

REVISED FINAL STATEMENT OF REASONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PRISON TERMS CHAPTER 3. PAROLE RELEASE ARTICLE 2. INFORMATION CONSIDERED

New to California Code of Regulations, Title 15, § 2240
Psychological Risk Assessments

RN 01-11

This new section codifies the Board of Parole Hearing's guidelines for the preparation of Psychological Risk Assessments for parole consideration hearings held pursuant to Penal Code Sections 3041 and 3041.5.

Inmates sentenced to life terms with the possibility of parole appear before the Board of Parole Hearings (BPH) for a hearing to determine whether they are suitable for parole, pursuant to Penal Code section 3041.

Existing BPH regulations provide a framework of the factors to be considered in making this determination. *See* California Code of Regulations, Title 15, sections 2282 and 2402. These sections state that an inmate's past and present mental state and present attitude toward their life crime shall be considered, along with any other information bearing upon the inmate's suitability for parole. In addition to the BPH regulations, Penal Code section 5068, provides for the preparation of a psychological evaluation before the release of an inmate committed to a term of life with the possibility of parole.

Historically, the California Department of Corrections' (CDCR) mental health staff prepared the psychological evaluations for the parole consideration hearings conducted by BPH. In 2006, the BPH formed its own Forensic Assessment Division (FAD) Lifer Unit, comprised of psychologists, to prepare the psychological evaluations. The formation of FAD addressed numerous concerns that had been raised about the evaluations, and enabled CDCR's mental health professionals to devote resources to providing mental health treatment to inmates, rather than conducting evaluations, pursuant to *Coleman v. Schwarzenegger* No. Civ S-90-0520 LKK JFM (E.D. Cal.).

Additionally, in the class action lawsuit of *In re Rutherford*, Marin County Superior Court, Case No. SC135399A, it was determined that the untimely preparation of psychological evaluations for parole consideration hearings contributed to the backlog of hearings, which gave rise to this ongoing litigation. The court issued several orders relative to the psychological evaluation process, including an order requiring the development of a streamlined psychological risk assessment tool for use at parole consideration hearings and an order requiring a minimum of thirty-five qualified

psychologists to be in place to prepare psychological evaluations for parole consideration hearings.

Pursuant to these orders, along with the above-referenced Penal Code and regulatory sections, the BPH currently prepares psychological evaluations for parole consideration hearings. Additionally, the proposed regulation is necessary because on November 8, 2010, the Office of Administrative Law determined that the “Board’s Psychological Report Process” contains provisions that meet the definition of a “regulation” as defined in [Government Code] section 11342.600, that should have been adopted pursuant to the APA.” *See* 2010 OAL Determination No. 27. As such, BPH submits these regulations. The provision of psychological risk assessments is necessary to assist BPH in determining whether an inmate sentenced to life with the possibility of parole poses a current unreasonable risk of danger to society if released on parole. *See* Penal Code sections 3041 and 3041.5; 15 CCR sections 2281 and 2402.

The specific purpose of each subsection of the proposed text and the rationale supporting BPH’s determination that each amendment is reasonably necessary to carry out the purpose for which the regulation is proposed is as follows:

Subsection 2240(a) interprets Penal Code section 5068 to provide that all life inmates will receive a Comprehensive Risk Assessment (CRA) prior to their initial parole consideration hearing. It implements the Governor’s 2008-09 Budget which authorized continuous funding to allow BPH to conduct initial and follow-up psychological evaluations for parole hearings held pursuant to Penal Code sections 3041 and 3041.5. This funding was expressly approved by the Legislature in Assembly Bill No. 1781, “The Budget Act of 2008.” *See* Chapter 268, Statutes of 2008.

The subsection establishes that licensed psychologists employed by BPH will perform these assessments. It is necessary to separate this function from CDCR’s Mental Health Delivery System to allow CDCR to devote its resources to providing mental health treatment to inmates pursuant to *Coleman v. Schwarzenegger*. Furthermore, given the specialized nature of forensic risk assessment, the creation of FAD within BPH ensures that psychologists are adequately trained and qualified to conduct risk assessments. It also facilitates BPH administrative oversight of the evaluation process and eliminates the bias that may result when a psychologist serves the dual role of treating physician and evaluator or otherwise has a vested interest in the outcome of the evaluation or parole decision.

Finally, this section makes clear the validity period of psychological reports prepared before January 1, 2009. This language is necessary as a directive to staff to ensure that new CRAs are timely prepared and, as such, it will help eliminate hearing postponements for untimely or absent reports.

Subsection 2240(b) establishes that a CRA will be completed every five years and defines what information will be contained in the report. It contemplates that risk assessment instruments may be used to evaluate an inmate’s potential for future violence.

This subsection is necessary to address concerns that psychological evaluations previously prepared for BPH lacked uniformity and didn't include empirically supported risk assessment measures. The standardization of information in the CRAs, as provided by this subsection, will promote report uniformity and will help make the reports easier to understand. Moreover, this language is necessary as a directive to staff to ensure that new CRAs are timely prepared and in accordance with the guidelines for the reports.

The text of this subsection provides that CRAs may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence. BPH included the language "structured professional judgment" and "actuarial" instruments because they are the two predominant approaches to assessing violence risk (*See Skeem, J., and Monahan, J. (2011) Current directions in violence risk assessment, Current Directions in Psychological Science, 20(1), 38-42*) and because they establish an acceptable minimum standard. The standard of practice in the community for violence risk assessments is the integration of clinical judgment and risk assessment instruments because the use of risk assessment instruments increases the validity and reliability of the psychological evaluation.

In August 2006, BPH convened a meeting of a panel of experts in Sacramento to recommend the most appropriate risk-assessment tools for the California lifer population. This meeting was moderated by Dr. Stephen Wyman, Special Consultant for BPH. Other experts participating in the panel included: Dr. Christopher Baird, National Council on Crime and Delinquency; Dr. Barry Krisberg, National Council on Crime and Delinquency; Dr. Kris Mohandie, Operational Consulting Inc.; Dr. Saul Rosenberg, U.C. San Francisco, Forensic Decision Sciences LLC; and Dr. Jennifer Skeem, U.C. Irvine. The panel agreed that a multi-method psychological risk assessment battery would be employed by the State of California for adult inmates sentenced to a life term with the possibility of parole. Based on a ranked vote, it was determined that the HCR-20 and LS/CMI would be administered as part of the risk assessment battery.

BPH Senior Psychologists also conducted an exhaustive review of the scientific literature and research on the various risk assessment instruments. This review of the existing research and science, and the determination of the experts (above) resulted in the recommendation to the BPH Executive Officer and the Secretary of CDCR, that the most viable and effective risk assessment instruments pertinent to the California life inmate population consists of using the (1) LS/CMI and (2) HCR-20/PCL-R. Additionally as appropriate, other focused assessment instruments would be employed for specific offender populations such as sex offenders (Static 99).

The risk assessment battery selected by BPH is necessary to assist BPH psychologists in anchoring their clinical opinions regarding violence risk by insuring overall objectivity and reliability; this in turn will aid BPH hearing panels in determining suitability for parole. Additionally, the *Rutherford* court ordered BPH to develop a streamlined risk assessment tool.

Subsection 2240(c) interprets Penal Code section 5068 and establishes the schedule for providing a Subsequent Risk Assessment (SRA) prior to a subsequent parole consideration hearing. It implements the Governor’s 2008-09 Budget which authorized continuous funding to allow BPH to conduct initial and follow-up psychological evaluations for parole hearings held pursuant to Penal Code sections 3041 and 3041.5. This funding was expressly approved by the Legislature in Assembly Bill No. 1781, “The Budget Act of 2008.” *See* Chapter 268, Statutes of 2008.

The subsection establishes that licensed psychologists employed by BPH will perform these assessments. This is necessary to ensure that psychologists are adequately trained and qualified to conduct these assessments and facilitates administrative oversight of the evaluation process.

