.<sup>14</sup> Given the rumors circling around  
5 CDCR headquarters and in the prisons, additional resignations may be pending, and several  
6 highly regarded candidates for promotion within the CDCR have decided to "keep their heads  
7 down," and reject promotion opportunities.

8 *4. The Purge of the State of California Labor Relations Negotiating Team.*

9 At the same time, the Special Master has learned that Susan Kennedy and Fred Aguiar  
10 have taken steps, on the eve of the July 1, 2006 contract negotiations between the State and the  
11 CCPOA, to remove the senior Department of Personnel Administration executives who manage  
12 contract negotiations with the CCPOA and other State labor unions. Sometime in either late  
13 April or early May 2006, Mike Navarro, the Director of DPA, and Bill Avery, the Deputy  
14 Director of DPA were told to resign.<sup>15</sup> The timing of these retirements, in conjunction with the  
15 other developments discussed above, give rise to the question of whether the State is in a position  
16 to adequately negotiate a contract which protects the court's remedial plans.

17 *5. Summary.*

18 Former Secretary Rod Hickman's decision to call for a zero tolerance policy concerning  
19 the code of silence was the heart of the Post Powers remedial plan, and rightfully so. Integrity  
20 and remedial plan efforts must begin at the top, and then percolate down. Beginning January  
21 2006, however, it appears that the requisite leadership has been absent from the Governor's  
22 Office. Evidence before the Special Master indicates that the Governor's Office may have given  
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24 <sup>14</sup> On Monday, April 17, 2006 Ms. Woodford learned that Susan Kennedy and Fred Aguiar had  
25 scheduled a meeting with CCPOA officials. Later on the 17<sup>th</sup>, Aguiar found out that Woodford had  
26 learned of this meeting. On the morning of April 18<sup>th</sup>, Aguiar called Woodford, told her of the  
meeting she already knew about and informed her that she could not attend.

27 <sup>15</sup> Mr. Navarro and Mr. Avritt retired effective July 1, 2006.

1 the code of silence in California's prisons a new lease on life. Considering the turn-over of  
2 CDCR Secretaries, the DPA purge, the meetings that Susan Kennedy and Fred Aguiar have  
3 arranged with the CCPOA without telling the CDCR Secretary, and the continuation of concerted  
4 efforts by the CCPOA to embarrass and humiliate CDCR employees who have the courage to  
5 report misconduct, the Special Master is seriously concerned that the entire Post Powers remedial  
6 plan is now in jeopardy. For this reason, he recommends that the Court direct him to hold  
7 hearings, open to the public, that investigate whether developments since January 2006, are, in  
8 fact, threatening the effective implementation of the Court's Post Powers remedial orders, and if  
9 so, whether the Court's remedial orders should be modified in any way to ensure their effective  
10 implementation.

### 11 III.

#### 12 COMPLIANCE WITH THE ORDER OF REFERENCE

##### 13 A. Introduction.

14 The Special Master filed a draft version of this report on June 21, 2006 and pursuant to  
15 the Order of Reference filed January 23, 1995 he conducted a hearing on the record about the  
16 draft report on Wednesday July 12, 2006. At page 34 of the draft report the Special Master set  
17 forth a procedure for interested non-parties to submit briefs in amicus curiae. In response to the  
18 invitation, three non-parties submitted briefs in amicus curiae: the Office of the Governor, the  
19 CCPOA, and Steven Nemec, a prisoner incarcerated at San Quentin State Prison. In addition,  
20 plaintiffs and defendants submitted written comments and objections.<sup>16</sup>

21 In order to consider the objections and concerns of the non-parties as thoroughly and  
22 carefully as possible, the Special Master allowed non-parties to present oral argument at the  
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24 <sup>16</sup> As explained at the hearing of July 12, 2006 the Special Master decided to deny Mr. Nemec's  
25 application to appear as amicus concerning the draft report. Individual inmates have been  
26 competently represented by the Prison Law Office as class members for more than fifteen years.  
27 Nothing in Mr. Nemec's submission convinced the Special Master to allow an exception concerning  
28 the draft report. After the hearing of July 12, 2006 the Special Master traveled to San Quentin State  
Prison, met with Mr. Nemec, and explained the rationale for his decision. In addition, the Special  
Master has provided copies of Mr. Nemec's brief to counsel and the Inspector General.

