

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER, et al.,  
Plaintiffs,  
v.

No. C 09-5796 CW  
ORDER DENYING  
MOTION TO DISMISS  
(Docket No. 160)

EDMUND G. BROWN, JR., et al.,  
Defendants.

---

Plaintiffs, ten inmates at Pelican Bay State Prison, bring this putative class action against Defendants, the Governor of the State of California, the Secretary of the California Department of Corrections and Rehabilitation (CDCR), the Chief of CDCR's Office of Correctional Safety, and the Warden of Pelican Bay State Prison, for violations of the Eighth and Fourteenth Amendments. Defendants move to dismiss Plaintiffs' second amended complaint (2AC) for lack of subject matter jurisdiction and failure to state a claim. Plaintiffs oppose the motion. After considering the parties' submissions and oral argument, the Court denies Defendants' motion.

BACKGROUND

Plaintiffs Todd Ashker and Danny Troxell have lived in solitary confinement in Pelican Bay's Secure Housing Unit (SHU) for over two decades. Docket No. 1, Compl. ¶¶ 16-18. On December 9, 2009, they filed this lawsuit challenging the conditions of their confinement. Their pro se complaint charged various CDCR officials with violating their First, Fifth, Eighth, and Fourteenth Amendment rights. Id. ¶ 8.

United States District Court  
For the Northern District of California

1 On September 10, 2012, after securing counsel, Ashker and  
2 Troxell filed a second amended complaint (2AC) converting this  
3 suit into a putative class action and joining eight other long-  
4 term SHU inmates as plaintiffs. Docket No. 136, 2AC ¶ 1. In  
5 their 2AC, Plaintiffs assert that the conditions inside the  
6 Pelican Bay SHU violate the Eighth Amendment's ban on cruel and  
7 unusual punishment. Id. ¶¶ 177-92. Specifically, they allege  
8 that "the cumulative effect of extremely prolonged confinement,  
9 along with denial of the opportunity of parole, the deprivation of  
10 earned credits, the deprivation of good medical care, and other  
11 crushing conditions of confinement at the Pelican Bay SHU" have  
12 caused them significant harm, both physically and psychologically.  
13 Id. ¶¶ 180-81. They claim that SHU inmates are forced to  
14 "languish, typically alone, in a cramped, concrete, windowless  
15 cell, for 22 and one-half to 24 hours a day" without access to  
16 "telephone calls, contact visits, and vocational, recreational or  
17 educational programming." Id. ¶ 3.

18 In addition to their Eighth Amendment claim, Plaintiffs  
19 assert that CDCR's procedures for assigning inmates to the SHU  
20 violate the Fourteenth Amendment's guarantee of due process. Id.  
21 ¶¶ 193-202. According to Plaintiffs, CDCR assigns inmates to the  
22 SHU based solely on their membership in or association with prison  
23 gangs, without regard for the inmate's "actual behavior." Id.  
24 ¶¶ 91-92. CDCR relies instead on the word of confidential  
25 informants and various indicia such as "gang-related art, tattoos,  
26 or written material" to determine whether inmates are affiliated  
27 with a gang -- a process known as "gang validation." Id. ¶ 92.

28

1 Inmates who have been validated as gang members or associates are  
2 assigned to the SHU for an indefinite term. Id. ¶¶ 92-94.

3 Once inside the SHU, inmates receive periodic reviews every  
4 six months to determine whether they should be released into  
5 Pelican Bay's general population. Id. ¶¶ 96-97. Plaintiffs  
6 assert that these reviews are essentially "meaningless," however,  
7 because they require inmates to "debrief" -- that is, renounce  
8 their membership in the gang and divulge the gang's secrets to  
9 prison officials -- in order to secure release. Id. ¶¶ 96-97, 7.  
10 Plaintiffs contend that debriefing is not a viable option for most  
11 inmates, who believe that it "places [them] and their families in  
12 significant danger of retaliation" from other prisoners. Id. ¶ 7.