This subsection defines what information will generally be contained in the SRA and it details that an SRA will generally not be prepared for certain hearings or following certain hearing events. This is necessary so that interested parties will have a common understanding of what information will be contained in the SRA as well as when the SRA will be prepared. Also, it is necessary to detail the process for the preparation of SRAs to help eliminate hearing postponements for untimely or absent reports.

Subsection 2240(d) makes it clear that the CDCR inmate appeal process does not apply to the Board’s psychological reports. Psychological reports are prepared solely to assist a hearing panel or BPH in determining whether an inmate is suitable for parole. Pursuant to Section 3084.1 of Title 15 of the California Code of Regulations, an inmate may only appeal “any department decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.” This section is necessary because there has been some confusion about whether the CDCR’s inmate appeal process is available to challenge psychological reports prepared by BPH—such reports are not subject to CDCR’s appeal process.

The inmate or his or her attorney may challenge the report and its conclusions at the hearing. Unlike the CDCR appeal process, an inmate is entitled to be represented by an attorney at a parole consideration hearing. *See* Penal Code section 3041.7 and 15 CCR section 2256. The hearing panel will then determine what evidentiary weight to give to the psychological report. Additionally, an inmate has the right to enter a written response to a psychological report pursuant to Penal Code section 3041.5 (a)(1) and 15 CCR section 2247.

Subsection 2240(e) defines a substantial error in a psychological report and describes how such errors will be reviewed if they are identified by a hearing panel. This subsection recognizes that certain factual errors may have a significant impact on the validity of the psychologist's opinions. The most obvious example is a factual error directly related to the circumstances of the Life Crime. This subsection promotes due process by providing a remedy to challenge evaluations that contain factually inaccurate descriptions of the Life Crime or other substantial errors that are likely to have a significant impact on the validity of the report. Moreover, the language is necessary as a

directive to staff to ensure that a substantial error in a psychological report is handled according to protocol.

Subsection 2240(f) describes how administrative factual errors in a psychological report will be reviewed if they are identified by the hearing panel. This subsection promotes due process by providing a remedy to challenge evaluations that contain three or more factual administrative errors. Factual errors unrelated to the Life Crime are unlikely to have a significant impact on the validity of the psychologist's opinions except when they are present in multitude. Additionally, the definition of factual administrative errors provides clear parameters and discourages hearing postponements due to non-factual errors related to disagreement with the psychologist's reasoning and opinions, disputed statements made during clinical interviews, and statements that otherwise have little bearing on the psychologist's risk assessment opinions. Moreover, the language is necessary as a directive to staff to ensure that administrative errors in a psychological report are handled according to protocol.

Subsection 2240(g) establishes that life inmates who don't reside in California may not receive a risk assessment or other psychological evaluation due to other state's licensing requirements for psychologists and variations in confidentiality laws from state-to-state. FAD is unable to provide risk assessments for life inmates who reside out-of-state because of licensure issues, resource issues, and confidentiality issues. Therefore, the provision of a psychological report for life inmates who reside out-of-state is at the discretion of the out-of-state institution and in accordance with that state's confidentiality laws. This subsection is necessary to provide a common understanding to staff and interested parties that a CRA or psychological report may not be available at parole hearings for life inmates who don't reside in California. It will help eliminate hearing postponements for untimely or absent reports by making clear the psychological report process for inmates who don't reside in California.

Subsection 2240(h) establishes that this regulation will not apply to medical parole hearings or applications for sentence recall. The criteria for a decision in medical parole hearings (*see* Penal Code section 3550 (g)) or applications for sentence recall (*see* Penal Code section 1170 (e)) is different than the criteria at a parole suitability hearing. Therefore, a psychological risk assessment is not necessary to reach a decision in medical parole hearings or applications for sentence recall. This subsection is necessary to avoid any possible confusion by making it clear that a CRA or SRA will not be prepared for medical parole hearings or applications for sentence recall.

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORTS OR DOCUMENTS

1. Notes from August 2, 2006 Panel of Experts Meeting on Psychological Assessment Tools

An independent panel of experts met on August 2, 2006 at the Board of Parole Hearings (BPH) Headquarters in Sacramento, California to develop a consensus on a psychological

assessment methodology for adult inmates sentenced in California to a life term with the possibility of parole.

This meeting was moderated by Dr. Stephen Wyman, Special Consultant, BPH. Experts participating in the panel were:

Dr. Christopher Baird, National Council on Crime and Delinquency

Dr. Barry Krisberg, National Council on Crime and Delinquency

Dr. Kris Mohandie, Operational Consulting Inc.

Dr. Saul Rosenberg, U.C.—San Francisco, Forensic Decision Sciences LLC

Dr. Jennifer Skeem, U.C.—Irvine

Standardized Risk Assessment

The primary use of the psychological evaluation for life parole consideration hearings is to provide an assessment of the inmate's risk of future violence should he or she be granted parole and released into the community. This risk assessment is only one factor to be considered in determining an inmate's parole suitability.

For an assessment of an inmate's potential risk to the community to be relevant it must be based upon scientifically validated analysis, rather than simply the opinion of a particular evaluator. Assessment of dangerousness has been the subject of much research in the forensic scientific community over the past decade, and a number of valid and reliable instruments have been developed and implemented in prisons in North America and internationally.

The Board of Parole Hearings convened a meeting of experts from the forensic scientific community to reach a consensus, based on the "state of the art," what risk and needs assessment instruments would best be employed by the State of California for adult inmates sentenced to a life term with the possibility of parole.

Consensus Recommendation

The panel of experts agreed that a multi-method psychological assessment battery would best be employed by the State of California for adult inmates sentenced to a life term with the possibility of parole. This multi-method psychological assessment should include a clinical psychological evaluation and a battery of objective risk assessment instruments.

The clinical psychological evaluation would include both a detailed interview with the inmate and the administration of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). The MMPI-2 will be used to assess personality and psychopathology.

A risk assessment battery would be administered inmates to determine their risk of violence. The panel determined that the two best objective risk assessment tools to employ on the population of adult inmates sentenced to a life term with the possibility of parole were the Level of Service/Case Management Inventory (LS/CMI) and the HCR-20

(Historical, Clinical, and Risk Management). Both the LS/CMI and HCR-20 would be administered to the inmate as part of the risk assessment battery.

Where the risk assessment battery yields a finding that the inmate has a high risk of violence, no additional risk or needs assessment tests will be conducted on the inmate.

Where the risk assessment battery yields a finding that the inmate has a low or moderate risk of violence, additional risk or needs assessment tests may be conducted on the inmate. Any additional assessments will take into account the inmate's status as a sexual offender, a substance abuser, or as having a diagnosed mental disorder. The panel will determine at its next meeting what, if any, additional risk or needs assessment tools would be appropriate for these segments of the adult inmate population sentenced to life with the possibility of parole.

Future Research

The panel felt that it would be valuable to conduct research to validate the reliability of risk assessment results for an inmate population sentenced to life with the possibility of parole. Areas of particular need for future research include:

- Track the performance of the LS/CMI and HCR-20 for predicting institutional behavior.
- Compare the LS/CMI and HCR-20 for overlap, reliability, and incremental validity.
- Analyze the effect of rater reliability on the administration of risk assessment tests and their corresponding results.
- Deploy CAIS or CMI on subsets of inmate population to evaluate the effect of various needs assessment instruments.

2. November 2006 Recommendation from BPH's Forensic Assessment Division

I. Introduction to Risk Assessment of Violence

A large body of research demonstrates that dangerousness and violence risk potential cannot be reliably predicted. Human behavior is complex and does not follow a formulaic equation. Moreover, prediction of low occurrence behaviors is difficult if not impossible to achieve. Violence is a low base rate behavior (less than 1%), thus compounding problems in accurate prediction. Error occurs in the risk assessment process when an offender deemed high-risk is released and does not recidivate (referred to as a 'false positive') or when an offender classified as low-risk re-offends after release (a 'false negative'). Rather than predict violence, forensic psychologists are asked to assess risk of or determine the likelihood of dangerousness or violence.