1 hearing of Wednesday, July 12, 2006. Thus, the Office of the Governor and CCPOA were not  
2 limited to filing written briefs, the usual practice concerning amicus submissions. The transcript  
3 of the July 12, 2006 hearing, which lasted approximately two hours and forty-five minutes, has  
4 been filed with the Court.

5 The Special Master responds to the comments and objections below.

6 B. Plaintiffs' Objections to the Draft Report.

7 Plaintiffs' comments concerning the draft report are set forth in a brief filed July 7, 2006  
8 (Exhibit 14). Plaintiffs' concerns are limited to seeking assurances that the Special Master will,  
9 when monitoring the BIR, also monitor the BIR's revision of its protocols, a process that is  
10 anticipated to be completed by October 2006. The BIR informed the Special Master that it does  
11 not object to a clarification about monitoring the protocol revision process. Therefore, the  
12 Special Master has modified the final report at page 25 to include Mr. Gennaco's monitoring of  
13 the BIR protocol revision process.

14 C. Defendants' Objections to the Draft Report.

15 Defendants' comments and objections to the draft report are set forth in a letter dated July  
16 7, 2006 (Exhibit 15). Defendants raise two objections.

17 First, defendants oppose the Special Master's recommendation for a \$900.00 per month  
18 recruitment and retention bonus for EAPT attorneys. Defendants raise two objections in this  
19 regard. First, defendants point out that a new contract with the State of California's attorney  
20 union provides a 5.9% salary increase for all rank and file State attorneys.

21 This argument is not persuasive. Turn-over in the EAPT primarily involves EAPT  
22 lawyers leaving EAPT for what they perceive as easier assignments elsewhere in State  
23 employment (e.g. the Department of Forestry).<sup>17</sup> Therefore, a blanket increase for all State  
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25 <sup>17</sup> EAPT attorneys are involved with a constant stream of administrative law litigation. The  
26 nature of the assignment also requires regular travel to the prisons for which each vertical advocate  
27 is responsible, as well as attending Skelly and SPB hearings inside the prisons. Alternative State  
28 attorney assignments do not require similar levels of litigation and travel.

1 attorneys does not solve the problem; indeed, the very purpose of the Special Master  
2 recommendation is to reward and recognize the difficult tasks faced by EAPT attorneys by  
3 providing a recruitment and retention bonus.

4 Second, defendants contend that the “link” between EAPT salaries and the constitutional  
5 violations that led to the Post Powers remedial plan is “tenuous at best.” The Special Master  
6 disagrees. The Final Report contained an extensive discussion of the systemic failures of the  
7 EAPT’s predecessor organization (the ELU), including responsibility for a 40% failure to  
8 prosecute rate based on the fact that the ELU did not adequately manage its litigation and  
9 allowed cases to linger on past the one-year statute of limitations. No one disputes the fact that  
10 (1) the EAPT and its vertical advocate program are an essential element of the Post Powers  
11 remedial plan and that (2) without adequate salaries this portion of the plan will fail.<sup>18</sup>

12 There are numerous alternative solutions to the problem, including hiring private law  
13 firms to assume EAPT duties, permanent salary increases, the establishment of a new  
14 classification of state attorney, etc. The Special Master’s recommendation, however, is designed  
15 to be the least intrusive possible: a limited recruitment and retention differential, consistent with  
16 State policy concerning issues of this nature.

17 Defendants, at page two of Exhibit 15, request that the Court permit the CDCR to explore  
18 with the DPA alternative solutions such as the creation of a specialist class for EAPT attorneys.  
19 While it is disappointing that the CDCR and DPA waited until the draft report issued before  
20 considering this alternative, in a abundance of caution and deference the Special Master has  
21 modified his recommendation concerning the \$900.00 to allow the CDCR and DPA 30 days  
22 from the date of the Court’s order to establish an adequate alternative program that will fairly  
23 compensate EAPT lawyers for the duties they perform.<sup>19</sup>

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25 <sup>18</sup> See Transcript of Proceedings of the July 12, 2006 Hearing [“Transcript”] at 20.

