

1 GAY C. GRUNFELD – 121944  
VAN SWEARINGEN – 259809  
2 MICHAEL FREEDMAN – 262850  
ERIC MONEK ANDERSON – 320934  
3 HANNAH M. CHARTOFF – 324529  
BEN HOLSTON – 341439  
4 ROSEN BIEN  
GALVAN & GRUNFELD LLP  
5 101 Mission Street, Sixth Floor  
San Francisco, California 94105-1738  
6 Telephone: (415) 433-6830  
Facsimile: (415) 433-7104  
7 ggrunfeld@rbgg.com  
vswearingen@rbgg.com  
8 mfreedman@rbgg.com  
eanderson@rbgg.com  
9 hchartoff@rbgg.com  
bholston@rbgg.com

10 AARON J. FISCHER – 247391  
11 LAW OFFICE OF  
AARON J. FISCHER  
12 1400 Shattuck Square Suite 12 - #344  
Berkeley, California 94709  
13 Telephone: (510) 806-7366  
Facsimile: (510) 694-6314  
14 ajf@aaronfischerlaw.com

15 Attorneys for Plaintiffs and the  
Certified Class and Subclasses  
16

17 UNITED STATES DISTRICT COURT  
18 SOUTHERN DISTRICT OF CALIFORNIA

19 DARRYL DUNSMORE, ANDREE  
ANDRADE, ERNEST ARCHULETA,  
20 JAMES CLARK, ANTHONY EDWARDS,  
REANNA LEVY, JOSUE LOPEZ,  
21 CHRISTOPHER NORWOOD, JESSE  
OLIVARES, GUSTAVO SEPULVEDA,  
22 MICHAEL TAYLOR, and LAURA  
ZOERNER, on behalf of themselves and all  
23 others similarly situated,

Plaintiffs,

24 v.

25 SAN DIEGO COUNTY SHERIFF'S  
DEPARTMENT, COUNTY OF SAN  
26 DIEGO, SAN DIEGO COUNTY  
PROBATION DEPARTMENT, and DOES  
27 1 to 20, inclusive,

Defendants.  
28

CHRISTOPHER M. YOUNG – 163319  
ISABELLA NEAL – 328323  
OLIVER KIEFER – 332830  
DLA PIPER LLP (US)  
4365 Executive Drive, Suite 1100  
San Diego, California 92121-2133  
Telephone: (858) 677-1400  
Facsimile: (858) 677-1401  
christopher.young@dlapiper.com  
isabella.neal@dlapiper.com  
oliver.kiefer@dlapiper.com

Case No. 3:20-cv-00406-AJB-DDL

**REBUTTAL EXPERT REPORT  
OF JAMES AUSTIN, PH.D.**

Judge: Hon. Anthony J. Battaglia  
Magistrate: Hon. David D. Leshner

Trial Date: None Set

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

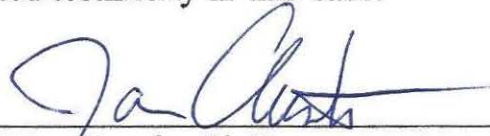
I, James Austin, Ph.D., declare:

1. A true and correct copy of my expert rebuttal report is attached hereto as **Exhibit A**.

2. I have had the opportunity to review the report of Lenard Vare. The opinions expressed therein do not change the opinions I expressed in my expert report.

3. The information and opinions contained in my rebuttal report are based on evidence, documentation, and/or observations available to me. I reserve the right to modify or expand these opinions should additional information become available to me. The information contained in this rebuttal report are a fair and accurate representation of the subject of my anticipated testimony in this case.

Dated: October 2, 2024

  
James Austin, Ph.D.

# **Exhibit A**

## **Rebuttal Report of James Austin, Ph.D.**

### **Introduction**

This report reviews the opinions of Lenard Vare listed in his 171 page report as they relate to the classification and custody staffing at the San Diego County Jail facilities. In particular, I focused on pages 1-6, 11-15, 43-50, 95-105, and 110-114 of Mr. Vare's report.

In the opening section at page 6 of Mr. Vare's report, he states the following objectives of his analysis:

The emphasis of my review in this case is on the appropriateness of the classification process and housing of incarcerated persons at the San Diego County jail facilities, adherence to reasonable safety standards, and compliance with policies and procedures. I will also consider safety and security concerns including appropriate classification and housing of individuals based on risk factors, responses to emergencies, steps taken to address security concerns such as narcotics interdiction, contraband control, and protective custody housing. I will review staff training approaches, professional development, staff adherence to standards of professional conduct, and the measures taken by the agency to ensure that staff are compliant with agency rules and regulations.

### **Mr. Vare's Methodology Regarding Classification Is Unreliable**

Mr. Vare's opinions are derived from his experience as a correctional administrator, his review of various depositions, his review of certain Sheriff's Department Policies and Procedures, and interviews with jail administrators during his inspection of jail facilities in April 2024.

Mr. Vare's opinions were based on an evaluation methodology that makes it impossible to offer an objective assessment of the current jail classification system and housing procedures. Specifically, Mr. Vare indicates that he did not conduct any interviews with any Incarcerated Persons (IPs) while he made his tours, did not review the classification instrument documents associated with the 12 named Plaintiffs, did not evaluate the classification records of any other IPs who are currently incarcerated in the jail, did not review records of any other IPs who have recently been assaulted or died in the jail, and did not review any data of the current jail population from which he could have drawn a random sample from which he could evaluate the classification system.