Formal methods of assessing risk can be categorized as either actuarial or clinical. Actuarial methods require the collection of a large amount of historical data which can indicate whether the offender is likely to re-offend. Risk factors measured by actuarial

tools can be static (unchangeable) or dynamic (changeable). For instance, an actuarial risk prediction tool may measure static variables, such as the number of prior convictions, age at the time of the offence and the offender's relationship to the victim, etc. Dynamic factors include response and amenability to treatment, acceptance of responsibility, motivation, etc.

When an offender is assessed using an actuarial tool, his particular characteristics are inventoried and his risk is determined by the extent to which he possesses various risk factors associated with recidivism. The information considered in the assessment process, drawn from an institutional intake report and case files, typically includes the offender's education level, employment status, relationship history, substance use, and known or suspected mental disabilities, in addition to the individual's criminal history. This information will later aid in assessing the risk posed by offenders being considered for release. For example, if a certain characteristic common to those who recidivate is found in a potential parolee, that person's risk is adjudged greater than one who does not display the trait. Similarly, individuals who display characteristics common to non-recidivists will be considered lower risk.

Actuarial risk assessment focuses primarily on static, or unchangeable, factors that influence recidivism. Several studies have found that the static risk factor with the strongest influence on general recidivism is prior contact with the criminal justice or mental health systems. Violent offense recidivism is best predicted by prior violent offenses, mental illness, and a history of substance abuse. However, an inventory of static variables alone does not provide a clear picture of risk. Several actuarial risk assessment tools also measure dynamic factors associated with risk of violence. Dynamic variables include: motivation, response to treatment, remorse, acceptance of responsibility, etc.

In contrast to actuarial risk assessment, clinical assessments are based on the professional opinions of psychologists and psychiatrists. A clinical assessment typically involves a judgment by a mental health professional concerning the risk a specific individual poses. The risk factors used in a clinical assessment include presence of mental illness, attitudes, behavior, amenability to treatment, etc.

It should be noted that the ability to accurately distinguish offenders who will recidivate from those who will not, strictly using clinical methods, is questionable. When assessing an individual, clinicians often fail to take into account risk factors such as age, gender and criminal history. Further, studies indicate that clinicians often come to different conclusions after assessing the same individual, calling into question inter-rater reliability (i.e., clinical agreement).

To improve the accuracy of risk assessment, researchers, clinicians and policy makers have put forth several suggestions. The combined use of actuarial and clinical assessments provides a greater degree of accuracy than one type of assessment used in isolation. Further, in determining risk, both static and dynamic factors should be taken into consideration.

II. Board of Parole Hearings (BPH), Forensic Assessment Division (FAD)

Inmates serving Life Term prison commitments (Penal Code Section 1168(b)), with the possibility of parole, appear for Initial Parole Consideration Hearings before the Board of Parole Hearings (BPH) when they are within one year of their minimum eligible parole date. Commitment offenses in these cases involve murder, kidnapping, or, since its inception in 1992, Three Strike cases. In preparation for these and Subsequent Parole Hearings (conducted in intervals of from one to five years following an initial denial of parole) CDCR provided BPH with evaluations prepared by counseling and mental health staff, as required by Penal Code Section 5068. In recent months, the responsibility for conducting the psychological evaluations was transferred from the individual CDCR institutions to a new unit of independent evaluating psychologists, employed by the BPH. The sole function of the new unit, named the Forensic Assessment Division (FAD) of BPH, is to conduct the psychological evaluations for purposes of the parole hearings.

The goals of the Forensic Assessment Division of BPH are as follows: (1) To provide a clinically appropriate and thorough psychological evaluation of Life Term inmates in order to assess overall risk of recidivism and violence risk potential, (2) standardization and uniformity in the report format, so as to promote stability and ease of comprehension of the material, (3) To train all staff psychologists in the use of empirically validated actuarial risk assessment instruments and to have these data incorporated into the psychological report, (4) To prioritize backlog cases for psychological evaluations, and (5) To have all psychological reports, and/or addendum reports, submitted in a timely manner.

III. Selection of Risk Assessment Tools

An exhaustive literature review was conducted to determine the most appropriate risk assessment tools to use for our particular population (i.e., life term inmates). The collective review and analysis process of the various risk assessment instruments included a consensus determination by a diverse consortium of highly respected experts, as well as thorough review by BPH Senior Psychologists. The collective education, experience, and knowledge of the existing research and science resulted in the recommendation to the BPH Executive Officer and the Secretary of CDCR, that the most viable and effective risk assessment instruments pertinent to the California life inmate population consists of using the (1) LS/CMI and (2) HCR-20/PCL-R. Additionally as appropriate, other focused assessment instruments would be employed for specific offender populations such as sex offenders (Static 99).

A number of other instruments were considered, including the COMPAS, an instrument used by CDCR to assist in decision-making regarding the placement, supervision, and case-management of offenders in community settings. The COMPAS is especially helpful to probation, parole, jail pretrial/early release and community corrections. After further analysis, it was determined that the focus of COMPAS on issues of community-based placement and alternative sentencing options was incompatible with BPH's purpose of determining violence risk potential, dangerousness and criminal recidivism

among indeterminate Life term inmates. Furthermore, the risk assessment tools selected would have to withstand legal rigors and scientific scrutiny demanded by any instrument used in the forensic arena (see *Daubert vs. Merrill Dow Pharmaceuticals* and *Frye vs. U.S.*).

The adoption of risk assessment instruments by the BPH is consistent with changes set to occur within the CDCR organization. The BPH psychologist evaluations represent a midpoint in the continuum of assessment. Starting at the reception center, future CDCR admissions will be administered psychological instruments for purposes of determining placement and treatment needs. These instruments will be administered by CDCR institutional staff. Prior to parole, inmates with determinate sentences will be given a Needs Assessment relative to case management needs in a less structured setting. The BPH FAD fulfills the space in the continuum for inmates with an indeterminate sentence who are eligible for parole consideration.

The risk assessment tools selected by BPH provide invaluable, objective data on violence risk potential and dangerousness of the Lifer inmate population. Such information is critical to assist BPH panels in their decision making process to grant or reject parole. Consequences of not using the risk assessment tools are numerous. Some of the most glaring concerns are as follows: (1) The absence of objective risk assessment tools results in decreased validity and reliability of the psychological evaluation report, thus potentially misclassifying violence risk levels. Public safety would be jeopardized should an individual who is deemed high risk of violence not be appropriately identified. Inversely, civil liberties of an inmate would be violated should they be misclassified as high risk when, in fact, they represent a low risk of dangerousness in the community. (2) The standard of practice in the community for violence risk assessments is the integration of clinical judgment and risk assessment instruments. To not incorporate risk assessment instruments into the overall evaluation would be in conflict with community standards of practice. (3) The Rutherford lawsuit requires that BPH utilize empirically validated risk assessment tools in the Lifer evaluations.

Scoring and interpretation of the risk assessment tools requires that the psychologist conduct a comprehensive clinical interview, as well as a thorough review of the inmate's records (i.e., C-File and UHR records). A brief summary of the risk assessment instruments will be provided herein.

IV. Risk Assessment Instruments

The battery of risk assessment tools consist of the (1) LS/CMI and (2) HCR-20/PCL-R. Additionally as appropriate, other focused assessment instruments would be employed for specific offender populations such as sex offenders (Static 99).

1. Level of Service/ Case Management Inventory (LS/CMI)

The LS/CMI was designed originally to assist probation officers in planning their supervision of probationers and parolees in Ontario, Canada. It is a 43-item instrument

composed of 8 subscales of criminogenic factors (listed below under Key Areas Measured). The items are scored following an interview and file review in Section 1 by either a Yes/No response, or a numeric range of 0 or 1 (level of dissatisfaction or need for improvement) to 2 or 3 (varying levels of satisfaction and little/no need for improvement) format. Section 2 consists of 21 items addressing Specific Risk/Need Factors, such as Personal Problems with Criminogenic Potential, and History of Perpetration. The LS/CMI was normed on 157,947 North American youth and adult offenders—60,156 U.S. adult and youth offenders from 10 jurisdictions, and 97,791 Canadian community and institutionalized adult and youth offenders. The LS/CMI appears well correlated with general criminal recidivism. A recent study from Washington supports the utility of this instrument in evaluating risk of criminal recidivism among a lifer population (Skeem, personal communication).