26 <sup>19</sup> The Special Master informed counsel for defendants about his decision to allow the CDCR and  
27 DPA additional time to establish an alternative immediately after the July 12, 2006 hearing. Thus  
28 by the time the Court issues an order concerning this issue, defendants and the DPA will have had

1 Defendants second objection relates to the Special Master's recommendation for an  
2 investigation and public hearings. This objection is similar in substance to the objections  
3 received from the Office of the Governor. Therefore, the Special Master will respond to this  
4 objection at the same time he responds to the Office of the Governor's objections, directly below.

5 D. Office of the Governor's Objections to the Draft Report.

6 1. *Introduction.*

7 The Office of the Governor sought permission to file a non-party response to the draft  
8 report on June 30, 2006 (Exhibit 16). The request was granted by the Special Master on July 3,  
9 2006 (Exhibit 17). The Office of the Governor's submission, consisting of a Letter brief  
10 ("Letter") from Andrea Lynn Hoch, and declarations from Susan Kennedy and Fred Aguiar is  
11 attached as Exhibit 18.

12 The Letter begins by commenting that the Special Master recognizes the positive steps  
13 taken by the Schwarzenegger Administration, and points out that the 2006-2007 budget contains  
14 the funding necessary for the continuation of the Post Powers remedial programs. The Special  
15 Master does not dispute the significant achievements of 2004-2005. As stated above, "the first  
16 twenty-four months of the governorship of Arnold Schwarzenegger, marked one of the most  
17 productive periods of prison reform in California history."

18 2. *The Governor's Prerogative to Seek Input From Stakeholders.*

19 The Letter stresses the Governor's prerogative to "seek input from stakeholders," and  
20 attempts to characterize the Kennedy/CCPOA connection as being one element of this process.  
21 The Special Master is not critical of the Governor's decision to seek input from stakeholders.  
22 The Special Master is seriously concerned, however, for the reasons discussed above, that the  
23 Kennedy/CCPOA connection goes far beyond the traditional process of "seeking input from  
24 stakeholders" and threatens the future of the Post Powers remedial plan. In this regard the  
25 Special Master notes that the Governor's Legal Secretary was unable to identify even one CDCR  
26 \_\_\_\_\_  
27 more than three months to develop and implement their proposed alternative.

1 reform or improvement that has been implemented during the six months which have transpired  
2 since the change in Chief of Staff (see Transcript at 24:4 to 26:12). The Office of the Governor's  
3 submission also details a continuing series of problems with the union, including numerous on-  
4 going lawsuits recently filed by CCPOA (*see* Letter at 5. footnote 1) and the CCPOA derailing  
5 the Governor's Strategic Growth Plan project concerning the construction of more than 80,000  
6 jail and prison beds in California (*see* Kennedy Declaration at 2:8 to 2:13). The facts concerning  
7 the CCPOA's conduct submitted by the Governor further support the Special Master's initial  
8 conclusion that further investigation is warranted.

9                   3. *The Office of the Governor's Contention that the Special Master's Concerns*  
10                   *are Based on Incomplete Information and Unsupported Inferences.*

11           The Letter also complains that: "[t]he Special Master spends only four pages of the 33-  
12 page draft report on his concerns about the Governor's Office, and without any supportive facts,  
13 resorts to rumors and innuendo to reach his speculative conclusion. This opinion is unfounded,  
14 unprofessional and wrong." The Special Master disagrees. He has talked with numerous CDCR  
15 officials and former employees and has assembled documents, some of which are attached to this  
16 report, that support an investigation. The Special Master concedes that he does not know all the  
17 facts because concerning many critical issues and details, no one is talking. If all that is hidden  
18 in Sacramento was disclosed, an investigation would not be necessary.