13 CDCR also conducts reviews of SHU inmates' gang affiliation  
14 status every six years to determine whether they are still  
15 "active" gang members or associates. Id. ¶¶ 102-04. As with the  
16 six-month reviews, however, Plaintiffs claim that this process  
17 typically only leads to the inmate's release from the SHU if the  
18 inmate is willing to debrief. Id. Plaintiffs allege, in short,  
19 that they have effectively been denied "information about an  
20 actual path out of the SHU, besides debriefing." Id. ¶ 117. They  
21 assert that they "are entitled to meaningful notice of how they  
22 may alter their behavior to rejoin general population, as well as  
23 meaningful and timely periodic reviews to determine whether they  
24 still warrant detention in the SHU." Id. ¶ 200.

25 Plaintiffs' 2AC seeks declaratory and injunctive relief. In  
26 particular, Plaintiffs request "alleviation of the conditions of  
27 confinement" in the SHU, meaningful review of the continued need  
28 for solitary confinement of all inmates who have been in the SHU

1 for over six months, and release from the SHU of every inmate who  
2 has spent over ten years there. Id. at ¶¶ 45-46. They have not  
3 asserted any claims for monetary damages.

#### 4 LEGAL STANDARDS

##### 5 I. Subject Matter Jurisdiction

6 Subject matter jurisdiction is a threshold issue which goes  
7 to the power of the court to hear the case. Federal subject  
8 matter jurisdiction must exist at the time the action is  
9 commenced. Morongo Band of Mission Indians v. Cal. State Bd. of  
10 Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988). A federal  
11 court is presumed to lack subject matter jurisdiction until the  
12 contrary affirmatively appears. Stock W., Inc. v. Confederated  
13 Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).

14 Dismissal is appropriate under Rule 12(b)(1) when the  
15 district court lacks subject matter jurisdiction over the claim.  
16 Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1) motion may either  
17 attack the sufficiency of the pleadings to establish federal  
18 jurisdiction, or allege an actual lack of jurisdiction which  
19 exists despite the formal sufficiency of the complaint. Thornhill  
20 Publ'g Co. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th  
21 Cir. 1979); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.  
22 1987).

##### 23 II. Failure to State a Claim

24 A complaint must contain a "short and plain statement of the  
25 claim showing that the pleader is entitled to relief." Fed. R.  
26 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
27 state a claim, dismissal is appropriate only when the complaint  
28 does not give the defendant fair notice of a legally cognizable

1 claim and the grounds on which it rests. Bell Atl. Corp. v.  
 2 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
 3 complaint is sufficient to state a claim, the court will take all  
 4 material allegations as true and construe them in the light most  
 5 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
 6 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
 7 to legal conclusions; "threadbare recitals of the elements of a  
 8 cause of action, supported by mere conclusory statements," are not  
 9 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
 10 (citing Twombly, 550 U.S. at 555).

#### 11 DISCUSSION

##### 12 I. Subject Matter Jurisdiction

13 Defendants contend that Plaintiffs' due process claim is moot  
 14 because CDCR has recently implemented new procedures for assigning  
 15 inmates to the SHU.<sup>1</sup> The new procedures -- which took effect in  
 16 October 2012 -- are part of the agency's "Security Threat Group"  
 17 (STG) pilot program, which aims to revamp CDCR's "gang management  
 18 policies." Declaration of G. Giurbino ¶ 5. According to a CDCR  
 19 administrator, George Giurbino, the pilot program involves  
 20 (1) creating a "new STG-behavior-based disciplinary matrix, which  
 21 provides for additional procedural due process safeguards";  
 22 (2) forming a "new STG Classification Committee, which provides an  
 23 additional level of due process review and confirms initial STG  
 24 validations"; and (3) introducing new procedures to incentivize  
 25 good behavior among gang affiliated inmates. Id. The program  
 26 will also include a case-by-case review of every SHU inmate across  
 27

---

28 <sup>1</sup> Mootness is properly raised on a motion to dismiss under Rule  
 12(b)(1). White v. Lee, 227 F.3d 1214, 1243 (9th Cir. 2000).