Key Areas Measured

- Criminal History
- Education/Employment
- Family/Marital
- Leisure/Recreation
- Companions
- Alcohol/Drug Problems
- Attitudes/Orientation
- Antisocial Pattern

2. Historical Clinical Risk Management- 20 (HCR-20)

The HCR-20 is an assessment tool that provides an estimate of overall risk of violence. The manual was published in 1997 and is used for criminal justice, forensic and civil psychiatric populations. Compared to the some other widely used risk assessment measures (e.g., VRAG), a major strength of the HCR-20 is its evaluation of both static and dynamic risk variables.

The HCR-20 consists of three main areas: historical (10 variables), clinical (5 variables), and risk management (5 variables). The HCR-20 domains are coded with a rating of 0 (available evidence contradicts the presence of the item), 1 (available information suggests the possible presence of the item), or 3 (available information indicates the presence of the item).

Historical (Past)

- Previous Violence
- Relationship Instability
- Employment Problems
- Substance Abuse Problem
- Major Mental Illness
- Psychopathy

- Early Maladjustment
- Personality Disorder
- Prior Supervision Failure

Clinical (Present)

- Lack of Insight
- Negative Attitudes
- Active Symptoms of a Major Mental Illness
- Impulsivity
- Unresponsive to Treatment

Risk Management (Future)

- Plans Lack Feasibility
- Exposure to Destabilizers
- Lack of Personal Support
- Noncompliance with Remediation Attempts
- Stress

The Hare Psychopathy Checklist-Revised (PCL-R)

The Hare Psychopathy Checklist-Revised (PCL-R) is required for scoring of the HCR-20 (see Item Six under Historical variables). It is an assessment tool designed to identify psychopathic tendencies. The PCL-R is accepted by most in the field as the “gold standard” for determining the presence and extent of psychopathy in a person. Psychopathy is not a diagnosis in the DSM-IV-TR. Rather, it is conceptualized as a constellation of cognitive, emotional and behavioral symptoms. The symptoms of psychopathy include: lack of a conscience or sense of guilt, lack of empathy, egocentricity, pathological lying, repeated violations of social norms, disregard for the law, shallow emotions, and a history of victimizing others.

The PCL-R is not a risk assessment per se. Developed in the early 1990s, the test was originally designed to identify the degree of a person's psychopathic tendencies. However, a large body of data suggests that the presence of psychopathy is correlated with violence. Because psychopaths are often repeat offenders who demonstrate a likelihood of committing sexual assaults or other violent crimes, the PCL-R has demonstrated its utility in the area of violence risk assessments.

The PCL-R was normed on a Canadian forensic sample, leading to concerns regarding the generalizability of this instrument to a US sample. However, the instrument has been cross validated on criminal justice populations and among an ethnically diverse U.S. incarcerated population.

The Hare PCL-R involves both a clinical interview and a review of the subject's file records and history. During the evaluation, the psychologist scores 20 items that measure

central elements of the psychopathic character. The items cover the nature of the subject's interpersonal relationships; his or her affective or emotional involvement; responses to other people and to situations; evidence of social deviance; and lifestyle. It is based on two different constructs that define a psychopath: Factor one characteristics consist of personality traits such as Manipulative and deceitful, glib and superficial, lack of empathy, and egocentric and grandiose. Factor two characteristics are the social deviant behaviors that consist of being impulsive, the need for excitement, having poor behavior controls, a lack of responsibility, early behavior problems and adult antisocial behavior.

The twenty traits assessed by the PCL-R score are:

- Glib and superficial charm
- Grandiose (exaggeratedly high) estimation of self
- Need for stimulation
- Pathological lying
- Cunning and manipulativeness
- Lack of remorse or guilt
- Shallow affect (superficial emotional responsiveness)
- Callousness and lack of empathy
- Parasitic lifestyle
- Poor behavioral controls
- sexual promiscuity
- early behavior problems
- lack of realistic long-term goals
- impulsivity
- irresponsibility
- Failure to accept responsibility for own actions
- Many short-term marital relationships
- Juvenile delinquency
- Revocation of conditional release
- Criminal versatility

V. Summary and Conclusions

Numerous instruments were thoroughly reviewed for possible inclusion in developing a battery for determining violence risk potential among parole eligible lifer term inmates serving an indeterminate sentence. After careful review and analysis, carried out by a consortium of community experts and BPH Senior Psychologists, the following two instruments were selected: (1) LS/CMI, and (2) HCR-20/PCL-R. Alternative measures, including the COMPAS, were deemed inappropriate for both the target population and the referral question (i.e., risk of dangerousness and violence). The risk assessment battery will assist BPH psychologists in anchoring their clinical opinions regarding violence risk by insuring overall objectivity and reliability; this in turn will aid the BPH panel in determining suitability for parole.

CONSIDERATION OF REASONABLE ALTERNATIVES

The Board has not identified any alternatives to the proposed regulatory change that would fully meet its objectives.

EFFECT ON SMALL BUSINESS

The subject of this regulatory action directly affects prisoners serving life sentences. The Board has not identified any alternatives that would lessen any adverse impact on small businesses. However, no impact on small business is expected.

SUMMARIES AND RESPONSES TO COMMENTS RECEIVED DURING THE INITIAL AND SUPPLEMENTAL PUBLIC COMMENT PERIODS

The Initial Public Comment period on the proposed text was open for 45 days from December 17, 2010, through January 31, 2011. One Hundred and twenty-eight written comment letters, e-mails and faxes were received during that period. Eight comments were received during the public hearing conducted on January 31, 2011. Thirteen written comment and e-mails were received after the comment period closed on January 31, 2011. The Supplemental Public Comment period on the proposed text was for 15 days from July 1, 2011, through July 15, 2011. Ninety-four written comment letters, e-mails and faxes were received during that period. Twenty-eight written comment and e-mails were received after the comment period closed on July 15, 2011. Pursuant to Government Code section 11346.9(a)(3), the Board of Parole Hearings (Board) has summarized and responded to those comments as follows:

I. COMMENTS OF GENERAL OPPOSITION

4, 8, 18, 20, 21, 26, 27, 31, 33, 34, 35, 48, 52, 54, 55, 56, 61, 63, 77, 78, 79, 81, 86, 87, 89, 90, 91, 92, 94, 95, 96, 97, 109, 110, 115, 116, 119, 121, 122, 124, 129, 135, R28, R50, R56, R60, R61, R62, R63, R68, R71, R85, R87 Comments: The comments consist of general opposition to the proposed regulation.

Response: There is no substantive comment to which to respond.

Accommodation: None.

II. COMMENTS REGARDING NOTIFICATION AND/OR POSTING OF THE REGULATIONS

8 Comment: The comment states the proposed rule change is not being made available to prisoners, that the writer has not seen it posted in the facility law library, and that no notice was sent to him.

Response: The Board disagrees with the comments. The Board is not required to post proposed rulemaking in facility law libraries. Penal Code section 5076.2 provides that the

Board shall post rules and regulations in conspicuous places throughout each institution no less than 20 days prior to their effective date. Regarding the inmate's claim that he did not receive special notice as requested, his mailing address had changed and he had not provided the Board with a forwarding address.

Accommodation: None.

49 Comment: The comment claims that the proposed rule was not properly posted in the Ironwood State Prison Housing Units, nor was it properly posted in the California State Prison-Corcoran III Housing Units.

Response: The Board disagrees with the comments. See response to Comment 8, *supra*.

Accommodation: None.