19           The following *facts* (neither rumors nor innuendo) support the Special Master's  
20 recommendation for an investigation: two CDCR Secretaries with unquestionable ethics and a  
21 commitment to prison reform left State service within a period of six weeks because of their  
22 concern about the Office of the Governor forming an alliance with the CCPOA; Susan Kennedy  
23 and Fred Aguiar conducted meetings with CCPOA officials without informing Rod Hickman and  
24 Jeanne Woodford; the Office of the Governor terminated the employment of the Director and  
25 Assistant Director of DPA on the eve of contract negotiations with the CCPOA; Tim Virga's  
26 appointment as Assistant Secretary of CDCR Labor was derailed by the Governor's Office the  
27 day after a meeting between the Chief of Staff, Cabinet Secretary, and CCPOA officials; and  
28

1 CDCR prison reform ground to a halt following Susan Kennedy's February 14, 2006 lunch with  
2 Mike Jimenez.

3 The Office of the Governor submitted declarations from Susan Kennedy and Fred Aguiar  
4 to support its position that the Special Master's concerns are based on incomplete information  
5 and unsupported inferences and therefore no investigation is warranted. The Special Master  
6 finds, however, that these limited and incomplete declarations raise more questions than they  
7 answer.

8 For example, Ms. Kennedy states that in her role as Cabinet Secretary for Governor  
9 Davis, she was "not involved in contract negotiations and was not privy to the details of contract  
10 negotiations" (Kennedy Declaration at 1:12 to 1:14). The Letter, at page 3, attempts to use this  
11 as proof that her conduct in 2006 does not signal a return to the Davis era practice of allowing the  
12 CCPOA to over-rule decisions of the CDCR Secretary. The declaration is limited however to  
13 Ms. Kennedy's duties as Cabinet Secretary. She also served as Governor Davis' Deputy Chief of  
14 Staff, where she had direct and numerous contacts with the CCPOA (*see* the Office of the  
15 Governor web-site press release attached as Exhibit 19). The Governor's Chief of Staff also  
16 explains that she did not recall meeting with CDCR Secretary Rod Hickman during January and  
17 February 2006 (Kennedy Declaration 1:19 to 2:6) because she was occupied with the Governor's  
18 Strategic Growth Plan ("SGP"), a multi-billion dollar investment package to address California's  
19 future infrastructure needs. A key element of the SGP was the construction of more than 80,000  
20 jail and prison beds, however, and the declaration does not explain why the Chief of Staff did not  
21 communicate with Secretary Hickman concerning the project, nor why she failed to involve Mr.  
22 Hickman in critical meetings about prison bonds. Not surprisingly, absent the Secretary's  
23 participation, the Administration's plan to construct jail and prison beds failed after the  
24 Governor's Legislative Unit met with CCPOA lobbyists, who refused to assist the Governor with  
25 prison bonds in the SGP (*see* Kennedy Declaration at 2:8 to 2:13). This portion of the  
26 declaration supports the Special Master's recommendations for an investigation. It also confirms  
27 statements made by Rod Hickman as to why he resigned as Secretary of the CDCR.



1 Similarly, Mr. Aguiar's declaration does not persuade the Special Master that there is no  
2 grounds for further investigation. First, it is exceedingly vague concerning meetings with  
3 CCPOA officials. Second, it raises credibility questions. For example, Mr. Aguiar's claim that  
4 he told Secretary Hickman that it was unlikely that he would be confirmed by the Senate (Aguiar  
5 Declaration at 1:20) is flatly contradicted by the former Secretary, and his description of a call to  
6 the Special Master (Aguiar Declaration at 2:9 to 3:2) omits that fact that he began the  
7 conversation by asserting that "[i]t's too bad that Jeanne Woodford is leaving the department to  
8 spend more time with her family." The Special Master has come to believe that Mr. Aguiar  
9 knew this was not the case.

10 *4. Defendants' and the Office of the Governor's Argument That an Investigation*  
11 *is Premature.*

12 Defendants and the Office of the Governor argue that an investigation is premature  
13 because the Post Powers remedial process continues, no serious harm to the remedial process has  
14 yet occurred, and the Governor is committed to prison reform (*see* Exhibit 15 at page 5 & Exhibit  
15 18 at page 8). These assertions ignore the fact that within a space of six weeks two Secretaries  
16 resigned from State service because of concerns about CCPOA influence in the Governor's  
17 Office, that key CDCR officials involved with the Post Powers remedial plan implementation  
18 subsequently left the Department, that the current Acting Secretary of the CDCR is serving on a  
19 temporary basis and has not, as of yet, agreed to stay permanently (*see* Transcript at 31:6-24),  
20 that the leadership of DPA was purged on the eve of CCPOA contract negotiations, and that  
21 Jeanne Woodford's appointment for Assistant Secretary of Labor Relations, Tim Virga, was  
22 rejected by the Office of the Governor one day after Susan Kennedy and Fred Aguiar met with  
23 CCPOA officials. These events have demoralized the staff at CDCR and may have put the  
24 fledgling Post Powers remedial programs at risk. Given this, the Special Master sees no reason  
25 to wait for additional remedial plan setbacks to occur, especially since the counsel for the  
26 prisoners, CDCR, CCPOA, and the Office of the Governor all agree that California's prisons face  
27 unprecedented crisis on a variety of fronts, including over-crowding, serious shortages of  
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1 correctional officers, constitutionally inadequate medical care, constitutionally inadequate mental  
2 health care, parole practices which require oversight by a Special Master, and a continuation of  
3 very high levels of turnover among wardens and health care managers.