1 the State. Id. ¶ 6. During the first nine weeks of the pilot  
2 program, these reviews led to forty-three inmates at five  
3 different correctional facilities being "classified for release  
4 from the SHU to the general population." Id. Defendants have not  
5 specified how many of these releases occurred at Pelican Bay.

6 The changes implemented by the STG program do not moot  
7 Plaintiffs' due process claim. A claim is moot only if it has  
8 lost its character as a present, live controversy, and if no  
9 effective relief can be granted. Flast v. Cohen, 392 U.S. 83, 95  
10 (1968). In general, a defendant cannot moot a claim merely by  
11 ceasing voluntarily to engage in illegal conduct; rather, it must  
12 show that "(1) there is no reasonable expectation that the wrong  
13 will be repeated, and (2) interim relief or events have completely  
14 and irrevocably eradicated the effects of the alleged violation."  
15 Barnes v. Healy, 980 F.2d 572, 580 (9th Cir. 1992). The defendant  
16 bears a "heavy burden" in making this showing. Tinoqui-Chalola  
17 Council of Kitanemuk & Yowlumne Tejon Indians v. United States  
18 Dep't of Energy, 232 F.3d 1300, 1303 (9th Cir. 2000).

19 Defendants here have failed to satisfy this burden. In  
20 particular, they have not shown that the STG program will  
21 permanently cure the specific due process violations that  
22 Plaintiffs allege. The Ninth Circuit has rejected mootness  
23 arguments for this reason in the past. In Gluth v. Kangas, the  
24 court specifically rejected prison officials' argument that a  
25 group of Arizona inmates' claims of lack of access to the courts  
26 were rendered moot by the prison's "post-litigation promulgation  
27 of a new access policy." 951 F.2d 1504, 1507 (9th Cir. 1991).  
28 The Gluth court found the officials' mootness argument

1 "overreaching" because they had not explained in detail how the  
2 new policy would permanently dispose of the plaintiffs' claims.  
3 Id. ("Even assuming that the policy meets constitutional standards  
4 on its face, given the Department's history of allegedly denying  
5 access arbitrarily and the vagueness of the new policy, it cannot  
6 be said 'with assurance' that there is no 'reasonable expectation'  
7 that the alleged violations will recur.").

8 Defendants' mootness argument is similarly lacking here.  
9 Although they have submitted a hundred-page CDCR memorandum  
10 describing the new program, they have not shown that any of the  
11 program's new procedures are permanent. To the contrary, CDCR has  
12 stated that the "pilot program has a lifespan of two years."  
13 Giurbino Decl. ¶ 10. As such, Defendants cannot establish that  
14 the program will "irrevocably eradicate[] the effects of the  
15 alleged violation[s]." Barnes, 980 F.2d at 580 (emphasis added);  
16 cf. Celano v. Marriott Int'l, Inc., 2008 WL 239306, at \*5 (N.D.  
17 Cal.) (finding that the defendant's pilot program to improve  
18 access to its facilities did not moot the plaintiff's Americans  
19 with Disabilities Act claim because the defendant conceded that  
20 "the pilot program . . . may be temporary").

21 Defendants request, as an alternative to dismissal, that the  
22 Court stay Plaintiffs' due process claims until the STG program  
23 has been fully implemented. This request is denied. A stay would  
24 prejudice Plaintiffs, delay the case unduly, and save few  
25 resources because the parties would still have to litigate  
26 Plaintiffs' Eighth Amendment claims during the pendency of the  
27 stay.  
28

1 II. Failure to State a Claim

2 A. Cruel and Unusual Punishment (First Cause of Action)

3 Plaintiffs allege that, while living inside the SHU, they  
4 have been deprived of basic human needs, including "normal human  
5 contact, environmental and sensory stimulation, mental and  
6 physical health, physical exercise, sleep, nutrition, and  
7 meaningful activity." 2AC ¶ 180. They assert that their  
8 "extremely prolonged exposure to these deprivations" has caused  
9 them serious physical and psychological harm in violation of the  
10 Eighth Amendment. Id. ¶¶ 179-82.