55, 57 Comment: The comment claims that receipt of a Notice of Public Hearing without proposed text caused him to be unable to provide relevant comment prior to end of the public comment period.

Response: The Board disagrees with the comments. There is no requirement that a Notice of Public Hearing be accompanied by the proposed text.

Accommodation: None.

109 Comment: The comment claims that a large portion of the general population did not receive notice of the proposed changes.

Response: The Board disagrees with the comment. The Board is not required to post proposed rulemaking in institutions. *See* Penal Code section 5076.2. Additionally, the commentators had not previously requested to receive notice of regulatory actions.

Accommodation: None.

R44, R48, R55, R59, R64, R65, R66, R70, R72, R73, R74 Comment: The comments claim that the Notice to inmates of BPH's supplemental "Revised Initial Statement of Reasons" was not compliant with the APA.

Response: The Board disagrees with the comments. The Board's revised statement of reasons complies with OAL's Decision of Disapproval which indicated that "the Board will have to prepare a supplement to its Statement of Reasons that includes substantial evidence of the necessity, add it to the record and provide an opportunity for public comment in accordance with Government Code section 11347.1." Prior to the July 1, 2011 publication date in the Notice Register, BPH mailed notices regarding the rulemaking supplement to inmates and others who had requested to receive notice of BPH regulatory actions.

Accommodation: None.

R94 Comment: The comment claims that the “15 Day Re-notice of Proposed Regulatory Text” was missing page 3 of 3.

Response: The re-notice did not contain a third page; there was a page number formatting error.

Accommodation: None.

III. COMMENTS REGARDING ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS

5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 29, 30, 36, 37, 39, 40, 41, 42, 45, 50, 51, 53, 54, 55, 59, 60, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 80, 83, 84, 85, 88, 89, 99, 100, 101, 102, 103, 104, 106, 111, 112, 113, 114, 115, 117, 118, R29, R41, R44, R57, R59, R64, R65, R66, R67, R69, R70, R72, R73, R74, R75, R77, R79, R81, R82, R83 **Comments:** The comments generally contend that the regulation does not meet the necessity, authority, clarity, consistency and reference requirements of the Administrative Procedure Act.

Response: On July 1, 2011, the Board issued a supplemental “Revised Initial Statement of Reasons” that meets the necessity and clarity standards of Government Code section 11349.1, subdivision (a).

The Board has the authority pursuant to Penal Code section 3052 “to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole.”

The proposed regulation is consistent with existing statutes, court decisions, and other provisions of law. It appropriately references Penal Code sections 3041, 3041.5, 3052, and 5068. Moreover, the proposed regulation implements the Governor’s 2008-09 Budget which authorized continuous funding to allow the Board of Parole Hearings to conduct initial and follow-up psychological evaluations for parole hearings held pursuant to Penal Code sections 3041 and 3041.5. *See* Chapter 268, Statutes of 2008.

Accommodation: None.

R6, R7, R8, R9, R10, R11, R12, R13, R14, R15, R16, R17, R18, R19, R20, R21, R22, R23, R24, R25, R26, R27, R32, R34, R36, R37, R38, R39, R46, R47, R49, R50, R54, R78, R88, R89, R92, R93 **Comment:** The comments object to the proposed regulation on the grounds that it exceeds the scope of the Office of Administrative Law’s Disapproval of Regulatory Action issued on May 5, 2011; that a public hearing should be held and new issues were raised that cannot be addressed in an arbitrarily shortened time

frame of 15 days; that financial requirements as noted by OAL were not addressed; and that alternatives to the proposed change were not considered.

Response: The Board disagrees with the comments. The Board's revised statement of reasons complies with OAL's Decision of Disapproval which indicated that "the Board will have to prepare a supplement to its Statement of Reasons that includes substantial evidence of the necessity, add it to the record and provide an opportunity for public comment in accordance with Government Code section 11347.1." Government Code section 11347.1 does not require that a public hearing be held and the section sets the time frame for public comment as 15 calendar days. The financial requirements noted by OAL will be addressed its final regulatory filing with the submission of a new STD. 399 and with an augmented response to the public comment about the cost of the regulation. The Board does not believe that any reasonable alternatives existed that would satisfy the *Rutherford* court orders as well as the Governor's 2008-09 Budget which authorized continuous funding to allow BPH to conduct initial and follow-up psychological evaluations for parole hearings held pursuant to Penal Code sections 3041 and 3041.5.

Accommodation: None.

44, 107, 131, R51, R52, R86 Comment: The comment opposes the proposed regulation because of an OAL determination that the Board's Psychological Report Process was an underground regulation.

Response: The comment did not make a substantive comment about the proposed regulation. On November 8, 2010, the Office of Administrative Law determined that the "Board's Psychological Report Process contains provisions that meet the definition of a "regulation" as defined in section 11342.600 that should have been adopted pursuant to the APA." See 2010 OAL Determination No. 27.

Accommodation: None.

20 Comment: The comment contends that the regulation is inconsistent with Title 15 CCR section 2402(b).

Response: The Board disagrees with the comment. The proposed regulation is consistent with 15 CCR section 2402 (b), which provides that the panel shall consider all "relevant, reliable information available" including an inmate's "past and present mental state."

Accommodation: None.

76, R42, R45, R91 Comment: The comments contend that the "Legislature has foreclosed the Board's authority to base a parole determination on "psychological risk assessments" or on anything other than the timing and gravity of the commitment or past offense(s)".

Response: The Board disagrees with the comments. Under the Board's current regulations a myriad of factors, other than just the gravity of the commitment offense, tending to show suitability and unsuitability are considered by the Board. *See* 15 CCR sections 2281 and 2402. The California Supreme Court addressed this issue when it interpreted the provisions of Penal Code section 3041 in *In re Lawrence* 44 Cal. 4th 1181 (2008). The court held that "current dangerousness is the fundamental and overriding question for the Board and the Governor. In addition,...evidence in the record corresponding to both suitability and unsuitability factors -- including the facts of the commitment offense, the specific efforts of the inmate toward rehabilitation, and, importantly, the inmate's attitude concerning his or her commission of the crime, as well as the psychological assessments contained in the record -- must, by statute, be considered and relied upon by both the Board and the Governor." *See, In re Lawrence* 44 Cal. 4th 1181, 1213 (2008).

Accommodation: None.

IV. COMMENTS REGARDING FISCAL IMPACT

5, 18, 26, 27, 31, 33, 34, 35, 48, 52, 53, 61, 79, 78, 86, 87, 91, 92, 95, 97, 113, 116, 118, 121, 122, 124, 125, 129, 131, 132, 133, 135, 136 Comments: The comments claim the provision of these risks assessments is a waste of tax dollars and they could be completed by CDCR staff.

Response: The Board disagrees with the comments. CDCR psychological staff is devoted to providing mental health treatment to inmates. The Governor's 2008-09 Budget authorized continuous funding to allow the Board of Parole Hearings to conduct initial and follow-up psychological evaluations for parole hearings held pursuant to Penal Code sections 3041 and 3041.5. *See* Chapter 268, Statutes of 2008. This funding was expressly approved by the Legislature in Assembly Bill No. 1781, "The Budget Act of 2008." This bill was chaptered by the Secretary of State on September 23, 2008, Chapter 268, Statute of 2008. There are currently 35.4 permanent positions for FAD to conduct these evaluations for a total annual cost of \$2,951,656. The \$2,951,656 is on-going funding for FAD which can only be increased or decreased through future Budget Change Proposals, Finance Letters, or other budget processes.

Accommodation: None.

R41, R43, R57, R64, R65, R66, R70, R72, R73, R74, R88, R90 Comment: The comments oppose the regulation because the "Revised Initial Statement of Reasons" fails to disclose the cost of the regulation.

Response: The on-going annual funding for FAD is \$2,951,656. Consistent with OAL's Decision of Disapproval, the financial requirements noted by OAL are appropriately addressed in BPHs final regulatory filing with an augmented response to the public comment about the cost of the regulation and the submission of a new STD. 399.