4 Finally, significant portions of the Letter are not relevant to the concerns raised in this  
5 report. For example, the Governor's decision to address prison overcrowding through a Special  
6 Session of the Legislature and his plans for the creation of a high risk sex offender task force are  
7 far outside the scope of issues raised in this report. As emphasized at the July 12, 2006 hearing,  
8 the *Madrid* litigation does not encompass prison overcrowding. The Special Master also  
9 emphasizes that he is not, at this time, recommending modifications to the Court's remedial plan,  
10 nor additional Court intrusion into CDCR operations. The issue pending is whether an  
11 investigation should commence to ensure that the Court is fully informed with respect to the  
12 continuing viability of the Post Powers remedial plan.<sup>20</sup>

13 E. CCPOA Objections to the Draft Report.

14 1. *Introduction.*

15 The CCPOA sought permission to respond to the Special Master's draft report in a letter  
16 dated June 28, 2006. The CCPOA claimed, in the letter, that it had the right to respond based on  
17 the limited intervention granted by the Court concerning the Special Master's MOU review in  
18 2005 (see Exhibit 20). The intervention order, however, is extremely limited and clearly did not  
19 provide CCPOA with a right to comment on the draft report. Nevertheless, the Special Master  
20 allowed the CCPOA to respond as a non-party to those portions of the draft report which discuss  
21 the actions of the CCPOA, its officers, and members (Exhibit 21). The Special Master notes,  
22 however, that the pleadings filed by the CCPOA refer to the union as an "intervenor" rather than  
23

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24 <sup>20</sup> The Special Master also notes the following point made by plaintiffs during the hearing of July  
25 12, 2006: the Post Powers remedial plan came about because CCPOA Executive Vice President  
26 Chuck Alexander made a phone call to Director of Corrections Edward Alameida about a pending  
27 force related investigation. That call led to the shut-down of that investigation. There is no reason  
28 to wait and allow this sort of CCPOA/CDCR dynamic to re-occur prior to the Special Master  
commencing an investigation. *See* Transcript at 52-53.

1 “amicus.” To the extent that the CCPOA is contending that it has some right to respond to the  
2 Special Master’s draft report pursuant to the Court’s intervention order, this error by the CCPOA  
3 should be corrected. Therefore, the Special Master has added a recommendation to the final  
4 report that the Court inform the CCPOA that its appearance before the Special Master was as a  
5 non-party amicus and not as an intervenor.

6 *2. Summary of the CCPOA’s Responsive Pleadings.*

7 As explained above, the Special Master recently completed a year-long series of meetings  
8 with counsel for the parties, CCPOA, and DPA concerning clarifications to certain sections of  
9 the CDCR/CCPOA MOU. At the conclusion of the process, counsel for DPA and CCPOA  
10 stated that the clarification proceedings had been conducted in a fair manner (*see also*, Transcript  
11 at 57:12 - 15). Given this positive experience, the Special Master welcomed input from the  
12 CCPOA and hoped that meaningful information would be provided through its amicus  
13 submission.