11 The Eighth Amendment requires prison officials to take  
12 reasonable measures to guarantee inmate safety. See Farmer v.  
13 Brennan, 511 U.S. 825, 832 (1994). Although the provision "does  
14 not mandate comfortable prisons," Rhodes v. Chapman, 452 U.S. 337,  
15 349 (1981), it does require that prisons provide inmates with  
16 "basic human needs." Helling v. McKinney, 509 U.S. 25, 33 (1993).

17 Eighth Amendment claims have two basic elements. The first  
18 is objective: the deprivation alleged must be sufficiently  
19 serious. Farmer, 511 U.S. at 832 (citing Wilson v. Seiter, 501  
20 U.S. 294, 297-98 (1991)). The second is subjective: the prison  
21 official must possess a sufficiently culpable state of mind. Id.  
22 (citing Wilson, 501 U.S. at 298). To determine whether an alleged  
23 deprivation is sufficiently serious to satisfy the objective  
24 component of an Eighth Amendment claim, a court must consider the  
25 circumstances, nature, and duration of the deprivation. Id. at  
26 834 (citing Wilson, 501 U.S. at 298). With respect to the  
27 subjective component, the requisite state of mind depends on the  
28 nature of the claim. In prison-conditions cases, the necessary



1 state of mind is one of "deliberate indifference." See, e.g.,  
2 Wilson, 501 U.S. at 302-03; Allen v. Sakai, 48 F.3d 1082, 1087  
3 (9th Cir. 1994).

4 Here, Plaintiffs have adequately plead both elements of an  
5 Eighth Amendment claim. They have alleged that their prolonged  
6 social isolation and lack of environmental stimuli -- each  
7 Plaintiff has lived in the SHU for at least eleven years -- causes  
8 "serious psychological pain and suffering and permanent  
9 psychological and physical injury." 2AC ¶¶ 181. These  
10 allegations are plausible in light of another court's fact  
11 findings that even shorter stays in the SHU are capable of causing  
12 psychological harm. See Madrid v. Gomez, 889 F. Supp. 1146, 1261-  
13 65 (1995) ("[T]he conditions of extreme social isolation and  
14 reduced environmental stimulation found in the Pelican Bay SHU  
15 will likely inflict some degree of psychological trauma upon most  
16 inmates confined there for more than brief periods.").  
17 Plaintiffs' asserted injuries -- the symptoms of which include  
18 "chronic insomnia," "severe concentration and memory problems,"  
19 "anxiety," and other ailments -- are sufficient to satisfy the  
20 objective component of their Eighth Amendment claim, considering  
21 the length of Plaintiffs' exposure to these conditions. See Hutto  
22 v. Finney, 437 U.S. 678, 686-87 (1978) ("[T]he length of  
23 confinement cannot be ignored in deciding whether the confinement  
24 meets constitutional standards. A filthy, overcrowded cell and a  
25 diet of 'grue' might be tolerable for a few days and intolerably  
26 cruel for weeks or months."); Keenan v. Hall, 83 F.3d 1083, 1089  
27 (9th Cir. 1996) (same).  
28

1 Plaintiffs have also adequately plead facts to satisfy the  
2 subjective component of their claim. Not only are the physical  
3 symptoms they allege sufficiently obvious to apprise prison  
4 officials of their injuries but, in addition, Plaintiffs claim  
5 that CDCR officials were given explicit notice of their injuries  
6 by way of administrative grievances, written complaints, and  
7 inmate hunger strikes. 2AC ¶¶ 189-92. This assertion -- that  
8 CDCR officials knew of the risks of long-term solitary confinement  
9 but ignored them for several years -- is sufficient to satisfy the  
10 deliberate indifference requirement at the pleading stage. See  
11 Helling, 509 U.S. at 33 ("We have great difficulty agreeing that  
12 prison authorities may not be deliberately indifferent to an  
13 inmate's current health problems but may ignore a condition of  
14 confinement that is sure or very likely to cause serious illness  
15 and needless suffering the next week or month or year.").