Of note, it appears that Mr. Vare has never designed or implemented an objective jail classification system. It also appears that he has never conducted a formal evaluation of an objective classification system, which would entail, among other things, reliability and

validity statistical tests, direct observations of the initial and reclassification processes, and interviews with incarcerated persons (IPs).

### **Mr. Vare's Review of the 12 Named Plaintiffs Is Unreliable**

Pages 46-50 and 102-105 provide his review of the deposition transcripts from the 12 named plaintiffs and his opinion that the SDSO classification system is not misclassifying anyone. Mr. Vare concludes on page 12 that:

The evidence in this case suggests that all the named plaintiffs met the criteria for maximum custody housing and were appropriately screened and classified.

Mr. Vare uses incomplete information about each of the 12 named plaintiffs to conclude that 1) they are appropriately classified and 2) imply that all of the other IPs are appropriately classified. For his classification analysis of each plaintiff, Mr. Vare appears to rely only on their criminal charges, prior record, and housing locations. He simply states that they are all maximum or high security levels based on their charges and prior record. Therefore, he concludes the entire classification is not flawed.

Anyone familiar with objective jail and prison classification systems would know that the current charge and prior criminal convictions are only part of the criteria upon which a classification level is determined. In particular, the IPs' prior institutional conduct, current disciplinary conduct, participation in work and rehabilitative services, age, gender, gang affiliation and prior institutional conduct are other factors to be applied. None of this is considered by Mr. Vare. Nor does Mr. Vare provide any other relevant information about how the IPs were scored on the classification system or how they were housed in the San Diego County Jail system—including with whom while incarcerated. If their conduct while incarcerated has been good and free of disciplinary actions, most if not all of the 12 plaintiffs should be assigned to medium—not maximum—custody.

Having formal reclassification instruments and processes are critical to ensure proper classification of IPs. The reclassification event should place more emphasis on the IPs' recent conduct rather than the current charges and prior convictions. And as noted in my first report, there is no formal reclassification instrument or reclassification process for IPs at the San Diego County Jail. Notably, Mr. Vare did not consider whether any reclassification processes were appropriate as to any of the 12 named plaintiffs.

### **Mr. Vare's Opinions Regarding the Jail Population Management Unit Are Unreliable**

Pages 97-105 of Mr. Vare's report address issues related to the Jail Population Management Unit (JPMU). A positive finding is the establishment of a centralized jail classification unit. However, the number of staff assigned to the unit is not listed.

One of the JPMU staff that Mr. Vare interviewed, Sgt. Diaz, confirmed that there is no confidential workspace to conduct interviews, but that staff at times try to find “secluded” areas. Mr. Vare notes that Sgt. Diaz reported that reclassifications are done every 45 days or sooner, there is no indication that JPMU staff interviews the IP in performing reclassifications.

Other aspects of a valid classification systems, not mentioned above, include whether the IP receives a copy of the new classification instrument and/or if the results are explained to the IP. Mr. Vare does not address these issues. There is also no mention of whether there is a separate instrument used for women.

Mr. Vare forms his opinions by speaking to “various members” of the JPMU, but does not tell us how many staff he talked to, the identities of these staff members, or the list of questions he applied during these interviews.

Mr. Vare seems to simply take some unknown staff members’ word as gospel. He provides no other basis for his opinion that comprehensive training has been completed. There is no documentation of the curriculum used for training, staff testing on the classification instrument, or JPMU members’ knowledge of other key classification concepts such as over-rides (both discretionary and non-discretionary).

### **Mr. Vare’s Opinions Regarding Custody Staffing Are Unreliable**

Pages 110-114 of Mr. Vare’s report address the issue of insufficient staffing at the jail and its impact on the safety of IPs and staff. His opinion that there are no instances of plaintiffs suffering a loss directly attributable to staffing shortages is based solely on former Assistant Sheriff Adams-Hydar’s deposition transcript and no independent review. He states at page 111:

Adams-Hydar had never witnessed an emergency where there was a lack of deputies and/or medical staff present, as confirmed by her personal experience and video footage from body-worn cameras.

The issues not addressed, as noted below, is how quickly did they respond, and could the incident have been prevented if an adequate number of staff were present in the housing areas.

Mr. Vare also fails to note former Assistant Sheriff Adams-Hydar’s other deposition testimony that show many negative effects of staff shortages, including: (1) the implementation of restricted movement protocols, limiting out-of-cell time for incarcerated individuals; (2) safety concerns for both incarcerated individuals and staff members; (3) the inability to escort incarcerated individuals to medical appointments; (4)

the cancellation or reduction of programs for incarcerated individuals, which can potentially impact rehabilitation efforts and the overall well-being of the incarcerated population; (5) difficulties in transporting incarcerated people to appointments outside the facility, such as specialty care providers; (6) delays in performing timely safety checks; (7) the potential for increased violence due to understaffing; and (8) staff fatigue and potential burnout. See Tr. at pages 132-146.

Mr. Vare apparently made no attempt to review any recent serious incidents (assaults, suicide, suicide attempts, drug overdose) to see (1) how many staff were deployed at the time of the incident, (2) how the incident was detected (e.g., other IPs, cameras, etc., and (3) how long it took for staff to respond to the incident.

Apparently, Mr. Vare did not review video or body-worn camera footage of such incidents to observe how long it took to respond to an incident or how staff were alerted to incident. This is especially critical as any tour of the facilities would have noted that officers rarely can be seen in the housing units except to make routine safety checks, usually hourly.

Mr. Vare made no apparent effort to interview line staff assigned to the housing areas to question them on issues related to staffing shortages. He acknowledges there are shortages but does not quantify them in terms of incidents of assault or other harm, as one could have done using the Watch Commander shifts.