Accommodation: None.

92 Comment: The comment claims that the State of California should use public funds in an efficient way and that having more of our population in prison than any other jurisdiction than China is not a good investment of public funds.

Response: The comment was not substantively related to the proposed regulation.

Accommodation: None.

93 Comment: The comment is concerned that institutional psychologists are being replaced with contract psychologists to prepare lifer risk assessments.

Response: The comment was not substantively related to the proposed regulation. CDCR psychological staff is devoted to providing mental health treatment to inmates.

Accommodation: None.

107 Comment: The comment claims that the new provisions will not only serve to create future backlogs [of parole suitability hearings], but they will also force taxpayers to incur new costs in response to the legal challenges that the state will be forced to defend.

Response: The comment was not a substantive comment about the proposed regulation.

Accommodation: None.

21, 55, 111, 116 Comment: The comment claims that keeping inmates in prison longer than what is necessary is a financial burden to the state and taxpayers when they are no longer a threat to society.

Response: The comment was not a substantive comment about the proposed regulation.

Accommodation: None.

V. COMMENTS REGARDING THE RISK ASSESSMENT INSTRUMENTS

2, R40 Comment: The comment states the regulation does not “specify which risk assessment instruments BPH psychologists may use” and that the regulation “must explicitly prohibit the use of any risk instruments... specifically, the PCL-R, HCR-20, LS/CMI, and, optionally, the Static- 99...”

Response: The Board disagrees with the comment. Subsection (b) of the proposed regulation provides that the “Board of Parole Hearings may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate’s potential for future violence.” The Board will only incorporate actuarially derived and

structured professional judgment approaches to risk assessment that have excellent technical properties and which provide consistent results.

The PCL-R, HCR-20, and LS-CMI are among the most studied and commonly used violence risk assessment instruments in the field of forensic psychology and each have accumulated a great deal of research to support their validity. Meta-analyses published within the past year indicate that each possesses a moderate degree of predictive accuracy in violence assessment (Yang, Wong, and Coid, 2010; Guy, Douglas, and Henry, 2010). Additionally, recognized experts emphasize the value of applying group data from empirically based instruments to inform individual assessments of risk (Skeem and Monahan, 2011) and the relative superiority of structured risk assessments over unstructured professional opinion (Hanson, 2009; Heilbrun, Hart, and Green, 2009). Finally, by incorporating both the HCR-20 and LS-CMI into its assessment battery, the FAD uses risk instruments that balance the relative contributions of both historic and dynamic risk factors (Douglas and Skeem, 2005) and assess risk from multiple theoretical perspectives, thereby strengthening the robustness of the assessment (Mills and Kroner, 2006).

Accommodation: None.

R2 Comment: The comment indicates that the HCR-20 should not be used in evaluations performed by FAD psychologists and that the LS/CMI, which is currently in use by FAD, be used as the principle method for determining violence risk potential.

Response: The Board disagrees with the comments. See response above.

Accommodation: None.

4, 5, 19, 20, 21, 24, 25, 31, 32, 58, 63, 76, 77, 81, 82, 90, 94, 95, 96, 98, 105, 107, 113, 116, 120, 121, 122, 124, 126, 135, R41, R43, R44, R57 Comments: The comments claim that the use of risk assessment tools by the Board and the Forensic Assessment Division (FAD) is of no evidentiary value and the FAD's assessment tools are unreliable.

Response: The Board disagrees with the comments. The provision of psychological risk assessments is reasonably necessary to assist the Board in determining whether an inmate sentenced to life with the possibility of parole poses a current unreasonable risk of danger to society if released on parole. See Penal Code sections 3041 and 3041.5 and 15 CCR sections 2281 and 2402. Moreover, a psychological risk assessment is only one piece of information available to a hearing panel which will determine what weight to give to information in considering whether an inmate is suitable for parole.

Reliability refers to the ability of a test to provide consistent results. There are different types of reliability, including internal consistency, test-retest, and inter-rater reliability. Applying this definition, there is no credible disagreement that each of the instruments used by FAD demonstrates exceptional test properties with respect to reliability (reliability coefficients above .80 are standard). Each of the instruments used by FAD

demonstrates excellent inter-rater reliability (above .80). Test properties of each instrument are summarized in respective technical manuals.

- The inter-rater reliability of the PCL-R Total Score across pooled samples ranges from .84 to .93 (Hare, 2003).
- Test-Retest/Inter-Rater reliability of the LS-CMI was .88 (Andrews, Bonta, and Wormith, 2004).
- The average inter-rater reliability of the HCR-20 full scale across numerous studies has averaged the .80+ range (Webster, Douglas, Eaves, and Hart, 2001).
- The inter-rater reliability of the Static-99 across three studies ranged from .80 to .96 (Harris, Phenix, Hanson, and Thornton, 2003).

Accommodation: None.

R3, R86, R90 Comment: The comments object to the use of actuarial risk measures as part of the psychological risk assessment because they generate a false high risk level for life inmates.

Response: The Board disagrees with the comments. None of the instruments utilized by the FAD involve purely actuarial interpretation or algorithmic weighting of items into an overall risk opinion. Additionally, because the FAD does not make predictive or probabilistic estimates of violence recidivism, the concept of “false positives” does not apply. With respect to normative comparisons, analysis of departmental data from 2009-10 indicates that life inmates earn lower average scores on the PCL-R, HCR-20, and LS-CMI relative to standardized norms. There is no indication that use of these instruments unfairly inflates their scores.

Frequency of FAD Overall Risk ratings are consistent with observations that long-term inmates are likely to be older at time of release, are less likely to engage in institution misbehavior, often remove themselves from antisocial peers, avoid altercations with others, and engage in pro-social self-programming (Manchak, Skeem, Douglas, 2007), and tend to have lower rates of general recidivism (CDCR Adult Institutions’ Outcome Evaluation Report, 2010).

Accommodation: None.

R31, R43, R45, R48, R76, R91 Comments: The comments object to the proposed regulation because the risk assessment instruments are not proven valid for California inmates who are serving a life-term with the possibility of parole.

Response: The Board disagrees with the comments. The comment that the instruments used by FAD are inappropriate for the California life inmate population is unsubstantiated by research and is inconsistent with current standards of practice in the field of forensic risk assessment. The standard of practice in the community for violence risk assessments is the integration of clinical judgment and risk assessment instruments because the use of risk assessment instruments increases the validity and reliability of the psychological

evaluation. Although some researchers have correctly observed that no risk assessment tools have been specifically validated for the life inmate population or for long-term-inmates in general and that life inmates may have different risk-relevant characteristics (Manchak, Skeem, and Douglas, 2008), the instruments used by FAD have been developed and/or cross-validated for use with correctional populations and allow reasonably modest inferences to be drawn from comparisons between life inmates and other prisoners.

Accommodation: None.

R1 Comment: The comment objects to the proposed regulation because the risk assessment tools are not proven valid for life-term women prisons and those who have experienced child abuse or intimate partner battering.

Response: See response above about the validity of the risk assessment instruments for the California life-inmate population.

Accommodation: None.

R35 Comment: The commenter was a member of the expert panel who indicated that the statement of reasons misrepresented his participation in the meeting because the panel reached no consensus on what risk and needs assessment instruments would best be employed by the state of California. The comment disagrees with the administration of these risk assessment tools because neither the LS/CMI nor the HCR-20/PCL-R have been validated for a population such as California's term-to-life prisoners.

Response: The Board has accurately captured the minutes of the meeting of the expert panel. The purpose of the meeting was "to reach a consensus...on what risk and needs assessment instruments would best be employed by the State of California for adult inmates sentenced to a life term with the possibility" because no risk assessment tools have been specifically validated for the life inmate population. Each member of the expert panel had their own stakeholders and vested interests in the selection process so there was some disagreement regarding the selection of instruments. The panel agreed that a multi-method psychological assessment battery would best be employed by the State of California for adult inmates sentenced to a life term with the possibility of parole. Based on a ranked vote, it was determined that HCR-20 and LS/CMI would be administered to the inmate as part of the risk assessment battery.

Accommodation: None.

7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 36, 37, 39, 40, 41, 45, 50, 51, 59, 60, 65, 80, 88, 104, 115, 124, 126, 131, 136, R5, R42, R53 Comments: The comments object to the proposed regulations because psychological risk assessments instruments are invalid for predicting a life inmate's risk of future violence or dangerousness.

Response: Subsection (b) of the proposed regulation provides that the "Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the

inmate's potential for violence." FAD psychologists do not offer predictive or probabilistic statements regarding the likelihood of a specific inmate recidivating violently. Instead, FAD psychologists provide BPH panels with an analysis of the inmate's potential for violence relative to other prisoners. The risk assessment instruments utilized by the FAD are well-suited to making this type of determination. Predictive statements specific to violent acts require an accurate understanding of base rates of violence recidivism within a given population. FAD avoids reporting risk in probabilistic or absolute terms due to inherent difficulties in accurately calculating base rates of violence of life inmates. This is because one can only determine violence recidivism rates of life inmates who have paroled – and one cannot generalize from this sample to the larger life inmate population. Moreover, a psychological risk assessment is only one piece of information available to a hearing panel. The hearing panel will determine what weight to give to various information in considering whether an inmate poses a current unreasonable risk of danger to society if released on parole.

Accommodation: None

R84 Comment: The comment objects to the proposed regulations because the risk assessment instruments used in the Comprehensive Risk Assessment only rely on past events and ignore decades of constructive change by prisoners.

Response: The Board disagrees with the comment. FAD conceptualizes violence risk both in terms of risk status and risk state. Risk state focuses on intra-individual variability in violence potential. Central to this construct is a recognition that risk factors vary in the extent to which they are changeable, ranging from highly static variables to highly dynamic ones (Douglas and Skeem, 2005). Structured Professional Judgment instruments, such as the HCR-20 and LS-CMI do not rely on statistically selected items and decision algorithms. Instead, clinicians make final risk ratings of low, moderate, or high risk for violence that are explicitly tied to anticipated levels of intervention efforts and a consideration of risk factors that have support with the scientific and professional literatures.

Accommodation: None.

23, 82, R4 Comment: The comment opposes the proposed regulation because a life inmate would not be allowed to utilize a private licensed psychologist to obtain his or her Comprehensive Risk Assessment

Response: The Board disagrees with the comment. A life inmate may hire a private psychologist to prepare an alternate risk assessment at his or her own expense. Pursuant to 15 CCR section 2249, an inmate has the right to present relevant documents to the hearing panel.

Accommodation: None.

VI. COMMENTS REGARDING SUBSEQUENT RISK ASSESSMENTS

21, 24, 25, 32, 46, 58, 63, 76, 89, 105, 108 116, 121, 122, 124 Comments: The comments claim that because a Subsequent Risk Assessment will not contain an opinion regarding the inmate's potential for future violence, inmates will be found unsuitable for parole until they receive a new Comprehensive Risk Assessment.

Response: The Board disagrees with the comments. A psychological risk assessment is only one piece of information available to a hearing panel. The hearing panel will determine what weight to give to various information in considering whether an inmate is suitable for parole. Pursuant to subsection (c) of the proposed regulation, a "Subsequent Risk Assessment will address changes in the circumstances of the inmate's case, such as new programming, new disciplinary issues, changes in mental status, or changes in parole plans since the completion of the Comprehensive Risk Assessment."

Accommodation: None.

83, 84, 85 & 117 Comments: The comments state that the proposed regulation does not address whether Subsequent Risk Assessments would be prepared if an inmate's hearing is advanced under the Victim Rights Act of 2008.

Response: If an inmate's hearing is advanced pursuant to Penal Code section 3041.5 (b)(4) or (d)(1), that hearing will be a regularly scheduled parole hearing covered under subsection (c) of the proposed regulations.

Accommodation: None.

113 Comment: The comment objects contends that the 5-year interval between CRAs does not meet the *Lawrence* standard that requires use of current information to determine an inmate's risk of dangerousness.

Response: The Board disagrees with the comment. Subsection (c) of the proposed regulation contemplates that a Comprehensive Risk Assessment or Subsequent Risk Assessment will generally be prepared before every regularly scheduled parole consideration hearing. At the hearing, the panel will determine whether an inmate is a current, unreasonable risk of danger to society if released from prison.

Accommodation: None.

83, 84, 85, 117 Comments: The comments suggest that the proposed regulation should require that psychological evaluations be prepared 150 days prior to a scheduled parole hearing. The comments state that the 5-year interval between Comprehensive Risk Assessments (CRA) bears no relation to the amount of time required for a prisoner to rehabilitate himself.

Response: The Board disagrees with the comments. It is not necessary to require that psychological evaluations be prepared 150 days prior to the scheduled hearing. Penal Code section 3041.5 (a)(1), requires that “[a]t least 10 days prior to any hearing by the Board of Parole Hearings, the prisoner shall be permitted to review his or her file which will be examined.” The psychological evaluations does not make a determination about whether a prisoner is rehabilitated or how much time it will take a prisoner to rehabilitate himself. The hearing panel will determine whether an inmate is a current, unreasonable risk of danger to society if released from prison.

Accommodation: None.

VII. COMMENTS REGARDING BIAS

5, 18, 23, 24, 25, 32, 26, 27, 31, 33, 34, 35, 38, 48, 52, 53, 58, 61, 63, 76, 78, 86, 87, 91, 92, 94, 96, 97, 109, 116, 120, 121, 122, 124, 125, 130, 131, 136 Comments: The comment states that the use of risk assessment tools by the Board and FAD is unethical and the psychologists who administer the tests may be biased.

Response: The Board disagrees with the comments. Board psychologists adhere to the American Psychological Association’s “Ethical Principles of Psychologists and Code of Conduct.” Additionally, Board psychologists have no vested interest in the outcome of parole suitability determinations nor are they generally aware of such outcomes.

Accommodation: None.

VIII. COMMENTS REGARDING TRAINING

18, 21, 33, 34, 35, 48, 26, 27, 52, 61, 78, 79, 81, 86, 87, 91, 92, 94, 96, 97, 116, 121, 122, 125, 130 Comments: The comments claim that there is no assurance that FAD received the specialized training needed to administer or interpret risk assessment tools.

Response: The Board disagrees with the comments. FAD psychologists have received extensive training related to the administration, scoring, and interpretation of risk assessment instruments (see above).

Accommodation: None.

31, 94, 95, 96, 98, 107, 124, 125, 126 Comments: The comments oppose the proposed regulation because of a Special Report issued by the Office of the Inspector General in July 2010 on *The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements*.

Response: The comment did not make a substantive comment about the proposed regulation. The Board has demonstrated substantial compliance with the OIG’s recommendations and CDCR’s Office of Compliance will monitor and document the Board’s progress in addressing the report’s recommendations.

Accommodation: None.

Comment R1: The comment objects to the proposed regulation because the criteria used to hire psychologists or the training that the psychologists will receive is not described in the proposed regulation.

Response: The Board disagrees with the comments. The text of the proposed regulation provides that psychologists must be licensed; other hiring and training criteria relate only to the internal management of BPH.

Accommodation: None.

108, 124 Comments: The comments claim that Commissioners are not trained in weighing psychological reports.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

IX. COMMENTS REGARDING INMATE APPEALS

2, 6, 18, 21, 23 24, 25, 26, 27, 31, 32, 33, 34, 35, 38, 42, 43, 48, 52, 53, 54, 56, 58, 61, 63, 76, 77, 78, 79, 81, 82, 86, 87, 91, 92, 94, 96, 97, 105, 107, 108, 111, 116, 121, 122, 124, 125, 130, 134, R1, R4, R31, R43, R45, R48, R76 Comments: The comments object to subsection (d) of the proposed regulation which provides that the CDCR inmate appeal process would not apply to evaluations prepared by BPH psychologists and because the denial of the grievance process does not give inmates an opportunity to have errors in the report corrected prior to their scheduled hearing.

