

McKool Smith Hennigan, P.C.  
Redwood Shores, CA

1 Shawna L. Ballard (SBN 155188)  
2 sballard@mckoolsmith.com  
3 Stephanie M. Adams Ryan (SBN 289548)  
4 sadamsryan@mckoolsmith.com  
5 Vandya L. Swaminathan (SBN 287896)  
6 vswaminathan@mckoolsmith.com  
7 Kate M. Falkenstien (SBN 313753)  
8 kfalkenstien@mckoolsmith.com  
9 McKool Smith, P.C.  
10 255 Shoreline Drive, Suite 510  
11 Redwood Shores, California 94065  
12 Telephone: (650) 394-1384  
13 Facsimile: (650) 394-1422

14 *Attorneys for Plaintiff, Jorge A. Rico*

15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**

17 JORGE ANDRADE RICO )

18 Plaintiff, )

19 v. )

20 JEFFREY BEARD, et al., )

21 Defendant. )

22 Case No. 4:16-cv-04348-KAW

23 **SECOND AMENDED COMPLAINT**

- 24 1. Plaintiff Jorge Andrade Rico filed his initial complaint in this matter on August 2, 2016.  
25 Counsel was appointed through the Federal Pro Bono Project on January 26, 2017.
- 26 2. Since 2015, Pelican Bay State Prison has awakened inmates in the Security Housing Unit  
27 and Administrative Segregation Unit at least once an hour, all night long, with a  
28 cacophonous system of "Guard One welfare checks" that requires officers to strike a  
metal button on each cell with a metal rod.
3. This system is intended to reduce inmate suicides, but instead subjects inmates to  
torturous and unconstitutional sleep deprivation in the process of checking whether they  
remain alive.

McKool Smith Hennigan, P.C.  
Redwood Shores, CA

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

**JURISDICTION**

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiff seeks declaratory and injunctive relief under 28 U.S.C. §§ 1343, 2201, and 2202 and 42 U.S.C. § 1983.

**VENUE**

5. Venue is proper under 28 U.S.C. § 1391(b)(1) because Plaintiff resides in the Northern District of California and all defendants reside in California.

6. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part or all of the events or omissions giving rise to Plaintiff’s claims occurred in the Northern District of California.

**PARTIES**

7. Plaintiff Jorge Andrade Rico is an inmate at Pelican Bay State Prison (Pelican Bay) in Crescent City, California. Plaintiff was housed in the Security Housing Unit (SHU) from October 2014 until August 24, 2016. Prior to his time in the SHU, he was housed in the Administrative Segregation Unit (ASU) from May 20, 2014, until October 2014.

8. Defendant Jeffrey Beard was the Secretary of the California Department of Corrections and Rehabilitation (CDCR) through December 2015 and is sued in his official and individual capacities. As the Secretary of the CDCR, Mr. Beard was responsible for establishing, monitoring, and enforcing overall operations, policies, and practices of the California state prison system, including Pelican Bay. He was responsible for ensuring the provision of constitutional conditions of confinement for all inmates. At all times hereto, he has acted under color of state law.

9. Defendant Scott Kernan has been the Secretary of the California Department of Corrections and Rehabilitation (CDCR) since January 2016 and is sued in his official and

1 individual capacities. As the Secretary of the CDCR, Mr. Kernan is responsible for  
2 establishing, monitoring, and enforcing overall operations, policies, and practices of the  
3 California state prison system, including Pelican Bay. He is responsible for ensuring the  
4 provision of constitutional conditions of confinement for all inmates. At all times hereto,  
5 he has acted under color of state law.

6 10. Defendant Michael Stainer was the Director of the Division of Adult Institutions of the  
7 CDCR until sometime in 2014 and is sued in his official and individual capacities. As  
8 Division Director, Mr. Stainer was responsible for establishing, monitoring, and  
9 enforcing operations, policies, and practices at all California adult prisons, including  
10 Pelican Bay. He was responsible for ensuring the provision of constitutional conditions of  
11 confinement for all adult inmates, and he personally signed one of the memoranda  
12 authorizing the Guard One system Plaintiff challenges. At all times hereto, he has acted  
13 under color of state law.

14 11. Defendant Kelly Harrington was the Director of the Division of Adult Institutions of the  
15 CDCR between 2014 and March 2016 and is sued in his official and individual  
16 capacities. As Division Director, Mr. Harrington was responsible for establishing,  
17 monitoring, and enforcing operations, policies, and practices at all California adult  
18 prisons, including Pelican Bay. He was responsible for ensuring the provision of  
19 constitutional conditions of confinement for all adult inmates, and he personally signed  
20 one of the memoranda authorizing the Guard One system Plaintiff challenges. At all  
21 times hereto, he has acted under color of state law.