16 The decision in Madrid, 889 F. Supp. at 1261-65, does not  
17 preclude Plaintiffs' claim here. Although the Madrid court only  
18 found that the conditions in the SHU violated the Eighth Amendment  
19 rights of inmates who were "already mentally ill" or predisposed  
20 to mental illness, it also stated:

21 We emphasize, of course, that this determination is  
22 based on the current record and data before us. We can  
23 not begin to speculate on the impact that Pelican Bay  
24 SHU conditions may have on inmates confined in the SHU  
for periods of 10 or 20 years or more; the inmates  
studied in connection with this action had generally  
been confined to the SHU for three years or less.

25 Id. The decision, thus, expressly left open the possibility that  
26 longer periods of confinement in the SHU -- such as those alleged  
27 here -- could implicate Eighth Amendment concerns, even for those  
28 inmates who are not predisposed to mental illness.

1 The other two cases that Defendants cite, Coleman v. Wilson,  
2 912 F. Supp. 1282, 1293 (E.D. Cal. 1995), and Plata v.  
3 Schwarzenegger, No. 01-1351 TEH, Docket No. 1237, Stipulation &  
4 Order, at 1 (N.D. Cal. June 6, 2008) are also not preclusive here.  
5 Coleman and Plata are class actions that address the adequacy of  
6 health care services provided by CDCR to inmates across  
7 California. The Coleman class includes all CDCR inmates "with  
8 serious mental disorders," 912 F. Supp. at 1293, while the Plata  
9 class includes all CDCR inmates with "serious medical conditions,"  
10 No. 01-1351 TEH, Docket No. 20, Compl., at 52.<sup>2</sup> In contrast,  
11 Plaintiffs here seek to represent a much narrower class (inmates  
12 housed in the Pelican Bay SHU) and assert a much broader claim  
13 (prolonged deprivation of human contact and environmental  
14 stimuli). Because neither the Coleman nor Plata class sought to  
15 challenge long-term confinement in the Pelican Bay SHU, these  
16 cases do not require dismissal of Plaintiffs' Eighth Amendment  
17 claim.

18 B. Due Process (Second Cause of Action)

19 Plaintiffs allege that CDCR's procedures for assigning  
20 inmates to the SHU and periodically reviewing those assignments  
21 violate the Due Process Clause of the Fourteenth Amendment. 2AC  
22 ¶¶ 193-202.

23 Courts use a two-step inquiry to determine whether a  
24 plaintiff has stated a valid procedural due process claim. See  
25 Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460  
26 (1989). First, the court asks whether the plaintiff has alleged a  
27

28 <sup>2</sup> The Plata class originally excluded Pelican Bay inmates but was later amended by stipulation.

1 deprivation of a legally cognizable interest -- that is, "whether  
2 there exists a liberty or property interest which has been  
3 interfered with by the State." Id. If the court finds that the  
4 plaintiff has alleged such a deprivation, it will then proceed to  
5 the second stage of the inquiry, asking "whether the procedures  
6 attendant upon that deprivation were constitutionally sufficient."