14 Because of the sheer volume of material submitted by the CCPOA (a responsive brief,  
15 numerous declarations including declarations from counsel, copies of dated pleadings which  
16 have previously been considered by the Special Master, numerous exhibits including transcripts  
17 of depositions involving State Court litigation filed by the CCPOA, DVD’s of selected California  
18 Senate hearings, and a request for judicial notice), the Special Master devoted several days to  
19 sorting through the CCPOA filing in an effort to understand what the union was attempting to  
20 say. Following this review, however, the Special Master concludes that much of what was  
21 submitted by the CCPOA is not relevant to the issues raised in the draft report. Taken as a  
22 whole, the CCPOA’s response to the draft report appears to attempt to construct an alternative  
23 reality, a world where the CCPOA is the victim and its repeated, public and personal attacks on  
24 Rod Hickman, Brigid Hanson, Tim Virga, and Court initiated code of silence reforms are  
25 legitimate responses by the union to alleged “retaliation.” This false world is easily refuted;  
26 indeed, several of the CCPOA contentions not only defy reality, they support the need for an  
27 investigation as recommended by the Special Master.

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The CCPOA response was also accompanied by a number of declarations. For the most part the declarations are vague and incomplete, and despite being carefully crafted, they raise more questions than they answer. In addition, several CCPOA declarations bring forth credibility issues.

For 11 ½ years, I was CCPOA's primary representative at PBSP. During that time, I was neither part of, nor was I aware of, any concerted activity by CCPOA, through its representatives, to actively prevent correctional officers or other members of staff from reporting employee misconduct or criminal wrongdoing.

This assertion was contradicted two years ago by the Special Master’s findings in the Final Report filed June 24, 2004, a section entitled: *The Obstruction of Justice Investigation of CCPOA Representatives Alexander and Newton, and the Sustained Findings of the*

1 *Knowles/Palmer Investigation*. To summarize, the Special Master found that Alexander and  
2 other CCPOA representatives had been involved, over the course of many years, with the  
3 obstruction of both administrative and criminal investigations at Pelican Bay State Prison. *See*  
4 Final Report at 38-39; *see also* the Knowles/Palmer Report (Exhibit 23), an internal affairs report  
5 which explains how CCPOA representatives worked to obstruct investigations, and Court expert  
6 Dr. Patrick Maher's May 31, 2004 Memorandum entitled "Qualitative Review of 1997 Internal  
7 Affairs Investigation of PBSB CCPOA Personnel Investigation 105-96" (Exhibit 24), which  
8 explains how CCPOA representatives engaged in conduct to promote the code of silence at PBSB  
9 in violation of the Court approved use of force remedial plan.

10 To cite another example, footnote 12 states that CCPOA leaders posted an unflattering  
11 picture of Governor Schwarzenegger in the CCPOA bulletin board at CDCR Headquarters  
12 because they where angered by the fact that Brigid Hanson and Tim Virga had taken steps to stop  
13 the misuse of vacation days and sick leave credits. The CCPOA Response objects to this  
14 statement. Arguing that the posting of Governor Schwarzenegger was done for other purposes,  
15 the CCPOA claims, at footnote 6 of the Response (utilizing bold letters): "this is the first time  
16 CCPOA has heard of such a claim." Steve Weiss, CCPOA's Chief of Labor, has also submitted  
17 a declaration concerning this assertion. However, CCPOA President Mike Jimenez began an  
18 exchange of letters with Tim Virga and Brigid Hanson concerning the reporting of vacation days  
19 and sick leave as far back as February 2006. *See* Exhibits 26 - 28. Furthermore, the CCPOA has  
20 been involved in arbitrations and State Court litigation concerning the "Relief Time Bank"  
21 ("RTB") for approximately eighteen months, and the union is aware that President Mike Jimenez  
22 and Executive Vice President Chuck Alexander have for many years failed to report vacation  
23 days and sick leave. Thus, the CCPOA's assertion that the draft report was "the first time  
24 CCPOA has heard of such a claim" is not accurate.<sup>21</sup>

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27 <sup>21</sup> After the July 12<sup>th</sup> hearing the Inspector General issued an audit of the RTB which found  
28 serious abuses of the RTB process (*see* Exhibit 25).