22 12. Defendant Kathleen Allison has been the Director of the Division of Adult Institutions of  
23 the CDCR since April 2016 and is sued in her official and individual capacities. As  
24 Division Director, Ms. Allison is responsible for establishing, monitoring, and enforcing  
25 operations, policies, and practices at all California adult prisons, including Pelican Bay.  
26 She is responsible for ensuring the provision of constitutional conditions of confinement  
27 for all adult inmates. At all times hereto, she has acted under color of state law.  
28

McKool Smith Hennigan, P.C.  
Redwood Shores, CA

- 1 13. Defendant Clark E. Ducart is the Warden of Pelican Bay and is sued in his official and  
2 individual capacities. As Warden, Mr. Ducart is responsible for establishing, monitoring,  
3 and enforcing operations, policies, and practices at Pelican Bay, including the Guard One  
4 system. He is responsible for ensuring the provision of constitutional conditions of  
5 confinement for inmates at Pelican Bay. At all times hereto, he has acted under color of  
6 state law.
- 7 14. Defendant F.P. Marulli is a Lieutenant at Pelican Bay and is sued in his official and  
8 individual capacities. He is responsible for supervising operations at the Security Housing  
9 Unit. In that role, Lieutenant Marulli responded to at least one of Plaintiff's  
10 administrative grievances requesting modifications to the Guard One system.
- 11 15. Defendant D. Abernathy is a Sergeant at Pelican Bay and is sued in his official and  
12 individual capacities. He is responsible for supervising operations at the Security Housing  
13 Unit. In that role, Sergeant Abernathy responded to at least one of Plaintiff's  
14 administrative grievances requesting modifications to the Guard One system.
- 15 16. Defendant J. Cuske is an official at Pelican Bay and is sued in his official and individual  
16 capacities. Sergeant Cuske responded to at least one of Plaintiff's administrative  
17 grievances requesting modifications to the Guard One system.
- 18 17. Defendant C. Parry is an official at Pelican Bay and is sued in his official and individual  
19 capacities. Officer Parry responded to at least one of Plaintiff's administrative grievances  
20 requesting modifications to the Guard One system.
- 21 18. Defendant Nelson was staffed as a floor officer during the First Watch on the SHU D-  
22 yard 3-block, where Plaintiff was housed from April 2015 to April 2016.
- 23 19. Defendant Garcia was staffed as a floor officer during the Second Watch on the SHU D-  
24 Yard 3-block, where Plaintiff was housed from April 2015 to April 2016.
- 25 20. Defendant Shaver was staffed as a floor officer during the Third Watch on the SHU D-  
26 Yard 3-block, where Plaintiff was housed from April 2015 to April 2016.
- 27
- 28

1 21. Defendant Escamilla was staffed as a floor officer during the Third Watch on the SHU C-  
2 Yard 1-block, where Plaintiff was housed from July 2016 to August 2016.

3  
4 **FACTUAL ALLEGATIONS**

5  
6 **I. Pelican Bay has implemented the Guard One System, awakening inmates hourly**  
7 **throughout the night.**

8 22. The Pelican Bay SHU contains six “pods” arranged around a circular hallway. Each pod  
9 has a metal door. Inside each pod, two floors of cells line one side of the pod, with four  
10 cells on each floor. The other side of the pod contains metal stairs connecting the two  
11 floors of cells. Each cell has a metal door.

12 23. When an officer enters a pod, the pod door slides open for about six seconds, making a  
13 loud noise. The door then closes for six seconds, making further noise. When the door  
14 fully closes, it bangs against the wall, creating a loud noise that resonates through the  
15 concrete walls.

16 24. Until August 3, 2015, officers at the Pelican Bay SHU normally entered the pods to  
17 conduct welfare checks only three or four times during the night.

18 25. On May 9, 2014, the California Department of Corrections and Rehabilitation issued a  
19 memorandum titled “Security/Welfare Check Procedure Utilizing the Guard One System  
20 to Supersede Administrative Segregation Unit Welfare Check and Security/Custody  
21 Rounds in Specialized Housing Procedures.” This memorandum was signed by  
22 Defendant Michael Stainer.