7 Id.

8 Defendants here do not dispute that reassigning inmates to  
9 the SHU qualifies as a deprivation of a legally cognizable liberty  
10 interest. See Wilkinson v. Austin, 545 U.S. 209, 223-24 (2005)  
11 (recognizing inmates have a liberty interest in avoiding  
12 assignment to a supermax unit that disqualifies them for parole  
13 and imposes "severe limitations on all human contact" for an  
14 "indefinite" period of time). Their motion therefore turns on the  
15 second part of the due process inquiry: namely, whether the  
16 procedures CDCR allegedly uses to assign inmates to the SHU are  
17 constitutionally adequate. To answer this question, the Court  
18 must apply the three-part balancing test laid out in Mathews v.  
19 Eldridge, 424 U.S. 319, 335 (1976). Under this test, the Court  
20 must weigh: (1) the "private interest that will be affected" by  
21 the challenged government action; (2) "the risk of erroneous  
22 deprivation of such interest" under current procedures and the  
23 "probable value, if any, of additional or substitute procedural  
24 safeguards"; and (3) the "[g]overnment's interest" in the official  
25 action, including the cost of providing additional procedures.

26 Id. Because Plaintiffs here allege that they receive only minimal  
27 procedural safeguards while being subjected to a significant  
28

1 deprivation of liberty, they have stated a valid due process claim  
2 under Mathews.

3 The Supreme Court's decision in Wilkinson provides useful  
4 guidance here. In Wilkinson, the Court held that Ohio's  
5 procedures for assigning inmates to the State's only supermax  
6 prison -- a facility similar to Pelican Bay's SHU -- satisfied the  
7 due process requirements of Mathews. 545 U.S. at 224-29. The  
8 Court's decision was based on the fact that Ohio's reassignment  
9 process includes numerous measures to help ensure that inmates are  
10 not erroneously assigned to the supermax facility. In particular,  
11 Court noted,

12 Ohio provides multiple levels of review for any decision  
13 recommending [supermax] placement, with power to  
14 overturn the recommendation at each level. In addition  
15 to these safeguards, Ohio further reduces the risk of  
16 erroneous placement by providing for a placement review  
17 within 30 days of an inmate's initial assignment to [the  
18 supermax facility].

19 Id. at 227.<sup>3</sup> The Court also emphasized that "Ohio requires that  
20 the decisionmaker provide a short statement of reasons. This  
21  
22

---

23 <sup>3</sup> Ohio's decision-making process involves several steps. First, to  
24 initiate the reassignment, a prison official must prepare a form  
25 detailing "matters such as the inmate's recent violence, escape  
26 attempts, gang affiliation, underlying offense, and other pertinent  
27 details." 545 U.S. at 216. Next, a three-member committee of  
28 corrections officials is convened to review the form and to hold a  
hearing on the matter. Although the inmate may not call witnesses at  
the hearing, he may appear to object to the proposed reassignment and  
offer any information or explanations that he finds relevant to the  
committee's decision. Id. The committee is required to give the inmate  
written notice, including a copy of the form that initiated the process,  
at least forty-eight hours before the hearing. Id.

1 requirement guards against arbitrary decisionmaking while also  
2 providing the inmate a basis for objection before the next  
3 decisionmaker or in a subsequent classification review." Id. at  
4 226. Finally, the Court noted that inmates housed in the supermax  
5 facility are entitled to this same multi-tiered review process  
6 every year that they remain there. Id. at 217. Based on these  
7 robust safeguards, the Court concluded that Ohio's reassignment  
8 policy "strikes a constitutionally permissible balance between the  
9 factors of the Mathews framework." Id. at 230.

10 CDCR's reassignment procedures include significantly fewer  
11 protections than Ohio's. According to Plaintiffs' complaint, CDCR  
12 inmates do not receive a multi-tiered review before being  
13 reassigned to the SHU. Nor do they receive an immediate review of  
14 the reassignment decision within thirty days of their placement  
15 there. Inmates also receive fewer opportunities to object to  
16 CDCR's initial reassignment decision and to the subsequent six-  
17 month and six-year reviews of their gang affiliation status. In  
18 fact, according to Plaintiffs' complaint, the only way inmates can  
19 realistically secure release from the SHU is to debrief, an option  
20 which many inmates are reluctant to exercise. See Wilkinson, 545  
21 U.S. at 227 ("Testifying against, or otherwise informing on, gang  
22 activities can invite one's own death sentence."). Finally,