1 Given all of this, the Special Master finds that the remedial process will not benefit by a  
2 detailed response to each and every assertion and argument which may be found within the  
3 numerous documents that comprises the CCPOA's Response. As clarified at the hearing of July  
4 12<sup>th</sup>, however, the Special Master made several changes in the text of this final report as  
5 requested by the CCPOA. In addition, the Special Master agrees with the CCPOA position that  
6 union officials may need to be heard at the hearings proposed by the Special Master. Questions  
7 and concerns about the declarations which accompanied the Response can be clarified at that  
8 time. The Special Master also agrees with the CCPOA's recommendation that he include, in his  
9 investigation, a review of DVD's of various legislative hearings. In that regard, in addition to  
10 reviewing the DVD's of those hearings submitted by the CCPOA, the Special Master will look  
11 into the Assembly Oversight Committee hearing of February 8, 2005 (conducted by  
12 Assemblyman Rudy Bermudez and Senator Gloria Romero), the February 22, 2006 Norwalk  
13 hearing (conducted by Assemblyman Rudy Bermudez), as well as the issue of the legitimacy of  
14 "pre-confirmation" hearings.

15 To summarize, the Special Master finds no reason to withdraw his recommendation that  
16 an investigation take place concerning the troubling events described in this report. At the  
17 conclusion of the July 12<sup>th</sup> hearing the CCPOA agreed with the Special Master concerning this  
18 issue, counsel for the union indicating that the CCPOA welcomed hearings and truthful  
19 testimony (*see* Transcript at 62 - 63).

#### 20 IV.

#### 21 RECOMMENDATIONS

22 Based on the findings above, the Special Master recommends as follows:

##### 23 1. Continued Monitoring:

24 While significant remedial progress has been achieved, each element of the Post Powers  
25 remedial plan needs to continue forward to be successful. Furthermore, as explained above, the  
26 January 2006 change of policy in the Governor's Office threatens the entire remedial process.  
27 Therefore, the Special Master recommends that the Court order him to monitor the Post Powers

1 reforms as follows:

2 A. Continue periodic meetings with counsel, CDCR officials, and the Inspector  
3 General concerning CDCR investigations and discipline;

4 B. Monitor and report to the Court concerning the adequacy of staffing for the  
5 BIR, Internal Affairs, and the EAPT, including the adequacy of the salaries and  
6 benefits for the BIR, Internal Affairs, and the EAPT;

7 C. Issue a report and recommendations, no later than January 31, 2008,  
8 concerning future Court oversight of CDCR investigations and discipline  
9 (including the end of the proposed peer review monitoring of the BIR by Court  
10 Expert Michael Gennaco).

11 2. Monitoring the BIR's Monitoring.

12 Now that the BIR has assumed systemic oversight over internal affairs investigations and  
13 CDCR discipline related casework, the Special Master and the Inspector General have approved  
14 a plan developed by Court Expert Michael Gennaco which provides a policy and mechanism for  
15 the Special Master to monitor the adequacy of BIR monitoring. The plan, attached as Exhibit 13,  
16 provides an appropriate and comprehensive tool to determine whether the newly created BIR is  
17 providing adequate oversight over CDCR investigations which warrants the end of, or some  
18 reduction of, Court oversight. Therefore, the Special Master recommends that the Court adopt  
19 the BIR monitoring plan submitted by Court Expert Michael Gennaco.

20 3. Establishing an Appropriate Salary Enhancement for EAPT Attorneys.

21 The salaries of the lawyers who serve in the critical EAPT unit are woefully inadequate.  
22 The Special Master has listened for months to various reports about why the State's salary system  
23 cannot self-adjust so that these attorneys, essential to the Post Powers remedial plan, are  
24 adequately compensated so that turn over in the EAPT is not excessive. Furthermore, it would  
25 have been helpful if defendants could have provided the Special Master with relevant  
26 comparative salary data. It appears, however, that such information is simply not compiled by  
27 the State. Therefore, in order to determine an appropriate salary enhancement, the Special

1 Master met and conferred with EAPT staff (including those who were leaving for other [and  
2 perceived easier] State attorney assignments), the Court experts, and representatives from the  
3 BIR. While the \$900.00 per month recruitment and retention differential proposed by the  
4 Special Master may be too conservative, hopefully the State will conduct an appropriate survey  
5 that considers both the job and the competition and thereafter further increase the salaries of  
6 EAPT staff.