Response: The Board disagrees with the comments. Psychological reports, which are prepared solely for parole hearings to assist a hearing panel or the Board in determining whether an inmate is suitable for parole, are not subject to the inmate appeal process. Pursuant to Section 3084.1 of Title 15 of the California Code of Regulations, an inmate may only appeal “any department decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.” Board actions are not subject to the CDCR’s appeal process.

However, an inmate does have the right to enter a written response to a psychological report pursuant to Penal Code section 3041.5 (a)(1) and 15 CCR section 2247. Moreover, subsection (d) of the proposed regulation provides that “the inmate and his/her attorney, at the hearing, will have an opportunity to rebut or challenge the psychological report and its findings on the record. The hearing panel will determine, at its discretion, what evidentiary weight to give psychological reports.” Additionally, subsection (e) and

subsection (f) of the proposed regulation establish a process of reviewing errors in a psychological report.

Accommodation: None.

20 Comment: The comment claims that the proposed regulation fails to define what constitutes “an opportunity to rebut or challenge the psychological report and its findings on the record.”

Response: The Board disagrees with the comments. The language in subsection (d) of the proposed regulation clearly defines how issues may be contested at a hearing and it does not require additional definition.

Accommodation: None.

89 Comment: The comment claims that inmates who had a psychological report prepared prior to this rulemaking won’t have an opportunity to challenge the report and its findings on the record.

Response: The Board disagrees with the comments. An inmate or his/her attorney may challenge the findings of any psychological report considered by the Board at the hearing; therefore, enactment of the proposed regulation will not affect an inmate’s ability to challenge the findings of a report that was prepared prior to the enactment of the proposed regulation.

Accommodation: None.

94, 96, 108, R1 Comments: The comments oppose the proposed regulation because inmates and attorneys are being denied access to the scoring sheet that FAD uses when administering risk assessments.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

111, R76 Comment: The comment claims that evaluations should be recorded to allow for independent challenges to their conclusions.

Response: The Board disagrees with these comments. The hearing panel only considers the final psychological report and the report may be challenged as detailed above.

Accommodation: None.

X. COMMENTS REGARDING THE CONSIDERATION OF ALTERNATIVES

76, R42, R43, R45, R59, R88 Comment: The comments claims that BPH failed to identify and consider viable alternatives to the regulation.

Response: The Board disagrees with the comments. FAD did consider other risk instruments (i.e., the Violence Risk Appraisal Guide or VRAG) before agreeing upon the current battery. There are a few other instruments that are used in the field of violence risk assessment, and each has their strengths and limitations. The VRAG, for example, is a purely static, actuarial instrument that does not consider maturational changes within an individual over time. Consequently, it does not fit particularly well with life term inmates. The Sex Offender Needs Assessment Rating (SONAR) is a nice adjunct to the Static-99 in the assessment of sex offenders, largely because it considers dynamic risk factors (the Static-99 is an actuarial instrument). However, given the low percentage of life term inmates who qualify as sex offenders and given that sex offender treatment is not an emphasis of programming within CDCR, this tool would add little to FAD's current battery. The Spousal Assault Risk Assessment (SARA) guide is useful for assessing domestic violence batterers but would only be relevant for a small percentage of Life term inmates. Additionally, there is some research to suggest that even among batterers the HCR-20 may provide a more accurate assessment of violence recidivism.

There are some tools that may be useful in highly specific circumstances, such as when a threat has occurred (i.e., the Psychosocial Evaluation of Threat Risk Assessment) or in specific psychiatric settings (i.e., the Classification of Violence Risk). Other instruments were developed as purely self-report measures (Inventory of Offender Risks, Needs, and Strengths). None of these tools are particularly applicable to the BPH's life term population.

Given all of the options, FAD's combination of actuarially derived instruments structured professional development schemes that incorporate the concept of psychopathy provides a reasonable and accepted approach to assessing violence potential among BPH's life term inmates. This opinion is supported by a wealth of scholarly, peer-reviewed, published literature and consultation with experts in the field of forensic psychology.

Accommodation: None.

XI. COMMENTS REGARDING OUT-OF-STATE INMATES

23, 76, 82, 111, 118, 124, 127, 136, R4, R45 Comment: The comment questions why a psychological risk assessment will be prepared for inmates housed in California if one won't be prepared for out-of-state inmates.

Response: The provisions of this regulation may not apply to inmates who reside in states other than California due to restraints imposed by other states' licensing requirements, rules of professional responsibility for psychologists, and variations in confidentiality law among states.

Accommodation: None.

XII. MISCELLANEOUS

1 Comment: Comment deleted.

Response: The comment was received prior to open public comment period.

Accommodation: None.

3 Comment: The comment states that this proposed regulation “is not apart of title 15 Div 2 yet” and that his interview with a Board psychologist in September 2010 “was unlawful”.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

28 Comment: Comment deleted because it wasn’t related to the proposed rulemaking.

42, R40 Comment: The comment opposes the proposed regulation because it runs “afoul of the Information Practices Act, California Civil Code, sections 1798 et seq.

Response: The Board disagrees with the comments. The proposed regulation is not inconsistent with the Information Practices Act as that law relates to protecting an individual’s right to privacy that is “being threatened by the indiscriminate collection, maintenance, and dissemination of personal information...” See Civil Code Section 1798.1(a).

Accommodation: None.

42, R40 Comment: The comment states that the proposed regulation “assume[s] that all life prisoners are serving time for violent offenses. There is no distinction made between violent lifer’s and non-serious, non-violent prisoners serving life sentences for petty theft, minor drug possession, or any number of commitment offenses of a relatively minor nature.”

Response: The Board disagrees with the comment. The nature of a lifer’s commitment offense is contemplated in the proposed regulation because subsection (b) provides that the psychological report may contain an evaluation of the commitment offense and risk factors from the prisoner’s history. Moreover, Penal Code section 3041 (b), provides that the Board shall consider “the timing and gravity of current or past convicted offenses...”

Accommodation: None.

47 Comment: The comment states that psychological evaluations are not necessary when all the Board needs to determine is “whether or not the person in front of them is happy.”

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

124, 133, R88 Comments: The comments oppose the proposed regulation because “very few states actually require each and every prisoner to be evaluated before every parole hearing...”

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

128 Comments: The comment emailed an attachment that only contained blank pages.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

R30 Comment: The comment asked several questions about the psychological evaluation process as it related to her.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

R33 Comment: The comment believes the proposed regulation is “a new attempt to discourage any lifer who is trying to give his best effort to do good.”

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

R53 Comment: The comment objects to the proposed regulation because the only factor the Board can use in judging the mental state on any life term inmate is whether the inmate has a lengthy history of mental illness related to the offense.

Response: The Board disagrees with the comment. Pursuant to 15 CCR sections 2281 (b) and 2402 (b), the panel shall consider all relevant, reliable information available including the inmate's past and present mental state, past and present attitude toward the crime, and any conditions of treatment or control.

Accommodation: None.

R55 Comment: The comments believes that it should be codified that the interview in preparation of the CRA should be conducted after the inmate's counselor has submitted the Life Prisoner Evaluation Report because otherwise the psychologist cannot properly consider the inmate's parole plans and support system.

Response: The Board disagrees with the comment because a psychologist will appropriately consider the inmate's self-reported parole plans and support system where final letters of support have yet to be received.

Accommodation: None.

R58 Comment: The comment was concerned that "the psych assessments cannot be done fairly if the information they are using is not correct.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

137-149 Comments: These comments were received after the January 31, 2011, comment period deadline.

R95 - R122: These comments were received after the July 15, 2011, comment period deadline.

Response: Copies of the comments have been submitted to Office of Administrative Law in a separate binder. The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

R80 Comment: Comment deleted because it was a duplicate of comment in R35.