23  
24 If the committee recommends reassignment, it must issue a written  
25 report explaining its reasoning and summarizing the evidence presented  
26 at the hearing. Id. at 216-17. The warden at the facility where the  
27 inmate is housed must then sign off on the committee report and forward  
28 it to a state agency staffed with corrections officials, who must do the  
same. Id. Both the warden and the agency must annotate the committee  
report with the reasons for their respective decisions and provide a  
copy of the annotated report to the inmate. Id. If the inmate is  
ultimately reassigned, his file will be reviewed again by an official at  
the supermax facility within thirty days of his arrival there. Id.

1 unlike in Ohio, CDCR's initial reassignment decision is based  
2 solely on the inmate's gang affiliations, without regard to his  
3 criminal history or propensity for violence. Taken together,  
4 CDCR's procedures as alleged appear create a much greater "risk of  
5 erroneous deprivation" -- the second Mathews factor -- than was  
6 present in Wilkinson.

7 The third Mathews factor also weighs slightly in Plaintiffs'  
8 favor here because the costs of providing additional safeguards  
9 would be relatively small. Plaintiffs allege that Pelican Bay's  
10 SHU houses roughly a thousand inmates, which constitutes only a  
11 small fraction of California's total inmate population. Amending  
12 the procedural protections afforded to this subset of  
13 geographically isolated inmates would be considerably easier --  
14 and cheaper -- than affording new protections to the inmate  
15 population as a whole.<sup>4</sup>

16 While the Court recognizes that the first Mathews factor --  
17 the private interest at stake -- is ordinarily given less weight  
18 "within the context of the prison system and its attendant  
19 curtailment of liberties," Wilkinson, 545 U.S. at 225, this case  
20 presents unique circumstances, given the length and severity of  
21 the deprivations alleged. Plaintiffs here have spent much more  
22 time in the SHU than any of the Wilkinson plaintiffs spent in  
23 Ohio's supermax facility, which was only four years old when the  
24 case was filed. Five of the Plaintiffs here allege that they have

---

25  
26 <sup>4</sup> As noted above, Defendants have represented that they intend to  
27 conduct a case-by-case review of all current SHU assignments as part of  
28 the new STG pilot program. Such an endeavor is likely possible only  
because of the relatively small number of inmates housed in SHUs across  
the State. Pelican Bay's SHU inmates represent an even smaller share of  
this subgroup.

1 lived in the SHU, with minimal human contact, for more than twenty  
2 consecutive years: even within the "context of the prison system,"  
3 this represents a significant deprivation of liberty. See Keenan,  
4 83 F.3d at 1089 ("We do know that relevant factors [when  
5 evaluating an inmate's liberty interest in avoiding a transfer]  
6 include whether there is a likelihood that the transfer will  
7 affect the duration of [the inmate]'s sentence and the duration of  
8 the transfer.").

9 Toussaint v. McCarthy, 801 F.2d 1080, 1098-1101 (9th Cir.  
10 1986), which Defendants cite for support, does not counsel  
11 otherwise. In Toussaint, the Ninth Circuit examined California's  
12 procedure for reassigning inmates to administrative segregation  
13 units and concluded that inmates lacked a substantial liberty  
14 interest in avoiding reassignment to those units. Id. at 1291-92.  
15 This holding has little application to the present case because  
16 Plaintiffs' asserted liberty interest here is considerably greater  
17 than merely avoiding administrative segregation. The SHU not only  
18 exposes inmates to harsher conditions than administrative  
19 segregation but, as noted above, does so for longer periods of  
20 time. Indeed, the conditions inside the SHU appear more similar  
21 to the conditions inside the Ohio supermax facility described in  
22 Wilkinson -- where the Supreme Court recognized a cognizable  
23 liberty interest -- than to those described in Toussaint.  
24 Toussaint is therefore inapposite.