7 Therefore, Special Master recommends that the Court order defendants to establish and  
8 implement, effective August 1, 2006, a recruitment and retention differential for all EAPT  
9 attorneys, up to and including the Assistant Chief Counsel of the Employment Advocacy Team,  
10 of \$900.00 per month. The Special Master further recommends that the Court stay this Order for  
11 thirty days to allow defendants, the DPA, and the State Personnel Board the opportunity to  
12 consider and implement an alternative solution, such as the creation of a specialist class of state  
13 attorneys that will provide at least \$900.00 per month more in salary to each EAPT attorney, up  
14 to and including the Assistant Chief Counsel. If such a program is established within 30 days the  
15 Special Master should notify the Court. If it is not, the Order should go into effect.

16 4. Conducting an Investigation, Including Public Hearings, to Preserve the Post Powers  
17 Remedial Plan and Move Forward the CDCR's Effort to Eliminate the Code of Silence.

18 There exists a compelling need to achieve, in a timely manner, the objectives of the  
19 *Madrid* and Post Powers remedial plans. Indeed, given the years which have elapsed and the  
20 limited results, the need is more compelling today than ever before. The Schwarzenegger  
21 Administration's 2006 reversal of policy, however, may threaten the entire Post Powers remedial  
22 plan. For example, it is absolutely essential for the timely and effective implementation of the  
23 Post Powers remedial plan that the Assistant Secretary of CDCR Labor Relations position is  
24 staffed by an individual who can effectively protect investigation and discipline related  
25 management rights set forth in the MOU. Susan Kennedy, however, appears to have given the  
26 CCPOA veto power over this critical appointment. If the CCPOA is allowed to select the next  
27 Assistant Secretary of CDCR Labor Relations, all that has been achieved during the past two  
28



1 years may be lost. Likewise (given an environment in Sacramento and the prisons where  
2 CCPOA leaders continue to enforce the code of silence), compliance with the Court's orders will  
3 not take place without competent, ethical prison executives who are willing to face up to CCPOA  
4 attacks. Two CDCR Secretaries with unquestioned ethics, however, have retired from State  
5 service – apparently because of the CCPOA's influence in the Governor's Office.

6 In similar fashion, the 2006 MOU negotiations may negatively impact on contract  
7 provisions tied directly to use of force and other remedial plan requirements. The CCPOA  
8 Sunshine Package (Exhibit 29), released July 3, 2006 (several weeks *after* the 2006 negotiations  
9 pursuant to the Ralph C. Dills Act began), provides ample reason for concern about the union's  
10 designs concerning investigations, correctional officer discipline, the expansion of post and bid  
11 into the investigation and discipline arena, and the placement of CCPOA representatives on  
12 management committees involving investigations and discipline. *See*, for example, the tone and  
13 content of the second entry on page 24 of Exhibit 29:

14 CCPOA proposes to enhance the section pertaining to Representation on  
15 Committees. Under the current administration, this section of the MOU has  
16 become nothing more than a bookmark as the state bends to the Federal Courts  
and their whims.


17 *See also* Exhibit 29 at pages 4, 5, 9, 10, 12, 13, 14, 15, 18, 24, 25, 26, 28, 33, 36. Taken  
18 as a whole, the CCPOA demands appear to be nothing less than a concerted attack on the Post  
19 Powers remedial plan and CDCR policies which were developed in 2004-2005 in order to  
20 improve investigations and discipline.

21 Because of the developments described above the Special Master recommends that the  
22 Court order the Special Master to investigate, hold public hearings as necessary, and report to the  
23 Court concerning whether the *Madrid* and Post Powers remedial plans have been compromised,  
24 and if so, whether the Court's remedial orders should be modified.

1           5. Clarification Concerning the CCPOA's Non-Party Status Concerning This Report and  
2 the Investigation Recommended by the Special Master.

3           The Special Master also recommends that the Court clarify that the CCPOA is a non-  
4 party concerning responses filed to this report, and concerning the investigation recommended in  
5 this report.

6  
7 Dated: August 21, 2006.

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12 John Hagar  
13 Special Master  
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I am a resident of the County of Alameda, California; that I am over the age of eighteen (18) years of age and not a party to the within titled cause of action. I am employed as an Assistant to the Special Master in *Madrid v. Tilton* in the County of San Francisco, California.

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21 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
22 true and correct. Executed on August 22, 2006 at San Francisco, California.

23   
24 Kristina Hector  
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