23 26. The May 9 memorandum required that an officer conduct “Security/Welfare Checks” of  
24 each cell housing an inmate in Administrative Segregation Units, Psychiatric Services  
25 Units, Security Housing Units, or Condemned Housing Units. During these checks, an  
26 officer is required to check that the inmate is alive and “free from obvious injury.”

27 27. On July 15, 2015, Defendant Kelly Harrington issued a memorandum titled  
28 “Implementation of the Security/Welfare Check Procedure Utilizing the Guard One

MCKOOL SMITH HENNIGAN, P.C.  
REDWOOD SHORES, CA

1 System (Completion of Phase 3),” which stated that a new security/welfare check  
2 procedure would begin on August 3, 2015.

3 28. On August 3, 2015, Pelican Bay began carrying out the “Guard One” system of  
4 security/welfare checks.

5 29. Under the Guard One system, officers walk through each pod to check inside each cell.  
6 To record that a cell has been checked, the officer hits a metal cone-like button on each  
7 cell with a metal Guard One rod. The metal-on-metal contact creates a loud noise.

8 30. The Guard One system does not even guarantee that a cell has been checked, because an  
9 officer can hit the button without looking inside the cell. The officers often do not even  
10 look inside Plaintiff’s cell during the checks.

11 31. Officers initially conducted Guard One checks every thirty minutes, twenty-four hours a  
12 day. Starting in December 2015, Pelican Bay officers conduct Guard One checks only  
13 once an hour during the First Watch, which occurs between 10 pm and 6 am. Officers  
14 continue to conduct Guard One checks every half hour from 6 am to 10 pm.

15 **II. The noise caused by the Guard One System subjects inmates to severe sleep**  
16 **deprivation.**

17 32. Inmates in the SHU are confined to their windowless cells for 22.5 hours a day. In the  
18 remaining 1.5 hours, they are allowed to go to a yard to exercise alone. The exercise yard  
19 is approximately twice the size of the cell and surrounded by high concrete walls.

20 33. Inmates in the Pelican Bay SHU can hear the doors of all six pods opening and closing.  
21 Plaintiff can also hear the Guard One rods hitting the metal buttons on each cell in his  
22 pod and at a minimum the two neighboring pods.

23 34. Other facilities where the CDCR has operated SHUs, including the California  
24 Correctional Institution in Tehachapi and Folsom State Prison in Folsom, have a different  
25 layout in which Guard One checks are not as disruptive. Those facilities do not have  
26 multiple pods arranged next to each other in a circle. Instead, cells are arranged along a  
27 straight hallway, so inmates do not hear as many pod doors opening and closing. They  
28

1 also do not hear the metal rods hitting the metal buttons on as many cells, or officers  
2 running on metal staircases within the pods. The cell walls also do not reverberate as  
3 severely in other prison designs.

4 35. While Plaintiff was housed in the Pelican Bay SHU, Officers Nelson, Garcia, Escamilla,  
5 and Shaver made extra noise by conducting the Guard One checks haphazardly. They ran  
6 loudly up and down the metal stairs and hit the Guard One buttons with more force than  
7 necessary. They also regularly rushed through the pods too quickly to hit the Guard One  
8 buttons accurately, causing them to attempt to hit the Guard One button on each cell  
9 multiple times, making extra unnecessary noise.

10 36. The cacophony of the Guard One checks—the pod doors opening and closing twelve  
11 times as an officer enters and leaves each of the six pods, the Guard One metal rod hitting  
12 the metal buttons on the cells, and the officers making extra noise by running between the  
13 cells—occurs every hour at night and every thirty minutes during the day.

14 37. It takes approximately 15 minutes for an officer to complete the Guard One checks,  
15 leaving only 15 minutes of uninterrupted time between checks during the day and 45  
16 minutes of uninterrupted time during the night.

17 38. Before the Guard One checks were implemented, Plaintiff slept 7 to 8 hours per night in  
18 the SHU, typically without waking up during the night. When the Guard One system was  
19 first implemented with checks every thirty minutes, Plaintiff woke up for each round of  
20 Guard One checks. As Plaintiff became more sleep-deprived several months into the  
21 checks, he began to occasionally sleep through some of the checks. Even after adjusting  
22 to the Guard One system, Plaintiff could sleep only 3 to 5 hours per night, typically  
23 awakening twice during those hours due to the Guard One checks.

24 39. Prison officials gave Plaintiff earplugs. The earplugs, however, irritate Plaintiff's ears,  
25 especially if worn all the time, and they do not fully muffle the noise from the Guard One  
26 system.

1 40. Plaintiff has suffered medical problems from sleep deprivation, including headaches,  
2 blurred vision, body pain, anxiety, mood swings, memory loss, inability to concentrate,  
3 irregular breathing, loss of appetite, and heart irregularities including heart pain and an  
4 abnormal heartbeat.

5 41. The Guard One system also prevents Plaintiff from concentrating during the day. He  
6 cannot effectively work on his legal appeals or think clearly. The constant noise  
7 exacerbates his symptoms during the day as well.

8 42. Plaintiff twice spoke briefly with Dr. P. Butler, a doctor treating mental health issues at  
9 Pelican Bay. Plaintiff told Dr. Butler about his symptoms, including his irregular  
10 heartbeat. Dr. Butler confirmed that sleep deprivation causes medical problems including  
11 headaches, anxiety, mood swings, memory loss, and heart irregularities. However, Dr.  
12 Butler told Plaintiff he could not change the policy.

13 43. Plaintiff's irregular breathing continued for one to two months after his transfer out of the  
14 SHU. He also experienced a dizzy spell about one month after the transfer, in which he  
15 suddenly felt dizzy and paralyzed, and his hearing and vision blurred temporarily.

16 44. Plaintiff continues to experience throbbing headaches after his transfer out of the SHU.  
17 He also continues to have trouble sleeping, jolting awake from light sounds, and reads at  
18 a slower pace due to difficulty concentrating.

19 45. Before his incarceration in the SHU, Plaintiff had never experienced heart problems,  
20 dizzy spells, irregular breathing, consistent trouble concentrating, blurred vision, or  
21 unexplained headaches, pain, or anxiety severe enough to interrupt his daily activities.

22 **III. Defendants have ignored Plaintiff's repeated complaints about his sleep deprivation.**

23 46. On August 9, 2015, Plaintiff, along with other Pelican Bay inmates, initiated a formal  
24 group grievance, complaining about the excessive noise during First Watch. The inmates  
25 submitted a timely appeal of the grievance, and it was reviewed by T.E. Puget, who  
26 granted it in part by stating that the First Watch officers would attempt to make as little  
27 noise as possible. The inmates then filed a timely appeal to the warden's level of review,  
28



1 where the appeal was reviewed by Defendant Ducart on August 20, 2015. Warden Ducart  
2 granted the request for the staff to make as little noise as possible but refused to make any  
3 changes to the execution of the Guard One system. The inmates filed a Group Appeal to  
4 the third level of review, where it was reviewed and denied by M. Hodges, Appeals  
5 Examiner, on November 23, 2015.

6 47. On September 9, 2015, Plaintiff filed an individual grievance complaining about the  
7 noise at all times of day. On September 14, 2015, Plaintiff's grievance was cancelled as  
8 duplicative of the group grievance. Plaintiff appealed the cancellation through the second,  
9 warden's, and third levels of review. At the second level, the appeal was reviewed and  
10 denied by D. Bradbury on October 14, 2015. At the warden's level of review, the appeal  
11 was reviewed and denied on October 14, 2015 by C.E. Ducart. At the third level of  
12 review, Plaintiff's appeal was reviewed and denied by M. Hodges, Appeals Examiner, on  
13 January 19, 2016.

14 48. On August 9, 2015, Plaintiff filed two Form 22s (a form for a "request for interview,  
15 item, or service") asking officers to hit the metal buttons more quietly and to leave the  
16 pod doors open while conducting the checks. Defendant Abernathy responded to both  
17 forms, stating that he was "looking into ways to reduce the noise created" but that the pod  
18 doors would not be left open. Plaintiff requested supervisor review on both forms on  
19 August 12, 2015. Defendant Marulli responded that "staff are making every effort to keep  
20 the noise to a minimum."

21 49. On October 7, 2015, Plaintiff filed another Form 22 request to reduce the noise. Sergeant  
22 Abernathy again responded that they were "looking into ways to reduce the noise."  
23 Plaintiff requested supervisor review, asking what would be done to reduce the noise.  
24 Lieutenant Marulli again responded that "staff are making an effort to keep the noise to a  
25 minimum" and that staff had "no control over the amount of noise the door makes."

26 50. On December 7, 2015, Plaintiff filed a Form 22 grievance addressed to the Facility  
27 Captain, asking him to have the door fixed because the noise was affecting Plaintiff's  
28

McKool Smith Hennigan, P.C.  
Redwood Shores, CA

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

mental and physical health. Defendant Cuske responded that he would refer Plaintiff for a mental health visit. Plaintiff requested supervisor review, stating that a mental health visit would not solve the problems stemming from excessive noise. Defendant Parry responded that Plaintiff could file an appeal if he chose to.

51. On December 20, 2015, Plaintiff filed another Form 22 request stating that the noise was harming his mental and physical health. Sergeant Abernathy responded that staff was “looking into ways to reduce the noise” and suggested earplugs.

52. Despite Defendants’ many assurances that they were looking into ways to reduce the noise, no actions have been taken to make the Guard One checks any quieter.

53. Unable to achieve any change through the administrative grievance process, Plaintiff filed his first complaint in this case on August 2, 2016.

**CLAIM FOR RELIEF**

54. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this complaint.

55. Plaintiff seeks relief under 42 U.S.C. § 1983 for conditions of confinement in violation of the Eighth Amendment of the United States Constitution. By their policies and practices described herein, Defendants subject Plaintiff to serious harm and injury from sleep deprivation. These policies and practices have been and continue to be implemented by Defendants under color of state law, in their official capacities, and are the proximate causes of Plaintiff’s ongoing deprivation of rights secured by the United States Constitution under the Eight Amendment.

56. Defendants have been and are aware of the deprivations complained of herein, and have condoned or been deliberately indifferent to such conduct.

**PRAYER FOR RELIEF**

- 1
- 2
- 3 57. WHEREFORE, Plaintiff requests that this Court grant him the following relief:
- 4 a. Adjudge and declare that the acts, omissions, policies, and practices of Defendants
- 5 described herein are in violation of the rights of Plaintiff under the Cruel and Unusual
- 6 Punishments Clause of the Eighth Amendment, which grants constitutional protection
- 7 to Plaintiff;
- 8 b. Preliminarily and permanently enjoin Defendants, their agents, employees, and all
- 9 persons acting in concert with them under color of state law from subjecting Plaintiff
- 10 to the illegal and unconstitutional acts, omissions, policies, and practices set forth
- 11 above;
- 12 c. Order Defendants and their agents, employees, and all persons acting in concert with
- 13 them under color of state law to develop and implement, as soon as practical, a plan
- 14 to limit the harm to Plaintiff’s mental and physical health caused by the Guard One
- 15 system. Defendants’ plan shall include at a minimum:
- 16 i. Defendants shall relocate the Pelican Bay SHU to a facility with a less
- 17 disruptive layout, such as the California Correctional Institute or Folsom State
- 18 Prison;
- 19 ii. Defendants shall order correctional officers to check on each cell in the SHU
- 20 and ASU at most once every two hours, absent special circumstances
- 21 justifying further rounds on particular days;
- 22 iii. Defendants shall develop a quieter system to register that each cell has been
- 23 checked, such as a non-metal rod and/or non-metal button and/or rubber
- 24 coating for the rod and button;
- 25 iv. Defendants shall repair the doors of the SHU pods to reduce the amount of
- 26 noise created by the officers’ entry and exit from the pods; and
- 27
- 28

McKool Smith Hennigan, P.C.  
Redwood Shores, CA

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

- v. Defendants shall provide Plaintiff with earplugs which fully block the noise of the Security/Welfare Checks;
- d. Award Plaintiff compensatory and punitive damages from each defendant in his or her individual capacity;
- e. Award Plaintiff the costs of this suit, and reasonable attorneys' fees and litigation expenses pursuant to 42 U.S.C. § 1988, and other applicable law; and
- f. Award such other and further relief as the Court deems just and proper.

**JURY TRIAL DEMANDED**

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury of all issues so triable.

McKool Smith Hennigan, P.C.  
Redwood Shores, CA

MCKOOL SMITH HENNIGAN, P.C.  
REDWOOD SHORES, CA

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

DATED: May 3, 2017

Respectfully submitted,

MCKOOL SMITH P.C.

By: /s/ Stephanie Adams Ryan

Shawna L. Ballard (SBN 155188)  
sballard@mckoolsmith.com  
Stephanie M. Adams Ryan (SBN 289548)  
sadamsryan@mckoolsmith.com  
Vandya L. Swaminathan (SBN 287896)  
vswaminathan@mckoolsmith.com  
Kate M. Falkenstien (SBN 313753)  
kfalkenstien@mckoolsmith.com  
MCKOOL SMITH, P.C.  
255 Shoreline Drive, Suite 510  
Redwood Shores, California 94065  
Telephone: (650) 394-1400  
Facsimile: (650) 394-1422

*Attorneys for Plaintiff, Jorge A. Rico*