25 So, too, is Bruce v. Ylst, 351 F.3d 1283, 1287-88 (9th Cir.  
26 2003), another case on which Defendants rely. In Bruce, the Ninth  
27 Circuit rejected an individual SHU inmate's due process claim  
28 alleging that "prison officials did not have sufficient evidence



1 to validate him as a member of the BGF prison gang." Id. at 1287.  
2 The court held that the prison officials were entitled to summary  
3 judgment because their initial gang validation decision was  
4 supported by "some evidence." Id. at 1288. While the Bruce court  
5 upheld CDCR's gang validation decision in that case, however, it  
6 did not resolve the broader question presented here: namely,  
7 whether CDCR's practice of assigning inmates to the SHU  
8 indefinitely and then allegedly denying them realistic  
9 opportunities for release violates due process. Unlike in Bruce,  
10 Plaintiffs here allege a wide range of procedural deficiencies,  
11 which include the infrequency of CDCR reviews, the lack of  
12 meaningful opportunities to contest reassignment, conditioning  
13 release from the SHU on debriefing, and denying SHU inmates a  
14 chance to earn good-time credits.<sup>5</sup> These deficiencies must be  
15 considered as a whole. The Supreme Court's decision in Wilkinson  
16 illustrates that courts deciding due process challenges to inmate  
17 reassignment procedures must examine the entire reassignment  
18 process -- including both the initial reassignment decision and  
19 subsequent reviews of that decision -- rather than focusing on a  
20 single element of the process in isolation. Bruce, which was  
21 decided two years before Wilkinson, dealt only with a single gang  
22 validation decision and did not examine CDCR's broader decision-  
23 making process.

24 This Court's decision in Ashker v. Schwarzenegger, No. 05-  
25 3286 CW, Docket No. 336 (N.D. Cal. 2009), is inapplicable here for

---

26  
27 <sup>5</sup> Notably, SHU inmates were not denied the opportunity to earn  
28 good-time credits until 2010, seven years after Bruce was decided, when  
the California Legislature amended the Penal Code to make them  
ineligible for such credits. Cal. Penal Code § 2933.6.

1 the same reason. In that case, Plaintiff Ashker challenged CDCR's  
2 repeated decisions to validate him as a member of the Aryan  
3 Brotherhood prison gang in 2001, 2002, and 2003. Relying on  
4 Bruce, this Court granted summary judgment to CDCR officials  
5 because their gang validation decisions were supported by "some  
6 evidence," id. at 27-35; the Court did not, however, hold that  
7 CDCR's entire reassignment process comports with due process.  
8 Furthermore, Ashker's claims in the present lawsuit are not based  
9 on the 2001, 2002, and 2003 gang validation decisions he  
10 challenged in his prior lawsuit. Docket No. 11, Order Granting  
11 Plaintiffs' Requests for Reconsideration & Extension of Time,  
12 at 3. As this Court has previously stated, Plaintiff Ashker's  
13 prior due process claims do not preclude his claims in this case.  
14 Id. ("[T]o the extent that Plaintiffs' claims regarding gang  
15 status reviews and revalidations have not been litigated in C 05-  
16 3286 CW, they are cognizable in this case.").

17 In sum, Plaintiffs have adequately plead a violation of their  
18 due process rights. The Court need not decide at this stage  
19 whether they are entitled to the specific hearing procedures  
20 described in Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974) or  
21 merely the "minimal process" required in cases like Sandin v.  
22 Conner, 515 U.S. 472, 479 (1995), and Hewitt v. Helms, 459 U.S.  
23 460 (1983). As explained above, Plaintiffs have alleged a  
24 sufficiently serious deprivation of liberty and corresponding lack  
25 of procedural safeguards to state a due process claim under  
26 Mathews. Determination of the process due would be premature at  
27 the pleading stage, where Plaintiffs have yet to produce evidence  
28 to support their allegations.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss (Docket No. 160) is DENIED. Defendants must file their answer within twenty-one days of the date of this order.

IT IS SO ORDERED.

Dated: 4/9/2013

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge